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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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JEFFREY ANDREWS and EILEEN ANDREWS, husband and wife,

Respondents,

v.

SU HWAN KIM and JANE DOE KIM, husband and wife,

Defendant and Third-Party Plaintiffs,

v.

MICHELE DAVIS,

Appellant.

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COMBINED REPLY BRIEF OF APPELLANT

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## A. INTRODUCTION

In this boundary dispute, Michele Davis seeks to reverse the trial court's decision shifting the parties' boundary lines to the lot lines depicted in the development's survey maps and plans ("plan maps") rather than leaving them as physically delineated by the developer and as historically recognized by the parties for more than nine years.

Jeffrey and Eileen Andrews filed suit against Su Hwan "John" Kim seeking to quiet title to and to eject Kim from the western five feet of what Kim believed to be his property. Kim answered and filed a third-party complaint against Davis, arguing that if the Andrews took the western five feet of his property then he was entitled to the western five feet of Davis's property.<sup>1</sup>

Davis moved for summary judgment against Kim, arguing under the common grantor theory that the existing fence and rockery between the Kim-Davis properties constituted the lawful boundary. The motion court<sup>2</sup> granted the motion and entered a final judgment under CR 54(b). The final order confirmed the Kim-Davis boundary at the location

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<sup>1</sup> Each party owns a home in a condominium development in Snohomish County. Kim's property sits between the Andrews and Davis properties. CP 128.

<sup>2</sup> The Honorable Eric Z. Lucas presided over the Davis-Kim summary judgment proceedings while the Honorable Michael T. Downes presided over the Andrews-Kim bench trial. As she did in her opening brief, Davis will refer to the original trial court as "the motion court" and the court that presided over the bench trial as "the trial court" to avoid confusion.

established by their common grantor, quieted title to the disputed property in Davis, and dismissed all of Kim's claims against Davis with prejudice. No claims remained to be adjudicated between Davis and either Kim or the Andrews.

The claims between the Andrews and Kim proceeded to trial. Even though the Andrews had not taken a position concerning the Kim-Davis dispute or application of the common grantor theory to the Kim-Davis boundary during the earlier summary judgment proceedings, the Andrews asked the trial court to set aside the order establishing the Kim-Davis boundary. The trial court did so, with minimal notice to Davis, and shifted the parties' fences to the lot lines depicted in the plan maps. The trial court denied Davis's CR 59 motion. This appeal followed.

Nothing in the responsive briefs of the Andrews or Kim should dissuade this Court from reversing the trial court's decision relocating the parties' fences to the boundary lines depicted in the plan maps or from quieting title to the property disputed between Kim and Davis in Davis. Kim and Davis have continuously recognized the fence between their properties as their true boundary; it should remain so. Unrelated facts and circumstances concerning the subsequent installation of the Andrews-Kim fence should not alter the established Kim-Davis boundary.

B. RESPONSE TO THE RESPONDENTS'  
COUNTERSTATEMENTS OF THE CASE

RAP 10.3(a)(5)<sup>3</sup> requires a brief to contain a “fair statement of the facts and procedure relevant to the issues presented for review, without argument.” Despite that rule, the introductions and counterstatements of the case in the Andrews and Kim briefs contain improper argument. *See, e.g.*, Kim Br. at 1 (Kim is an “innocent, unwitting participant[] in a tussle between the owners of the other lots, Ms. Davis and the Andrews.”); (“It is intolerable, however, for the two boundaries of the Kim[] lot to be treated inconsistently.”); *id.* at 2 (arguing Kim will be left with an illegal lot). *See also*, Andrews Br. at 1 (arguing the appeal should only involve the boundary dispute between Davis and Kim; arguing Davis has improperly assigned error to components of the court’s decision); *id.* at 2 (“The Andrews-Kim and Kim-Davis disputes remain unrelated[.]”); *id.* at 4 (“ . . . the Order contained none of the required findings . . . but rather included only a bare recitation from the rule[.]”); *id.* at 6 (“As noted, Kim, the only party who qualifies as ‘aggrieved’ with respect to the Trial Court’s decision . . . [is] apparently satisfied with the Trial Court’s decision.”). These arguments are out of place in a counterstatement of the case and are a far cry from the “fair recitation of

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<sup>3</sup> RAP 10.3(b) requires the Andrews and Kim to comply with the provisions of RAP 10.3(a).

the facts, without argument,” required by RAP 10.3(a)(5). Accordingly, the Court should disregard them.

Regardless of the irregularities in the Andrews and Kim briefs, the parties agree on the basic facts of this case, with some exceptions. Comparing the parties’ factual statements, it is clear they agree:

The parties own homes in Baywood Heights, a condominium development in Snohomish County. CP 262-81. The Andrews own Lot 5, Kim owns Lot 6, and Davis owns Lot 7. CP 128. Kim’s property sits between the Andrews and Davis properties. *Id.*

When the developer built the development, he constructed fences, rockeries, and other improvements between the parties’ properties to physically delineate the boundaries of each.<sup>4</sup> CP 263, 267-68. But he reconfigured the parties’ lot lines when he did so because he placed the improvements dividing the properties too far to the west. CP 130, 141, 150, 166. Because of the developer’s error, neither the Andrews-Kim fence nor the Kim-Davis fence is located on the boundary line depicted in the plan maps. CP 275. Consequently, Kim has no side yard to the east of his home. CP 150; Exs. 4-5. He accesses his backyard from the west side of his home. *Id.* The Andrews access their backyard by traveling across

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<sup>4</sup> The developer, Avance Group II, LLC, went out of business in 2003. CP 119.

their property and the property of their neighbors to the west. RP I:22-23.<sup>5</sup>

When Kim purchased his property, the fences and rockeries installed by the developer clearly marked the east and west boundaries of the property. CP 141, 150, 263, 268-69; RP I:52-54.

The Andrews filed suit against Kim, seeking to take the western five feet of Kim's property. CP 273-81. Kim answered and filed a third-party complaint against Davis, arguing if the Andrews succeeded in taking the western five feet of his property then he was entitled to the western five feet of Davis's property. CP 268-69. Davis answered the third-party complaint and counterclaimed against Kim. CP 262-64.

