

NO 69051-5-1

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION I

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PAUL COLVIN AND PATRICIA GUERTIN,
PETITIONERS

V.

KRISTINE SMITH
RESPONDENT

APPEAL FROM THE SUPERIOR COURT OF SNOHOMISH COUNTY
CAUSE NO. 11-2-06646-9

BRIEF OF RESPONDENT SMITH

KRISTINE SMITH, PRO SE

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TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	5
II. ASSIGNMENTS OF ERROR	5
III. ISSUES PRESENTED FOR REVIEW	6
IV. STATEMENT OF THE CASE	7
V. ARGUMENT	13
VI. MOTION FOR COSTS AND ATTORNEY FEES	29
VII. CONCLUSION	29
VIII. APPENDICES	
APPENDIX A	DECLARATION OF JAMES YOUNG
APPENDIX B	AMENDED ANSWER
APPENDIX C	SURVEY OF PROPERTY
APPENDIX D	SETTLEMENT AGREEMENT
APPENDIX E	STIPULATION AND ORDER OF DISMISSAL
APPENDIX F	ORDER ON MOTION FOR STATUS QUO RESTRAINING ORDER
APPENDIX G	AFFIDAVIT OF SERVICE

TABLE OF AUTHORITIES

CASES	PAGE
<i>Alejandre v. Bull</i> , 159 Wn.2d 674, 684, 153 P.3d. 864 (2007)	23, 25
<i>Austin v. Ettl</i> , 286 P.3d 85 (Wash App. 2012)	27
<i>Carlisle v. Harbor Homes</i> , 147 Wash.App. 193, 204, 194 P.3d 864	27
<i>Douglas v. Visser</i> , 295 P3d 800 (Wa. App. 2013)	20, 28
<i>Eastwood v. Horse Harbor Foundation, Inc.</i> , 170 Wn.2d 380, 241 P.3d 1256 (2010)	23
<i>Elcon Construction v. Eastern Washington University</i> , 174 Wash. 2d 157, 273 P3d 965 (2012)	26
<i>Hudson v. Condon</i> , 101 Wash.App. 866, 6 P.3d 615 (2000)	17
<i>Jackowski v. Borchelt</i> , 278 P.3d 1100 (2012)	11,22, 24
<i>Lopez-Vasquez v. Depart. of Labor and Industries</i> , 276 P.3d 354 (Wa. 2012)	13
<i>North Pac. Pub. Serv. Co. v. Clark</i> , 185 Wash. 132, 134-135, 52 P.2d 1255 (1936)	15
<i>Sherbeck v. Estate of Lyman</i> , 15 Wash.App.866, 552 P.2d 1076 (1976)	17, 20
<i>Seafirst Center Ltd. Partnership v. Erickson</i> , 127 Wash.2d 355, 898 P.2d 299 (1995)	15

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COURT RULES

Rule of Appellate Procedure 14.2 29

Rule of Appellate Procedure 18.1 29

STATUTES

Revised Code of Washington 4.16.080(4) 16

I. INTRODUCTION

This is a review of the trial court's ruling on Defendant Kristine Kay Smith's (hereinafter "Smith") Summary Judgment Motion granting dismissal of the Plaintiffs' Complaint against Smith for Quiet Title and damages as to Smith. The basis for Smith's motion was that the economic loss rule (later referred to as the independent duty doctrine) and the statute of limitations barred the Plaintiffs Guertin and Colvin (hereinafter collectively "the Colvins") from proceeding against Smith. The court ruled that the Economic Loss Rule/Independent Duty Doctrine applied to bar Colvin's case against Smith, resulting in a dismissal. After the court dismissed the Colvin's case against Smith, and after this appeal was filed, the Colvin's and codefendants Youngs, settled their case and released each other from any further liability. The case was dismissed by the trial court on August 7, 2012 based upon that settlement.

II. ASSIGNMENTS OF ERROR

In their brief the Colvin's identify three assignments of error in the trial court:

(1) That summary judgment was inappropriate because genuine material issues of fact exist.

(2) That the trial court erred in applying the “economic loss rule and barring the misrepresentation claim against Smith, and

(3) That the Statute of Limitations did not apply and bar the misrepresentation claim. Colvin Brief pge. 2.

III. ISSUES PRESENTED FOR REVIEW

Smith contends that the Colvins’ assignments of error do not provide a legal basis for relief. In response to the Colvins’ assignments of error, Smith purports that this court consider the following issues and dismiss the appeal on the following grounds:

(1) The settlement in the lower court between the Colvins and the codefendants, the Youngs, which was entered into and approved by the court after the court granted Smith’s Summary Judgment motion and after this appeal was filed, bars any further claims against Smith, including this appeal.

(2) Undisputed facts in the lower court definitively support a finding that the three years statute of limitations that is applicable to frauds, ran before the filing of the lawsuit, making this appeal moot.

(3) There was no genuine issue of material fact that would have precluded the trial court from granting summary judgment.

(4) The court appropriately applied the economic loss rule/independent duty doctrine in dismissing the Colvins' case against Smith.

(5) The misrepresentation claim is not provable.

(6) Smith should be entitled to attorney fees and costs in connection with this case.

IV. STATEMENT OF THE CASE

Smith does not agree with all of the Statement of the Case provided by the Colvins in the Petitioner's Brief. Specifically, Smith denies the statements that the Colvins were not advised or did not know of the Young's claim to the property at issue at the time of the sale, that they did not discover the true boundaries of the property until 2011 and denies the statements that the Colvins exclusively maintained and improved the property. Colvin Brief pge. 3. Those facts are not material to the determination of whether the independent duty doctrine applies.

Smith provides the following statement which includes the relevant facts necessary to determine whether this court should even review the lower court ruling on its merits, and whether the relief sought by the Colvin's should be granted or denied.

In 2000, Smith purchased the subject property at 15014 Old Manor Way, Lynnwood Washington. CP 33. Appendix A to Colvin Brief pge. 2. Subsequent to the purchase, and in connection with constructing a fence in the backyard, Smith was advised by her sellers that the boundary of her lot on the South side extended only 5 feet from the residence instead of to the driveway of the neighbors as represented by the seller's real estate agent. This property section, in fact, belonged to the predecessor of Defendants Young. CP 89. Appendix A, pges. 1-2. This property included, part of what is now the fenced in backyard, and the property south of the residence from the backyard to the end of the driveway, called the "grassy knoll" in the trial court. Smith solicited and attained permission to put up the fence and use that property from the predecessor of the Youngs, Terry Chin. CP 89, Appendix B, pge. 2, Sec. 2.0.

In 2002, Mr. Chin sold and codefendant Youngs purchased a residence and the lot adjacent to the Smith residence, the property at issue in this case. CP 89. Appendix A pge. 2, attached hereto. After their purchase, the Youngs were approached by Smith and asked if they would continue to allow that permissive use as a neighborly accommodation. Ms. Smith also made arrangements to maintain that portion which was Young's property. CP 89 . Appendix A, pge. 2.

In May of 2006, the Colvins purchased their home at 15014 Old Manor Way in Lynnwood from Smith, pursuant to a standard Real Estate Purchase and Sales agreement. CP 33. Smith's sale was arranged for and completed by her real estate agent and brother, Scott Smith.¹ Contrary to what the Colvins' alleged in their complaint, Kristine Smith had no discussions whatsoever with the Colvin's or their agent regarding the property, having left that to her agent as she was instructed to do. CP 75. Appendix B, Pge. 2.² Ms. Smith believed the Colvins were advised of the permissive use of the subject property prior to the sale. CP 75., Appendix B pge. 2

In 2006, after the Colvin's purchase, Mr. Colvin approached codefendant James Young and asked the Youngs to quit claim him the property which is the subject of the dispute in this matter. The Youngs declined because they did not want to give him the grassy knoll area. 986,

¹.The Colvin Complaint names a John Doe Smith, and identifies him as a co- owner of the subject property. CP 33. The sales agreement and closing documents, unequivocally established Ms. Smith was the sole owner.

² In their complaint, the Colvins state the Ms. Smith told them the boundary of the property was to the Colvin's driveway. CP 34, Section 3.2. As she told the court in her answer, amended answer, and declaration, she has never had a conversation with the Colvins regarding the property. CP 75, Appendix B, pge. 2 In their brief the Colvins change the alleged representations they claimed they relied include two Form 17 representations, apparently having abandoned that previous erroneous statement to the court.

CP 9. Appendix A pge. 2. The Youngs maintained the grassy knoll area outside the fence line which was adjacent to their driveway until a dispute arose between the Colvins and Youngs. CP 84. Mr. Colvin had Carolyn Young arrested for violation of an antiharrassment order he improperly attained without notice to the Youngs for being on the portion of the property she owned. CP 105. This lawsuit ensued thereafter.

In November of 2007, Mr. Colvin procured and commissioned a survey of the Colvin property, which was recorded on his behalf. CP 10, Appendix C. He commissioned another survey in 2009. As conceded by Mr. Colvin, markers were put at the southern boundaries after both of the surveys. CP 81, Appendix F to Colvin Brief.³

In July 8, 2011, 5 years after the sale, and more than three years after the 2007 survey, the Colvin's filed this lawsuit against Smith and the Youngs. CP 30-36. The Youngs countersued the Colvins for trespassing, quiet title and injunctive relief. CP 23-29. The court subsequently entered an order on a motion for an injunction, allowing the Colvin's to use the fenced in area of the property's CP 99-100, Appendix F.

Smith was not served with the Complaint until October 16, 2011, more than three months after the case was filed, and after the case had

³ In that sworn declaration Mr. Colvin claims the survey was completed in 2008. The survey itself discloses it was in 2007. CP 10, Appendix C.

already been scheduled for trial in January 2012. CP 97, Appendix G.

Smith answered the complaint and asserted the statute of limitations barred the Colvins' claims CP 74-79. Appendix B, pge. 5.

In their complaint, the Colvin's sought to quiet title and take the property by adverse possession and or mutual acquiescence from the Youngs. The Colvins also sought damages against both Smith and the Young. CP 36. The only count remaining against Smith at the time the Summary Judgment motion was heard was Count 5 of the Complaint for Intentional and Negligent Misrepresentation. The others were dismissed, upon concession of the Plaintiffs CP 16.

