

90025-6

No. 68416-7-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

Edward M. Goodman and Bernice Goodman,
husband and wife, Respondents.

v.

Michael J. Goodman and Mary Goodman,
husband and wife, Petitioners.

v.

Chance Goodman, a single man, and Tyson Goodman,
a single man,

Defendants.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAR -5 AM 11:34

PETITION FOR REVIEW

FILED
MAR 18 2014
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

Michael Goodman
13785 Goodman Lane
Anacortes, Wa 98221
(360)293-3298

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A. IDENTITY OF PETITIONER

Michael Goodman asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Petitioner Michael Goodman seeks review of the affidavit of prejudice and motion, manifest error that affects a constitutional right.

Petitioner Michael Goodman moved to reverse in the Court of Appeals based on the affidavit of prejudice and was denied (appendix A-3).

Michael then requested discretionary review of the denial of the motion to reverse in our Supreme Court. Commissioner Steven Goff stated “the motion should be considered part of the ongoing appeal from the trial court's January 2012 decision” and “error must be assigned in the brief”.

Michael moved for leave to amend brief and include the affidavit of prejudice in his brief. The Court of Appeals denied leave. Appendix A-4.

The Court of Appeals opinion filed on January 13, 2014 did not include review of the affidavit of prejudice.

Michael's motion for reconsideration requested review of the affidavit of prejudice and that appellants were prejudiced not to receive fair and full review when the motion for leave to amend brief was denied. The motion for reconsideration was denied on February 18, 2014, appendix A-4.

C. ISSUES PRESENTED FOR REVIEW

Whether petitioner Michael Goodman/defendants filed a timely affidavit of prejudice and motion?

D. STATEMENT OF THE CASE

On March 26, 2010 this case was filed in Skagit County Superior Court. Petitioner Michael Goodman/defendants had known Judge Susan Cook for over 30 years, and were former neighbors in Anacortes, Washington.

Before this case started, actual prejudice existed.

- 1) Co-defendant Tyson Goodman was involved in an altercation with Judge Susan Cook's stepson.

2) Respondent Edward Goodman was a co-defendant and party in a federal lawsuit with Judge Cook, Case No. C95-1360R. CP 601-623.

Defendants Chance Goodman and Tyson Goodman were served April 14, 2010 and Michael and Mary Goodman were served April 16, 2010.

Petitioner Michael Goodman/Defendants did not believe they would have a fair and impartial trial before Judge Susan Cook.

On June 1, 2010, co-defendant Tyson Goodman filed the affidavit of prejudice and motion. CP 201. See Appendix A-1.

Judge Susan Cook had not made any discretionary rulings or orders prior to June 1, 2010.

On June 3, 2010 Judge Cook denied the affidavit and defendants objected:

“Tyson Goodman objects to this case being heard by Judge Cook, as his affidavit of prejudice was filed in a timely fashion, Lowell Ashbach #2777, 6-3-10”. Appendix A-2. CP 529.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Michael contends that the trial court erred when it denied defendants affidavit of prejudice and motion.

The Court reviews a trial court's denial of an affidavit of prejudice de novo. See *State v. Tarabochia*, 150 Wn. 2D 59, 64-65, 68, 74 P.3d 642 (2003); *In re Estate of Black*, 116 Wn. App. 492, 496, 500, 66 P.3d 678 (2003). Under RCW 4.12.040 and .050 each party may file a timely motion and affidavit of prejudice to remove one superior court judge. For the motion to be timely, the party must file the motion “before the judge presiding has made any order or ruling involving discretion” RCW 4.12.050(1). Filing a timely motion and affidavit divests the judge of authority to pass on the merits of the case. *Lamon v. Butler*, 112 Wn.2d 193, 201-02, 770 P.2d 1027 (1989).

Yet, if the party shows actual prejudice, the court must consider a motion for disqualification even if the statutory right has been exhausted. *State v. Palmer*, 5 Wash.App. 405, 411-12, 487 P.2d 627 (1971).