Davis moved for summary judgment against Kim, arguing under the common grantor theory that the existing fence and rockery between their properties constituted their lawful boundary. CP 137-39, 165-79, 260-61. The motion court granted the motion, quieting title to the disputed property in Davis and dismissing all of Kim's claims against Davis with prejudice. CP 132-34.

The remaining claims between the Andrews and Kim proceeded to trial, at which time the trial court reconsidered and then revised the motion court's summary judgment order with minimal notice to Davis. CP 26,

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<sup>5</sup> "RP I" refers to the verbatim report of proceedings from the bench trial held on February 25, 2009. "RP II" will refer to the trial court's March 5, 2009 oral ruling. The number following the "RP" designation represents the page number of the particular volume.

28; RP I: 3; RP II:5, 7, 9. The trial court determined the plan maps established the parties' boundary lines and ordered the fences between the properties moved to conform to those lot lines. CP 65-88. Davis appealed. CP 4-5.

Continuing to compare the parties' factual statements, it is also clear they disagree on several central facts in this case:

Kim contends the developer misplaced the parties' fences by five feet. Kim Br. at 1. By contrast, the Andrews and Davis contend the developer installed the parties' fences ten feet too far to the west. Andrews Br. at 3; Br. of Appellant at 6; CP 51, 58.

Davis and the Andrews contend the parties' disputes arise from different facts and thus involve different issues. Br. of Appellant at 5 n.5, 33; Andrews Br. at 2, 25-26. Although the parties' claims were litigated under one cause number, they were truly different cases arising out of dissimilar facts. *See id.* Kim disagrees, contending the facts are essentially the same because the parties purchased their respective homes subject to the physical boundaries delineated by the developer. Kim Br. at 3, 9-10. Kim later relies on this "factual" statement to argue the common grantor theory must be consistently applied to all three properties. *Id.* at 8-10. He is mistaken. The critical distinction Kim fails to make is that the developer did not install the Andrews-Kim fence until *after* the Andrews

had purchased their home, which means they could not have purchased their property “with reference to” the fence. Andrews Br. at 26; RP I:16-17. The Andrews lived in their home several months before the developer installed the fence. *Id.* By comparison, the developer installed the Kim-Davis fence *before* Kim purchased his property. CP 103. It was there when he moved in. *Id.* Unlike the Andrews, Kim purchased his property “with reference to” the fence. *Id.*

In addition, the Andrews and Kim gloss over or ignore several essential facts the Court should keep in mind when considering this case:

The Andrews claim Davis offered no testimony or evidence during the Andrews-Kim trial except for her previously filed summary judgment pleadings and appear to take issue with the fact that she did not personally appear for trial. Andrews Br. at 4-5, 34. The Andrews neglect to mention that Davis did not submit a trial brief and did not intend to participate in the trial because she believed the motion court’s summary judgment order disposed of all possible claims between Kim and her; consequently, there were no claims left for her to litigate. RP I:3-4. It was a mere fortuity that her counsel even appeared in court the day the trial began. *See id.* Davis was unable to attend the trial because she was extremely ill. CP 36. More critically, the Andrews fail to mention that the parties *agreed* to allow the trial court to consider Davis’s summary judgment pleadings in lieu of her

live testimony because they agreed the testimony would be the same.  
RP I:6-7.

For obvious reasons, the Andrews also fail to mention they became aware of the boundary discrepancy between the Andrews-Kim properties in 1998, *when the fence was being installed*. CP 99; RP I:26, 29. Yet they did nothing about it and instead acted for more than nine years as if the fence marked the true boundary between their properties. CP 141, 268.

Kim glosses over Davis's summary judgment motion by limiting his discussion of the motion to two short sentences: "Ms. Davis brought a motion for partial summary judgment advocating application of the common grantor theory . . . . The motion was granted." Kim Br. at 4. In doing so, Kim attempts to divert the Court's attention from several important concessions he made during that proceeding. He *conceded* that the physical boundary created by the fence and the rockery was the true boundary between the Kim-Davis properties. CP 141, 149. He *admitted* that he and Davis had relied upon that boundary for more than nine years. CP 141, 268-69. He *agreed* the common grantor theory applied to establish the Kim-Davis boundary. CP 151. He *agreed* that summary judgment in Davis's favor was appropriate. CP 152. He also *conceded* that any decision in Davis's favor would become the law of the case. CP 122-23, 152.

Finally, the Andrews and Kim neglect to mention that if the Kim-Davis boundary is moved to the lot line depicted in the plan maps, then Davis will have extremely limited access to her backyard on the west side of her home and no access to it from the east side of her home because the fence on that side is built along her eastern lot line. CP 3, 6, 50-51.

C. ARGUMENT IN REPLY

(1) Standard of Review

As Davis recites in her opening brief, this Court reviews a trial court's rulings under CR 54(b) and CR 59 for an abuse of discretion. Br. of Appellant at 15. Kim does not discuss this standard of review in his brief. The Andrews only mention it in passing. Andrews Br. at 19, 21.

Davis also notes this Court reviews a trial court's findings of fact to determine whether they are supported by substantial evidence and, if so, whether those findings support the conclusions. Br. of Appellant at 15-16. The Court reviews questions of law and conclusions of law *de novo*. *Id.* Neither the Andrews nor Kim address these standards in their briefs.

(2) Davis Has Standing to Appeal the Trial Court's Decisions Relating to the Andrews-Kim Boundary Line

The Andrews lack strong arguments on the merits and thus resort to borderline frivolous procedural arguments. They begin their response by arguing the Court should dismiss Davis's appeal for lack of standing because she has "no dog in the fight" with respect to the location of the Andrews-Kim boundary.<sup>6</sup> Andrews Br. at 7. They specifically contend Davis lacks standing to appeal any of the findings or conclusions relating to the Andrews-Kim boundary because she is not an aggrieved party under RAP 3.1, a real party in interest under CR 17(a), or a proper party under RCW 7.28.010. This argument borders on the frivolous. Andrews Br. at 7-8. Even though the Andrews and Davis do not share a common boundary and they never asserted claims against one another, Davis has standing to challenge the trial court's rulings with respect to the Andrews-Kim boundary insofar as those decisions directly and substantially impact her pecuniary, proprietary, and personal rights. The trial court's decision on the Andrews-Kim boundary obviously had a domino effect on Davis's property.