On June 6, 2013 Smith filed a motion for summary judgment, arguing the economic loss rule and the statute of limitations precluded Colvin's claim against her. CP 17-22.⁴ While the motion was pending and prior to the hearing on the motion, the Supreme Court decided the case of *Jackowski v. Borchelt*, 2012 WL 2146781 (Wash 2012), 278 P.3d 1100 (Wa. 2012) At hearing on the motion, having considered the *Jackowski*

⁴ Ms. Smith also filed a declaration in support of that motion and certificate of service of both and served it on the other parties. They are missing from the court file. In Colvin's brief they note that the declaration was not part of the clerk's papers and seem to argue that the court erroneously relied upon it when it issued its order granting summary judgment. CP. 90. However, the Colvins include the Declaration as Appendix D and part of their record, in effect, conceding it was a clerical error and should be part of the record.

case, the trial court held that the economic loss rule, now rephrased by the Washington Supreme Court as “the independent duty doctrine”, precluded the Colvins’ from proceeding with their tort claim against Smith. On July 10, 2012, the trial court granted Smith’s Motion for Summary Judgment and dismissed the case against Smith. CP 1-2.

On July 17, 2012, the Colvins filed an appeal of that decision to this court.⁵ The Colvin and Young trial had been scheduled for August 7, 2012. The Colvins and Youngs settled their case by a Settlement Agreement and Mutual Release on August 6, 2012. CP 55-65, Appendix D to this brief. The settlement agreement included a full release between the parties. CP 59, Sec 2.8, Appendix D, page 3, Sec. 2.8.. In the settlement agreement the Youngs agreed to a boundary line adjustment granting the Colvins the land which was located in the fenced in area. They were released from all other claims. There was no reservation of rights as to Smith in the agreement and release. CP 55-65, Appendix D. The court dismissed the Colvin’s case against the Youngs pursuant to that agreement on August 7, 2012. CP 66-70, Appendix E.

⁵ This appeal was originally filed as a Motion for Discretionary Review. At hearing on the motion, the Court of Appeals Commissioner ruled that the appeal was a matter of right, and ordered a perfection notice be issued. .

IV. ARGUMENT

1A. The Appeal should be dismissed based upon the doctrine of Collateral Estoppel.

The parties Young and Colvin settled the boundary dispute and agreed to the boundary of the property Colvins were entitled to. This occurred after the appeal was filed against Ms. Smith. This court should find that the Mutual Release clause of the Settlement agreement and Order of Dismissal collaterally estopps the Colvins from proceeding against Smith.

Collateral estoppels applies only when the party seeking estoppel is able to show that (1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) prior adjudication (resulted) in a final judgment on the merits; (3) the party against whom (collateral estoppel) is asserted was a party or in privities with a party to the prior adjudication;” and (4) there is no injustice if the parties are prevented from relitigating the issues. *Lopez-Vasquez v. Department of Labor and Industries*, 276 P.3d 354, 356 (Wa. 2012)

Applying that rule to this case, the issue as to Ms. Smith is identical: What property were the Colvin’s entitled to? There was a final adjudication on that issue by virtue of the settlement agreement and court order of dismissal. The Colvins were a party in the adjudication., There is no injustice to the Colvins as they received the property they were already using.

In the Colvin's Complaint, they alleged they were entitled to the "disputed property". CP 33-36. The Settlement Agreement and the Stipulation and Order for Dismissal made a final determination of the disputed property this case. In the settlement agreement, the parties agreed the Colvins were entitled to the fenced in property they were using. CP 55-65, Appendix E to this brief. The Colvin's sought the same relief from both defendants in their prayer for relief, asking for quiet title and damages against all defendants. CP 36. By the nature of this case, the quiet title claim and the misrepresentation claim are in effect two alternative claims for relief. If awarded the property, they would not be able to demonstrate any damages since they had use and possession of the property five years prior to filing this lawsuit and exclusive use of the fenced in area that was necessary for their use and enjoyment. Appendix F.

The Colvin's' settlement with the Youngs gives the Colvins that portion of the property that both parties agreed they were entitled to (the disputed property). That settlement determines the quiet title action and obviates the need to reach the issue of damages. Since they waived their rights to the other portion by agreement, disposed of the quiet title action, and did not reserve the right to proceed for damages against Smith in the agreement, they should be collaterally estopped from proceeding on the appeal against Smith.

1B. The release of the Youngs as parties should operate as a release to Smith and preclude appellate review of this case.

The Settlement Agreement and Mutual Release between the Colvin and Young parties contains a mutual release provision. CP 58-59, sec 2.8 Appendix D, pge. 3, sec. 2.8. There is no reservation of rights as to Ms. Smith in the agreement. CP 55-65. The rule that release of one obligor should operate as a release to the other if there are no reservations of rights, should be applied in this case. In *North Pac. Pub. Serv. Co. v. Clark*, 185 Wash. 132, 134-135, 52 P.2d 1255 (1936) the court ruled:

The General Rule is that a release by a creditor of one of several persons who are jointly or jointly and severally obligated is to discharge them all. But that rule is not applicable where, in the release there is an express reservation of rights against the co-obligor or obligors.

In 1995, *Seafirst Center Ltd. Partnership v., Erickson*, 127 Wash.2d.355, 898 P.2d 299 affirmed that that rule of law was still applicable. *Id.* 898 P.2d 299,304-303.

Since there was no reservation of rights in the release, Smith should be deemed released also and this appeal should be dismissed.

2. The Issue on appeal is moot because the Statute of Limitations precludes the Colvins from proceeding with this lawsuit against Smith.

This appeal should not be heard on the merits because undisputed material facts establish that the statute of limitations bars the misrepresentation cause of action against this defendant, making any determination on the application of the independent duty doctrine moot.

The court granted summary judgment based upon the independent duty doctrine and did not rule on the second basis raised by Smith: that the statute of limitations has run on the fraud claim. CP 1-3. This issue was argued in the motion and at the summary judgment hearing and was addressed in the Colvins' brief therein. Colvin Brief pgs. 10-11. Since this court is required to review an order granting summary judgments de novo, Smith also argues here, as she did at the summary judgment hearing, that the three year statute of limitations applying to frauds, RCW 4.16.080(4) bars the misrepresentations claim.

RCW 4.16.080(4) provides:

The following actions shall be commenced within three years: An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

The Colvins claim in their brief, that discovery of the fraud was within the statutory period of 3 years. Colvin Brief pgs 10-11. Smith contends and provided evidence to the lower court that they discovered or should have discovered the facts allegedly consisting of the fraud, i.e. the boundaries,

before the purchase and certainly no later than November 2007, when the Colvin's survey was completed and the Southwest boundary was marked, approximately 4 and 1/2 years before filing the suit.⁶

According to the ruling in *Hudson v. Condon*, 101 Wash.App. 866, 6 P.3d 615 (2000):

We infer actual knowledge of fraud if the aggrieved party, through due diligence, could have discovered it. (citations omitted) Accordingly, the statute of limitation for damages based on fraud commences when the aggrieved party discovers, or should have discovered, the fact of fraud and sustains some damage as a consequence. *First Maryland Lease Corp v. Rothstein*, 72 Wash.App. 278, 283, 864 P.2d 17 (1993). The plaintiff need not be aware of the full extent of the damages, knowledge of some actual, appreciable damage is sufficient to begin the running of the statute of limitations. (citations omitted) *Hudson v. Condon*, 101 Wash.App. at 875.

Actual knowledge of the fraud will be inferred if the aggrieved party, by the exercise of due diligence, could have discovered it. The Colvins bear the burden to establish they did not discover the facts constituting fraud and could not reasonably have discovered them within the statute of limitations period. *Sherbeck v. Estate of Lyman*, 15 Wash. App. 866, 870, 552 P.2d 1076 (1976).

⁶ Smith purports the Colvin's waited until 2011 to file for quiet title because they were aware that there must be possession of at least 10 years to support an adverse possession claim. The Colvin's relied on Smith's 6 years of possession from 2000 to 2006 and the Colvin's 5 years of possession, from 2006- 2001 to meet this requirement CP 35, Sec. 5.3.

The undisputed evidence in this case supports a finding that not only have the Colvins failed to meet that burden, but that with the exercise of due diligence they could, should, or did in fact discover the facts that would support a claim of fraud more than three years before filing this lawsuit.

The relevant facts are as follows: The Colvins attained Title Insurance and a Title report on this property when they purchased it. CP 33, Sec. 3.3. Colvin cannot dispute that the County Records have always shown the true boundaries. Mr. Colvin communicated with Mr. Young, soon after the purchase of the property in 2006, asking for a quit claim deed to the disputed area. CP 71-73, Appendix A, pge. 2. Paul Colvin admits that not only did he have two surveys conducted; the surveyors put markers on the actual southwest and southeast corners of the property, where the disputed boundary is. CP 81, Sec. 6,7, Appendix F to Colvin Brief, page 2, Sec 6,7. The 2007 marker and survey disclosed the true boundaries as of November 2007.

In order to avoid any evidence that he knew or should have known the boundaries through the survey and markers, and to support his claim that he “just recently” learned of the boundary problem, he misadvised the court in a sworn declaration that the survey was conducted in 2008. CP 81, Appendix F to Colvin Brief pge. 2. As pointed out previously in this

brief, the survey itself establishes it was done in 2007, more than 4 years prior to this lawsuit's. Appendix C attached hereto. He further admits to having put no improvements on the property during the time period of 6 years. CP 39, Sec 17. Appendix F to Colvin Brief pge. 3.⁷ The undisputable facts, particularly, the survey, are definitive evidence that Colvin had knowledge or could have discovered facts to support a fraud claim and damages no later than 2007. Surveys are the tool by which we legally establish boundaries and the recording of a survey provides legal notice to all of the boundaries. This definitive undisputed fact establishes the Colvins were on notice of the fact consisting of the alleged fraud no later than November, 2007.

