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FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2011 JUN 30 PM 3:48

NO. 668404

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

ASHLEY THOMAS and WENDI SMITH, husband and wife, and their  
marital community composed thereof; CHARLES M. OGDEN, an  
unmarried individual; and WILLIAM G. BROWN and G. LYNN  
BROWN, husband and wife, and their marital community composed  
thereof,

Appellants,

v.

BARRY REISS, an unmarried individual; and WALTER GUSTAFSON  
and SHEILA GUSTAFSON, husband and wife,

Respondents,

ASHLEY THOMAS and WENDI SMITH, husband and wife,

Counterclaimants/Third-Party Plaintiffs,

v.

BARRY REISS, an unmarried individual; and WALTER GUSTAFSON  
and SHEILA GUSTAFSON, husband and wife,

Counterdefendants,

and

HOMESTREET BANK, a Washington State Chartered Savings Bank,  
Third-Party Defendant.

**BRIEF OF APPELLANTS**

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## **I. ASSIGNMENT OF ERROR**

1. The Superior Court erred in construing provisions of a Stipulation and Order of Dismissal that purportedly settled a property line dispute between neighbors.

### **A. Issue Pertaining to Assignment of Error**

1. A stipulation intended to resolve a property line dispute between neighbors required that one party relocate a fence marking the boundary “to a location four feet (4’) from the exterior wall of the [other party’s] garage.” The stipulation then provided that “[t]he new property boundary . . . will be located along the new position of the re-located fence (4 feet south of the exterior wall of the garage) and will extend in a straight line west to the public road.” May such language reasonably be construed as redrawing the boundary line to the east of the garage, as well as to the west?

(Assignment of Error 1)

## **II. STATEMENT OF THE CASE**

### **A. Facts**

Barry Reiss (Reiss) and Ashley Thomas and Wendi Thomas (Thomas) live next door to each other in an Everett neighborhood. A dispute arose between them concerning where the boundary line between their properties was located. Among other things, the dispute involved a question of whether adverse possession had altered the boundary.

In 2007, Reiss filed suit, seeking a determination of where the boundary line was located. In June 2010, counsel for the parties reached agreement concerning all disputed issues. The agreement was set forth in a Stipulation and Order, which the trial court entered on June 4, 2010. (CP 66) Counsel signed the stipulation. Neither Ashley Thomas nor Wendi Thomas reviewed the stipulation before its entry, and neither signed any form of settlement agreement. (CP 23, ¶ 2; CP 26, ¶ 2)

Among other things, the stipulation provided as follows:

2. Defendants Thomas/Smith<sup>1</sup> will relocate the chain link fence and footings from their current location on the south side of the Reiss garage to a location four feet (4') from the exterior wall of the Reiss garage.
3. The new property boundary between the Reiss and Thomas/Smith properties will be located along the new position of the re-located fence (4 feet south of the exterior wall of the garage) and *will extend in a straight line west to the public road.*

(Emphasis added; CP 67, ¶¶ 2 and 3)

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<sup>1</sup>Smith is Wendi Thomas's maiden name.

Counsel for the Thomases during the agreement’s negotiations, Thomas Adams, does not recall ever discussing an extension of the negotiated boundary to the east.<sup>2</sup> (CP 10, ¶ 2.) Moreover, correspondence between counsel during the negotiations makes no reference to such an extension. (See Exhibits A, B, C, and D to Adams Decl., CP 9-21) Indeed, a letter from Adams to Reiss’s counsel, Christopher Knapp, proposed specific terms of settlement without any reference to extending the line to the east of the garage. That letter provides: “The property boundary will be located along the new position of the fence (south of the eave of the garage) and will extend in a straight line West to the public road.” (CP 14) In a handwritten note, Knapp responded, “4 feet,” referencing how far the line should be from the garage. (CP 17) In a follow-up letter from Adams to Knapp, the parties’ intent regarding where the line should be is made crystal clear: “My clients are willing to agree that the new line (and the fence) will be located four (4) feet south of the most southerly point on the south wall

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<sup>2</sup>The Thomases did not believe the property lying to the east of the garage’s eastern edge had ever been in dispute. They believed an old fence, installed long in the past, demarcated the eastern boundary between the properties. (CP 23, ¶¶ 2 and 4; and 26, ¶ 2.) The fence which ran east to west was the one they thought to be at issue. Pulling out the fence running north and south would have cost them additional money. (CP 27-28, ¶ 8.)

of the garage. *The line would run West to the easterly margin of the public street.*” (Emphasis added; CP 20)

In August 2010, pursuant to the terms of the stipulation, Thomas Barry of Metron & Associates surveyed the Thomas property. He staked the boundary line. Neither Thomas was home at the time. The next day, upon seeing where the stakes were, Ashley Thomas pulled out the stakes because he did not believe they were placed consistent with his understanding of the parties agreement. (CP 23, ¶ 3) In particular, at the west boundary, the stakes cut off a triangular piece of land that neither Thomas had consented to give up. (CP 26, ¶¶ 4 and 5)