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<sup>6</sup> The Andrews' assertion is absurd and ignores the practical effect of the trial court's findings and conclusions on the parties. The court's findings and conclusions are interconnected because the court revisited and then modified the established Kim-Davis boundary based on its determinations in the ongoing Andrews-Kim dispute.

The Andrews first argue Davis lacks standing because she does not qualify as an “aggrieved party” under RAP 3.1. *Id.* at 8. RAP 3.1 states: “Only an aggrieved party may seek review by the appellate court.” An “aggrieved party” entitled to appeal is one whose personal right or pecuniary interests have been affected. *See, e.g., State ex rel. Simeon v. Superior Court*, 20 Wn.2d 88, 90, 145 P.2d 1017 (1944). *See also, Temple v. Feeney*, 7 Wn. App. 345, 347, 499 P.2d 1272 (1972) (finding real estate broker was an aggrieved party and entitled to appeal when he was a named co-defendant in an action for rescission, was found to have participated in fraudulent misrepresentations, and was ordered to reconvey property received as a commission; trial court judgment directly affected broker’s proprietary, pecuniary, and personal rights). *But see, Polygon Northwest Co. v. American Nat’l Fire Ins. Co.*, 143 Wn. App. 753, 767-68, 189 P.3d 777 (2008) (finding liability insurer was not an aggrieved party because of rulings and judgment that required another insurer to pay litigation costs where the judgment did not directly or indirectly impose any obligations or restrictions upon insurer; thus, insurer lacked standing to appeal).

The cases the Andrews rely upon in their brief to argue that Davis is not an aggrieved party are easily distinguishable in no small part due to

their ancient status, long pre-dating the adoption of RAP 3.1.<sup>7</sup> Andrews Br. at 10. For example, in *City of Port Townsend v. Trumbull*, 40 Wash. 386, 82 P. 715 (1905), the City brought an action to foreclose a tax lien on property owned in fee simple by the Trumbulls. The other defendants had or claimed some interest in the property subordinate and subject to that lien. *Id.* at 387. Those defendants answered and demurred to the complaint, arguing it did not state facts sufficient to constitute a cause of action. When the trial court overruled the demurrer, they elected to stand on their demurrer and refused to participate further. *Id.* Only the Trumbulls proceeded to trial, at which time judgment was entered for the City. *Id.* On appeal, the Supreme Court indicated it was unclear whether the other defendants had any interest in the property and if they did, it was their duty to set such interest forth by answer. *Id.* at 388.

*Watson v. Sawyer*, 12 Wash. 35, 40 P. 413 (1895), was an equitable action to foreclose a mortgage. There, the defendants were made parties to the underlying action only by a general allegation that they had some interest in the property that was subsequent to the plaintiff's interest. *Id.* at 36. They appeared only for the purpose of disclaiming title to the property and asked the court to dismiss the action as to them. *Id.* It

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<sup>7</sup> The Andrews rattle off the referenced cases without analyzing the underlying facts or applying the law to the facts of this case. Moreover, they seem to conflate the concept of an "aggrieved party" with the concept of a "necessary party." Andrews Br. at 10.

did so. *Id.* When they disclaimed any interest in the property, they were no longer necessary parties to the appeal. As such, the Supreme Court determined the failure to serve them with the notice of appeal did not provide any reason for its dismissal. *Id.*

*Lowe v. Lowe*, 53 Wash. 50, 101 P. 704 (1909), was a dissolution matter involving the conveyance of real estate to a trustee for the benefit of the parties' minor children. When the children's parents failed to do anything to divest themselves of the property after the divorce decree was entered, the trial court ordered them to appear before him to execute the necessary trust deed. *Id.* at 51. At that time, the parents informed the court that they intended to remarry. *Id.* at 52. Nevertheless, the court ordered them to execute the deed. *Id.* The parents and the trustee appealed. *Id.* Following a motion to dismiss, the Supreme Court determined the trustee was not a necessary party to the appeal because he was not made a party to the underlying action and never formally appeared in the case. *Id.* at 52-53.

*Iverson v. Bradrick*, 54 Wash. 633, 104 P. 130 (1909), involved a judgment against a lumber company in favor of Iverson. When Iverson was unable to collect from the lumber company, he filed an affidavit alleging Bradrick was indebted to the company and obtained a writ of garnishment against Bradrick. *Id.* at 634. Following a hearing, the trial

court entered final judgment in Bradrick's favor and Iverson appealed. *Id.* Bradrick moved to dismiss the appeal, arguing the notice of appeal was not served upon the lumber company as the judgment debtor. *Id.* The Supreme Court determined the lumber company was not a necessary party because the issues on appeal arose exclusively between Iverson and Bradrick as garnishee. *Id.* The motion to dismiss was denied. *Id.*

Unlike the appellants in the above-referenced cases, Davis was an aggrieved party below. She was dragged into the litigation by Kim's third-party complaint. She appeared in and actively participated in the trial court proceedings. The specific findings and conclusions that she challenges with respect to the Andrews-Kim boundary directly and adversely impact her proprietary, pecuniary, and personal rights. The trial court's determinations concerning the Andrews-Kim boundary had a domino effect on the Kim-Davis boundary and ultimately forced Davis to relinquish ownership of the land between her property and Kim's property, which she had been awarded by the motion court. Plainly, Davis is aggrieved by the trial court's decision.

The Andrews next argue Davis does not qualify as a "real party in interest" under CR 17 with respect to their claims against Kim. Andrews Br. at 11-12. This argument is equally as frivolous as their RAP 3.1 argument. Moreover, they did not raise it below. Accordingly, this Court

should decline to consider the argument for the first time on appeal. RAP 2.5(a). *See also, Boeing Co v. State*, 89 Wn.2d 443, 451, 572 P.2d 8 (1978) (declining to consider a theory raised for the first time on appeal).