Moreover, even assuming, as the Colvin's claims, that they had no personal knowledge of the boundary line at the time of the sale, Smith's statement in the Form 17 that "she didn't know" of encroachments, boundary agreements, or boundary disputes, should have alerted him to use due diligence in ascertaining where the boundaries to the property were prior to the Colvin's purchase. "Sufficient notice to excite attention and put a person on guard or to call for an inquiry is notice of everything to which

⁷ Carolyn Young points out that it was only within the year of 2010 that Mr. Colvin began to maintain the property by putting beauty bark on the grassy knoll area. CP 84. Sec. 6. That is when the 10 years necessary for adverse possession or mutual acquiescence ran.

such inquiry might have led.” *Sherbeck v. Estate of Lyman*, 15 Wash.App. 866, 879, 552 P.2.d 1076 (1976).

In *Douglas v. Visser*, 295 P.3d 800 (Wash. App. 2013) the court considered this issue of notice in determining the merits of a misrepresentation claim and whether the individual had “a right to rely” to meet that element of a fraud claim. In *Visser*, the court noted that the Form 17 disclosures were inadequate, but the buyers had an obligation to inquire further and did not fulfill that obligation. The buyers’ failure to inquire, along with their inspection, made their claim of fraudulent concealment fail factually. The court ruled that despite numerous misrepresentations, plaintiff could not prove a fraud claim because they had some notice and a duty to inspect further; therefore they did not have the right to rely, an essential element of a claim of misrepresentation. *Douglas v. Visser*, 295 P.3d 800, 805. (Wa. App. 2013)

The Colvins had sufficient knowledge and notice prior to the sale in 2006 for this court to determine that they discovered or should have discovered facts supporting a claim of fraud at that time. Unequivocally, by November of 2007, they had ascertained the boundary lines themselves, through their survey. The three year statute of limitations under RCW 4.16.080(4) applies and precludes the Plaintiff from proceeding on the misrepresentation claim.

3. There were no Genuine Issues of Disputed Material Facts That Precluded the Court from Granting Summary Judgment.

The Colvin' brief does not identify any conflicting facts that were material and would have been relevant to the court's ruling. Therefore relief on this basis should be denied. The only facts that are in dispute according to the Colvins' brief are what other and which representations were made by Ms. Smith that might further support their cause of action for fraud.⁸ Those facts are irrelevant to determination of the application of the statute of limitations and whether the independent duty doctrine applies to bar the tort claim.

The only material facts the court needed to rely upon to determine the summary judgment motion were that there was a purchase and sales agreement (a contract), the nature of the case was a boundary dispute, and the Colvin's' one remaining cause of action against Smith was grounded in tort law. Those facts are undisputed. The court ruled that, as a matter of law, the "economic loss rule" now stated as the "independent duty doctrine" applied in this case because the Colvin's did not provide the court

⁸ As stated hereinabove; the complaint alleged a different representation than the brief now does, which was disputed by Smith. The Colvin's claim in their complaint that Smith failed to disclose encumbrances and that she told them the boundary extended to the Young's driveway. CP 33, Sec. 3.2 Ms Smith disputed that she told them anything. In their brief they claim two Form 17 statements are the misrepresentations, apparently conceding that Ms. Smith made no verbal statements. Colvin Brief pge. 1.

with sufficient evidence of an independent duty, and precluded recovery on the tort claim. That decision was a sound application of court rules given the nature of this case, a boundary dispute. The only facts necessary to determine the statute of limitations application was when the Colvins discovered or should have discovered the facts supporting a fraud claim. There is no genuine material issue of fact in the determination of that issue given the Form 17 disclosure and the Colvin survey, uncontested facts.

4. The Trial Court did not Error in Applying the Independent Duty Doctrine in this Case.

The trial court's decision did not consist of error which requires reversal. In making its decision granting summary judgment and a dismissal, the trial court considered the recent Washington Supreme Court case of *Jackowski v. Borchelt*, 151 Wash.2d 696, 278 P.3d 1100 (2012) and made an appropriate application given the undisputed facts and the nature of the "injury" in this case.

This case consists of a boundary dispute. It is not a case of physical injury to person or property resulting from tortious conduct as in *Jackowski* and the cases relied upon in *Jackowski*. The *Jackowski* case involved a claim for rescission because of a landslide which damaged the home on the property. The case relied upon by the Colvins in their motion, *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 241 P.3d

1256 (2010), also involved a tortious injury of waste and damage to the property. Given the nature of this case, a boundary dispute, *Jackowski* should not apply to allow a separate tort action. The trial court appropriately determined that there is no independent duty in tort law, given the nature of this case.

As stated in *Alejandre v. Bull*, 159 Wa.2d 674, 684, 153 P.3d. 864 (2007):

The key inquiry is the nature of the loss and the manner in which it occurs, i.e., are the losses economic losses with economic losses distinguished from personal injury or injury to other property. If the claimed loss is an economic loss, and no exception applies to the economic loss rule, then the parties will be limited to contractual duties.

The Colvins further rely on out of state cases for their argument. Colvin Brief pgs. 8-9. Those cases are not helpful to the determination of this issue, particularly since this state's Supreme Court has established, though perplexing, case law regarding the independent duty doctrine.

The Colvins argue that *Jackowski* makes it clear that Form 17 disclosures are an independent duty from which a separate claim can arise. Colvin Brief, pgs. 10. Colvin's brief cites two statements in the form 17 he claims were misrepresentations relied upon:; (1)whether Smith had

legal authority to sell the property and (2) whether there were any encroachments, boundary agreements, or boundary disputes, to which Smith answered “don’t know”. In fact there weren’t any encroachments on the disputed portion of the property, no agreements on boundaries, and no disputes, Ms. Smith had permissive use of the property as a neighborly accommodation. The property was described in the purchase agreement as Lot 57. Ms. Smith had legal authority to sell Lot 57.

The *Jackowski* ruling should not be extended to all cases in which the misrepresentation is claimed to come from statements in the Form 17. *Jackowski* was a case where there was physical injury to the property. The independent tort law duties in the residential property context should be limited to cases where there is physical injury to property or person with accompanying damages, not the economic loss claimed in this case. Given the nature of this case, the trial court correctly found, there is no independent duty in tort law. The doctrine should not be extended to create a duty when injury to property or person is not present or proven. It would undermine the contractual allocation of risk that the rule is designed to protect. In *Alejandre*, the court stated the justification and policy reasons for the economic loss rule:

The economic loss rule maintains the “fundamental boundaries of tort and contract law.” *Berschauer/Philips*, 124 Wash.2d at 826, 881 P.2d 986. Where economic losses occur, recovery is confined

to contract “to ensure that the allocation of risk and determination of potential future liability is based on what the parties bargained for in the contract....If tort and contractual remedies were allowed to overlap, certainty and predictability in allocating risk would decrease and impede future business activity.” Id. *Alejandre v. Bull*, 159 Wash.2d 674, 682-683, 153 P.3d 864 (2007).

This is true whether or not the risk is allocated in the contract.

In fact, if a court permits a tort claim on the ground that the parties have not expressly allocated a particular risk, it interferes with the party’s freedom to contract. *Rich Prods. Corp. V. Kemutec, Inc.*, 66 F.Supp.2d 937, 968-69 (E.D.Wis. 1999), aff’d, 241 F.3d 915 (7th Cir. 2001); *see also Maresk Line*, 271 F.Supp.2d at 822 (“to permit a party to a broken contract to proceed in tort where only economic losses are alleged would eviscerate the most cherished virtue of contract law, the power of the parties to allocate the risks of their own transactions’ “ (quoting *Princess Cruises, Inc. v. General Elec. Co.*, 950 F.Supp. 151, 155 (E.D. Va. 1996), rev’d on other grounds, 143 F.3d 828 (4th Cir. 1998)); *Snyder*, 992 P.2d at 1087 (“(t)he effect of confusing the concept of contractual duties, which are voluntarily bargained for, with the concept of tort duties, which are largely imposed by law, would be to nullify a substantial part of what the parties expressly bargained for-limited liability” (quoting *Isler v. Texas Oil & Gas Corp.*, 749 F.2d 22, 23 (10th Cir. 1984))). *Alejandre v. Bull*, 159 Wash.2d 674, 688, 153 P.3d 864 (2007).

This court should rule that in the context of this residential sale, the independent duty rule applies. This court should affirm the trial court’s decision and dismiss this appeal.

5. Regardless of the Application of the Independent Duty Doctrine, the Colvin Claim of Negligent and/or Intentional Misrepresentation Fails.

Smith purports that regardless of the application of the independent duty doctrine, The Colvin's' fraud claims fail, making the application of the independent duty doctrine inconsequential.

The Fifth Cause of Action in the Colvin Complaint states a claim for intentional and negligent misrepresentation.⁹

VI. Fifth Cause of Action - Intentional and/or Negligent Misrepresentation
(Against Defendant's Smith)

6.1 Plaintiff incorporates paragraph 1.1 through 5.5 as full set forth therein.

6.2 Defendant Smith intentionally and/or negligently failed to disclose the property boundary and/or acquiescence to the disputed property.

6.3 As a result of Defendant Smith's failure to disclose the property boundary, the Plaintiffs have suffered and continue to suffer damages in an amount at trial. CP 35.

In *Elcon Construction v. Eastern Washington University*, 174 Wash. 2d 157, 273 P.3d 965 (2012) the Washington Supreme Court was considering the application of the economic loss doctrine on appeal from an order granting summary judgment base upon the economic loss rule.

⁹ In their brief The Colvin's' describe Ms. Smith's conduct as concealment. Colvin Brief pge. 10 The Colvin complaint does not state a cause of action for fraudulent concealment. CP 30-36.

The Supreme Court found that the lower courts' application of and reliance on the economic loss rule/ independent duty doctrine was in error, but that the error was inconsequential because the plaintiffs were unable to prove the fraud claims by clear, convincing, and cogent evidence.

