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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

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No. I-64019-4

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Gregory R. Zaputil, a married man as his separate estate; and
Rudolph Zaputil and Gregory R. Zaputil as co-trustees of the
Rudolph Zaputil Living Trust U/A dated June 15, 2006,

Appellants

v.

51st Avenue, L.L.C., a Washington limited liability company,

Respondent

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

As it did in the trial court, Respondent (“51st”) misrepresented the nature of the dispute in its response brief. This is not a question of whether the re-located quarter corner placed in 1964 (“the 1964 monument”) is correctly located. It is a question of whether lots platted and laid out prior to 1964 are to be measured from the long standing monument that was used as the quarter corner before 1964 (the reference monument), and which 51st argues continues to be the monument that must be used for surveying the streets dedicated in or from the plat, or from the 1964 monument.

II ARGUMENT

Contrary to the arguments of 51st, authority of the court under the statute is not limited to cases where a monument has been physically lost or obscured. RCW 58.04.020 confers upon the court the authority to determine the proper location of a property boundary where the boundary has become “uncertain” due to “any other cause”. RCW 58.04.007 provides that, “Whenever a point or line determining the boundary

between two or more parcels of land ... is in dispute”, and the affected landowners cannot agree, then “... any one of them may bring suit for determination as provided in RCW 58.04.020.”

There is no dispute that the reference monument was, and is, the monument from which the location of all the streets in the plat is determined. There is no evidence that any other monument was used in the original survey of the plat. But, 51st wrote a new legal description for its property, using a metes and bounds description that started from the 1964 monument instead of the lot and block description that had been used in every deed. The result is that 51st points to the metes and bounds description it invented to claim that its boundary with Appellant (“Zaputil”) must be measured from the 1964 monument, effectively shifting the boundary about ten feet east into the Zaputil land. Zaputil on the other hand points to the reference monument, the only monument in existence when the plat was created and the monument from which all the streets have been measured, as the point from which the boundary must be measured.

The boundary is in dispute. Zaputil is an affected property owner. RCW 58.04.007 allows them to bring suit for determination of the

property boundary as provided in RCW 58.04.020. RCW 58.04.020 confers upon the court the authority to determine the proper location of the property boundary.

51st argues entirely from the viewpoint that this action is one challenging the placement of the 1964 monument, but that is not what this case is about. What this case is about is 51st's effort to take land from Zaputil by using the 1964 monument, which 51st admits is not the monument from which any of the adjoining streets must be measured but insists is the proper point from which to measure its land, as the starting point for the new legal description it created.

“Courts should ascertain and carry out the intention of the original platters.” *Staaf v. Bilder*, 68 Wn.2d 800, 803, 415 P.2d 650 (1966). In the present case the only evidence of the intent of the original platters is the placement of the streets that were created in the plat (51st Ave. S. and S. 152nd St.) or by reference to the plat (52nd Ave. S.). All of those streets were, and are, measured from the reference monument.

Stewart v. Hoffman, cited by 51st, dealt with a situation in which there was a survey, “which was accepted and acted upon by the parties” (*Stewart v. Hoffman*, 64 Wn.2d 37, 42, 390 P.2d 553 (1964)), that one

party later sought to challenge. There has been no such acceptance by Zaputil of 51st's claimed boundary. The cases are not similar.

Squire v. Greer and *Kalin v. Lister*, cited by 51st, dealt with a claim that the original government survey had been based on an erroneous assumption. The only such argument made in this case is 51st's argument that the reference monument (from which it agrees that all the streets were, and must, be measured) was in the wrong location. To the extent that those cases have any bearing at all on the present case it would be to bar 51st from arguing that the 1964 monument (as the correct location of the quarter corner) is the monument that the original platters actually meant to use but they mistakenly used the reference monument instead.

DD&L, Inc. V. Burgess and *Erickson v. Wick*, cited by Zaputil in their opening brief and criticized by 51st in its response both stand squarely on the principal that a plat must be measured according to the intent of the original platter. Those cases dealt with situations where long standing, physical indications on the ground were used to alter plats. No such thing exists in this case to support 51st's claim.

The criticisms leveled by 51st point directly to cases which counter its thesis. In *Ray v. King County*, 120 Wn.App. 565, 86 P.3d 183 (2004),

the court held that the railroad track, referenced in the deed, was the monument from which the property was to be measured even though it did not fit precisely with the measurements called out in the deed. Reference to the track, built shortly after the boundary was established, in the deed proved the intent to use its actual placement as the monument from which the boundary would be measured. In *Thein v. Burrows*, 13 Wn.App. 761, 537 P.2d 1064 (1975), the court held that even though the meander line of a stream had shifted over time, it is the original meander line (the one in existence when the land was originally surveyed into parcels) that must be used when measuring lots platted from the government survey.

51st finishes its response by arguing that it has the more equitable position. It does not offer any authority for that argument, probably because of the incongruity of its plea for equity when it is the party seeking to take land from its neighbor. The effect of a decision upholding 51st's position points to where equity lies in this case. 51st bought its land, then wrote a new legal description which replaced the lot and block descriptions contained in the deeds it received with a metes and bound description that used the 1964 monument. It started but quickly abandoned activity, then waited nearly ten years before it became active

again. Faced with a renewed claim to part of its land, Zaputil commenced the present action to determine the correct location of the boundary between it and 51st. 51st claims that its boundary with Zaputil must be determined according to the 1964 monument, but that the streets that bound Zaputil on the east and 51st on the west must be determined according to the reference monument. The result of such a determination would be that 51st would take ten feet of Zaputil's land (by shifting the Zaputil property east into 52nd Ave. S.), and apparently would gain the gap that would be left between its western boundary and 51st Ave. S. Where is the equity in that?

Respectfully submitted, November 9, 2009.



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Attorney for Appellant.

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COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

Gregory R. ZAPUTIL, and married man as)
his separate estate; and, Rudolph Zaputil)
and Gregory R. ZAPUTIL as Co-Trustees)
of the RUDOLPH ZAPUTIL LIVING)
TRUST U/A DATED JUNE 12, 2006,)
Plaintiffs.)

No. I-64019-4

DECLARATION OF MAILING OF
REPLY BRIEF OF APPELLANT

vs.)

51ST AVENUE, L.L.C., a Washington)
limited liability company,)
Defendant.)

The undersigned declares that on November 9, 2009, I caused to be served the forgoing document to: The Court of Appeals, Division 1 (Original, Copy) and Christina Mehling of VSI Law Group (Copy).

_____ via hand delivery (_____)

via first class mail, postage prepaid

_____ via facsimile

_____ via e-mail

DECLARATION OF MAILING OF
REPLY BRIEF OF APPELLANT

Law Office of Gerald F. Robison
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1 I declare under penalty of perjury under the laws of the State of Washington on November 9,
3 2009, at Burien, Washington.



5 Elisabeth Olivieri

7 Assistant