CR 17(a) states, in pertinent part: “Every action shall be prosecuted in the name of the real party in interest.” Under this rule, the only parties on whose behalf suits may be initiated are those persons whose interests will be “materially affected by the outcome. 3A Karl B. Tegland, *Wash. Prac. Series: Rules Practice*, CR 17 at 370 (6th ed. 2006). The purpose of the rule is to protect the defendant against a subsequent action by the party actually entitled to recover and to insure generally that the judgment will have its proper effect as res judicata. *Rinke v. Johns-Manville Corp.*, 47 Wn. App. 222, 226-27, 734 P.2d 533, *review denied*, 108 Wn.2d 1026 (1987) (citation omitted). The rule relates to the identification of plaintiffs, not defendants. *See Geschwind v. Flanagan*, 65 Wn. App. 207, 211-12, 828 P.2d 603 (1992), *rev’d on other grounds*, 121 Wn.2d 833, 854 P.2d 1061 (1993) (text of CR 17(a) makes “clear” that the rule applies only to plaintiffs).

CR 17 is not implicated here because Davis *is* a party, forced to litigate by Kim’s third-party complaint. Moreover, the outcome of the Andrews-Kim dispute has materially affected her rights in spite of the fact that she does not share a boundary with the Andrews. The trial court

made sure that it did. The Andrews' assertion that Davis is not a real party in interest is frivolous.

Finally, the Andrews claim Davis cannot maintain a quiet title action under RCW 7.28.010<sup>8</sup> with respect to the Andrews-Kim boundary. Andrews Br. at 12-13. This argument, too, borders on the frivolous and was not raised below. The Andrews rely on *Magart v. Fierce*, 35 Wn. App. 264, 666 P.2d 386 (1983), for support. But *Magart* is unavailing to the Andrews given the unique factual situation presented in this case. There, the Magarts purchased substantial acreage that they eventually subdivided. *Id.* at 264. They conveyed one of the subdivided lots to the Fierces by warranty deed. *Id.* Although the Magarts intended to retain a strip of land between the shoreline and the lot, no mention was made of it in the deed. *Id.* at 265. When the Fierces built certain improvements on that strip of land, the Magarts sued and claimed they owned it. *Id.* The trial court held the Magarts were equitably estopped from denying title in the Fierces and quieted title to the disputed strip of land in the Fierces. *Id.*

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<sup>8</sup> RCW 7.28.010 requires that a person seeking to quiet title establish a valid subsisting interest in property and a right to possession thereof: "Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein, and may have judgment in such action quieting or removing a cloud from plaintiff's title[.]"

On appeal, the Court of Appeals held the Magarts lacked standing to bring the action. *Id.* at 266. In particular, Division III noted the Magarts had conveyed their interest in the surrounding subdivision, which contained the Fierces' lot and the disputed strip, to a third party prior to commencing their action against the Fierces. *Id.* at 267. By failing to reserve a portion of the subdivision in themselves, the Magarts lacked standing because they were no longer the owners and real party in interest. *Id.* Since they failed to join the indispensable third-party who now owned the land, their case was dismissed. *Id.*

Unlike the Magarts, Davis has a property interest *directly impacted* by the trial court's judgment that the Andrews continually fail to recognize. As previously mentioned, Davis was dragged into this controversy by Kim's third-party complaint. CP 268-69. In that complaint, Kim alleged that if the Andrews prevailed on their claims against him and the fence between their properties was moved, then the fence between the Kim-Davis properties should likewise be moved. CP 269. Kim specifically prayed for relief against Davis in the form of a: "judgment which sets the [Kim-Davis] boundary line, . . . , in a manner which is *consistent with the treatment of the boundary, fence, and easement rights along the Andrews/Kim boundary* so that Kim does not lose land to both his neighbors through inconsistent treatment." CP 270

(emphasis added). Kim invited the trial court to consider the Andrews-Kim boundary and to use that boundary when determining the Kim-Davis boundary. The trial court clearly did so.

In addition, the Andrews misinterpret Davis's arguments concerning the trial court's findings of fact and conclusions of law with respect to the Andrews-Kim boundary. What the Andrews fail to acknowledge is that if Davis did not challenge the specified findings of fact, they would become verities on appeal. See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992) (unchallenged findings of fact are verities on appeal). If she did not challenge the specified conclusions of law, they would become the law of the case. See *King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 716-17, 846 P.2d 550 (1993). Davis had to challenge the specified findings and conclusions because the trial court relied upon them when it redetermined the Kim-Davis boundary. She does not dispute them to take property from the Andrews as they allege. Instead, she seeks to retain the parties' boundaries as they were physically delineated by the developer and as the parties have historically recognized for more than nine years.

The Andrews have turned a blind eye to the actual effect of the trial court's judgment on Davis. She has suffered more than hurt feelings or disappointment. She has been both aggrieved and prejudiced;

accordingly, she has standing to appeal the findings and conclusions relating to the Andrews-Kim boundary because they directly and adversely impact her proprietary, pecuniary, and personal rights. *See* 2A Karl B. Tegland, *Wash. Prac. Series: Rules Practice*, RAP 3.1 at 405 (6th ed. 2004).

(3) The Trial Court Should Not Have Revisited or Revised the Motion Court's Order Establishing the Kim-Davis Boundary Line

As Davis argued in her opening brief, the trial court lacked the authority to reconsider the motion court's partial summary judgment order under Snohomish County Local Civil Rule 7(b)(1)(A) where it reapplied the same facts to reach a different result.<sup>9</sup> Br. of Appellant at 20-21. The Andrews and Kim do not respond to this argument. By failing to rebut Davis's SCLCR 7(b) argument, the Andrews and Kim concede it. *See State v. Evans*, 129 Wn. App. 211, 221 n.7, 118 P.3d 419 (2005), *reversed on other grounds*, 159 Wn.2d 402, 150 P.3d 105 (2007); RAP 10.3(b).

Davis also argued the trial court lacked the authority to revisit the motion court's order because the order was final and not subject to revision given its CR 54(b) certification. Br. of Appellant at 18-20. The Andrews and Kim disagree. Andrews Br. at 14-19; Kim Br. at 5-7.