To prevail on a claim of intentional misrepresentation, the Colvins must prove nine elements, by clear and convincing evidence. As state in *Carlisle v. Harbor Homes*, 147 Wash.App. 193, 204, 194 P.3d 280 (2007)

The nine elements of intentional misrepresentation (fraud) are:

(1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representations, (8) the plaintiff's right to rely upon the representation; and (9) damages suffered by the plaintiff. Citations omitted. *Carlisle v. Harbor Homes*, 194 P.2d 280, 285.

Negligent Misrepresentation requires following six elements to be proven by clear cogent and convincing evidence:

that (1) the defendant supplied information for the guidance of others in their business transactions, that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information,(4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damage. *Austin v. Ettl*, 171 Wash. App. 82, 286 P3d. 85, 89 (2013).

In *Austin* the court was considering whether the court erred in determining that the economic loss rule barred the negligent misrepresentation claim. The court found regardless of the application of

the economic loss rule, the negligent misrepresentation claimed failed because the Plaintiffs failed to use due diligence to pursue the facts that they were on notice of and the complaint did not adequately plead the facts to sustain a negligence claim. *Austin*, Id. at 91.

Douglas v. Visser, 295 P.3d 800 (Wash. App. 2013) was also a case in which the court reached the conclusion that the failure to adequately prove the elements of a fraud defeated the Plaintiff's case. The court decided that given that determination it would not reach the defendant's argument that the economic loss rule precluded recovery. *Douglas v. Visser*, 295 P.2d 800, 804 fn. 2. (Wash App. 2013)

For the reasons stated throughout this brief, those cases should apply here to determine that the fraud claims made by the Colvins do not adequately plead the facts, and fail for lack of proof, Particularly the Colvins have failed to claim and prove, these elements: First, that there as a material misrepresentation that was false. Count Five of the complaint alleges only a failure to disclose, not material misrepresentations. Second, the falsity of the representation. The representations claimed made by Smith in the Colvin brief are not false. Third, they relied on the misrepresentation. There is no claim of reliance in the complaint, and there is evidence that they knew or should have discovered the real boundaries at time of sale; Fourth, that they had the right to rely upon the

misrepresentation. The statements in the Form 17 should have alerted them to ascertain the boundaries, which they could have done by looking at the county records prior to the sale. Fifth, that the reliance was reasonable. They did not use due diligence in ascertaining the boundaries prior to the sale, and they had no right to rely after ascertaining the boundaries 3 years before filing the lawsuit.

V. MOTION FOR COSTS AND ATTORNEY FEES

The Purchases and Sales agreement between the parties allows for attorneys fees and costs to the prevailing party. Smith as had to hire a consulting attorney, Douglas Scott to advise her legal issues. Pursuant to Appellate Rule 14.2 Smith moves this court for an order granting costs on appeal. Pursuant to Appellate Rule 18.1 she moves for attorney's fee incurred in connection with this appeal. This court should also rule that she is entitled to attorney fees and costs incurred in the lower court pursuant to the purchase and sales agreement.

VI. CONCLUSION

This court should rule that any cause of action against Smith, including this appeal is collaterally stopped, and that the release clause in the settlement agreement by which the Colvins' received the "disputed

property “has the legal effect of releasing Ms. Smith. Further, any court ruling on the issue the appeal is based upon is moot because the statute of limitations bars recovery. The court should further find that the lower court’s ruling regarding the application of the independent duty doctrine was not in error, and the case against Smith was rightly dismissed. If not, the error is inconsequential. Smith’s costs and attorney fees on appeal should be granted upon submission of a bill of costs. The court should further rule that Ms. Smith’s attorney’s fees and costs in the lower court should be granted pursuant to the purchase agreement in an amount to be determined by submission to this court and/or the lower court.

Respectfully submitted this 23rd day of July, 2013



Kristine Smith Pro Se
678 Olympic View Dr.
Coupeville, Wa 98239
360-678-3303

APPENDIX A

Exhibit A

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SNOHOMISH COUNTY SUPERIOR COURT
STATE OF WASHINGTON

PAUL COLVIN & PATRICIA GUERTIN,

Plantiffs,

vs.

JAMES YOUNG & CAROLYN YOUNG,
KRISTINE K. AND JOHN DOE SMITH,

Defendants.

NO. 11-2-06646-9

REPLY DECLARATION OF JAMES
YOUNG

I, JAMES YOUNG, hereby certify and declare under penalty of perjury under the laws of Washington State, as follows:

1. I am one of the Defendants in the action. I am over the age of eighteen years, am competent to be a witness herein and make this declaration from my own personal knowledge.

2. I have reviewed the Declaration of Paul Colvin in response to Kristine Smith's Motion for Summary Judgment and this Declaration is submitted to clarify a few of the more egregious statements.

3. In reply to paragraph 9 of Colvin's Declaration, I deny ever having a conversation with Mr. Colvin wherein I stated that I did not know where the property boundaries were located. When my wife and I purchased the property in 2002 we were

DECLARATION OF JAMES YOUNG - 1

RIACH GESE PLLC
7331 - 196th St. SW / PO Box 1067
Lynnwood, WA 98046-1067
(425) 776-3191 / (425) 775-0406 (Fax)

1 provided a parcel map that identified the property boundaries and there were property
2 markers in place when we moved in. We have always known where the boundary lines
3 were located.

4 4. In reply to paragraph 10 of Colvin's Declaration, we did grant permissive
5 use of the property to Kristine Smith shortly after we purchased our property in 2002. Due
6 to Ms. Smiths' illness, she requested that she be allowed to have her family maintain the
7 grassy knoll area because she was sick and all of the noise was disturbing her. I provided
8 her with a weed whacker to cut the grass in the area.

9 5. In reply to paragraph 11 of Colvin's Declaration, shortly after Mr. Colvin
10 bought the property from Kristine Smith in 2006 he began asking us to quitclaim the area to
11 him. For a couple of years after he purchased the property, he asked us on multiple
12 occasions to quit claim the property to him. At first I assumed he was referring to the
13 fenced area, but later I realized he wanted some of the grassy knoll area, as well as the
14 fenced area. Since 2006 Mr. Colvin knew that the property in question (fenced area and
15 grassy knoll) was not his property.

16 Dated this 3rd day of July, 2012.

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19
20 
21 JAMES YOUNG

APPENDIX B

SNOHOMISH COUNTY SUPERIOR COURT
STATE OF WASHINGTON

PAUL COLVIN & PATRICIA GUERTIN,)	NO. 11-2-06646-9
)	
Plaintiffs,)	
)	
vs.)	DEFENDANT KRISTINE SMITH'S
)	AMENDED ANSWER AND
)	AFFIRMATIVE DEFENSES
JAMES YOUNG & CAROLYN YOUNG,)	
KRISTINE K. AND JOHN DOE SMITH.)	
)	
Defendants.)	

COMES NOW, the defendant, Kristine K. Smith and amends her answers to the allegations of Plaintiff's complaint as follows:

I. AMENDED ANSWER

1.1 Answering Paragraph 1 of plaintiffs' complaint, defendant Kristine Smith is without sufficient information to form a belief as to the truth of the averments contained therein, and therefore denies the same.

1.2 Answering Paragraph 2 of plaintiffs' complaint, defendant Kristine Smith admits.

1.3 Answering Paragraph 3 of plaintiffs' complaint, defendant Kristine Smith admits she was the prior owner of the property at 15014 Old Manor Way, but denies that John Doe Smith was a prior owner.

1.4 Answering Paragraph 2.1 of plaintiffs' complaint, defendant Kristine Smith admits.

1.5 Answering Paragraph 2.2 of plaintiffs' complaint, defendant Kristine Smith admits.

1.6 Answering Paragraph 3.1 of plaintiffs' complaint, defendant Kristine Smith admits.

1.7 Answering Paragraph 3.2 of plaintiffs' complaint, defendant Kristine Smith admits she never personally identified to the plaintiffs during the purchase and sale process, any licenses, easements, or encumbrances on the disputed property and denies making and representations that the property boundaries extended from the home to the private drive adjacent to the road, and further answers that defendant Smith never spoke to the plaintiffs about any specifics regarding the property but believed the plaintiffs were on notice of the nature of the use of the disputed property.

1.8 Answering paragraph 3.3 of plaintiffs' complaint, defendant Kristine Smith is without sufficient information to form a belief as to the averments therein and therefore denies the same.

1.9 Answering paragraph 3.4 of the Plaintiffs' Complaint defendant Kristine Smith is without sufficient information to form a belief as to the truth of the averments therein, and therefore denies the same.

2.0 Answering paragraph 3.5 of Plaintiff's complaint defendant Smith denies continuously maintaining the disputed property all the way to the private road from when she purchased it until the property was sold to the Plaintiffs and by way of further answer avers some of the property was maintained by defendant Kristine. Smith during her ownership, with defendants Young's and their predecessors' in interest's verbal permission.

- 2.1 Answering paragraph 3.6, defendant Kristine Smith denies the same.
- 2.2 Answering paragraph 3.7 defendant Smith is without sufficient information to form a belief as to the truth or falsity of the averments therein and therefore denies the same.
- 2.3 Answering paragraph 3.8 of the plaintiffs' complaint, defendant Kristine Smith admits she was given verbal permission to maintain a portion of the defendants Youngs' property . Except as expressly admitted, the balance of the averments are denied.
- 2.4 Answering paragraph 3.9 of the plaintiffs' complaint, defendant Kristine Smith denies.
- 2.5 Answering paragraph 3.10 of plaintiffs' complaint defendant Kristine Smith denies.
- 2.6 Answering paragraph 4.1 of plaintiffs' complaint, defendant Kristine Smith incorporates her answers set forth above.
- 2.7 Answering paragraph 4.2 of the plaintiffs' complaint defendant Kristine Smith denies.
- 2.8 Answering paragraph 4.3 of the plaintiffs' complaint, defendant Kristine smith denies.
- 2.9 Answering paragraph 4.4 of plaintiffs' complaint defendant Kristine Smith denies.
- 3.0 Answering paragraph 5.1 of plaintiffs' complaint, defendant Kristine Smith incorporates her answers set forth above.
- 3.1 Answering paragraph 5.2 of plaintiffs' complaint, defendant Kristine Smith denies.
- 3.2 Answering paragraph 5.3 of plaintiffs' complaint, defendant Kristine Smith denies.
- 3.3 Answering paragraph 5.4 of plaintiffs' complaint, defendant Kristine Smith denies.
- 3.4 Answering paragraph 5.5 of plaintiff's' complaint, defendant Kristine Smith denies.
- 3.5 Answering paragraph 6.1 of plaintiffs' complaint, defendant Kristine Smith incorporates her answers set forth above.