1) Michael's United States Constitutional rights provided by the Fourteenth Amendment and the Due Process Clause, including "equal protection of the laws" are violated.

2) Michael's Washington State Constitutional rights provided in Article 1 section 3, "due process" and a "fair tribunal" are violated.

The appellate court will review pursuant to RAP 2.5 (a)(3) manifest errors which affecting a constitutional right.

Pursuant RAP 2.4 (b) The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling made, before the appellate court accepts review.

The affidavit of prejudice is a structural error prior to the merits.

The Court of Appeals substantially prejudiced Michael's ongoing appeal by denying his motion for leave to amend brief and include the denial of the affidavit of prejudice as assigned error.

Actual prejudice existed before this case started and defendants filed a timely affidavit of prejudice as their first motion in the trial court. Judge Cook had not made any discretionary rulings or orders prior to the affidavit of prejudice.

F. CONCLUSION

The Petitioner Michael Goodman filed a timely affidavit of prejudice and may the Court please accept review for the reasons indicated in Part E (pages 4 and 5) and grant one change of judge.

Dated this 28th day of February 2014.

Respectfully submitted,


Michael Goodman

APPENDIX

June 1, 2010 affidavit of prejudice and motion.	A-1
June 3, 2010 objection to the denial of the affidavit of prejudice and motion.	A-2
April 23, 2013 order denying motion to reverse affidavit.	A-3
November 6, 2013 ruling denying motion for leave to amend brief and include the affidavit of prejudice.	A-4
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Approved As To Form:

[Signature]
T.R.G. Wolf, WSBA # 4146
Attorney for Michael and Mary Goodman

Lowell Ashbach, WSBA # 2777
Attorney for Chance and Tyson Goodman

Tyson Goodman objects to this case being heard by Judge Cook, as his affidavit of prejudice was filed in a timely fashion

Lowell Ashbach 2777

6-3-10

PRELIMINARY INJUNCTION - 3



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

EDWARD M. GOODMAN and
BERNICE S. GOODMAN, husband
and wife,

Respondents,

v.

MICHAEL J. GOODMAN and MARY F.
GOODMAN, husband and wife,

Appellants.

No. 68416-7-1

ORDER DENYING MOTION
TO REVERSE AND DENYING
MOTION TO STAY TRIAL
COURT PROCEEDINGS

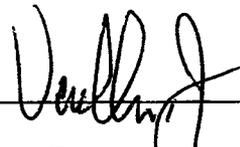
Appellants Michael and Mary Goodman have filed a "Motion to Reverse Trial Court" and an "Emergency Motion for Stay of Trial Court Proceedings." We have considered the motions and have determined that both motions should be denied.

Now therefore it is hereby

ORDERED that appellants' motion to reverse and emergency motion for a stay of trial court proceedings are both denied.

Done this 23rd day of April, 2013.





Becker, J.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2013 APR 23 PM 3:20

*The Court of Appeals
of the
State of Washington*

RICHARD D. JOHNSON,
Court Administrator/Clerk

DIVISION I
One Union Square
600 University Street
Seattle, WA
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(206) 464-7750
TDD: (206) 587-5505

November 6, 2013

Michael J. Goodman
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Anacortes, WA. 98221

C. Thomas Moser
Attorney at Law
1204 Cleveland Avenue
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Mary F. Goodman
13785 Goodman Lane
Anacortes, WA. 98221

CASE #: 68416-7-1

Edward M. Goodman & Bernice S. Goodman, Res. v. Michael J. Goodman & Mary F. Goodman, Apps.

Counsel:

The following notation ruling by Richard D. Johnson, Court Administrator/Clerk of the Court was entered on November 5, 2013, regarding appellant's motion for leave to amend brief:

At the direction of the panel, the motion is denied.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

khn

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

EDWARD M. GOODMAN and
BERNICE S. GOODMAN, husband
and wife,

Respondents,

v.