When the Thomases asked him what had happened with regard to the triangular piece of land, Adams acknowledged that he had not obtained their authority to give away the triangular piece of land. (CP, Ex. 5.) Because of the conflict that thereby arose between his clients and him, Adams withdrew from their representation with regard to the Reiss dispute. The Thomases’ current counsel, Daniel Fjelstad, substituted in for Adams in September, 2010. Shortly thereafter, the Thomases agreed to abide by the boundary line identified in the stipulation and give up the triangular piece. (CP 26-27)

From the outset of his representation of the Thomases, Fjelstad had difficulty communicating with Thomas Barry. Fjelstad wanted to meet with Barry at the Thomas residence to ensure that the survey he performed complied with the terms of the stipulation. Fjelstad also proposed that Reiss's counsel attend. During the one conversation Fjelstad recalls having with Barry, Barry agreed that he would coordinate with Fjelstad to schedule the survey. Barry did not respond to Fjelstad's subsequent attempts to contact him. (CP 30, ¶¶ 2-3.)

On December 13, 2010, Mr. Thomas called Fjelstad to inform him that Barry was on his property staking the boundary line. Barry had not notified Fjelstad that he planned to do the staking that day. After speaking with Fjelstad, Thomas went out to speak with Barry. He asked him why he had not contacted Fjelstad to coordinate the visit. Barry indicated that he had not had time to do so. (CP 27, ¶ 7.) During that conversation, Barry stated that he would be extending the survey line dividing the parties' property east of the eastern wall of Reiss's garage. Thomas informed Barry that the stipulation did not provide for the line to extend east of the garage and that his wife and he would never have agreed to that provision. Barry nonetheless staked the boundary line to extend east of the edge of the garage. (*Id.*)

**B. Superior Court Proceedings**

On December 20, 2010, Reiss filed a Motion to Enforce Settlement Agreement. (CP 51) In the motion, Reiss did not specifically state that he sought to have the boundary line extended beyond the eastern edge of the garage. Rather, the motion sought an order requiring that “the survey performed according to the Settlement Agreement be accepted and paid for by the Thomases, and that they remove the trees and move the fence . . .” (CP 52) Thomas subsequently cut trees down that grew next to Reiss’s garage and had the fence moved so that it ran parallel, at a distance of 4 feet, to the southern side of the garage. (CP 27, ¶ 8)

Not until filing his Supplemental Memorandum on January 13, 2011 (CP 40), did Reiss make clear that he sought to extend the boundary line to the east of his garage (CP); the memorandum also made clear that this claim was based entirely on Thomas Barry’s interpretation of the stipulation language. In particular, in paragraph 6 of the Declaration of Thomas Barry filed with the memorandum, Barry states:

Apparently, Defendants [the Thomases] believe that the Stipulation and Order required that the new property line extend four-feet from the garage only. *I do not interpret the agreement the same way. I interpret the agreement line, which is 4 feet from the garage wall, to extend easterly to terminate at the east line of the original title ownership of Reiss. I also interpret the agreement line to extend westerly to the city road right of way margin. When this interpretation is applied, the Reiss ownership will have a clearance of 4 feet on the east and south walls of his garage.* If the Thomas/Smith [interpretation] is applied then Reiss will not have a continuous 4 feet of ownership around his garage.

(Emphasis added; CP 44.) An exhibit Barry prepared for Reiss further clarifies how he interpreted the stipulation: “The agreement documents describe a line 4 feet from garage and parallel to intersect the east line of Reiss.”<sup>3</sup> (CP 48) Moreover, in his reply brief filed several days later, Reiss even suggested that because of his experience as a surveyor, Barry should be accorded expert status in interpreting the June 4, 2010

Stipulation and Order:

Mr. Barry’s interpretation of the parties’ Stipulation and Order, which is an interpretation based upon his professional judgment, should also stand. Mr. Barry is a professional surveyor and has served in that capacity for 20 years. Mr. Barry has experience in

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<sup>3</sup>For illustrative purposes only, to aid the Court in visualizing the disputed property, a photographic exhibit Barry prepared for Reiss is attached hereto as Appendix A. (CP 50) The photograph at the bottom of the page shows the Reiss garage (white) on the left. The foreground of the photograph is to the west and the back to the east. The photograph in the upper left corner frames the disputed piece of property in red. The back line, running north and south, is the boundary between the Thomases and a different neighbor.

land surveying and mapping, as well as interpreting documents prepared by legal counsel regarding boundary line adjustments.

(CP 36-37)

Following argument, the trial court granted Reiss's motion. (CP 3) Specifically, the court's order stated, "[t]he survey, boundary line and legal descriptions completed by Thomas Barry, surveyor, dated December, 2010, shall be used as those documents require to adjust the boundary line pursuant to the stipulation and order. [¶] Defendants Ashley Thomas and Wendi Smith shall readjust their fence to the lines indicated by Thomas Barry . . ."<sup>4</sup> (CP 4) This appeal followed. (CP 1)

### **III. ARGUMENT**

#### **A. Argument**

##### **1. Standard of review.**

"Settlement agreements are governed by contract principles 'subject to judicial interpretation in light of the language used and the circumstances surrounding their making.'" *Sherrod v. Kidd*, 138 Wn. App. 73, 75, 155 P.3d 976 (2007), quoting *Stottlemyre v. Reed*, 35 Wn. App. 169, 171, 665 P.2d 1383 (1983). Because interpretation of a contract presents a legal question, an appellate court's review is de novo.