3.7 Answering paragraph 6.2 of plaintiffs' complaint, defendant Kristine Smith denies.

3.8 Answering paragraph 6.3 of plaintiffs' complaint, defendant Kristine Smith is without sufficient information to form a belief as to the truth of the averments therein, and therefore denies the same.

3.9 Answering paragraph 7.1 of plaintiffs' complaint, defendant Kristine Smith incorporates her answers set forth above.

4.0 Answering paragraph 7.2 of plaintiffs' complaint, defendant Kristine Smith denies.

4.1 Answering paragraph 7.3 of plaintiffs' complaint, defendant Kristine Smith denies.

4.2 Answering paragraph 8.1 of plaintiffs' complaint, defendant Kristine Smith incorporates her answers set forth above.

4.3 Answering paragraph 8.2 of plaintiffs' complaint, defendant Kristine Smith is without sufficient information to form a belief as to truth of the averments contained therein, and therefore denies the same.

4.4 Answering paragraph 8.3 of plaintiffs' complaint, defendant Smith is without sufficient information to form a belief as to the truth of the averments therein and therefore denies the same.

4.5 Answering paragraph 8.4 of plaintiffs' complaint, the defendant Kristine Smith denies.

II. AMENDED AFFIRMATIVE DEFENSES

Having fully answered plaintiffs' complaint, defendant Kristine Smith sets forth the Amended Affirmative Defenses as follows:

- 1.1 Plaintiffs have failed to state a claim upon which relief can be granted against this Defendant;
- 1.2 Plaintiffs have failed to include a necessary party;
- 1.3 Plaintiffs' injuries and damages, if any, were caused by plaintiffs to the extent they were not caused by other parties;
- 1.4 Plaintiffs have failed to mitigate their damages;
- 1.5 Plaintiffs' claims against defendant Kristine Smith are barred by the Statutes of Limitations;
- 1.6 Plaintiff's claims may be barred by estoppel, laches, and/or waiver;
- 1.7 Plaintiff's claims may be barred by unclean hands;
- 1.8 Plaintiffs' damages, if any were caused by Plaintiff's representative, or others, over which Defendant Smith had no control, and no damages were caused by defendant Smith, and/or,
- 1.9 Plaintiff's claims would result in unjust enrichment.

III. RESERVATION OF RIGHTS

- 2.1 Defendant Smith reserves the right to add further Affirmative Defenses and Third party Defendants and Counter Claims or Cross Claims as supported by discovery.

IV. PRAYER FOR RELIEF

Wherefore, having answered and plead affirmative defenses, Defendant Kristine Smith prays that the Court grant the following relief:

- 3.1 That the Plaintiff' Complaint be dismissed with prejudice and to Defendant Smith and the Plaintiffs take nothing thereby;

3.2 That the Defendant Kristine Smith be granted such costs and attorneys fees as authorized under Washington law;

3.2 That the defendant Krisitne Smith be granted any other and further relief as the Court deems just and equitable.

Dated this 6th day of January, 2012

By: 
Kristine Smith
Defendant
678 Olympic View Dr.
Coupeville, WA. 98239
360-678-3303
krisedfred@gmail.com

The Undersigned hereby declares under penalty of perjury, pursuant to the laws of Washington State, that she is authorized to execute the instrument, and that she has read the foregoing Answer and Affirmative Defenses, knows the contents thereof, and believes the same to be true and correct.

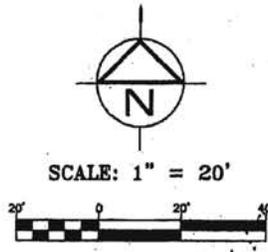
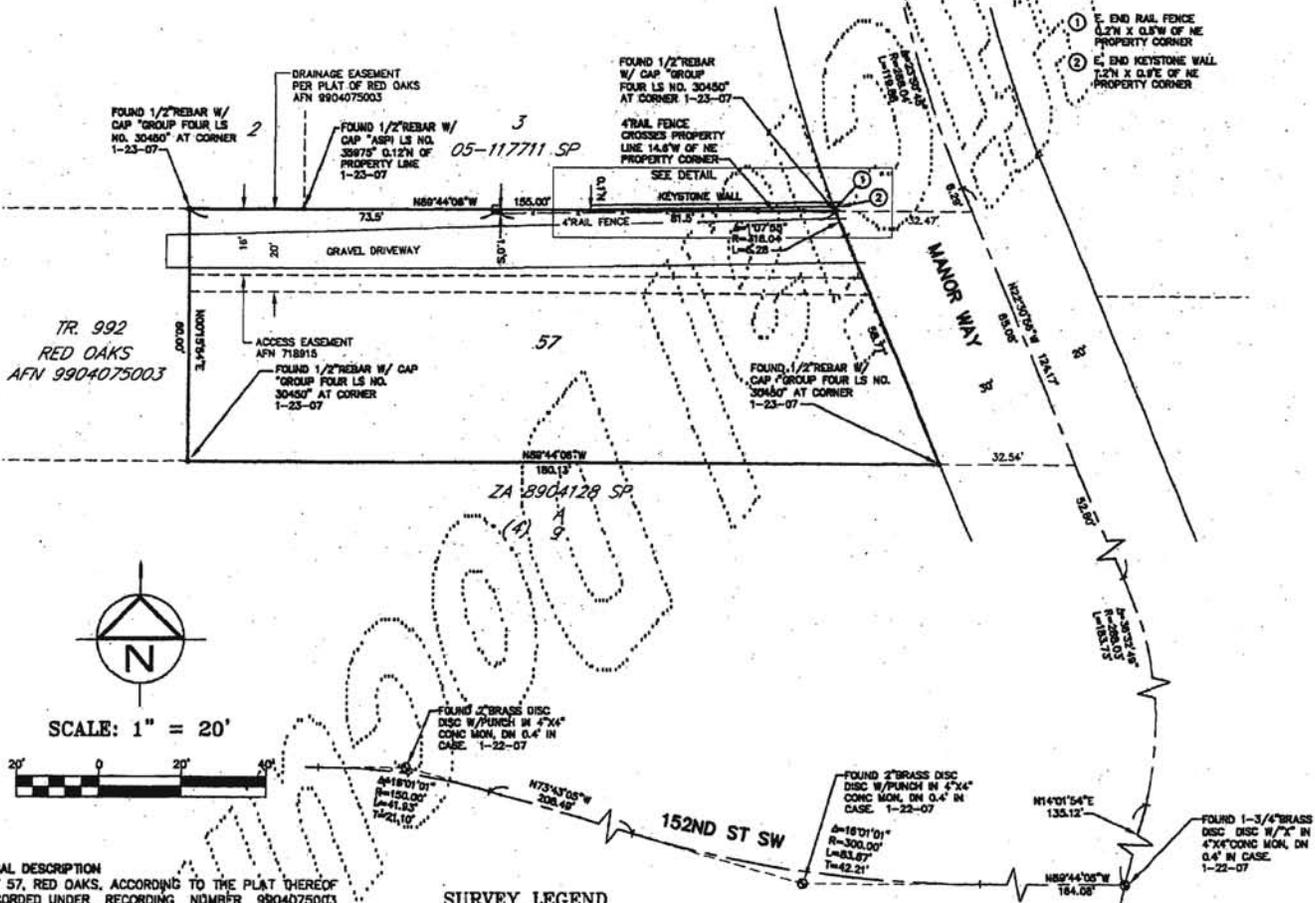
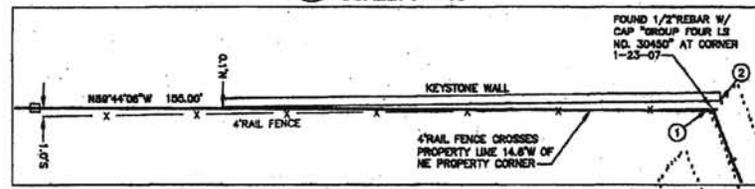
Dated this 6th day of ~~February~~ ^{January}, 2012



APPENDIX C

Exhibit B

DETAIL
SCALE: 1" = 10'



LEGAL DESCRIPTION
LOT 57, RED OAKS, ACCORDING TO THE PLAT THEREOF
RECORDED UNDER RECORDING NUMBER 9904075003
RECORDS OF SNOHOMISH COUNTY, WASHINGTON

BASIS OF BEARINGS
RED OAKS, ACCORDING TO THE PLAT THEREOF
RECORDED UNDER RECORDING NUMBER 9904075003
RECORDS OF SNOHOMISH COUNTY, WASHINGTON

INSTRUMENT DATA: LOCK TR 703 AUTO
(1" DIRECT READING, RECODUTE WITH E.D.M.)

PRECISION OF CONTROL TRAVERSE IS AT HIGHER
LEVEL THAN MINIMUM STANDARDS REQUIRED
BY WAC 332-130-090.

SURVEY LEGEND

- FOUND CAPPED REBAR
- SET LINE STAKE
- ⊙ FOUND CONC. MON. IN CASE
- AFN AUDITOR'S FILE NUMBER

THIS SURVEY WAS PERFORMED WITHOUT
THE BENEFIT OF A TITLE REPORT.
ANY EASEMENTS, RESTRICTIONS OR
BENEFITS ARE NOT SHOWN HEREON.

THIS MAP IS A REPRESENTATION OF THE
CONDITIONS AT THE TIME THE
FIELD SURVEY WAS PERFORMED.

SHT 1 OF 1
G4 JOB #07-3001

INDEXING DATA:
NW 1/4, NW 1/4 SEC. 2, TWP. 27, RGE. 04, W.M.

