

FILED

APR 18 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 312496-III

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

JOHN and CLAUDIA SWENSON,
Husband and wife,

Plaintiffs/Respondents,

v.

ALAN F. WEEKS, individually and the marital
Community of ALAN F. WEEKS and JULIE WEEKS,

Defendants/Appellants.

APPEAL FROM THE SUPERIOR COURT FOR CHELAN COUNTY
THE HONORABLE T.W. SMALL, PRESIDING

APPELLANTS' OPENING BRIEF

Christopher M. Constantine
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III. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its Order Granting Swenson's Motion to Clarify Judgment.

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in considering respondents' motion to clarify judgment due to respondents' failure to submit an affidavit or any other sworn testimony in support of their motion?
2. Did the trial court err in considering exhibits submitted with respondents' motion to clarify judgment that were not part of the trial record before the court in this case?
3. Did the trial court err in construing the judgment, the amended findings of fact and conclusions of law and the memorandum decision by failing to attach any significance to language in the memorandum decision that described the point from which the adverse possession boundary was to be measured?
4. The trial court err in failing to follow the rules for construction of a judgment?
5. Did the trial court err in concluding that the description of the adverse possession boundary in the memorandum decision was ambiguous?
6. Did the trial court err in failing to reconcile the diagram of the boundary of the respondents' property attached to the order clarify judgment with the diagram attached of the respondents' property attached to the memorandum decision?

7. Did the trial court err in granting relief to respondents under CR 60?
8. Did the trial court err in the order clarifying judgment by attempting to clarify a judicial error?
9. Was the trial court barred by the doctrine of res judicata from grant respondents' motion?

V. STATEMENT OF THE CASE

A. FACTS

Prior to March 15, 2012, Appellant, Alan F. Weeks (Weeks), was the owner of certain real property situated in Chelan County, more particularly described as follows:

That portion of the South half of the Southwest Quarter of Section 3, Township 27 North, Range 22 East of the Willamette Meridian, Chelan County Washington, described as follows:
Commencing at the Southeast corner of said South half; thence South 89°32'20" West along the South line of said South half a distance of 424.98 feet to the true point of beginning; thence continuing South 89°32'20" West a distance of 462.25 feet to intersect the Northeasterly margin of Secondary State Highway 10-C; thence North 40°50'36" West a distance of 63.79 feet along said margin; thence South 49°09'24" West a distance of 45.00 feet; thence North 40°50'36" West a distance of 15.06 feet to the most southerly corner of the plat of Lake Chelan Hills No.3, recorded in Volume 8 of Plats at pages 3 through 5, records of Chelan County Auditor; thence along said plat boundary by the following courses and distances, North 26°24'36" East a distance of 286.84 feet, thence North 13°06'40" West a distance of 146.22 feet, thence North 42°00'00" East a distance of 125.00 feet, thence North 18°28' 16" East a distance of 117.34 feet to intersect the Westerly boundary of the Plat Chelan Highland, recorded in Volume 0 of Plats at pages 100 through 106, records of Chelan County

Auditor, thence South 24°37'59" East a distance of 255.79 feet; thence South 48°19'40" East 464.17 feet; thence South 43°08'20" West a distance of 281.60 feet to the true point of beginning.
(CP 93).

On March 15, 2012, in Chelan County Superior Court Cause Number 09-2-01058-1, the trial court entered a judgment consisting of five pages. CP 104-08: App. 2. Therein, the court quieted title in defendants to the following portion of plaintiff's real property: a 25-foot wide strip parallel to defendants' northwest side of their property, exclusive of the area adjacent to the access easement) that narrows to 17 feet in width at a point 3 feet past the southwest corner of defendants' home. CP 105, 123, 133; App. 2, 3, 4.

On January 6, 2012, the trial court entered amended findings of fact and conclusions of law in that case. CP 109-125: App. 3. The amended findings of fact incorporated the trial court's memorandum decision of July 5, 2011. CP 126-36; App. 4. In the memorandum decision, the trial court entered a conclusion of law in which it held that the portion of Week's property that the Swensons had adversely possessed was a 25-foot wide strip parallel to the northwest side of the Swensons' property, exclusive of the area adjacent to the access easement, that

“narrows to 17 feet in width at a point 3 feet past the southwest corner of plaintiffs’ home. See attached diagram. (CP 133: App. 4).

The diagram attached to the memorandum decision is a photocopy of a portion of a 2009 survey of the plat of Riviera Chelan No. 1, filed under Chelan County Auditor’s File No. 2308224. CP 136; App. 4. The diagram depicts the foundation line of the Swensons’ house and the lot on which it is situated. *Ibid.* Superimposed by the trial court on the diagram are the court’s hand-drawn dimensions of the area of the Week’s property adversely possessed by the Swensons. *Id.* The diagram depicts a jog in the adverse possession area boundary at a point approximately three feet south of the southwest corner of the Swensons’ home. *Id.* The area south of the adverse possession boundary at the 17-foot jog is outside the adverse possession area, and remained the Weeks’ property. *Id.*

The decks on the south wall of the Swensons’ house do not appear in the diagram. *Id.* Nor are the decks on the on the south wall of Swensons house mentioned in either the Amended Findings of Fact or the Conclusions of Law. CP 109-125; App. 3. Nor are the decks on the south wall of the Swensons’ house mentioned in the judgment. CP 104-08; App. 2.

In paragraph 6 of the judgment, the court ordered Weeks to convey the above-described adverse possession area to the Swensons, or the court would convey said property or a duly appointed commissioner to convey said property to defendants. CP 106-07; App. 2. The judgment did not authorize the Swensons to create a legal description for the adverse possession area. Nor did the judgment direct or authorize a conveyance of any part of Week's property other than as described in the amended findings of fact and conclusions of law.

The Swensons caused to be prepared a record of survey in which the adverse possession area is purportedly depicted. CP 138-40. That record of survey is inaccurate in that the 17-foot jog is drawn substantially farther than the 3-foot distance from the southwest corner of the Swensons' house required in the amended findings. CP 133; App. 4.

The Weeks requested the Swensons' attorneys to verify that the 17-foot jog in defendants' record of survey is drawn no farther than 3 feet from the Swensons' house, as required by the amended findings. CP 94-95. The Swensons' attorneys represented to Weeks that the 17-foot jog is within 3 feet of the Swensons' house. CP 95.

The Weeks caused to be prepared a map by a licensed surveyor of the adverse possession area occupied by the Swensons. CP 95, 163, 174. The map reveals that the Swensons located the 17-foot jog in the adverse

possession boundary at a point 11.52 feet from the southwest corner of their home. CP 95, 163, 174.

The Swensons unlawfully occupied the Week's property outside of the adverse possession area drawn by the trial court in its memorandum decision, and erected substantial structures thereon, including an iron fence and a block wall. CP 95, 146-50. The Swensons also entered onto the Week's real property without permission and unlawfully dumped large amounts of construction debris thereon. CP 95, 152-58.

B. PROCEDURE

In July, 2012, the Weeks filed an action for injunctive relief and damages, alleging trespass and wrongful injury to their property. CP 92-161. Weeks also filed a motion for preliminary injunction. CP__.

In September, 2012, the Swensons filed a motion to clarify judgment. CP 22-46. The Swensons' motion attached various photographs and diagrams of their property, most of which were taken after entry of the judgment in Chelan County Cause No. 09-2-01058-1. *Ibid.* The Swensons' motion was unaccompanied by sworn testimony of any kind. *Id.*

The matter came on for hearing on September 18, 2012. RP 2. The trial court gave the following discussion in connection with its ruling on the Swensons' motion:

The –when the Court made its determination of indenting it was because of these trees. The Court determined that there wasn't --they weren't that size -- the size they were at the time of the trial -- for the adverse possession period.

And the point of the line coming off the home was basically, giving room for the trees that were already on the property, because the other trees that were off the property, were in the same line. And –that was the Court's intent.

When it meant "home," I assumed that this drawing included the deck. Obviously it didn't, now that this motion's been brought. But that was the intent of what the court meant by "home"; including – the deck was part of the home. Because you can't grow a tree through a deck.

So that – that was the court's intent. And I think "home" is ambiguous. And I think, while ultimately that results in an area more than what the Court's drawing was, because the Court's drawing was assuming that the foot print included the deck, I don't think it violates the rule in the Kemmer case.

Because I agree, the Kemmer case says you cannot expand. And -- I don't think the Court's expanding it. It's simply clarifying what it meant by "home." And that meant the deck that was there, when the trees were planted, originally. And we narrowed it, because the trees weren't that big.

So that was the Court's intent.
(RP 9-10).

On October 15, 2102, the trial court entered its Order Granting Swenson's Motion to Clarify Judgment. CP 77-84; App. 1. The order attached a photograph taken of the decks on the south wall of the Swensons' residence. CP 80. The order also attached a copy of a sketch of the southwest corner of the Swensons' property, dated May 22, 2012, drawn by Pinnacle Surveying. CP 82-84. Both of those attached documents were created after the March 15, 2012 judgment. CP 104-08: App. 2.

On November 5, 2012, the Weeks filed a notice of appeal. CP __.

VI. ARGUMENT

A. Standard of Review

Construction of a judgment presents a question of law. *Callan v. Callan*, 2 Wash. App. 446, 448, 468 P.2d 456 (1970); *In re Marriage of Jarvis*, 58 Wash. App. 342, 345, 792 P. 2d 1259 (1990). Questions of law are reviewed *de novo*. *Paradise Orchards Gen. P'ship v. Fearing*, 122 Wash. App. 507, 516, 94 P.3d 372 (2004); *Chavez v. Chavez*, 80 Wash. App. 432, 435, 909 P.2d 314 (1996). The trial court's Order Granting Swenson's Motion to Clarify Judgment construed the March 15, 2012 judgment. The trial court's order is therefore subject to review *de novo*.