Any summary judgment order disposing of fewer than all of the

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<sup>9</sup> Under SCLCR 7(b)(1)(A), "when a motion has been ruled upon in whole or in part, *the same motion may not be later presented to another judge.*" (Emphasis added.)

claims or parties “is subject to revision at any time before entry of the judgment adjudicating all the claims and the rights and liabilities of the parties.” CR 54(b). The rule attempts to strike a balance between the undesirability of more than one appeal in a single action and the need for making review available in multiple-party or multiple-claim situations at a time that best serves the needs of the litigants. *Doerflinger v. New York Life Ins. Co.*, 88 Wn.2d 878, 880, 567 P.2d 230 (1977). The only exception to the rule is when the partial summary judgment order is made “upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for entry of the judgment.” *Id.*

The Andrews and Kim correctly note that pro forma language is typically insufficient to make an order final under CR 54(b). Andrews Br. at 15-16; Kim Br. at 5. But the Court will accept a CR 54(b) certification containing pro forma language where there is a demonstrated basis for the trial court finding of no just reason for delay. *See Fox v. Sunmaster Prods., Inc.*, 115 Wn.2d 498, 503, 798 P.2d 808 (1990) (ruling interlocutory order was non-appealable where nothing in the record suggested that delay in entry of a final judgment posed any danger of hardship). *See also, Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 300, 840 P.2d 860 (1993) (finding certification improper where the order

contained pro forma language and the record did not demonstrate no just reason for delay). In the absence of the required findings, however, the Court may look to the record below and need not remand where the record is clear. *See Pepper v. King County*, 61 Wn. App. 339, 351, 10 P.2d 527 (1991) (finding the equivalent of the required findings in the trial court's oral opinion, but concluding an immediate appeal was not appropriate).

Here, the record affirmatively shows the actual hardship and injustice Davis suffered based on the trial court's decision not to treat the summary judgment order as a final order.<sup>10</sup> In effect, the motion court entered an agreed order establishing the Kim-Davis boundary line based on Kim's concessions in his summary judgment pleadings. CP 141, 149, 151, 268-69. The motion court then dismissed all of Kim's claims against Davis with prejudice and dismissed Davis from the case. Based on that dismissal, she did not submit a trial brief and had no reason to participate in the Andrews-Kim trial because her participation was not necessary to resolve that distinct dispute. RP I:3-4. Although the parties' claims were

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<sup>10</sup> The Andrews contend that Davis's failure to assert her claims for nearly two years, until she raised them in response to Kim's third-party complaint, somehow demonstrates the absence of hardship or injustice necessary to support the holding of "no just reason for delay." Andrews Br. at 17-18. Davis had no notice of the misplaced Kim-Davis fence until the Andrews filed their lawsuit because the parties had recognized the fences and rockeries between their respective properties as the true boundaries for more than nine years. If anyone should have raised their claims sooner, it was the Andrews. They were aware of the boundary discrepancy between the Andrews-Kim properties back in 1998, *when that particular fence was being installed*. CP 99; RP I:26, 29. Yet they did *nothing* about it. CP 141, 268.

litigated under one cause number, they were truly distinct cases arising out of dissimilar facts. The outcome of either case was not dependent on the other.

Despite the fact that Davis was completely out of the case, she was hauled into court on the day the Andrews-Kim trial began and ordered to participate. That her counsel was even present when the trial began was a mere fortuity. Rather than preventing injustice and hardship, the trial court's decision to revisit the summary judgment order created an injustice by divesting Davis of a property interest after she had been dismissed from the case. This should not have occurred. As the court persuasively stated in *Jackson v. Van Corlaer*, 11 Johns. 123 (N.Y. Sup. 1814) (cited in *Rose v. Fletcher*, 83 Wash. 623, 628, 145 P. 989 (1915)):

The parties themselves ought to be the best judges of the boundaries of their own lands; and after they have deliberately settled a boundary line between them, it would give too much encouragement to the spirit of litigation, to look beyond such settlement, and break up the lines so established between them.

The motion court was well-positioned to evaluate the import and impact of its own decision within the context of this case. Certification under CR 54(b) required that court to employ its intimate knowledge of the case to explain its rationale to this Court. It did so. Where the motion court's order was entered upon an express determination that there was no

just reason for delay and an express direction for entry of the judgment, it was a final judgment not subject to revision. The trial court erred by revising it.

(4) The Trial Court Should Have Considered the Additional Evidence Davis Submitted Following the Bench Trial and Should Have Granted Her CR 59 Motion

As Davis articulated in her opening brief, the trial court abused its discretion by refusing to consider her additional evidence and by denying her motion for reconsideration. Br. of Appellant at 22-24. Importantly, neither the Andrews nor Kim *ever* filed a motion to strike Davis's supplemental declaration. CP 37-49. Nor did they avail themselves of the opportunity under CR 59(c)<sup>11</sup> to respond to it. *Id.*

Kim takes no position concerning the trial court's CR 59 ruling or its refusal to consider Davis's additional evidence on reconsideration except to argue for the opportunity to rebut it if necessary. Kim Br. at 8. Kim has already had that opportunity. CR 59(c). He failed to take advantage of it below and should not be permitted to do so now. By failing to refute Davis's arguments on these issues, Kim concedes them on appeal. *See Evans*, 129 Wn. App. at 221 n.7; RAP 10.3(b).

Unlike Kim, the Andrews contend the trial court did not err by denying Davis's motion and properly refused to consider her additional

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<sup>11</sup> CR 59(c) states, in pertinent part: "The opposing party has 10 days after service to file *opposing affidavits . . .*" (Emphasis added.)

evidence for the first time on reconsideration.<sup>12</sup> Andrews Br. at 21. They continue to harp on Davis's absence during the trial and suggest it was a strategic decision for which she must suffer the consequence. *Id.* at 20. As previously mentioned, Davis did not submit a trial brief and did not intend to participate in the trial *because she had been dismissed from the case*. CP 132-34; RP I:3-4. In any event, she was extremely ill on the day of trial and was unable to attend. CP 36. As a result, the parties *agreed* to allow the trial court to consider her summary judgment pleadings in lieu of her live testimony because they *agreed* her testimony would be the same. RP I:6-7. She could not have presented further evidence at trial to support her claims or to rebut the evidence produced by the Andrews or Kim as the Andrews allege because she was not expecting to be hauled into court on the day of trial. Moreover, she was not an original owner and had no knowledge of what took place when the Andrews purchased their home or when the Andrews-Kim fence was installed. CP 36. She could not have offered any additional admissible evidence had she been present at the trial.