RECORDING CERTIFICATE

FILED FOR RECORD BY GROUP FOUR, INC.
THIS 14 DAY OF November 20 07 A.D. AT 18
MINUTES PAST 3 O'CLOCK P.M. AND RECORDED
UNDER AUDITOR'S FILE NO. 20071142006
RECORDS OF SNOHOMISH COUNTY, WASHINGTON

SURVEYORS CERTIFICATE

THIS MAP CORRECTLY REPRESENTS A SURVEY MADE
BY ME OR UNDER MY DIRECTION IN CONFORMANCE WITH
THE REQUIREMENTS OF THE SURVEY RECORDING ACT, AT
THE REQUEST OF PAUL COLVIN
THIS 13TH DAY OF NOVEMBER 20 07
REGISTERED LAND SURVEYOR L.S. NO. 30450



GROUP FOUR
Land Surveying | Civil Engineering
Land Use Planning | Biological Services

BRAND BY: SMO DATE: 11-14-07 CHECKED BY: RVM DATE: 11-14-07 APPROVED BY: DCR DATE: 11-14-07

RECORD OF SURVEY FOR PAUL COLVIN
SNOHOMISH COUNTY WASHINGTON

20071142006

01-12-08

APPENDIX D

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

THIS SETTLEMENT AGREEMENT AND MUTUAL RELEASE (the "Agreement") is made and entered into this 6 day of August, 2012, by and between Paul Colvin and Patricia Guertin, single persons as joint tenants and fee simple owners of the property described below (hereinafter collectively the "Colvins"); and James Young and Carolyn Young, husband and wife and the marital community composed thereof (hereinafter the "Youngs"). The Colvins and the Youngs are collectively referred to herein as the "Parties".

I. RECITALS

1.1 The Colvins are the owners of certain real property located in Snohomish County, Washington commonly known as 15014 Old Manor Way, Lynnwood, Washington and legally described as follows:

Lot 57 of Red Oaks, as per plat recorded April 7, 1999 under recording no 9904075003, records of Snohomish County Auditor, Situate in the County of Snohomish, State of Washington.

hereinafter (the "Colvin Property").

1.2 The Youngs are the owners of certain real property located in Snohomish County, Washington commonly known as 15030 Old Manor Way, Lynnwood, Washington and legally described as follows:

Lot 4 of Short Plat ZA 8904128SP Recorded under Recording No 9111040372, being a portion of Lot 9, Block 7, Alderwood Manor No 4, According to the Plat thereof recorded in volume 9 of plats, page 73, records of Snohomish County Auditor, Situate in the County of Snohomish, State of Washington.

hereinafter (the "Young Property").

1.3 The Colvins purchased the Colvin Property in May 2006.

1.4 The Youngs purchased the Young Property in October 2002.

1.5 The Colvin Property is immediately north of the Young Property and the two parcels share a common boundary. The common boundary between the parcels is approximately five (5) feet from the south edge of the Colvins' residence (the "Common Property Line"). Attached as **Exhibit A** is a copy of a survey of the Common Property Line performed by Western Engineers Inc., in June 2012 and recorded under Snohomish County Auditor's number 201206285001.

1.6 As identified in Exhibit A, there is a six foot wooden fence (the "Fence") approximately 24 feet in width that encroaches on the Young Property by 7.2 feet on the west side and 8.3 feet on the east side of the Fence (hereinafter the "Fenced Area").

1.7 Disputes arose between the Colvins and Youngs as to the location of the Common Property Line and use and maintenance of the property in the area adjacent to the Common Property Line (the "Grassy Knoll").

1.8 The disputes resulted in litigation presently pending in Snohomish County Superior Court in *Paul Colvin and Patricia Guertin v James Young and Carolyn Young; Kristine Smith and Johns Doe Smith*, Snohomish County Superior Court Cause No. 11-2-06646-9 (the "Lawsuit").

1.9 The Colvins and the Youngs wish to resolve their disputes and terminate the Lawsuit pursuant to the terms and conditions set forth below.

II. AGREEMENT

NOW, THEREFORE, in consideration of the covenants, agreements, and warranties hereafter described, the parties hereby agree as follows:

2.1 Recitals. The above recitals are hereby incorporated herein by reference.

2.2 Fenced Area. The Parties will enter into a Boundary Line Adjustment ("BLA") adjusting the Common Property Line around the Fenced Area: the existing fence will be on the Colvins Property. The Colvins will pay for all costs associated with the BLA and will apply for the BLA within sixty (60) days of execution of this Agreement. The Youngs will execute documents necessary to effectuate the BLA. If the BLA is rejected by the County through no fault of the Parties, the Common Property Line will not be adjusted.

2.3 Common Property Line. The Parties agree to accept and respect the legally described Common Property line as adjusted by the BLA and as depicted in Exhibit A.

2.3.1 The Colvins will not directly or indirectly trespass on, enter, access, use, travel over or maintain the Young Property. The Colvins acknowledge that they do not have any license, permission, or right to enter, access, use, travel over or maintain the Young Property.

2.3.2 The Youngs will not directly or indirectly trespass on, enter, access, use, travel over or maintain the Colvin Property. The Youngs acknowledge that they do not have any license, permission, or right to enter, access, use, travel over or maintain the Colvin Property.

2.4 Maintenance of Property. The Youngs will maintain the Grassy Knoll in a reasonable manner in a style comparable to similarly situated areas in the local neighborhood.

2.5 Fence Along the Common Property Line. The Youngs will refrain from installing a fence along the Common Property Line for a period of twelve (12) months from the date of execution of this Agreement or until the Colvins sell the Colvin Parcel, whichever is sooner.

2.6 Removal of Property. The Colvins will remove the sprinkler system and/or lights installed on the Young Property in a reasonable manner within seven (7) days of the date of execution of this Agreement.

2.7 No Contact. The Parties agree to have no contact, directly, or indirectly, or through third parties, except through their attorneys or by lawful legal process, with each other, and further agree to engage in no conduct that shall be identified as harassment under Washington law. The Parties agree that the specific conduct identified in this Agreement, or incidental to said conduct, shall not constitute harassment by the other party and Colvin specifically acknowledges that the Youngs maintenance, use, or occupancy of the Young Property and/or the Grassy Knoll does not constitute harassment.

2.8 Mutual Release. The Parties agree to release all claims relating to or arising from the Parties' use, ownership or maintenance of the Colvin Property or the Young Property and that were brought or could have been brought in the Lawsuit (the "Release of Claims"). The Release of Claims includes doubtful and disputed claims, present and future, known and unknown, and includes any and all future injury and damage, including effects of consequences thereof, not now known, which may later develop or be discovered, and all related causes of action. The Release of Claims discharges the Parties' insurers, dependents, attorneys, heirs, spouses, marital communities, executors, and successors in interest from any and all claims that were or could have been brought in the Lawsuit.

2.9 Dismissal of Lawsuit. Upon Execution of this Agreement, the Parties stipulate and consent to the entry of a Stipulation and Order of Dismissal of the Lawsuit with prejudice and without costs or fees to either Party in the form attached hereto as **Exhibit B**.

2.10 Amendment and/or Modification. Neither this Agreement nor any terms or provisions hereof may be changed, waived, discharged, amended or modified orally or in any manner other than by an instrument in writing signed by all of the parties hereto.

2.11 Binding Effect. Subject to the provisions hereof regarding assignment, if any, this Agreement shall be binding upon and inure to the benefit of the respective parties and their legal representatives, successors, assigns and heirs.

2.12 Interpretation and Construction of Contract. This Agreement has been reviewed and approved by each of the parties and their attorneys. In the event it should be determined that any

provision of this Agreement is uncertain or ambiguous, the language and all parts of this Agreement shall be in all cases construed as a whole according to its fair meaning and not strictly construed for nor against either party.

2.13 Documents. Each party to this Agreement shall perform any and all acts and execute and deliver any and all documents as may be necessary and proper under the circumstances in order to accomplish the intent and purposes of this agreement and to carry out its provisions.

2.14 Attorney's Fees. If any party hereto shall bring any suit, arbitration or other action against another for relief, declaratory or otherwise, arising out of this Agreement, the prevailing party shall have and recover against the other party, in addition to all costs and disbursements, such sum as the court or arbitrator may determine to be reasonable attorney's fees. Venue for such action shall be in Snohomish County Superior Court.

2.15 Waiver of Breach. The failure of any party hereto to insist upon strict performance of any of the covenants and agreements herein contained, or to exercise any option or right herein conferred, in any one or more instances, shall not be construed to be a waiver or relinquishment of any such action or right, or of any other covenant or agreements, but the same shall be and remain in full force and effect.

2.16 Entire Agreement. This Agreement (and any attached exhibits) contains the entire agreement and understanding of the parties with respect to the entire subject matter hereof, and there are no representations, inducements, promises, or agreements, oral or otherwise, not embodied herein. Any and all prior discussions, negotiations, commitments and understandings relating thereto are merged herein. There are no conditions precedent to the effectiveness of this agreement other than as stated herein, and there are no related collateral agreements existing between the parties that are not referenced herein.

2.17 Recording. This Agreement does not need to be recorded with the County Auditor to be effective. If either party wishes to record the Agreement, they may do so at their own cost.

2.18 Law. This agreement shall be governed by, construed and enforced in accordance with the laws of the State of Washington.

2.19 No Admission of Liability. Each member of each party hereto agrees that this Agreement is a result of compromise, and shall not be construed as an admission of:

2.19.1 Liability to any person;

2.19.2 Breach of any agreement; or

2.19.3 Violation of any law or regulation.

2.20 Voluntary Execution. In executing this Agreement, each member of each party fully, completely, and unconditionally acknowledges and agrees that:

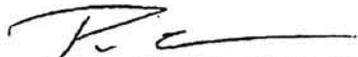
2.20.1 They have consulted with, and had the advice of, counsel of duly licensed and competent attorneys, and that they have executed this Agreement after independent investigation, voluntarily and without fraud, duress, or undue influence; and,

2.20.2 Expressly consents that this Agreement be given full force and effect according to each and every of its express terms and provisions.