B. The trial court erred in construing the March 15, 2012 judgment.

The Weeks assign error to the trial court's Order Granting Swenson's Motion to Clarify Judgment. CP 77-84; App. 1.

Exhibits A and C to the Order Granting Swenson's Motion to Clarify Judgment are not part of the trial court record that supported the March 15, 2012 judgment. CP 80, 82-84. While CR 59 (h) authorizes the trial court to take additional testimony, Swensons' motion was bought under CR 60, which contains no similar language. CR 60 (a) contains no such language. CR 60 (b) (3) authorizes relief from a judgment based upon newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b). The Swensons made no showing that Exhibits A and C could not have been discovered in time to move for a new trial. The trial court therefore erred in considering Exhibits A and C.

The Swensons' failure to support their motion with a supporting affidavit violates CR 60 (e) (1): "*Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based...*"

Paragraph 2 of the Order Granting Swenson's Motion to Clarify Judgment states that the Amended Findings of Fact and Conclusions of Law were ambiguous. CP 77. The remedy for curing such an ambiguity, if one exists, is stated in *Gimlett v. Gimlett*, 95 Wash. 2d 699, 705, 629 P. 2d 450 (1981): "Normally the court is limited to examining the provisions of the decree to resolve issues concerning its intended effect." Further, if a judgment is ambiguous, the reviewing court seeks to ascertain the intention of the court that entered it by using the general rules of construction applicable to statutes and contracts. *In re Marriage of Thompson*, 97 Wash. App. 873, 878, 988 P. 2d 499 (1999); *Marriage of Chavez*, 80 Wn. App. 435; *Marriage of Kruger*, 37 Wash. App. 329, 331, 679 P.2d 961 (1984). A judgment or decree must be construed as a whole so as to give effect to every word and part. *Boundary County, Idaho v. Woldson*, 144 F.2d, 17, 20 (9th Cir. 1944).

Paragraph 3 of the trial court's judgment recites that the adverse possession area defined in the amended findings of fact and conclusions of law was quieted in the Swensons. CP 78; App. 2. It is therefore appropriate to refer to the amended findings and conclusions in resolving any ambiguity.

Amended Conclusion of Law 6 incorporates the adverse possession area defined in the trial court's

July 5, 2011 memorandum decision. CP 123; App. 3. That decision measured the distance at the jog “*at a point 3 feet past the southwest corner of Plaintiffs’ home*”. CP 133; App. 4. The measuring point adopted by the trial court in the judgment is thus not the Swensons’ home, but rather the “*southwest corner*” thereof. The trial court thereby violated the rules of construction by failing to attach any meaning to the use of the term “*southwest corner.*” See *In re Marriage of Thompson*, 97 Wash. App., 878; *Boundary County, Idaho v. Woldson*, 144 F. 2d 20.

Any lingering “*ambiguity*” in Court’s July 5, 2011 memorandum decision regarding the meaning of the phrase “*Plaintiffs’ home*” is resolved by following the Court’s instruction to “*See attached diagram*”. CP 133; App. 4. The diagram, attached as Exhibit “B” to the court’s memorandum opinion, depicts the foundation line of the south wall of the Swensons’ house and the southwest corner. CP 135-36; App. 4. The decks on the south wall of the Swensons are not shown on the diagram. *Id.* The foundation line of the south wall of the Swensons home as shown in the diagram is roughly parallel to the point where the adverse possession boundary jogs from 25 feet to 17 feet. *Id.* The diagram’s depiction of the foundation line of the south wall is thus consistent with the memorandum decision’s description of the location of the jog at a point 3 feet past the southwest corner of the Plaintiffs’ home.

The Order Granting Swenson's Motion to Clarify Judgment also makes no mention of Exhibit B to the to the court's memorandum decision. Instead, the order attaches Exhibit C., a diagram, dated May 22, 2012, by Pinnacle Surveying. Exhibit C depicts the jog in the adverse possession boundary at a point approximately eight and one-half feet further south than did Exhibit "B" to the court's memorandum opinion. CP 82; App. 1. The trial court in its order made no attempt to reconcile the two diagrams. Thus, far from providing clarity to the judgment, the two conflicting diagrams promise to create further confusion as to the location of the adverse possession boundary. The trial court's failure to reconcile the two exhibits constitutes a further violation of the rules of construction. *Marriage of Thompson*, 97 Wn. App. 878; *Boundary County, Idaho v. Woldson*, 144 F. 2d 20.

Instead of addressing key provisions of its memorandum decision, the trial court instead focused on its previously unexpressed intent to include the decks on the Swensons' house as part of their "home." RP 9-10. The trial court erred by elevating its intent to defeat the plain language of the memorandum decision. Note *Salt Lake City v. Salt Lake City Water and Electrical Power Co.*, 174 P. 2d 1134, 1137-38 (Utah 1918):

...To say that the unexpressed intention of the author controls as against the usual and ordinary meaning of the

language is to fly in the face of all rules and canons of construction. To say that a judgment can be made to mean something contrary to the ordinary and usual meaning of the language used, except in case of a practical construction and application by the parties to the judgment, would not only be contrary to all rules of construction but would be most dangerous in practice. If such were the law, a party might be held guilty of contempt for violating a judgment or decree when he had strictly followed the ordinary and usual meaning of the language used therein. Moreover, the doctrine of *res adjudicata* could then be restricted or expanded at the will of the court....

In light of the trial court's failure to follow the rules of construction, the trial court's Order Granting Swenson's Motion to Clarify Judgment should be reversed.

C. The trial court's order was not recognized under CR 60.

The Order Granting Swenson's Motion to Clarify Judgment recites that Swensons' motion was brought pursuant to CR 60. CP 77. CR 60 (b) does not support the order, as that rule contemplates vacation of a judgment, not clarification or amendment. CR 60 (a) will support the order only if the order addresses a clerical, as opposed to a judicial, error. *Presidential Estates Apartment Associates v. Barrett*, 129 Wash. 2d 320, 326, 917 P.2d 100 (1996). In *Presidential Estates*, the court explained the distinction between clerical and judicial errors:

In deciding whether an error is “judicial” or “clerical,” a reviewing court must ask itself whether the judgment, as amended, embodies the trial court’s intention, as expressed in the record at trial. *Marchel v. Bunger*, 13 Wash.App. 81, 84, 533 P.2d 406, review denied, 85 Wash.2d 1012 (1975). If the answer to that question is yes, it logically follows that the error is clerical in that the amended judgment merely corrects language that did not correctly convey the intention of the court, or supplies language that was inadvertently omitted from the original judgment. If the answer to that question is no, however, the error is not clerical, and, therefore, must be judicial. Thus, even though a trial court has the power to enter a judgment that differs from its oral ruling, once it enters a written judgment, it cannot, under CR 60(a), go back, rethink the case, and enter an amended judgment that does not find support in the trial court record. (Footnote omitted).

129 Wn. 2d 326.

The court gave further explanation of the clerical versus judicial error distinction:

A statement made at oral argument before this court illuminates another indicator of the essential distinction between “clerical error” and “judicial error.” Counsel for Barrett-Yeakel began its argument and said that it asked the trial court to “amend the judgment because we did not believe that he intended the results of his original judgment.” Oral argument tape 1 (Feb. 8, 1996). Whether a trial court intended that a judgment *should have a certain result* is a

matter involving legal analysis and is beyond the scope of CR 60(a). The rule is limited to situations where there is a question whether a trial court intended to enter the judgment that was actually entered.

129 Wn. 326 n. 5.

Tested by the foregoing analysis, the Order Granting Swenson's Motion to Clarify Judgment attempts to correct a judicial error. Paragraph 3 of the order states that "[T]his Court intended the phrase 'Plaintiffs' home the deck shown in the photo attached hereto as Exhibit 'A', and intended that the transition point where the Adverse Possession Area (as defined in the Judgment) narrows from 25 feet to 17 feet be measured from a point 3 feet past the southwest corner of the deck...." Paragraph 3 of the order does not and cannot embody the court's intention as expressed in the record at trial, because it relies upon a photograph and a diagram that were not part of the record at trial. Further, as in *Presidential Estates*, Paragraph 3's recitation of the court's intent manifests an intent that the judgment should have a certain result. Therefore, as in *Presidential Estates*, CR 60 (a) does not authorize the changes made by the order in question.

In *Presidential Estates*, the court upheld part of the trial court's order of clarification that granted the defendants the right to lay a storm water drain pipe within the easement in question. The court held that part

of the order of clarification did not conflict with the original judgment, which recognized the defendants' interest in the easement for utilities, but which was ambiguous as to where a storm drain could be located. 129 Wn. 2d 328-29. Here, in contrast, the trial court's order recognized the decks on the south wall of the Swensons' residence as the point from which was to be measured the three-foot distance to the adverse possession boundary. Unlike the original judgment in *Presidential Estates*, in this case, the decks are nowhere mentioned in either the trial court's memorandum decision, amended findings of fact and conclusions of law, or judgment. CP 126-135; 109-125; 77-84; App. 4, 3, 2.

Presidential Estates therefore does not support the trial court's order.