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<sup>4</sup>The land impacted by the court's order amounts to about 10 square feet. (CP 44, ¶ 6)

*See Clevco, Inc. v. Municipality of Metro. Seattle*, 59 Wn. App. 536, 539, 799 P.2d 1183 (1990).

**2. The plain language of the stipulation does not support the trial court's determination that the stipulation provided for the boundary line between the parties' properties to run in both easterly and westerly directions from the southeastern corner of Reiss's garage. The court's order to that effect, accordingly, constitutes error.**

In *Carpenter v. Remtech, Inc.*, 154 Wn. App. 619, 624, 226 P.2d 159 (2010), the court outlined the judicial approach to interpreting a contract:

To [determine the intent of the parties], we view the contract as a whole. [Citation omitted.] We include “the subject matter and objective of the contract, all circumstances surrounding its formation, the subsequent acts and conduct of the parties, statements made by the parties in preliminary negotiations, and usage of trade and course of dealings.” *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 895, 28 P.3d 823 (2001). This approach permits us to then “discover the intent of the parties based on their real meeting of the minds, as opposed to insufficient written expression of their intent.” *Id.*

With specific regard to interpreting a settlement agreement, “[a] strong presumption attaches that the parties have considered and settled every existing difference.” *Oregon Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 414, 36 P.3d 1065, *review denied*, 146 Wn.2d 1014, 51 P.3d 88 (2001).

In the instant case, the provisions governing the replacement of the fence (*see above at page 2*; CP 67, ¶¶ 2 and 3) are clear on their face.

Those provisions simply cannot be construed to permit extension of the boundary line to the east of Reiss's garage, thereby requiring replacing additional fencing. The provisions refer to a "fence," not to fences or fencing. Moreover, while ¶ 3 certainly mandates a four-foot gap between the south side of Reiss's garage and the relocated fence, it does not mandate the same gap between the eastern side of his garage and the fence located there. Barry, stepping out of his role as a surveyor and improperly into the role of a legal expert, misinterpreted those provisions, and Reiss, seizing a gift, sought enforcement of that misinterpretation.

While the stipulation's language is sufficiently clear that turning to extrinsic evidence to elucidate its meaning is unnecessary, review of such evidence in the record further establishes that the Thomas interpretation should be adopted. First, the Thomases never intended to give up any property east of the eastern edge of Reiss's garage—they never even understood that land to be in dispute, so there was no meeting of the minds on that issue. (CP 23, ¶ 2; 26, ¶ 2) Second, the Thomases' initial attorney, Thomas Adams, recalls no discussion of extending the

new boundary line to the east of the garage during negotiations, and correspondence between counsel reflects no such discussion.<sup>5</sup>

After three years of litigation between neighbors, the stipulation was executed. The stipulation most certainly should be presumed to have resolved all issues between the parties, and not to have left open the issue of where the boundary line was located to the east of Reiss's garage. If the line had been intended to extend to the east, nothing could have been easier than to simply so state.

In sum, aside from a surveyor's opinion concerning how to interpret the settlement agreement, nothing in the record supports the trial court's order. No provision of the stipulation references any extension of the boundary to the east of the garage. No provision references Reiss as having a right to four feet of clearance on the east wall of his garage. No provision references Thomas as having to move fences or fencing, which Barry's interpretation required. Rather, the stipulation only dictates that Thomas must move the "fence" on the south side of the garage.

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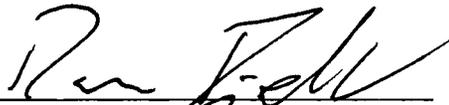
<sup>5</sup>Evidence of parties' negotiations may be considered in determining a contract's meaning. *Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990).

#### **IV. CONCLUSION**

For the reasons set forth above, the Thomases respectfully submit that the Superior Court's order granting Reiss's Motion for Enforcement of Settlement Agreement should be reversed and this matter remanded to the Superior Court with instructions to enter judgment in favor of the Thomases.

DATED this 30<sup>th</sup> day of June, 2011.

SCOTT, KINNEY, FJELSTAD & MACK



Daniel R. Fjelstad, WSBA #18025  
Of Attorneys for Appellant

## Appendix A

Fence should continue to the east another 4 feet and then north to the existing fence line.

Ashley claimed that the agreement only went to the corner of the garage. I told him the agreement was to go to the east line of reiss ownership. I set rebar as a reference to Ashley claim.

This distance is not 4 feet from the wall. The rebar is 4 feet from wall.

This fence is 4 feet from the wall.

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