2.21 Authority to Execute. Each person executing this Agreement represents and warrants to each member of all other parties that he or she is fully authorized to execute and deliver this Agreement. Each member of each party represents and warrants to all members of all other parties that no consent of any person not a party to this Agreement is necessary in order for this Agreement to be fully and completely binding upon each member of the parties hereto.

2.22 Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed to constitute an original Agreement, and all of which shall constitute one Agreement. The execution of one counterpart by any party shall have the same force and effect as if that party had signed all other counterparts.

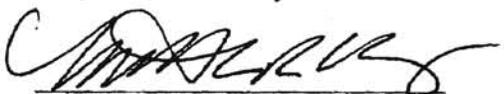
SIGNED AND SEALED this 6th day of August, 2012, at Lynden WA.
(city and state)



PAUL COLVIN

STATE OF WASHINGTON)
)
) ss.
COUNTY OF ~~SNOHOMISH~~)

Before me this 6 day of August, 2012 came PAUL COLVIN, known to me to be the individual who executed this Release and Indemnity Agreement, and acknowledged that he has completely read and fully understands its contents, and that he freely executed the same for the sole consideration therein expressed.



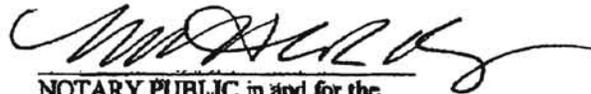
NOTARY PUBLIC in and for the
State of Washington,
residing at Sammamish
My commission expires 10-19-2014

SIGNED AND SEALED this 6 day of August, 2012, at SEATTLE, Washington
(city and state)

Patricia Guertin
PATRICIA GUBRTIN

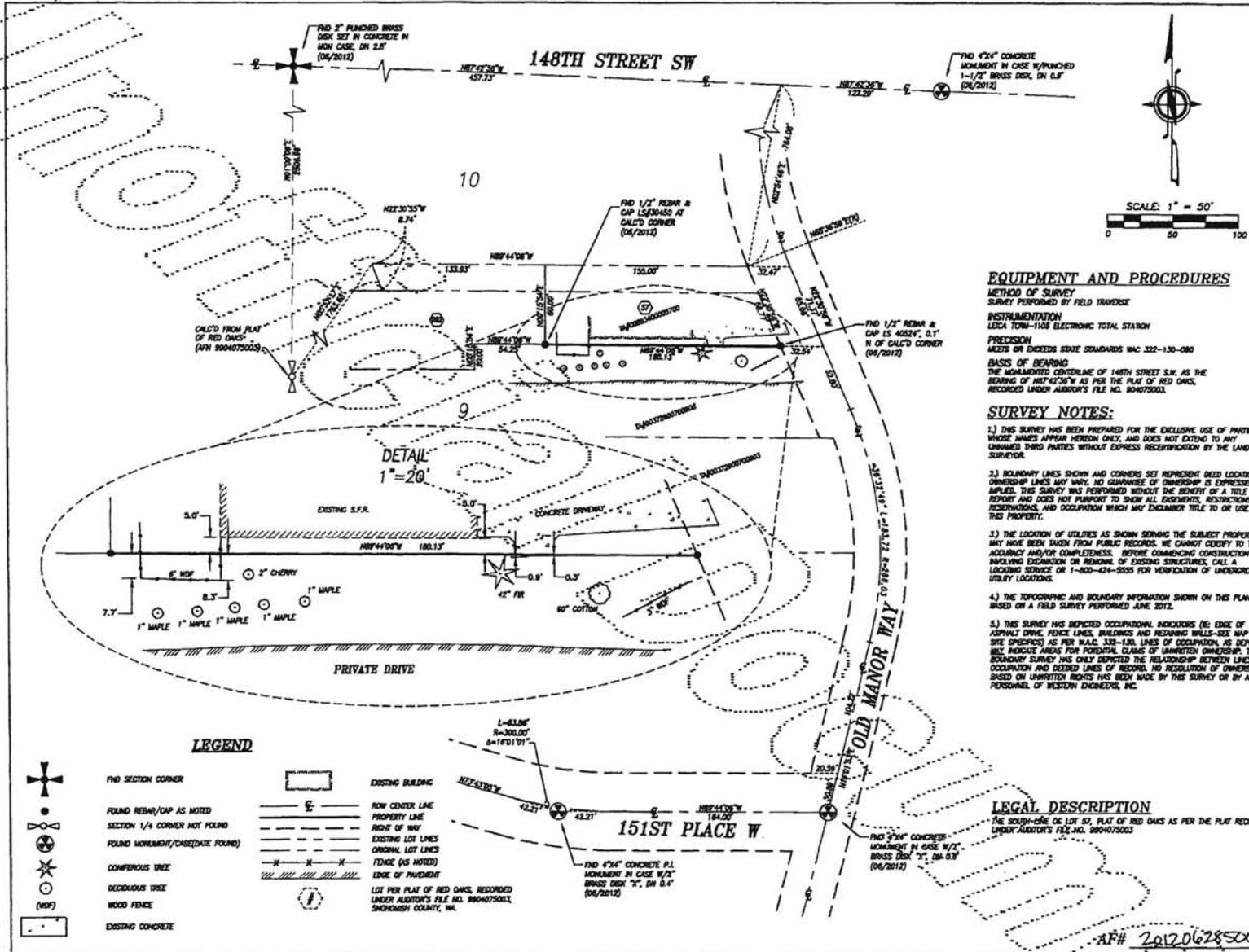
STATE OF WASHINGTON)
Kear) ss.
COUNTY OF ~~SNOHOMISH~~)

Before me this 6 day of August, 2012 came PATRICIA GUERTIN, known to me to be the individual who executed this Release and Indemnity Agreement, and acknowledged that she has completely read and fully understands its contents, and that she freely executed the same for the sole consideration therein expressed.



NOTARY PUBLIC in and for the
State of Washington,
residing at SAMMAMISH
My commission expires 10-19-2014

Unrecorded



EQUIPMENT AND PROCEDURES

METHOD OF SURVEY
SURVEY PERFORMED BY FIELD TRAVELER

INSTRUMENTATION
LEICA TOPCON-1108 ELECTRONIC TOTAL STATION

PRECISION
MEETS OR EXCEEDS STATE STANDARDS WAC 322-130-080

BASIS OF BEARING
THE MONUMENTED CENTERLINE OF 148TH STREET S.W. AS THE BEARING OF N87°42'50"W AS FOR THE PLAT OF RED OAKS, RECORDED UNDER AUDITOR'S FILE NO. 8904075003.

SURVEY NOTES:

- 1.) THIS SURVEY HAS BEEN PREPARED FOR THE EXCLUSIVE USE OF PARTIES WHOSE NAMES APPEAR HEREON ONLY, AND DOES NOT EXTEND TO ANY UNNAMED THIRD PARTIES WITHOUT EXPRESS REPERMITION BY THE LAND SURVEYOR.
- 2.) BOUNDARY LINES SHOWN AND CORNERS SET REPRESENT BEST LOCATIONS. OWNERSHIP LINES MAY VARY. NO GUARANTEE OF OWNERSHIP IS EXPRESSED OR IMPLIED. THIS SURVEY WAS PERFORMED WITHOUT THE BENEFIT OF A TITLE REPORT AND DOES NOT PURPORT TO SHOW ALL EASEMENTS, RESTRICTIONS, ENCUMBRANCES, AND OCCUPATION WHICH MAY ENCLAVE TITLE TO OR USE OF THIS PROPERTY.
- 3.) THE LOCATION OF UTILITIES AS SHOWN SERVING THE SUBJECT PROPERTY MAY HAVE BEEN TAKEN FROM PUBLIC RECORDS. WE CANNOT GUARANTEE THEIR ACCURACY AND/OR COMPLETENESS. BEFORE COMMENCING CONSTRUCTION INCLUDING EXCAVATION OR REMOVAL OF EXISTING STRUCTURES, CALL A LOCATING SERVICE OR 1-800-424-6225 FOR VERIFICATION OF UNDERGROUND UTILITY LOCATIONS.
- 4.) THE TOPOGRAPHIC AND BOUNDARY INFORMATION SHOWN ON THIS PLAN IS BASED ON A FIELD SURVEY PERFORMED JUNE 2012.
- 5.) THIS SURVEY HAS REPLICATED OCCUPATION INDICATORS (E.G. EDGE OF ASPHALT DRIVE, FENCE LINES, BUILDINGS AND RESIDING WALLS-SEE MAP FOR SITE SPECIFICS) AS PER WAC 322-130 LINES OF OCCUPATION, AS DEPICTED MAY INDICATE AREAS FOR REMOVAL, CHANGE OF JURISDICTION OR OWNERSHIP. THIS BOUNDARY SURVEY HAS ONLY DEPICTED THE RELATIONSHIP BETWEEN LINES OF OCCUPATION AND DEPICTED LINES OF RECORD. NO RESOLUTION OF OWNERSHIP BASED ON UNWRITTEN RIGHTS HAS BEEN MADE BY THIS SURVEY OR BY ANY PERSONNEL OF WESTERN ENGINEERS, INC.

LEGAL DESCRIPTION

THE SOUTH-1/4 OF LOT 57, PLAT OF RED OAKS AS PER THE PLAT RECORDED UNDER AUDITOR'S FILE NO. 8904075003

AP# 201206285001

LEGEND

- FOUND SECTION CORNER
- FOUND REBAR/CAP AS NOTED
- SECTION 1/4 CORNER NOT FOUND
- FOUND MONUMENT/CASE (DATE FOUND)
- CONIFEROUS TREE
- DECIDUOUS TREE
- WOOD FENCE
- EXISTING CONCRETE
- EXISTING BUILDING
- ROW CENTER LINE PROPERTY LINE
- RIGHT OF WAY
- EXISTING LOT LINES
- ORIGINAL LOT LINES
- FENCE (AS NOTED)
- EDGE OF PAVEMENT
- LOT PER PLAT OF RED OAKS, RECORDED UNDER AUDITOR'S FILE NO. 8904075003, SNOHOMISH COUNTY, WA.