D. The trial court was barred by res judicata from granting the Swensons' motion.

The Order Granting Swenson's Motion to Clarify Judgment is barred by the doctrine of res judicata. The Swensons asked the trial court to clarify its judgment and amended findings. CP 22-46. A motion to clarify is available to explain or refine rights already given; an order clarifying a previous judgment or order cannot grant new rights or extend old ones. *Rivard v. Rivard*, 75 Wash. 2d, 415, 418, 451 P. 2d 677 (1969); *Kemmer v. Keiski*, 116 Wash. App. 924, 933, 68 P. 3d 1138 (2003); *Marriage of Jarvis*, 58 Wn. App. 345.

Kemmer v. Kieski illustrates this rule. Four months after obtaining a judgment awarding him a 12-foot wide implied easement over Louise Kemmer's property, Mr. Kieski brought an action for contempt in which he asked the court to "*clarify*" its earlier judgment by expanding the easement road to the 20-foot wide road that he had originally requested. The trial court granted a judgment that expanded the easement road to the minimum necessary for a log truck to pass, resulting in an expansion in a curve in the easement road from 12 to nearly 30 feet. The Court of Appeals reversed the trial court with the following reasoning:

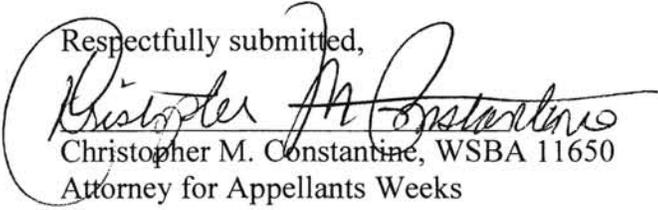
As stated in *Rivard v. Rivard*, an order "clarifying" a judgment explains or refines rights already given. It neither grants new rights nor extends old ones. Unlike a modification, amendment, or alteration, which must be accomplished under CR 59, CR 60 or some other exception to preclusion, a "clarification" can be accomplished at any time.

Here, the August 2001 judgment expanded the May 2000 judgment's easement from 12 to 30 feet at some points. It also ordered, for the first time, that the easement be open to log trucks and dump trucks. It constituted a substantial and significant modification of the May 2000 judgment, not a mere "clarification" of the May 2000 judgment. It was not accomplished in compliance with CR 59, CR 60, or any other exception to preclusion that we are aware of. We hold that the August 2001 judgment was precluded by the May 2000 judgment.

Kemmer v. Kieski provides the rule to apply here. As in *Kemmer*, the Swensons sought an expansion of the adverse possession area from 3 to 11-1/2 feet at the point where the adverse possession boundary jogs from 25 to 17 feet. No provision in the memorandum decision, the amended findings of fact and conclusions of law, or the judgment supports such a change. Instead, the Swensons obtained a significant modification of the court's amended findings of fact, conclusions of law and judgment based solely upon their subjective belief that the judgment gave them the right to measure the distance not from their house foundation line but from their deck. The trial court acknowledged that its ruling would expand the area encompassed by the Swensons' adverse possession. "[T]hat results in an area more than what the Court's drawing was..." RP 9. Here, as in *Kemmer v. Keiske*, the Swensons' are precluded by the finality of the trial court's judgment from seeking to expand the adverse possession area.

VII. CONCLUSION

The trial court's Order Granting Swenson's Motion to Clarify Judgment should be reversed.

Respectfully submitted,

Christopher M. Constantine, WSBA 11650
Attorney for Appellants Weeks

VIII. APPENDICES

1. Order Granting Swenson's Motion to Clarify Judgment
2. Judgment
3. Amended Findings of Fact and Conclusions of Law
4. Memorandum decision

APPENDIX 1

ORDER GRANTING MOTION TO CLARIFY JUDGMENT

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Kim Morrison
Chelan County Clerk

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

JOHN and CLAUDIA SWENSON,
husband and wife,

Plaintiffs,

v.

ALAN F. WEEKS, individually, and the
MARITAL COMMUNITY OF ALAN F.
WEEKS and JULIE WEEKS,

Defendants.

NO. 09-2-01058-1

ORDER GRANTING SWENSON'S MOTION
TO CLARIFY JUDGMENT

THIS MATTER, having come before this Court on Plaintiffs John and Claudia Swenson's ("Swenson") Motion to Clarify pursuant to CR 60, and the Court having reviewed the records and files herein, including but not limited to Swenson's Motion to Clarify and Defendant Alan F. Weeks' ("Weeks") Objection thereto, and the Court having heard oral argument on September 18, 2012, it is HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. That Swenson's Motion to Clarify is Granted;
2. That this Court's previously entered Judgment *was*

... ambiguous. The Court needs to clarify what it meant in its July 5, 2011 Opinion Letter, which Letter the Court made a part of the

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Judgment, when the Court stated: "Based upon the evidence and the extent of Plaintiffs' use, the portion they adversely possessed is a 25 wide strip parallel to Plaintiffs' northwest side of their property (exclusive of the area adjacent to the access easement) that narrows to 17 feet in width at a point 3 feet past the southwest corner of Plaintiffs' home. See attached diagram."

3. That this Court intended the phrase "Plaintiffs' home" include the deck shown in the photo attached hereto as Exhibit "A," and intended that the transition point where the Adverse Possession Area (as defined in the Judgment) narrows from 25 feet to 17 feet be measured from a point 3 feet past the southwest corner of the deck. The Court believes the deck was and is part of the Plaintiffs' home, existing when Weeks sold the Swenson Property to Swenson. Measuring the transition point from the corner of the deck is consistent with the Court's findings at trial related to the scope of Plaintiffs' use of the Weeks Property. The Court concluded Plaintiffs' use of the Adverse Possession Area included a row of fruit trees that existed on the Swenson Property, as platted, and extending into the Adverse Possession Area. A photo of these trees is attached hereto and incorporated herein as Exhibit "B."

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APPENDIX 2

JUDGMENT AND ORDER GRANTING INJUNCTION

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KIM MORRISON
CHELAN COUNTY CLERK

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

JOHN and CLAUDIA SWENSON,
husband and wife,

Plaintiffs,

v.

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MARITAL COMMUNITY OF ALAN F.
WEEKS and JULIE WEEKS,

Defendants.

NO. 09-2-01058-1

JUDGMENT NO. 12-9 0 0354 8

JUDGMENT AND ORDER
GRANTING INJUNCTION

I. JUDGMENT SUMMARY

The following information is provided in compliance with RCW 4.64.030:

Judgment Creditor	John and Claudia Swenson, husband and wife
Judgment Creditor's Attorney	Brian A. Walker Ogden Murphy Wallace, P.L.L.C.
Judgment Debtors	Alan F. Weeks, individually, and the marital community of Alan F. Weeks and Julie Weeks
Principal Balance Due	\$ 33,160.40
Attorneys' Fees	\$ 42,867.50 43,010.00 <i>CO</i>

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Costs	<i>OC</i>	\$	<u>2,925.82</u>
TOTAL JUDGMENT	<i>5.25%</i>	\$	<u>79,096.22</u>

Post Judgment Interest Rate: ~~3.25%~~ per annum.

II. JUDGMENT AND ORDER GRANTING INJUNCTIVE RELIEF

THIS MATTER, having come before this Court for a bench trial on April 11-12, 2011, and the Plaintiffs John and Claudia Swenson appearing by their attorney, Brian A. Walker of Ogden Murphy Wallace, P.L.L.C., and Defendants Alan and Julie Weeks initially appearing by their attorney, Roy Earl Morriss of Land Law Washington PLLC and now appearing by and through their attorney, Christopher M. Constantine of Of Counsel, Inc., PS, and the Court having heard the evidence and argument of counsel, and having also entered its Memorandum Decision, Amended Findings of Fact and Conclusions of Law, and Findings of Fact and Conclusions of Law In Support of Award of Attorneys' Fees and Costs,

IT IS NOW, THEREFORE, ORDERED, ADJUDGED, AND DECREED as follows:

1. That a money judgment is hereby entered in favor of the Plaintiffs, John and Claudia Swenson, against Defendant Alan F. Weeks, individually, and against the marital community of Alan F. Weeks and Julie Weeks, jointly and severally, in the amount of SEVENTY-NINE THOUSAND NINE HUNDRED SIX DOLLARS and 22 /100 Dollars (\$79,096.22) (the "Judgment Amount"). The Judgment Amount is calculated as follows:

Damages	\$33,160.40
Attorneys' Fees	\$42,867.50
Costs	\$ <u>2,925.82</u>

5.25%

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2 2. That interest shall accrue on the Judgment Amount at the rate of ~~3.25%~~ per
3 annum, until the date that this Judgment is paid in full;

4 3. That the Adverse Possession Area defined in the Court's Amended Findings of
5 Fact and Conclusions of Law shall be and hereby is quieted in favor of Swenson. Weeks and his
6 agents shall be and hereby are enjoined from having, or asserting any right, title, estate, lien, or
7 other interest adverse to Swenson on or to said lands, subject to the Court's power or contempt.

8 4. That Weeks and his agents are hereby permanently enjoined, subject to the
9 Court's power of contempt, from (i) trespassing, or otherwise interfering, with Swenson's rights
10 to use and enjoy the Swenson Property, including the Adverse Possession Area, and the Drainage
11 Lines (as defined in the Court's Amended Findings of Fact and Conclusions of Law) and the
12 discharge area from the Drainage Lines; (ii) interfering with Swenson's removal of the fencing,
13 signage, and other things Weeks wrongly put in and located on the Adverse Possession Area;
14 (iii) interfering with Swenson's restoration of the Swenson Property and the Adverse Possession
15 Area; and (iv) blocking or otherwise interfering with Swenson's use of the Swenson Property
16 burdened by the Access Easement (as defined in the Court's Amended Findings of Fact and
17 Conclusions of Law).