MICHAEL J. GOODMAN and
MARY F. GOODMAN, husband and
wife,

Appellants.

No. 68416-7-1

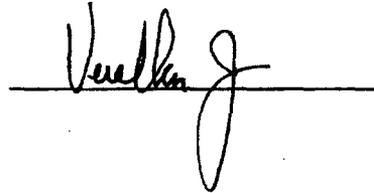
ORDER DENYING MOTION
FOR RECONSIDERATION

Appellants filed a motion for reconsideration of the court's opinion entered January 13, 2014. The panel has considered the motion and determined it should be denied. Now therefore, it is hereby

ORDERED that appellants' motion for reconsideration is denied.

Done this 18th day of February, 2014.

FOR THE PANEL:



FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 FEB 18 PM 4:20

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

EDWARD M. GOODMAN and
BERNICE S. GOODMAN, husband
and wife,

Respondents,

v.

MICHAEL J. GOODMAN and
MARY F. GOODMAN, husband and
wife,

Appellants.

No. 68416-7-I

ORDER DENYING MOTION
FOR RECONSIDERATION,
CHANGING AND REPLACING
OPINION

Appellants Michael and Mary Goodman filed a motion for reconsideration of the court's opinion filed November 25, 2013. The panel has determined that the motion should be denied but that the opinion should be changed and replaced as noted below. Now therefore, it is hereby

ORDERED that on page 3, n.2: Delete the phrase "it was not admitted at trial" in the sentence beginning "But Michael." It is further

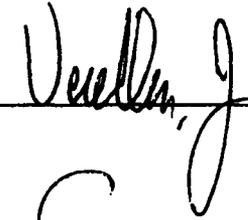
ORDERED that on page 7, add a footnote to the last sentence in the first paragraph ending with "Lot 2." The footnote shall read, "Without relevant authority or compelling argument, Michael claims that the Shoreline Management Act precludes the trial court from finding an implied easement in this case. In the absence of meaningful authority, Michael does not establish grounds for any relief based on the Shoreline Management Act. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828

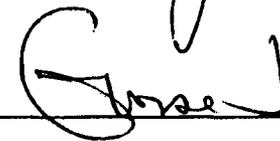
No. 68416-7-I
Order Granting Motion for Reconsideration,
Changing and Replacing Opinion

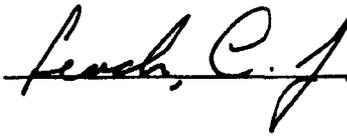
P.2d 549 (1992) (court need not address arguments unsupported by relevant authority)." It is further

ORDERED that the amended opinion shall replace the original opinion filed herein.

Dated this 13th day of January, 2014.







FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 JAN 13 AM 10:14

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

EDWARD M. GOODMAN and
BERNICE S. GOODMAN, husband
and wife,

Respondents,

v.

MICHAEL J. GOODMAN and
MARY F. GOODMAN, husband and
wife,

Appellants.

No. 68416-7-1

UNPUBLISHED OPINION

FILED: January 13, 2014

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 JAN 13 AM 10:48

VERELLEN, J. — Michael Goodman appeals the trial court's order quieting title and granting declaratory relief to his brother, Edward Goodman, in this dispute involving easements over Michael's property. Because Michael fails to demonstrate error, we affirm. We also grant Edward's motion for an award of attorney fees.

FACTS

In 1977, Ruth Goodman conveyed a 26-acre parcel of land in unincorporated Skagit County to her son, Edward Goodman. In 1979, Edward and his younger brother Michael Goodman hired a surveyor to prepare a short plat of the parcel, dividing it into four lots. Ruth lived in the family home on Lot 4. Edward sold Lot 1 to pay Ruth's living expenses. Edward and Michael constructed a driveway across Lot 2 to Lot 3. Edward

No. 68416-7-1/2

installed a septic tank and drain field in Lot 2 to serve the house he planned to build on Lot 3. In 1980, Edward conveyed Lot 2 to Michael by quitclaim deed.