Contrary to the Andrews' assertions, nothing in CR 59 prohibits the submission of new or additional materials on reconsideration. *Chen v.*

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<sup>12</sup> The Andrews incorrectly assert that Davis sought only reconsideration and that she did not seek to reopen the case or to obtain a new trial. Andrews Br. at 21. On the contrary, Davis specifically sought a new trial, reconsideration, or amendment of the judgment. CP 54.

*State*, 86 Wn. App. 183, 192, 937 P.2d 612, *review denied*, 133 Wn.2d 1020 (1997); *Sellsted v. Washington Mut. Sav. Bank*, 69 Wn. App. 852, 865 n.19, 851 P.2d 716 (1993), *review denied*, 122 Wn.2d 1018 (1993). *See also*, *Meridian Minerals Co. v. King County*, 61 Wn. App. 195, 202-03, 810 P.2d 31 (1991) (declining to flatly prohibit the practice of basing a motion for reconsideration on evidence that was available earlier). Under CR 59(g), the trial court may consider additional evidence at a motion for a new trial in an action tried without a jury. *Ghaffari v. Dep't of Licensing*, 62 Wn. App. 870, 875-76, 816 P.2d 66 (1991), *review denied*, 118 Wn.2d 1019 (1992) (consideration of additional evidence at motion for reconsideration of bench trial within discretion of trial court). In fact, the trial court may open the judgment, *take additional testimony*, amend findings of fact and conclusions of law, and direct entry of a new judgment. CR 59(g). This is particularly appropriate when the trial court has made an erroneous assumption of fact, as it did here by asserting that Davis would not have an access problem no matter what the court decided.

The Andrews' reliance on *Biehn v. Lyon*, 29 Wn.2d 750, 758, 189 P.2d 482 (1948), and *Jet Boats, Inc. v. Puget Sound Nat'l Bank*, 44 Wn. App. 32, 721 P.2d 18 (1986), is misplaced because those cases are distinguishable. As an initial matter, their reference to *Biehn* is suspect where they fail to explain the reason for the Court's holding and that

explanation is critical to distinguishing that case from this one. Andrews Br. at 22.

In *Biehn*, the trial court considered excerpts from the parties' testimony in their divorce proceedings and the memorandum decision of the judge who tried that case when deciding a motion for a new trial in their subsequent contract dispute. 29 Wn.2d at 757. The Court of Appeals held this was error for numerous reasons, most notably because the courts are required to decide cases on the basis of the evidence submitted to them and not on the basis of evidence introduced in other trials. *Id.* at 758. As the Court stated: "Surely, no authority is needed to make apparent the impropriety of an exploration by a trial judge of the *testimony in other cases for the purpose of determining the issues before him in the instant case.*" *Id.* (Emphasis added.)

Unlike the situation in *Biehn*, the trial court here was not asked to consider evidence from another case involving the same parties to decide the motion pending before him. Davis's additional evidence was limited to her supplemental declaration, which informed the court of a significant error in trial exhibits 9-11 reflecting an incorrect distance between the Andrews-Kim properties and confirmed she had been left with the same access problem from which the Andrews had been relieved. CP 50-52.

She did not ask the court to consider evidence from another case that was not introduced in this one to decide her CR 59 motion.

In *Jet Boats*, the seller of a fishing boat brought an action against the purchaser to recover the purchase price and the purchaser counterclaimed for damages for breach of contract. 44 Wn. App. at 36. The seller also sued the bank for negligence and breach of its fiduciary duty. *Id.* The seller and the bank subsequently reached an agreement whereby the bank reduced the outstanding principal on the loan. *Id.* At the bench trial between the seller and the purchaser, the trial court refused to reduce the purchaser's obligation by the amount the seller received in settlement with the bank. *Id.* at 37. The purchaser moved for reconsideration, arguing the amount of his obligation to the seller should have been reduced by the amount of that settlement. *Id.* at 41. He submitted an unsigned copy of what his counsel "believed" was the settlement agreement. *Id.* at 42. Relying on *Biehn*, the Court of Appeals held the presentation of the agreement did not support the motion where it had not been properly offered and the necessary foundation had not been laid. *Id.*

Unlike the situation in *Jet Boats*, Davis submitted a signed declaration to the trial court verifying the actual distance between the Andrews-Kim properties. She relied on previously admitted exhibits to

demonstrate the problem rather than relying on an unsigned declaration attesting to what she “believed” the actual distances to be. CP 50-51, 172. And contrary to the Andrews’ assertion in their brief at 22, both the Andrews and Kim had an opportunity to challenge the contentions in Davis’s new declaration by filing opposing affidavits. CR 59(c). *Yet they chose not to do so.* CP 37-49.

As the Andrews acknowledge, this Court will overturn a trial court’s CR 59 determination when it is based on manifestly unreasonable or untenable grounds. Andrews Br. at 19. Given the fact that Davis was dragged into court despite an earlier final judgment determining the Kim-Davis boundary and dismissing her from the case, the trial court abused its discretion by refusing on reconsideration to consider additional evidence that specifically addressed the court’s errors of fact and flawed assumptions. The trial court did not give any reason, let alone a tenable reason, for denying Davis’s CR 59 motion under the circumstances. It therefore abused its discretion. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26-27, 482 P.2d 775 (1971).

(5) The Trial Court Erred in Entering Its Final Judgment

As Davis noted in her opening brief, a boundary established by a common grantor is binding upon the grantees. Br. of Appellant at 24-25. Accordingly, the trial court erred by refusing to apply that doctrine to the

Kim-Davis boundary where Kim conceded the doctrine applied and confirmed the boundary had been created by the developer. *Id.* at 26.