18 5. That Weeks, and the marital community of Weeks, are jointly and severally liable
19 to Swenson for Swenson's attorneys' fees and costs in the amounts set forth in the Court's
20 Findings of Fact and Conclusions of Law In Support of Award of Attorneys' Fees and Costs.

21 6. That subject to the Court's power of contempt, Weeks shall convey to Swenson
22 the Adverse Possession Area. In the event Weeks fails to so convey, this Court (or a duly
23 appointed Commissioner), shall so convey these lands to Swenson by Quitclaim Deed. Swenson
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may record this Judgment and/or the Court's Amended Findings of Fact and Conclusions of Law with the Chelan County Auditor's Office.

7. Subject to the Court's power of contempt, Weeks shall convey to Swenson an easement for the Drainage Lines. In the event Weeks fails to so convey, this Court (or a duly appointed Commissioner) shall execute the necessary instrument to grant Swenson the easement(s).

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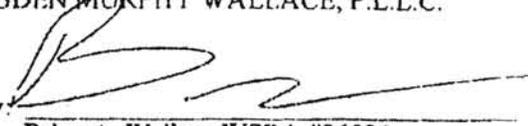
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8. Pursuant to RCW 58.04.011, Swenson and their surveyor may enter onto the Weeks Property for purposes of obtaining the necessary surveys to prepare the required deeds and other documents necessary to fulfill the Orders of this Court.

DATED this 15th day of March, 2012.


HONORABLE T.W. SMALL

Presented by:
OGDEN MURPHY WALLACE, P.L.L.C.

By: 
Brian A. Walker, WSBA #26586
Attorneys for Plaintiffs
John and Claudia Swenson

Approved as to Form and Content;
Notice of Presentation Waived:
OF COUNSEL, INC., PS

By: _____
Christopher M. Constantine, WSBA #11650
Attorneys for Defendants Weeks

APPENDIX 3

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

SB
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FILED

JAN 06 2012

Kim Morrison
Chelan County Clerk

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

JOHN and CLAUDIA SWENSON,
husband and wife,

Plaintiffs,

v.

ALAN F. WEEKS, individually, and the
MARITAL COMMUNITY OF ALAN F.
WEEKS and JULIE WEEKS,

Defendants.

NO. 09-2-01058-1

AMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

THIS MATTER came before the Court for a bench trial April 11-12, 2011. The Court reviewed all the pleadings on file, including all memorandums and the declarations admitted into evidence.

The Court heard live testimony from the following witnesses:

- John Swenson
- Claudia Swenson
- Alan Weeks

Following trial, the Court issued a Memorandum Decision, a true and correct copy of which is attached hereto as Exhibit "A." To the extent the Findings of Fact and Conclusions of

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2 Law set forth in this document differ from those stated on Exhibit "A," this document shall
3 control.

4 I. FINDINGS OF FACT

5 1. In 1998, Alan Weeks ("Weeks") was the Trustee of a Trust established pursuant
6 to a Trust Agreement dated September 20, 1990 (the "Trust").

7
8 2. In 1998, the Trust owned the following described real property (the "Swenson
9 Property"), and had since 1997 listed the Swenson Property for sale with Windermere Real
10 Estate's office in Chelan, Washington:

11 Lot 708, Plat of Riviera Chelan #1, Chelan County, Washington,
12 according to the plat thereof recorded in Volume 7 of Plats, page 10
through 15, inclusive.

13 3. On about April 27, 1998, John and Claudia Swenson ("Swenson") and the Trust
14 entered into a Purchase and Sale Agreement for Swenson's purchase of the Swenson Property
15 (the "P&SA"). The transaction closed on Saturday, May 30, 1998, with Weeks' signing the
16 Statutory Warranty Deed.

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18 4. On May 22, 1998, and prior to closing, Weeks recorded as Trustee of the Trust
19 with Chelan County, Washington, an instrument granting to the owner of the Weeks Property
20 (defined below), which Weeks Property was and still is owned by Weeks, an access and utility
21 easement over a portion of the Swenson Property. The area of land described in the Easement
22 Instrument is referred to herein as the "Access Easement." Weeks' purpose for the Easement
23 Instrument was to provide access to the Weeks Property for that property's future development,
24 which development Weeks anticipated could include Weeks' future residence or a subdivision
25 of residential houses to be potentially developed by Weeks.
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2 5. The Easement Instrument provides, “[t]he easement shall not be used for parking
3 or be obstructed or blocked in any way so as to impede ingress or egress.”

4 6. The Easement Instrument further provides: “In the event either party breaches
5 this agreement ... [t] he prevailing party shall be entitled to receive reasonable attorneys fees
6 and costs”

7 7. From Monday, May 25 to Thursday, May 28, 1998, John Swenson was not in
8 Chelan County, Washington. He was either at work in Olympia, at his home in Kirkland, or
9 commuting between the two locations.

10
11 8. On Thursday, May 28, 1998, John and Claudia Swenson approved the draft
12 Warranty Deed from the Trust to Swenson for the Swenson Property. John and Claudia
13 approved this draft at the home of James Pair located in Bellevue, Washington. On this date,
14 and in Bellevue, Washington, the Swensons also signed the documents needed to close their
15 purchase of the Swenson Property, which included a promissory note made payable to
16 Washington Mutual Bank and Deed of Trusts dated May 28, 1998, which were recorded on
17 June 3, 1998, under Auditor’s File No. 2029487, records of Chelan County, Washington.

18
19 9. On Friday, May 29, 1998, John Swenson flew from Seattle to a Continuing
20 Education Seminar and Annual Meeting in Baltimore, Maryland, that started on Saturday,
21 May 30, 1998.

22 10. From Saturday, May 30, 1998 to Thursday, June 4, 1998 John Swenson was in
23 Baltimore, Maryland.

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2 11. On Saturday, May 30, 1998, Weeks signed the Statutory Warranty Deed, as
3 trustee of the Trust, conveying the Swenson Property to Swenson. Weeks signed this Deed in
4 King County, Washington.

5 12. On about June 3, 1998, the Statutory Warranty Deed, conveying title of the
6 Swenson Property from the Trust to Swenson, was recorded with Chelan County, Washington.
7 Also recorded this date was Swenson's Deed of Trust to Washington Trust Bank.

8 13. At closing, the Swenson Property was improved with a residence. The residence
9 included an apartment in the basement (the "Apartment" or the "ADU").

10 14. Access to the Apartment is by the Stone Stairs (defined below).

11 15. Swenson are husband and wife and the current owners of the Swenson Property.
12 The Swenson Property is currently occupied by Swenson, as Swenson's residence. In addition,
13 Swenson rents the Apartment to tenants, whose access to the Apartment is via the Stone Stairs.
14

15 16. Weeks is a married man residing in Skagit County, Washington, and owns, with
16 his wife, Julie Weeks, that real property neighboring the Swenson Property and located in
17 Chelan County, Washington, and legally described as follows (the "Weeks Property"):
18

19 That portion of the South half of Southwest Quarter of Section 3,
20 Township 27 North, Range 22 East of the Willamette Meridian, Chelan
21 County, Washington, described as follows:

22 Commencing at the Southeast corner of said South half; thence South
23 89°32'20" West along South line of said South half a distance of 424.98
24 feet to the point of beginning; thence continuing South 89°32'20" West
25 462.25 feet to intersect the Northeasterly margin of Secondary State
26 Highway 10-C; thence North 40°50'36" West 63.79 feet along said
margin; thence South 49°09'24" West 45.00 feet; thence North 40°50'36"
West 15.06 feet to the most southerly corner of the plat of Lake Chelan
Hills No. 3, recorded in Volume 8 of Plats at pages 3 through 5, records of
Chelan County Auditor; thence along said plat boundary by the following
courses and distances North 26°24'36" East 286.84 feet, North 5°28'20"

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2 West 170.00 feet, North 78°20'00" West 180.00 feet, North 13°06'40"
3 West 146.22 feet, North 81°40'12" East 56.48 feet, South 65°00'00" East
4 230.00 feet, North 42°00'00" East 125.00 feet and North 18°28'16" East
5 117.34 feet to intersect the Westerly boundary of the Plat Chelan
6 Highland, recorded in Volume 9 of Plats at pages 100 through 106,
7 records of Chelan County Auditor, thence South 24°37'59" East 255.79
8 feet; thence South 48°19'40" East 464.17 feet thence South 43°08'20"
9 West 281.60 feet to the point of beginning.

10 17. The Weeks Property consists of about seven acres, and is unimproved and vacant
11 real estate, except for the Adverse Possession Area, which was improved by the Pre-Existing
12 Improvements and other improvements of Swenson, until Weeks destroyed them as described
13 below. The Weeks Property is adjacent to residences on fully developed and improved real
14 property and is located in a residential setting overlooking Lake Chelan, Washington.

15 18. While Alan and Julie Weeks do not reside on the Weeks Property, they made
16 regular visits to the Weeks Property, usually about once or twice a year. During these visits, the
17 Pre-Existing Improvements (defined below) and their healthy condition were easily visible from
18 the Weeks Property. Also easily visible were the other improvements (described in Paragraph
19 26 below) Swenson added over the years in the Adverse Possession Area and beyond the
20 Adverse Possession Area and further onto the Weeks Property. Swenson's continued expansion
21 of new improvements onto the Weeks Property and in the Adverse Possession Area
22 demonstrates Swenson used the Adverse Possession Area as his own, asking permission from
23 no one, and hostile to the interests of Weeks and all others and this use was visible to a
24 reasonable person.