Edward and Michael and their families peacefully coexisted on Lots 2 and 3 until March 2010, when a dispute arose regarding Edward's septic system, as well as his use of the driveway. Edward filed a quiet title action and obtained a temporary restraining order preventing any change to the status quo for the septic system or the shared driveway.

After a bench trial and a site visit, the trial court determined that Edward established implied easements for use of the shared driveway and the septic system and drain field on Michael's property, quieted title to the easements in Edward, and enjoined Michael from interfering with Edward's use of the shared driveway easement and the septic system easement.

Michael appeals.¹

¹ Edward has moved to strike illustrations included on pages 6 and 12 of Michael's opening brief, but not labeled with citations to the record. In his reply brief, Michael cites Clerk's Papers 248-78 for the diagram on page 6 and Clerk's Papers 50-85 for the diagram on page 12. No diagram identical to that included on page 6 of the brief appears in the identified pages, but that printed on page 12 appears at Clerk's Papers 80 as Exhibit I to Michael's posttrial motion for reconsideration. Even accepting these diagrams as having been considered by the trial court, they do not change the outcome of the appeal.

ANALYSIS²

Following a bench trial, we review factual findings for substantial evidence and legal conclusions de novo, determining whether the findings support the conclusions.³ Substantial evidence is that sufficient to persuade a fair-minded person of the finding's truth.⁴ If the standard is satisfied, we will not substitute our judgment for that of the trial court even if we would have resolved a factual dispute differently.⁵ We defer to the trial court's assessment of witness credibility and persuasiveness of the evidence, as well as its resolution of conflicting testimony.⁶ Unchallenged findings of fact are verities on appeal.⁷

Michael assigns error to only one of the trial court's 89 numbered findings of fact. He claims the trial court abused its discretion in finding 36, in that "[t]he 1979 road build date is false."⁸ Finding 36 provides:

² Along with his opening brief, Michael filed a "Motion in Brief" citing RAP 17.4(d) and requesting "equitable relief for fraud." Motion in Brief at 1, 5. In his motion, Michael quotes trial testimony regarding Exhibit 18 and claims that Edward violated various statutes and acted in bad faith by creating and recording Exhibit 18, a purported express easement as to the shared driveway. But Michael never requested relief in the trial court based on Exhibit 18, and the trial court dismissed any claim of an express easement before Michael presented his defense at trial. The motion is denied. We also deny all other pending motions Michael has filed presenting any challenges to the trial court's decision outside of the briefs.

³ Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).

⁴ City of Tacoma v. William Rogers Co. Inc., 148 Wn.2d 169, 191, 60 P.3d 79 (2002).

⁵ Sunnyside Valley, 149 Wn.2d at 879-80.

⁶ Lodis v. Corbis Holdings, Inc., 172 Wn. App. 835, 861, 292 P.3d 779 (2013).

⁷ Keever & Assoc., Inc. v. Randall, 129 Wn. App. 733, 741, 112, 119 P.3d 926 (2005).

⁸ Appellant's Br. at 4.

The road built in 1979 included Goodman Lane, the paved driveway up to Lot 3, the driveway south downhill on Lot 2 to the beach area (portions of which were paved) and the access to Lot 3 along the edge of Lake Campbell. The construction of the road was completed before the short plat was approved by the County.^{9]}

Michael asserts that Edward's evidence regarding the date the road was built was "incompetent," while Michael admitted an aerial photograph and claims that it shows that no road existed before 1980.¹⁰

At trial, Michael testified that the road was completed in 1986, and offered an aerial photograph, Exhibit 32, which he claimed did not show the road as of 1980. But Edward testified that he and Michael shared the expense of hiring a construction company to complete work on the road in 1979, and offered family pictures taken during the project, as well as various written records. Edward also testified that the road was visible on Exhibit 32, and identified its location in relation to a dock and a trailer as they existed on the property in 1979. Because we defer to the trial court's assessment of credibility and resolution of this conflicting testimony, Michael's challenge to finding 36 fails.