Kim *admits* the doctrine should have applied to establish the Kim-Davis boundary. Kim Br. at 8. Nonetheless, he continues to argue without authority that the doctrine must be applied to the Andrews-Kim boundary if it is applied to the Kim-Davis boundary. Kim Br. at 7-8. He is wrong. There is no case law to suggest that the common grantor theory must be applied consistently to non-contiguous boundaries, especially when, as here, those boundaries are created under dissimilar circumstances. Moreover, he fails to recognize the significance of the fact that the Andrews could not have purchased their property with reference to the Andrews-Kim fence because it was not installed until *after* they moved in. Where the Andrews did not acquire their property with reference to the fence line, the common grantor doctrine does not apply. *See Thompson v. Bain*, 28 Wn.2d 590, 591-93, 183 P.2d 785 (1947); *Winans v. Ross*, 35 Wn. App. 238, 240-41, 666 P.3d 908 (1983). By comparison, Kim and Davis's predecessor-in-interest purchased their properties after the Kim-Davis fence had been installed. Consequently, the common grantor theory should have applied to conclusively establish the Kim-Davis boundary at the fence line. Br. of Appellant at 25-26.

It is unfortunate that Kim stands to lose a portion of his property

because of the developer's error and the Andrews' failure to do anything about it when the fence was installed; however, the common grantor theory may work against the grantee in some situations. For example, if the designated boundary line falls inside the paper boundary, then the grantee will get less than the title document describes. As the courts say, the grantee as well as the grantor is bound by the line fixed on the ground. *See Angell v. Hadley*, 33 Wn.2d 837, 207 P.2d 191 (1949); *Strom v. Arcorace*, 27 Wn.2d 478, 178 P.2d 959 (1947).

Davis also contends the trial court's findings of fact are not supported by substantial evidence and fail to support the conclusions of law. Br. of Appellant at 28-34. Kim takes no position with regard to most of the challenged findings and conclusions. Kim Br. at 11. The Andrews argue only that the record supports findings 14, 16, 18-19, and 22 and conclusion 6; they take no position with respect to findings 17 and 23 and conclusions 4, 8, and 10. Andrews Br. at 28-35. By failing to rebut Davis's arguments on the challenged findings and conclusions, the Andrews and Kim concede the errors. *See Evans*, 129 Wn. App. at 221 n.7; RAP 10.3(b).

Kim does argue, however, that there was no evidence offered at trial to support Davis's assertion that there is ten feet of space between the Andrews and Kim properties. Br. of Resp't Kim at 11. Kim is incorrect.

Jeffrey Andrews<sup>13</sup> testified the fence between his property and Kim's property is ten feet. RP I:19. *See also*, Exs. 4-5. Moreover, Jeffrey confirmed he could install a small gate in the ten-foot fence he shares with Kim to access his backyard from the east side of his home. RP I:48; Exs. 4-5.

The Andrews initially argue that Davis's failure to assign error to conclusions 1, 3, 5, 7, and 9 is fatal to her appeal. Andrews Br. at 27-28. They are wrong. Davis did not challenge those conclusions because they had no direct impact on her or the Kim-Davis boundary. That those conclusions have become the law of the case does not in any way negate or undermine Davis's appeal of the court's unsupported conclusions.

Unlike Kim, the Andrews next insist the record supports findings 14, 16, 18-19, and 22 and conclusion 6 and that even if they do not, those findings and conclusions remain harmless error. Andrews Br. at 28-35. They are mistaken on both points.

This Court applies a harmless error standard to findings of fact that contain errors. *See, e.g., State v. Banks*, 149 Wn.2d 38, 43-46, 65 P.3d 1198 (2003). Under that standard, an error is considered prejudicial when it affects, or presumptively affects, the outcome. *See Thomas v. French*, 99 Wn.2d 95, 104-05, 659 P.2d 1097 (1983) (noting error without

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<sup>13</sup> Jeffrey Andrews will be referred to by his first name to avoid confusion; no disrespect is intended.

prejudice is not grounds for reversal). *See also, Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 898 P.2d 284 (1995) (reversing judgment where trial court's giving of improper jury instruction may have changed the outcome of the case).

Here, the errors in findings 14, 16-19, and 22-23 affected, or presumptively affected, the outcome of this case generally and Davis specifically. The trial court entered the challenged findings to create a "fair and equitable resolution of this case." RP II:6. In doing so, the court entered specific findings with respect to the Andrews-Kim boundary that caused it to redetermine the previously established Kim-Davis boundary. If the trial court had not entered those findings, it would not have needed to adjust the Kim-Davis boundary because Kim would not have been "squeezed" between the two properties and left without access to his own backyard. The trial court's entry of findings establishing the Andrews-Kim boundary clearly impacted its findings with respect to the Kim-Davis boundary.

The Andrews continue to assert they had no "proof" the Andrews-Kim fence was incorrectly located until 2007. Andrews Br. at 29 (discussing finding 18). Their assertion is contradicted by the record. They had sufficient knowledge of the potential boundary problem to cause further inquiry, but chose not to investigate. Br. of Appellant at

26-27, 32. As Jeffrey testified during the trial, he and his wife believed the fence was incorrectly located *when it was installed*. RP I:26, 29. It cannot be said that the “proof” the Andrews found in 2007 was not readily available to them in 1998, when the fence was installed. Br. of Appellant at 27-28, 32.

The Andrews next argue the record supports the findings addressing the inaccessibility of their backyard from their own property. Andrews Br. at 32-33 (discussing findings 14, 16, 19, 22). Those findings are not supported by the evidence. For example, Jeffrey specifically testified that the real impediment to accessing his backyard from the west side of his house is the large laurel hedge he and his wife planted and not the incorrectly placed Andrews-Kim fence. RP I:44; Ex. 6. But for that large hedge and the other plantings installed by the Andrews’ western neighbor, there is no reason for the Andrews to cross their neighbor’s property to access their own backyard. *Id.*; Ex. 7. Contrary to the Andrews’ assertions that they do not have access to their back yard absent moving the Andrews-Kim fence, Andrews br. at 33, Jeffrey testified that he could install a small gate in the ten-foot fence he shares with Kim to access his backyard from the east side of his property. RP I:48; Exs. 4-5.

Where the trial court’s findings are not based upon substantial evidence, they do not support the conclusions of law. Br. of Appellant

at 32-33. The trial court ignored undisputed evidence that conclusively showed the Kim-Davis fence was installed by the common grantor and that Kim and Davis had historically recognized the fence as the true boundary between their properties for more than nine years. The court also ignored uncontroverted evidence that the parties' boundaries were established under dissimilar circumstances, making it logical and reasonable to resolve their disputes differently. The court's resolution of this case merely shifted the Andrews' access problem to Davis.