25 19. Prior to the Trust's May 30, 1998 sale of the Swenson Property to Swenson, there
26 existed on the Weeks Property the following (collectively, the "Pre-Existing Improvements"):

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- Two drainage lines that benefited the Swenson Property by allowing storm water to drain off the Swenson Property and onto the Weeks Property;
- Two peach trees and irrigation lines for the trees. The irrigation lines originate on the Swenson Property and Swenson has paid for the water delivered by those lines since May 30, 1998;
- Six evergreen trees and irrigation for the trees, which irrigation extends twenty-five feet onto the Weeks Property. The irrigation lines originate on the Swenson Property and Swenson has paid for the water delivered by those lines since May 30, 1998;
- Two grapevines and irrigation lines for the vines that sat on the Weeks Property. The irrigation lines originate on the Swenson Property and Swenson has paid for the water delivered by those lines;
- A planter box, inside of which existed pumpkins, beans, carrots, and squash, and irrigation lines for the vegetable garden located inside the planter box. The irrigation lines originate on the Swenson Property and Swenson paid for the water delivered by those lines;
- Stone Steps leading to the ADU;
- A wood retaining wall that holds up and supports a portion of the Access Easement, approximately four feet in height;
- A retaining wall that supports soil above the planter box; and
- A portion of the Swenson Property's cement parking area and steps leading from the parking area and to the ADU.

20. Additionally, inside the Access Easement there existed, on May 30, 1998, irrigation lines (the "Easement Irrigation Lines") that supplied water to six (6) trees and a grapevine located inside the Access Easement. Weeks, for the Trust, installed these lines and landscaping during the period of time the Trust owned the Swenson Property.

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2 21. At all times relevant, Swenson continued to use the Easement Irrigation Lines to
3 water the trees and grapevine, which trees and grapevine Swenson also maintained. The
4 Easement Irrigation Lines, trees, and grapevine in the Access Easement did not interfere with
5 Weeks' use of the Access Easement.

6 22. The Easement Irrigation Lines also supplied water to trees located on top of a
7 retaining wall Swenson constructed in July, 1999, primarily on City of Chelan real property, but
8 a portion of which is located inside the Access Easement (the "Upper Retaining Wall").
9 Swenson maintains the landscaping and the Upper Retaining Wall located inside the Access
10 Easement.
11

12 23. A portion of the Upper Retaining Wall is located in the Access Easement, but has
13 not prevented Weeks' use of the Access Easement. ~~Within a reasonable time following entry of~~
14 ~~the Judgment in this case,~~ ^{137 March 31, 2012,} Swenson shall remove the portion of the Upper Retaining Wall
15 located in the Access Easement at Swenson's expense; ~~provided, however, Weeks shall be~~
16 ~~obligated to pay all costs associated with building a new retaining wall to be located outside the~~
17 ~~Access Easement and not on Swenson's Property, if a new retaining wall is required by the City~~
18 ~~of Chelan.~~
19

20 24. According to the platted boundary line between Weeks Property and the Swenson
21 Property, the Pre-Existing Improvements, including the Stone Steps, are located on the Weeks
22 Property. Alan Weeks constructed the Pre-Existing Improvements on the Weeks Property when
23 the Trust, which Trust Weeks administered, owned the Swenson Property. When built, the Pre-
24 Existing Improvements benefited the Swenson Property.
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2 25. Following May 30, 1998, and for more than ten years, Swenson took possession
3 of the Swenson Property and began to use and maintain, at Swenson's sole expense, the Pre-
4 Existing Improvements and the Easement Irrigation Lines, and all landscaping serviced by the
5 Easement Irrigation Lines. Swenson (or their tenants) used the Stone Steps to access the ADU.
6 Swenson fertilized the peach and evergreen trees, grapevines, and the planter box vegetation.
7 Swenson watered the trees, the grapevines, and the planter box vegetation using the irrigation
8 lines running from the Swenson Property and onto the Weeks Property, and Swenson paid for
9 the water used to irrigate. Swenson pruned and thinned the grapevines, the trees, and picked the
10 fruit off the fruit trees. Swenson also maintained the irrigation lines by repairing them and
11 preparing them for use every fall and spring. Swenson further created a firebreak commencing
12 from the platted boundary line of the Swenson Property and extending twenty-five (25) feet
13 into the platted Weeks Property. From May 30, 1998 to September 1, 2009, Swenson
14 maintained the firebreak by routinely clearing the land of weeds and vegetation and burning or
15 hauling out the weeds and vegetation located on the platted Weeks Property.
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18 26. In addition to using the Pre-Existing Improvements and the Adverse Possession
19 Area starting May 30, 1998, Swenson also used the Adverse Possession Area (as defined in
20 Paragraph 28 below) and encroached further onto the Weeks Property beyond the Adverse
21 Possession Area by building and using the following since the following dates:

22 May 1999 – raised garden bed, 1 foot high, 12 feet long, 2 feet wide which was situated
23 in area 25 feet from West of Weeks/Swenson property line installed. This garden required
24 biannual sprinkler maintenance and biweekly care of plantings. This raised garden
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existed in area of dispute (Adverse Possession Area) and was replaced by larger raised garden in May 2007 that Weeks destroyed in September 2009.

June 2001 – wood birdhouse mounted on metal post installed about 32 feet from property line. It was removed during Weeks’ September 2009 destruction.

August 2005 - Stone steps installed to allow access to lower terraced areas (terraces built 2003, 2004, 2005 by Misty Meadows Landscaping). Weeks destroyed these steps in September 2009.

May 2007 – raised garden bed, 2-4 feet high, 12 feet long, 6 feet wide situated in the area 25 feet west of Swenson/Weeks property. This garden required biannual sprinkler maintenance and biweekly care of plantings. Weeks destroyed this raised garden in September 2009.

27. The Pre-Existing Improvements are located 17 to 25 feet from the platted boundary line between the Swenson Property and the Weeks Property. And, Swenson maintained this entire area and treated this entire area as their own by the acts described above in Paragraphs 25 and 26.

28. A map showing the location of the Pre-Existing Improvements and the area in which Swenson maintained the fire break is attached hereto as Exhibit “B.” This area is referred to herein as the “Adverse Possession Area.”

29. The area where the two Drainage Lines sit and the water discharges therefrom on the Weeks Property is referred to herein as the “Drainage Easement Area.” The location of the two Drainage Lines is as generally depicted on Exhibit “B.”

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2 30. Weeks knew of Swenson's use of the Pre-Existing Improvements. Weeks had
3 built the Pre-Existing Improvements to benefit the Swenson Property and sold, as Trustee of the
4 Trust, that property to Swenson in May 1998. Further, about one year following the May 30,
5 1998, closing of the Trust's sale of the Swenson Property to Swenson, Alan Weeks called
6 Valerie Conrad, who was Swenson's realtor when acquiring the Swenson Property. Weeks
7 asked Ms. Conrad to assist him in dealing with Swensons' use of the Adverse Possession Area.
8 Ms. Conrad refused.
9

10 31. In the summer of 2008, Alan Weeks again called Valerie Conrad. In the second
11 call, Weeks again advised that he was having boundary issues with Swenson. Ms. Conrad
12 recalls informing Mr. Weeks that she would not get involved with boundary issues and
13 suggested that Mr. Weeks talk to the Swensons directly.

14 32. On July 14, 2008, John Swenson sent Alan Weeks a letter. In his letter, John
15 Swenson stated that the Swensons had acquired the Adverse Possession Area via the doctrine of
16 adverse possession.
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18 33. In July 2009, and more than ten years after closing on May 30, 1998, Weeks sent
19 Swenson a letter threatening to take action, including removing the Stone Steps accessing the
20 ADU, which apartment Swenson leased to a tenant, if Swenson's "... pain in the ass attitude
21 continues...."

22 34. On August 27, 2009, Weeks sent Swenson, by certified mail, a second letter in
23 which Weeks wrote, "I gave you express verbal permission that you could maintain the peach
24 tree, garden box, hemlock trees, and grapevines that I had planted/placed upon my adjoining
25 separate property... TODAY I AM NOTIFYING YOU THAT THE EXPRESS VERBAL
26

1 PERMISSION TO ENTER UPON MY PROPERTY IS RESCINDED. I AM GIVING YOU
2 UNTIL 10:00 P.M. ON AUGUST 31, 2009 TO REMOVE ANY PERSONAL PROPERTY
3 YOU PLACED ON MY PROPERTY. AFTER 10:00 P.M. ON AUGUST 31, 2009
4 ENTERING MY PROPERTY WILL BE CONSIDERED TRESPASSING. I WILL CHARGE
5 YOU WITH CRIMINAL TRESPASS!"
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7 35. From September 1, 2009 to September 10, 2009, while Swenson was at work and
8 away from the Swenson Property, Weeks ripped out and destroyed the Pre-Existing
9 Improvements, including retaining walls, the fruit and evergreen trees, the grapevines, and the
10 planter box and the vegetation it contained. Weeks also removed additional improvements
11 Swenson added in the Adverse Possession Area, such as stone steps Swenson had built leading
12 to the lower portion of the Swenson Property. Weeks did not remove the Drainage Lines or the
13 Stone Steps leading to the ADU, despite his threat of July 2009 to remove those steps, if
14 Swenson's "pain in the ass attitude continues."
15

16 36. From September 1, 2009 to September 3, 2009, Weeks also built a fence in
17 proximity to the platted boundary line between the Weeks Property and the Swenson Property,
18 and in the Access Easement. Weeks placed signage in the Access Easement, including religious
19 references, tow truck signs, private property sign, no parking signs, a "Weeks' Easement" sign,
20 and a sign threatening Swenson with criminal trespass, if Swenson entered into the Access
21 Easement. Weeks also removed the trees and grapevine that had been located in the Access
22 Easement prior to May 30, 1998, and used by Swenson.
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24 37. On about September 14, 2009, and while Swenson was again at work and away
25 from the Swenson Property, Weeks installed two posts and strung wire between the posts
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2 preventing others from accessing that portion of the Swenson Property burdened by the Access
3 Easement. Weeks later installed another "No Parking" sign on this wire.