EXHIBIT A

AUDITOR'S CERTIFICATE

FILED FOR RECORD AT THE REQUEST OF WESTERN ENGINEERS, INC. THIS DAY OF June 28, 2012, AT 43 MINUTES PAST 11 A.M. AND RECORDED IN VOLUME 1 OF SHOW-PLANS, PAGES 1 SUBDIVISION RECORDS OF SNOHOMISH COUNTY, WASHINGTON.

Christina Wenzel COUNTY AUDITOR
Mike Jacobs DEPUTY AUDITOR

SURVEYOR'S CERTIFICATE

THIS MAP CORRECTLY REPRESENTS A SURVEY MADE BY ME OR UNDER MY DIRECTION IN CONFORMANCE WITH THE REQUIREMENTS OF THE SURVEY RECORDING ACT AT THE REQUEST OF MIKE JACOBS IN JUNE, 2012.

KENNETH L. LONG CERTIFICATE NO. 16916



Western Engineers, Inc. (425) 356-2700

LAND USE CONSULTANTS
CIVIL ENGINEERS • LAND SURVEYORS

13000 HWY 99 SOUTH • EVERETT • WA • 98204

WWW.WESTERNEENGINEERS.COM

RECORD OF SURVEY FOR:
RIACH GÉSE LAW FIRM
IN THE NW 1/4, NW 1/4, SEC. 2, T.27N., R.4E., W.M. SNOHOMISH COUNTY, WASHINGTON

DRAWN BY	DATE	REV. BY	DATE	PROJECT MANAGER	SCALE
M.L. GORG	06/2012	M.L. GORG	06/2012	M.L. GORG	1"=50'
DRAWING FILE NAME	CHK. BY	P.B. NO.	ISS. NO.	SHT. NO.	
811112E EXP.DWG	KLL	591	81-112-E	7 of 1	

APPENDIX E

FILED

AUG 07 2012

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH.

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SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

PAUL COLVIN & PATRICIA GUERTIN,

Plaintiffs,

vs.

JAMES YOUNG & CAROLYN YOUNG,
KRISTINE K. AND JOHN DOE SMITH,

Defendants.

NO. 11-2-06646-9

**STIPULATION AND ORDER OF
DISMISSAL BETWEEN
PLAINTIFFS AND DEFENDANTS
YOUNG**

*Clerk's action required – dismiss
Defendants James Young and
Carolyn Young*

STIPULATION

IT IS HEREBY STIPULATED and agreed by and between Plaintiffs, PAUL COLVIN and PATRICIA GUERTIN, by and through their attorney, Matthew King of the Law Office of Matthew R. King, PLLC; and Defendants, JAMES YOUNG and CAROLYN YOUNG, by and through their attorney, Michael Jacobs of Riach Geese PLLC, that all claims and counterclaims filed in this action or that could have been filed in this action between Plaintiffs, PAUL COLVIN and PATRICIA GUERTIN, and Defendants, JAMES YOUNG and CAROLYN YOUNG, have been settled and compromised and may be dismissed with prejudice and without costs to either party.

This Stipulation does not affect the claims and counterclaims between Plaintiffs and Defendant Kristine Smith.

STIPULATION AND ORDER OF DISMISSAL - 1

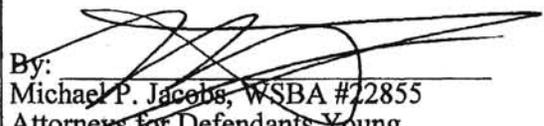
RIACH GESE PLLC
7331 196th St SW / PO Box 1067
Lynnwood, WA 98046-1067
(425) 776-3191 / (425) 775-0406 (Fax)

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Presented By:

RIACH GESE PLLC

By: 
Michael P. Jacobs, WSBA #22855
Attorneys for Defendants Young
7331 196th St SW, Lynnwood WA 98036
425.776.3191

Approved as to Form; Notice of
Presentation Waived By:

LAW OFFICES OF MATT KING

By: SEE ATTACHED
Matthew King WSBA # 31822
Attorney for Plaintiffs
1420 Fifth Ave, Suite 2200
206-274-5303

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DATED this _____ day of _____, 2012.

DATED this 6 day of July, 2012.

LAW OFFICES OF MATT KING

RIACH GESE PLLC

By: SEE ATTACHED
Matthew King WSBA # 31822
Attorney for Plaintiffs
1420 Fifth Ave, Suite 2200
206-274-5303

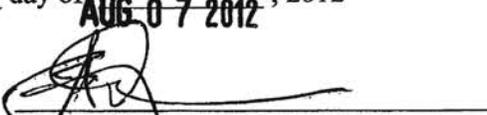
By: 
Michael P. Jacobs WSBA #22855
Attorneys for Defendants Young
7331 196th St SW, Lynnwood WA 98036
425.776.3191

ORDER

THIS MATTER, having come on duly for hearing before the undersigned Judge/Court Commissioner of the above-entitled Court upon the Stipulation of the parties hereto as set forth hereinabove, and the Court being fully advised in the premises, now and therefore,

IT IS HEREBY ORDERED that all claims and counterclaims filed in this action or that could have been filed in this action between Plaintiffs, PAUL COLVIN and PATRICIA GUERTIN, and Defendants, JAMES YOUNG and CAROLYN YOUNG, are dismissed with prejudice and without costs to either party.

DONE IN OPEN COURT this _____ day of AUG 07 2012, 2012


JUDGE/COURT/COMMISSIONER

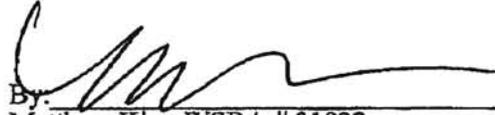
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DATED this 6 day of Aug, 2012.

DATED this 6 day of Aug, 2012.

LAW OFFICES OF MATT KING

RIACH GESE PLLC





By: Matthew King WSBA # 31822
Attorney for Plaintiffs
1420 Fifth Ave, Suite 2200
206-274-5303

By: Michael P. Jacobs, WSBA #22855
Attorneys for Defendants Young
7331 196th St SW, Lynnwood WA 98036
425.776.3191

ORDER

THIS MATTER, having come on duly for hearing before the undersigned Judge/Court Commissioner of the above-entitled Court upon the Stipulation of the parties hereto as set forth hereinabove, and the Court being fully advised in the premises, now and therefore,

IT IS HEREBY ORDERED that all claims and counterclaims filed in this action or that could have been filed in this action between Plaintiffs, PAUL COLVIN and PATRICIA GUERTIN, and Defendants, JAMES YOUNG and CAROLYN YOUNG, are dismissed with prejudice and without costs to either party.

DONE IN OPEN COURT this ____ day of _____, 2012

JUDGE/COURT/COMMISSIONER

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Presented By:

RIACH GESE PLLC

By: 
Michael P. Jacobs, WSBA #12855
Attorneys for Defendants Young
7331 196th St SW, Lynnwood WA 98036
425.776.3191

Approved as to Form; Notice of
Presentation Waived By:

LAW OFFICES OF MATT KING

By: 
Matthew King WSBA # 31822
Attorney for Plaintiffs
1420 Fifth Ave, Suite 2200
206-274-5303

APPENDIX F

FILED

2011 SEP 15 AM 10:08

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH



CL14999731

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SNOHOMISH COUNTY SUPERIOR COURT
STATE OF WASHINGTON

PAUL COLVIN and PATRICIA GUERTIN,

Plantiffs,

vs.

JAMES YOUNG and CAROLYN YOUNG,
KRISTINE K. and JOHN DOE SMITH,

Defendants.

NO. 11-2-06646-9

ORDER ON DEFENDANTS' MOTION
FOR STATUS QUO RESTRAINING
ORDER

THIS MATTER having come on for hearing on Defendants' Motion for Status Quo Restraining Order and the Court having heard argument of counsel and having reviewed the pleadings filed herein, including the following: *Declaration of Carolyn Young in Response to Motion for Status Quo Restraining Order; Declaration of James Young in Response to Motion for Status Quo Restraining Order; Declaration of John Burt in Support of Defendants Young; Declaration of David Malametz in Support of Defendants Young; Response to Motion for Status Quo Restraining Order, Defendants' Motion for Status Quo Restraining Order, Plaintiffs Motion for Status Quo Restraining Order, Declaration of Paul Colvin, Declaration of Matt King and REPLY DECLARATION OF CAROLYN YOUNG* and the Court having been fully advised in the premises,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED and DECREED as follows:

1. Defendants' Motion for Status Quo Restraining Order is GRANTED.
2. The Parties are restrained from the following during the pendency of this

action:

ORDER ON MOTION FOR STATUS QUO - 1

RIACH GESE PLLC
7331 - 196th St. SW / PO Box 1067
Lynnwood, WA 98046-1067
(425) 776-3191 / (425) 775-0406 (Fax)

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- a. Neither Party shall Remove the existing fence and deck encroaching on Defendants' property;
- b. Neither Party shall build a fence along the common boundary line;
- c. Neither Party shall Enter, remain on, or travel across the legally described property of the other party except that Plaintiffs may use and occupy the property enclosed by the fence and deck encroaching on Defendants' legally described property; and,
- d. Neither Party shall contact the other except through their counsel.

3. *Defendants' motion to strike aerial photos, police report and correspondence between attorneys is granted.**

4. *Defendants' motion to strike Colvin's Declaration is granted.*

DATED this 15th day of September, 2011.

Ang N. powder
JUDGE

** attached to King's Declaration,*

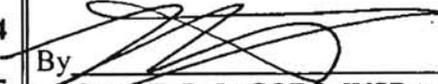
ORDER RELEASING:
[Signature]
MATTHEW KENZ. WSPA 51822

1 Presented by:

2 **RIACH GESE, PLLC**

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By 

5 **MICHAEL P. JACOBS, WSBA #22855**

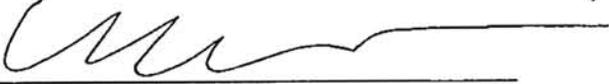
6 Attorney for Defendants Young

6

7 Approved as to form:

8 **LAW OFFICES MATTHEW KING, PLLC**

9

10 By 

11 **MATTHEW KING, WSBA #31822**

12 Attorney for Plaintiffs

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APPENDIX G