Finally, the Andrews continue to misinterpret Davis's arguments with respect to their notice and knowledge of the improperly placed Andrews-Kim fence. Br. of Appellant at 26-28; Andrews Br. at 31; CP 35. Davis does not assert, on her behalf or Kim's, "some sort of adverse possession claim as to the disputed land." Andrews Br. at 31. Instead, she contends the Andrews' knowledge of the Andrews-Kim boundary discrepancy in 1998 disposed of their claims. Br. of Appellant at 27. They admit they knew for nine years that the Andrews-Kim fence was not accurately located, but allowed it to remain. Their knowledge of the discrepancy should have subjected them to a very different set of equitable considerations than the ones the trial court drew upon. CP 35. The trial court should have considered the equities arising from the fact that Kim and Davis took title to their properties in good faith reliance on

the boundary established by their common grantor while the Andrews knew something was wrong with their boundary but sat back and did nothing about it for more than nine years.

(6) The Andrews and Kim Are Not Entitled to Attorney Fees and Costs on Appeal

The Andrews argue they are entitled to attorney fees and costs on appeal under CR 11. Andrews Br. at 35. They are mistaken. In addition, their request is ironic given their frivolous procedural arguments.

CR 11 does not apply in appellate proceedings. 3 Karl B. Tegland, *Wash. Prac. Series: Rules Practice*, CR 11 at 445, 456 (6th ed. 2004) (noting the 1994 amendments to RAP 18.7 make it clear that CR 11 no longer applies on appeal). Instead, RAP 18.9(a)<sup>14</sup> authorizes the Court to impose attorney fees as a sanction for defending against a frivolous appeal. See *Eugster v. City of Spokane*, 139 Wn. App. 21, 34, 156 P.3d 912 (2007). Even if the Andrews correctly requested attorney fees on appeal under RAP 18.9(a), which they did not, they should not recover those fees because Davis's appeal is not frivolous.

An appeal is not frivolous if the issues presented are at least debatable. *Kirshenbaum v. Kirshenbaum*, 84 Wn. App. 798, 808, 929 P.2d 1204 (1997). Any doubts are to be resolved in favor of the appellant.

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<sup>14</sup> RAP 18.9(a) provides that the Court may assess terms or compensatory damages against a party or counsel who: (1) uses the rules for delay, (2) files a frivolous appeal, or (3) fails to comply with the rules.

*Pub. Employees Mut. Ins. Co. v. Rash*, 48 Wn. App. 701, 706, 740 P.2d 370 (1987). An appeal that is affirmed merely because the arguments are rejected is not frivolous. *See Streater v. White*, 26 Wn. App. 430, 434-35, 613 P.2d 187 (1980). Resolving all doubt in favor of Davis, her appeal raises debatable issues upon which reasonable minds could differ. Her briefs contain legal authority to support her issues and meaningful analysis of those issues to permit this Court to reverse the trial court's final judgment. Her appeal is not frivolous. In any event, the Andrews failed to notify Davis of the objectionable conduct and to provide her with an opportunity to mitigate the sanction by amending or withdrawing the paper. *See Biggs v. Vail*, 124 Wn. 2d 193, 198 n.2, 876 P.2d 448 (1994) (noting counsel should give notice of a potential violation before seeking CR 11 sanctions and evidence of such notice, or lack thereof, should be considered when addressing a request for sanctions). *See also, Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 218-19, 829 P.2d 1099 (1992) (Andersen, J., concurring in part, dissenting in part) (holding that notice should be provided at the earliest opportunity). Accordingly, the Andrews' request for fees and costs on appeal should be denied.

Unlike the Andrews, Kim did not request an award of attorney fees and costs in his brief. Kim Br. at i, 12. Pursuant to RAP 18.1(b), a party seeking attorney fees on appeal must devote a section of the opening brief

to a request for such fees. A party who fails to comply with this procedure is not entitled to an award of attorney fees. *See, e.g., Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 772 n.17, 162 P.3d 1153 (2007). Thus, Kim is not entitled to an award of attorney fees and costs on appeal even if applicable law were to grant him the right to recover such fees where he failed to request them in his opening brief.

#### D. CONCLUSION

The trial court's determinations concerning the Andrews-Kim boundary influenced its redetermination of and subsequent findings concerning the Kim-Davis boundary. Davis has standing to appeal the challenged findings and conclusions because they directly and substantially impact her pecuniary, proprietary, and personal rights.

Kim has repeatedly admitted the common grantor established the Kim-Davis boundary. The Andrews have consistently asserted their dispute with Kim arises out of different facts that occurred after the establishment of the Kim-Davis boundary. Where Davis took title to her property with reference to the boundary established by the common grantor, the trial court erred by relying on the facts in the Andrews-Kim dispute to deprive Davis of the boundary she thought she was getting.

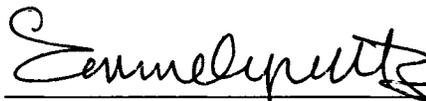
CR 11 does not apply in appellate proceedings. Even if the Andrews correctly requested attorney fees and costs on appeal under

RAP 18.9(a), which they did not, they should not recover those fees because Davis's appeal is not frivolous. She has presented debatable issues on appeal. Kim should not recover attorney fees and costs on appeal because he failed to comply with RAP 18.1(b).

For the reasons set forth in Davis's opening brief and reiterated above, this Court should reverse the trial court's decision relocating the parties' fences to the boundary lines delineated on the plan maps and by quieting title in the property disputed between Kim and Davis in Davis. The Kim-Davis fence should remain where it is. Costs on appeal should be awarded to Davis.

DATED this 30<sup>th</sup> day of December, 2009.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I sent by email and deposited in the US Postal Service a true and accurate copy of the following document: Motion for Leave to File Over-Length Reply Brief and Combined Reply Brief of Appellant in Court of Appeals Cause No. 63507-7-I to the following:

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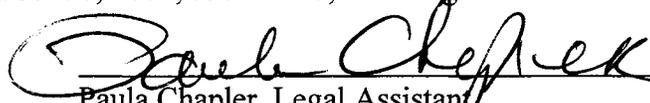
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: December 30, 2009, at Tukwila, Washington.

  
Paula Chapler, Legal Assistant  
Talmadge/Fitzpatrick