4 38. Swenson's use of the Pre-Existing Improvements and the Adverse Possession
5 Area was actual, open and notorious, hostile, continuous, and without interruption for a period
6 of more than ten years, from May 30, 1998 to September 1, 2009.

7 39. Swenson's use of the Pre-Existing Improvements and the Adverse Possession
8 Area depicted on Exhibit "B" was without Weeks' permission, which permission Swenson
9 never sought.

10 40. Weeks and his agent put some of the debris from their September 2009 actions
11 described above onto the Swenson Property, injuring Swenson's irrigation system. Weeks and
12 his agent put other debris, including the trees they cut down, in the Adverse Possession Area.
13 Irrigation lines benefitting the Swenson Property are also located in the Adverse Possession
14 Area, and were also damaged by Weeks' and his agents' conduct.

15 41. It will cost Swenson \$11,053.80 to restore the Pre-Existing Improvements and
16 other improvements Swenson had in the Adverse Possession Area.

17 42. On September 24, 2009, Swenson filed this civil action against Weeks for, among
18 other things, quiet title to the Adverse Possession Area, removal of the obstructions Weeks had
19 built in the Access Easement, and for other injunctive relief. Swenson also brought a Motion
20 for a Preliminary Injunction against Weeks, the hearing on which was initially held on
21 October 16, 2009.

22 43. On October 23, 2009, Judge Bridges entered a written Order granting Swenson
23 preliminary relief, following his oral ruling of October 16, 2009.
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2 44. On March 14, 2011, this Court entered an Order granting Swenson Partial
3 Summary Judgment. Pursuant to that Order, the following issues were decided as a matter of
4 law, and were not part of trial:

- 5 - The following claims of Weeks were dismissed with prejudice: soil trespass;
6 frivolous lawsuit; business interference; and bad faith.
7
8 - The following affirmative defenses of Weeks were dismissed with prejudice: implied
9 and presumed permission; waiver; laches; and failure to state a claim.
10
11 - At a minimum, Swenson has an easement to the area of land on which the Stone
12 Steps exist leading to the ADU. The question of whether title to this area of land
13 should be quieted in favor of Swenson was reserved for this trial.
14
15 - Weeks and his agents are permanently enjoined from in any way further obstructing
16 or blocking the Access Easement described in that easement instrument recorded
17 May 22, 1998, under Auditor's No. 2028804, records of Chelan County, Washington,
18 subject to the Court's power of contempt.
19
20 - Swenson's has implied easements to the two Drainage Lines and the discharge areas
21 therefrom, and Swenson is authorized to enter onto the Weeks' property for purposes
22 of having the two Drainage Lines and the discharge areas therefrom surveyed to
23 create easement instruments to be recorded with Chelan County Superior Court.

24 45. Swenson placed a truck canopy on the Weeks' Property and outside the Adverse
25 Possession Area and Swenson parked a vehicle in the Access Easement, both of which Swenson
26 removed at Weeks' request and prior to Weeks' filing his counterclaim in this action.

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II. CONCLUSIONS OF LAW

1. Jurisdiction and venue are proper in Chelan County Superior Court.
2. Swenson's use of the Pre-Existing Improvements and the Adverse Possession Area shown on Exhibit "A" was actual, open and notorious, hostile, continuous, and without interruption for a period of more than ten years, from May 30, 1998 to September 1, 2009. Swenson has acquired all of Weeks' interests in Adverse Possession Area by adverse possession, satisfying the requirements of common law and RCW 4.16.020.
3. Swenson used the Adverse Possession Area as the true owner would have used it, considering the nature of the land, and the area it is situated. Swenson's use of the Adverse Possession Area was known to Weeks, or reasonably should have been known to Weeks, in light of the good condition of the Pre-Existing Improvements. Swenson's use of the Adverse Possession Area was adverse to Weeks' and any other person's claim to that property, as Swenson used it as Swenson's own, entirely disregarding the claims of others, asking permission from nobody, and using the Adverse Possession Area under a claim of right.
4. Swenson shall remove that portion of the Upper Retaining Wall that exists in the Access Easement at Swenson's expense when the Upper Retaining Wall interferes with Weeks' ability to access the Weeks Property after Weeks has developed that property. The remainder of the Upper Retaining Wall exists on the property of the City of Chelan and its removal requires the City's consent.
5. Swenson's use of a -portion of the Access Easement was not inconsistent with Weeks' use thereof. Swenson has not acquired all of Weeks' interests in that portion of the Access Easement by adverse possession.

1
2 6. The Adverse Possession Area depicted on Exhibit "A" shall be and hereby is
3 quieted in favor of Swenson. Weeks and his agents shall be and hereby are enjoined from
4 having, or asserting any right, title, estate, lien, or other interest adverse to Swenson on or to
5 said lands, subject to the Court's power or contempt.

6 7. Weeks and his agents are hereby permanently enjoined, subject to the Court's
7 power of contempt, from (i) trespassing, or otherwise interfering, with Swenson's rights to use
8 and enjoy the Swenson Property, including the Adverse Possession Area, and the Drainage
9 Lines and the discharge area; (ii) interfering with Swenson's removal of the fencing, signage,
10 and other things Weeks wrongly put in and located on the Swenson Property and in the Adverse
11 Possession Area; (iii) interfering with Swenson's restoration of the Swenson Property, and the
12 Adverse Possession Area; and (iv) blocking or otherwise interfering with Swenson's use of the
13 Swenson Property burdened by the Access Easement.
14

15 8. Weeks obstructed or blocked the Access Easement in violation of the terms of the
16 Easement Instrument drafted by Weeks, and entitling Swenson to an award of attorneys' fees
17 and costs against Weeks and Weeks' marital community, jointly and severally.
18

19 9. Weeks is entitled to nominal trespass damages for Swenson placing Swenson's
20 truck canopy on the Weeks Property in the amount of \$1. Weeks is not entitled to an award of
21 attorneys' fees and costs. The \$1 nominal damage award shall be offset from the damage award
22 entered in favor of Swenson herein.
23

24 10. Weeks, and Weeks' marital community, are jointly and severally liable to
25 Swenson for money damages caused by Weeks' destruction of the Pre-Existing Improvements
26 and the trees and grapevine located inside the Access Easement in the amount of \$33,161.40,

1
2 less the \$1 nominal damage award for Weeks, which includes treble damages per
3 RCW 4.24.630 due to Weeks' (i) wrongfully causing waste or injury to the Swenson Property,
4 and the property of Swenson located therein; and (ii) wrongful trespass of Swenson's trees,
5 gardens, grapevine, and other similar valuable property.

6 11. The total amount of the judgment against Weeks, and Weeks' marital community,
7 is \$33,160.40, excluding legal fees and costs which shall be added to the judgment.

8 12. Weeks, and the marital community of Weeks, are jointly and severally liable to
9 Swenson for Swenson's attorneys' fees and costs pursuant to RCW 4.24.630.

10 13. Weeks shall convey to Swenson the Adverse Possession Area depicted on
11 Exhibit "A." In the event Weeks fails to so convey, this Court (or a duly appointed
12 Commissioner), shall so convey these lands to Swenson by Quitclaim Deed. Swenson may
13 record this Judgment with the Chelan County Auditor's Office.
14

15 14. Weeks shall convey to Swenson an easement for the Drainage Lines. In the event
16 Weeks fails to so convey, this Court (or a duly appointed Commissioner) shall execute the
17 necessary instrument to grant Swenson the easement(s).
18

19 15. Pursuant to RCW 58.04.011, Swenson and their surveyor may enter onto the
20 Weeks Property for purposes of obtaining the necessary surveys to prepare the required
21 deeds and other documents necessary to fulfill the Orders of this Court.

22 16. Swenson's encroachments further onto the Weeks Property and beyond the
23 Adverse Possession Area described in Finding of Fact No. 26 above, did not amount to
24 adverse possession, except for the May 1999 raised garden bed that was open, notorious,
25 actual, and remained in the Adverse Possession Area without interruption for more than
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ten years. . Swenson's clearing of brush outside of the Adverse Possession Area did not amount to adverse possession. Only Swenson's conduct and improvements located inside the Adverse Possession Area satisfied the elements of adverse possession.

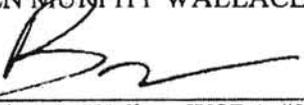
17. Weeks saw, or should have seen, the Pre-Existing Improvements and Swenson's other improvements located in or beyond the Adverse Possession Area during Weeks' visits to the Weeks Property, which visits were described in Finding of Fact No. 18 above.

DATED this 6th day of January, 2012.


HONORABLE T.W. SMALL

Presented by:

OGDEN MURPHY WALLACE, P.L.L.C.

By: 
Brian A. Walker, WSBA #26586
Attorneys for Plaintiffs
John and Claudia Swenson

Approved as to Form and Content;
Notice of Presentation Waived:

OF COUNSEL, INC., PS

By: _____
Christopher M. Constantine, WSBA #11650
Attorneys for Defendants Weeks

APPENDIX 4
MEMORANDUM DECISION

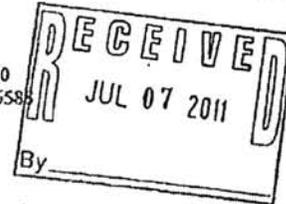
Superior Court of the State of Washington
For Chelan County

Lesley A. Allan, Judge
Department 1
T.W. Small, Judge
Department 2



John E. Bridges, Judge
Department 3
Bart Vandegrift
Court Commissioner

401 Washington Street
P.O. Box 880
Wenatchee, Washington 98807-0880
Phone: (509) 667-6210 Fax (509) 667-6588



July 5, 2011

Brian Walker
Ogden, Murphy, Wallace, P.L.L.C.
Riverfront Center, 1 Fifth St., Ste. 200
P.O. Box 1606
Wenatchee, WA 98807

Earl Morriss
Land Law Washington, P.L.L.C.
2920 Colby Ave., Ste 214
Everett, WA 98201

Re: **Swenson v. Weeks**
Court's Memorandum Decision
Chelan County Superior Court Cause No. 09-2-01058-1

Dear Counsel:

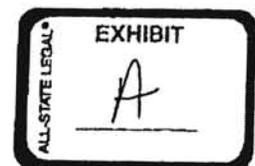
This matter came before the court for trial on April 11-12, 2011. Plaintiffs, John and Claudia Swenson, were represented by Brian Walker and defendants, Alan and Julie Weeks, were represented by Earl Morriss.

The court heard testimony from the following witnesses:

1. John Swenson
2. Claudia Swenson
3. Alan Weeks

The court also viewed the property in dispute and has now completed its review of the trial exhibits, its trial notes and the pleadings filed by counsel. The court has also reviewed the following:

- State v. Scott Ross Newcomb, 160 Wn.App. 184 (2011)
- Edmonds v. Williams, 54 Wn.App. 632 (1989)
- Thompson v. Smith, 59 Wn.2d 397 (1962)
- Mugaas v. Smith, 33 Wn.2d 429 (1949)
- McInnis v. Day Lumber Co., 102 Wash 38 (1918)
- RCW 4.16.020



- RCW 4.24.630

Contentions of the Parties

Plaintiffs seek title by adverse possession to a portion of defendants' adjoining undeveloped parcel and a portion of the easement across plaintiffs' parcel. They also seek a prescriptive easement for drainage lines and the area of discharge for these drainage lines on defendants' property. Plaintiffs also seek a permanent injunction against defendants, money damages and treble damages.

Defendants contend they gave plaintiffs permission to use a portion of defendants' adjoining parcel such that plaintiffs are not entitled to adverse possession, an injunction or any damages. Defendants seek to quiet title to the disputed areas; damages for (1) trespass, (2) interference with a business expectancy, (3) violation of the easement agreement; attorney's fees; a permanent injunction; and treble damages.

This court previously dismissed defendants' claims for bad faith, interference with a business expectancy and frivolous action. This court also ruled as a matter of law that plaintiffs were entitled to, at the least, an easement to the stone steps and a permanent injunction preventing defendants from obstructing or blocking the recorded access and utility easement. The court also concluded as a matter of law that plaintiffs were entitled to easements for the drainage lines that ran onto defendants' adjoining parcel and the related discharge areas for these drainage lines, and a permanent injunction against defendants from interfering with these drainage lines and discharge areas, and plaintiffs' access to them.

Issues

The remaining issues are:

1. Who is entitled to a judgment quieting title to the disputed area?
2. What area of the recorded easement across plaintiffs' property may defendants use?
3. What party is entitled to money damages?
4. What party is entitled to treble damages?
5. What party is entitled to attorney's fees?

Findings of Fact

Background

In May, 1998, Plaintiffs purchased a home from the defendants' trust. Shortly before the purchase, defendants subjected the trust property to a non-exclusive recorded easement for vehicular access and utilities to defendants' adjoining property, see Exhibit 11.

The easement agreement contains an attorney's fees clause to the prevailing party in the event there is a breach of the easement agreement.

At the time of the purchase, several trees, grapevines and arbor vitae, planted by defendants, were already growing within the recorded easement's boundaries on the side of the easement closest to the trust home, see Exhibit 12 and 14E.

In addition, a stone staircase, providing access to the lower dwelling unit on the trust property, traversed across the defendants' adjoining property, such that it was impossible to gain

access to the lower dwelling unit on the trust property without crossing over defendants' adjoining property.

The adjoining parcel owned by defendants, which is the dominant estate for purposes of the recorded easement, is approximately 7 acres of undeveloped hillside with native grasses, sage and other plants. This adjoining parcel is subject to a 20 foot wide utility easement, immediately adjacent to the trust property, see Exhibits 9 and 10. This utility easement was recorded in 1992.

Defendants knew no permanent structures could be erected on their adjoining property within that 20 foot wide area that would interfere with the recorded sewer and utility easement. However, before the sale of the trust property, defendants planted two peach trees in this area, built a retaining wall, constructed the concrete steps and a raised vegetable bed, planted other trees in the area of the steps, and trees and grapevines extending from the access easement area. The defendants also installed irrigation lines for the plants within the 20 foot wide area adjoining the trust property. The defendants constructed the stone steps and planted the trees, grapevines and arbor vitae during the time the trust owned the property.

Contact between the Parties

Plaintiffs viewed the trust property on two occasions before the closing of the sale. Defendants were not present either time. The parties did not meet at closing. In fact, the parties signed the closing documents in King County at separate locations, see Exhibits 3 and 7.

Plaintiffs did not meet defendant, Alan Weeks, until 2000, when Mr. Weeks came to see the remodeling to the home done by plaintiffs.

Mr. Weeks testified that he and Mr. Swenson did a two hour walk through a few days prior to closing and that he gave plaintiffs permission to use his adjoining property in the area of the improvements Mr. Weeks had made.

There was no other evidence introduced to support this testimony. The documentary evidence supports the court's finding that no such meeting occurred prior to closing as well as the testimony of plaintiffs and Ms. Conrad (by declaration). Tim Flood did not testify. Even Mr. Weeks conceded he resided in King County at the time of the sale and signed the closing documents in King County. His letter dated July 28, 2009, was written one year after he had notice of plaintiffs' adverse possession claim.

The preponderance of the evidence proved that Mr. Weeks knew about the 20 foot wide easement on the adjoining property, intended to build his own home on the adjoining property someday, wanted a vegetation buffer between his future home and the plaintiffs' home, and personally made many of the improvements that made up such a buffer while disregarding the boundary line between the two parcels. In his mind, he had no reason to object to plaintiffs' exclusive use and possession of this portion of his own parcel until he received their letter dated July 14, 2008.

Mr. Weeks also determined that the small portion of retaining wall built on the access easement on plaintiffs' property was not worth the trouble of more than a phone call to Ms. Conrad. He decided not to object to its location until plaintiffs filed this action.

Use of Disputed Property

After closing, Plaintiffs constructed a planter on defendants' adjoining parcel in the spring of 1999. The height and size of the planter and its fencing made it easily observable.

Later that spring plaintiffs added a retaining wall across the top of their property and on city property. Plaintiffs then discovered the actual physical location of the boundary line between defendants' adjoining parcel and plaintiffs' property. This was the first time they knew all the improvements built and planted by defendants in the disputed area were not actually on plaintiffs' property.

According to Valerie Conrad, defendants had notice that plaintiffs were adding improvements to his land because defendant Weeks called her in about 1999. Ms. Conrad suggested that he speak to plaintiffs about this apparent boundary issue. Defendant did not do so.

When plaintiff, John Swenson, first met defendant, Alan Weeks, in 2000, plaintiff inquired of defendant about obtaining an easement in the area originally developed by Mr. Weeks. Mr. Weeks declined to grant one to plaintiffs stating the area was already subject to the utility easement described above.

Plaintiff Swenson again asked about obtaining an easement from defendant Weeks in about 2003. Again, defendant declined explaining that he had already provided the utility easement in the same area. In July 2008, defendant Weeks cleared some weeds and posted a "For Sale" sign on his adjoining parcel, but not in the disputed area. Weeks spoke to Swenson once again, see Exhibit 16. Defendants did not respond to this letter.

At all times material hereto, Plaintiffs irrigated and maintained all the plants on defendants' adjoining parcel, weeded the area, and used and maintained the concrete steps from the date of closing until defendants' actions on September 1, 2009. The area of use by the peach trees was significantly less than the area above them on the hillside, in part, because the peach trees were not full grown at the time of plaintiffs' purchase.

At no time, did the plaintiffs ask permission to use defendants' property. Defendants had knowledge of the extent of plaintiffs' use of defendants' property and did not object. Defendant Weeks did remove a small planter box *on plaintiffs' property* without permission from plaintiffs in the area of the access easement.

After the sale to plaintiffs and prior to September 1, 2009, defendants did not use or maintain any of the plants and structures in the disputed area. Defendants did not prevent plaintiffs from using the disputed property at any time prior to September 1, 2009. In fact, one of the reasons defendants planted several trees in the disputed area was to create a buffer between plaintiffs' residence and the defendants' future residence.

Defendant Weeks' letter dated July 28, 2009, was the first time defendant threatened to remove all the improvements on his parcel in the disputed area, see Exhibit 17. He carried out the threat on September 1, 2009, see Exhibits 18, 19, 20 and 21.

Plaintiffs had no actual prior notice that defendant Weeks was going to destroy almost all the improvements and remove the plants in the disputed area. His letter dated August 27, 2009, was not received by plaintiffs until after the destruction began. Defendants did not seek to obtain authority from the court before taking action on September 1, 2009, despite their having actual knowledge of plaintiffs' adverse possession claim after receipt of plaintiffs' letter dated July 14, 2008.

Plaintiffs stored a truck canopy on defendants' property outside the disputed area which they removed upon defendants' request *before* defendants filed their counter-claim.

Damages

The cost of repairing what was destroyed by defendants in the disputed area is \$10,235 (excluding tax). This amount is undisputed.

Additional Findings

The court hereby adopts the following paragraphs from plaintiffs' proposed findings of fact: 1-4, 7-13, 15, 16, 20-22, 25, and 36-39.

Principles of Law

Adverse Possession

Because it is extraordinary in the law to give a "trespasser" or "wrongdoer" rights against a "true owner", courts examine the reasons for such an extraordinary result when determining whether the elements of adverse possession have been met, Washington Real Property Deskbook Series, §8.1(1) (2010).

Purposes the courts have identified for allowing this extraordinary remedy include:

- Protection against stale claims
- *Encouragement of the use and development of land*
- *Punishment of the lax owner and nonuser of land*
- Clearing of title to land and clouds on title and facilitating the transfer of land
- Protection of third parties dealing with the possessor of land

Ibid., (Emphasis added).

To establish title to real property by adverse possession plaintiffs must prove:

1. Open and notorious,
2. Actual and uninterrupted,
3. Exclusive, and
4. Hostile

ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 757 (1989).

Easement

Termination of easements is disfavored under the law, Edmonds v. Williams, 54 Wn.App. 632, 636 (1989). Thus, a permanent easement is not lost by mere nonuse, Ibid.

Nor is an easement lost by prescription during a period of nonuse, unless the adverse use is clearly inconsistent with the future use of the easement, Ibid.

The owners of the servient estate (plaintiffs) have the right to use their land in a manner not inconsistent with the ultimate use for the reserved purpose, Ibid.

Damages

The court's interpretation of Washington Practice Vol. 17 §8.6, Mugaas v. Smith, 33 Wn.2d 429 (1949) and McInnis v. Day Lumber Co., 102 Wash 38 (1918) is that after the period

of adverse possession has passed, title vests until such time the adverse possessor deeds it to another or is otherwise disseized of the land.

With regard to the retaining wall in the access easement area, Thompson, supra, indicates upon proof that such removal will involve substantial cost, plaintiffs will not have to remove it at this time.

Treble Damages

RCW 4.24.630 provides in part:

Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration.

Attorney's Fees

RCW 4.24.630 provides in part:

In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.

Attorney's fees are recoverable to the prevailing party in the event of a breach of the easement's provisions.

Analysis

Adverse Possession

Since the day Ms. Swenson took possession of the property she and her husband purchased from the Weeks trust (May 30, 1998), plaintiffs have used a portion of the adjoining property owned by defendants in a manner that was obvious to plaintiffs despite plaintiffs' infrequent visits to the adjoining parcel. Plaintiffs' use was obvious to defendants because they contacted Ms. Conrad to seek her assistance in resolving this dispute within a year of closing. However, defendants chose not to follow up their concerns, probably because the use of their property was primarily in the area of the 20 foot utility easement and defendants wanted a buffer between their future home and plaintiffs' home. Based upon the tenor of their letter dated July 28, 2009, it is presumed defendants were unaware of the law of adverse possession until 2008 after they received plaintiffs' letter.

The use of a portion of defendants' adjoining parcel was actual and uninterrupted for a period of more than ten years. The area used by plaintiffs varied depending upon the nature of the use. The stone steps were continuously used. The trees, grapevines and peach trees were continuously growing. The irrigation and drainage pipes were used whenever needed. The raised garden planters were used during season. Weed clearing occurred as needed.

The evidence was undisputed that only the plaintiffs, their guests, and tenants used the area, no one else. Plaintiffs use was exclusive.

Hostility, as used in adverse possession cases, does not mean animosity. It is a term of art used to describe that the manner and use of the property by plaintiffs was not in a manner

subordinate to the title of defendants, El Cerrito, Inc. v. Ryndak, 60 Wn.2d 847, 854 (1962). After plaintiffs realized the location of the actual boundary line (late Spring, 1999), they continued to use defendants' land exclusively as their own. Absent credible evidence of permission, plaintiffs' use was clearly hostile.

Easement

The purpose of the recorded access easement is to allow defendants, their successors and assigns, access to defendants' seven acre adjoining parcel once it is developed.

Because the construction of the retaining wall minimally encroaches upon the access easement and defendants have not yet developed their property, the end of the retaining wall is not clearly inconsistent with the recorded easement. Consequently, plaintiffs are not entitled to extinguish defendants' easement in the area of the retaining wall, see Thompson v. Smith, 59 Wn.2d 397 (1962).

The trees and other plantings on plaintiffs' property within the area of the easement were not proven to be clearly inconsistent with the recorded easement. Similarly, those portions of the easement shall not be extinguished.

Damages

By late Spring, 2009, plaintiffs had met all the requirements to adversely possess the land described below. Defendants admittedly destroyed all the improvements, trees, plants and landscaping in the adversely possessed area with the exception of the stone steps and drainage pipes after plaintiffs' adverse possess claim was established.

The trees and other landscaping in the area of the access easement were owned by plaintiffs at the time they purchased the property. There was insufficient evidence to prove the trees and other landscaping in the area of the easement were clearly inconsistent with the recorded access easement at the time they were destroyed by defendants.

Given the nature of the construction of the retaining wall (key stone), the court concludes removal of the end portion of it will involve substantial expense. Consequently, plaintiffs must propose a method that will assure the defendants that the portion of the retaining wall that sits on the access easement will be removed, if and when it becomes inconsistent with the use of the access easement after defendants develop their adjoining parcel.

Treble Damages

By late Spring 2009 plaintiffs owned the property described below. Consequently, in September, 2009, defendant Weeks clearly entered the property of plaintiffs and destroyed the improvements, trees, plants and landscaping thereon. Defendant did so wrongfully and maliciously. Plaintiffs are entitled to treble their damages pursuant to RCW 4.24.630.

Attorney's Fees

Because plaintiffs' claim for damages under RCW 4.24.630 was successful, they are entitled to reasonable attorney's fees incurred for recovery of damages to their property.

Defendants' destruction of property within the access easement and erection of the locked barricade constituted breach of the easement agreement.

There was insufficient evidence that the retaining wall constructed on the easement was inconsistent with the use of that easement as of the time of trial. However, plaintiffs parked a vehicle on the easement which is a breach of the easement agreement.

Plaintiffs immediately removed the vehicle upon defendants' request long before defendants filed their counter-claim. Therefore, no attorney's fees were incurred to get plaintiffs to move their vehicle.

Conclusions of Law

Plaintiffs have proven all the elements of adverse possession of a portion of defendants adjoining property. Based upon the evidence and the extent of plaintiffs use, the portion they adversely possessed is a 25 wide strip parallel to plaintiffs' northwest side of their property (exclusive of the area adjacent to the access easement) that narrows to 17 feet in width at a point 3 feet past the southwest corner of plaintiffs' home. See attached diagram.

Because defendants' title was subject to the utility easement, plaintiffs title to that portion of defendants' parcel adversely possessed shall also be subject to the same utility easement.

Plaintiffs have failed to meet their burden of proof to extinguish any portion of defendants' access easement.

Plaintiffs are entitled to damages in the amount of \$11,053.80. They are entitled to a judgment three times that amount or \$33,161.40.

Plaintiffs are entitled to reasonable attorney's fees incurred related to the recovery of their money damages and enforcing the easement agreement in an amount to be determined at presentment.

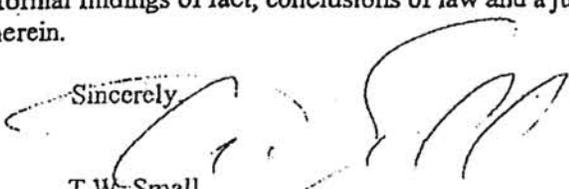
Defendants are entitled to nominal damages for breach of the easement agreement in the amount of \$1. They are not entitled to an award of attorney's fees.

Order

Plaintiffs are entitled to a judgment quieting title to the above-described portion of defendants' adjoining parcel, subject to the existing utility easement; judgment in the amount of \$33,161.40 less any amounts determined to be needed to assure defendants that the portion of the retaining wall that sits on the access easement will be removed if and when it can be shown to be inconsistent with the use of the access easement after defendants develop their adjoining parcel; and a permanent injunction against defendants from interfering with the use of plaintiffs' property. If defendants believe plaintiffs' use of the access easement area is inconsistent with the easement's provisions, then their only recourse is a court action, absent agreement between the parties.

Defendants are entitled to offset plaintiffs' judgment by \$1. Mr. Walker is directed to prepare formal findings of fact, conclusions of law and a judgment consistent with the court's rulings herein.

Sincerely,

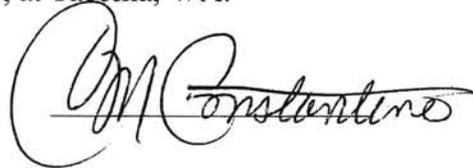

T.W. Small
Superior Court Judge

IX. CERTIFICATE OF MAILING

The undersigned does hereby certify that on April, 16, 2013, he served a copy of the Brief of Appellants upon Respondents, by depositing the same in the United States mail, first class postage prepaid, addressed to the following:

Brian A. Walker
OGDEN, MURPHY WALLACE, PLLC
1 Fifth Street, Suite 200
Wenatchee, WA 98807-1606

Dated this 16th day of April, 2013, at Tacoma, WA.

A handwritten signature in black ink, appearing to read "C. M. Constantino". The signature is written in a cursive style with a large, stylized "C" at the beginning.