Michael also challenges the trial court's conclusions regarding the existence of the implied easements. An easement may be implied from prior use based on the following three elements: "(1) unity of title and subsequent separation by grant of the dominant estate; (2) apparent and continuous user; and (3) the easement must be reasonably necessary to the proper enjoyment of the dominant estate."¹¹ But unity of

⁹ Clerk's Papers at 512.

¹⁰ Appellant's Br. at 5.

¹¹ MacMeekin v. Low Income Hous. Inst., Inc., 111 Wn. App. 188, 195, 45 P.3d 570 (2002).

title and subsequent separation is the only absolute requirement.¹² The other two elements are merely “aids to the construction in determining the cardinal consideration—the presumed intention of the parties as disclosed by the extent and character of the use, the nature of the property, and the relation of the separated parts to each other.”¹³

Michael challenges conclusion 1, which states, “Prior to 1980, Lots 2 and 3 were owned by Edward and Bernice Goodman and thus there was unity of title.”¹⁴ He also challenges the reference in conclusion 6 to Goodman Lane.¹⁵ Referring to Exhibit 27, Michael claims that Edward “did not own or convey Lot 1 or Lot 3 of Short Plat 61-89.”¹⁶ But Exhibit 27, depicting Short Plat 61-89, is the subdivision into four lots of the original Lot 1 Edward sold to provide for Ruth’s expenses.¹⁷ Michael does not dispute the trial court’s findings that Edward owned the two lots at issue in the litigation, Lot 2, which Edward conveyed to Michael in 1980, and Lot 3, which Edward retained, of Short Plat 55-80.¹⁸ And Michael does not challenge the trial court’s finding describing Edward’s

¹² Roberts v. Smith, 41 Wn. App. 861, 865, 707 P.2d 143 (1985).

¹³ Adams v. Cullen, 44 Wn.2d 502, 505-06, 268 P.2d 451 (1954).

¹⁴ Clerk’s Papers at 518.

¹⁵ Conclusion 6 provides, “An easement implied from prior use has been established by the Plaintiffs as to the roadway constructed in 1979, including Goodman Lane and the roadway down to and across the lake front of Lot 2, and as to the septic system installed as described on page 5 of Exhibit 20.” Clerk’s Papers at 519.

¹⁶ Appellant’s Br. at 6.

¹⁷ Finding of Fact 17 states, “Lot 1, which bordered Campbell Lake Road, was sold to provide income to Ruth Goodman. It was later subdivided into 4 lots (Exhibit #27).” Clerk’s Papers at 510.

¹⁸ Michael does not challenge Finding of Fact 41, which states in pertinent part, “Ed and Bernice Goodman conveyed Lot 2 of Short Plat 55-80 to Mike and Mary Goodman on September 8, 1980 by quit claim deed.” Clerk’s Papers at 512.

easement over the original Lot 1 as to Goodman Lane. "On plat map 55-80 is a 60-foot wide right-of-way access from Campbell Lake Road along the west side of Lot 1, which is now Goodman Lane and part of the shared driveway."¹⁹ Conclusions 1 and 6 are properly supported by these unchallenged findings.

Next, Michael contends that the trial court erred by concluding that Edward's use of the disputed roadway and septic system was continuous before 1980 because he did not build his home or reside on Lot 3 until 1991. But in unchallenged findings, the trial court found that Edward put a travel trailer on Lot 3 before conveying Lot 2 to Michael in 1980, and continuously maintained and used the shared roadway to access the trailer and the beachfront to work on the property and for recreation.²⁰ As to the septic system, Michael has not challenged the trial court's findings that Michael knew about the septic system when Edward installed it in 1979, and that Edward connected the septic system to his trailer in 1982 and his house in 1991, and used it continuously until it was destroyed in 2010.²¹ These findings support the trial court's conclusion regarding continuous use.

Michael also challenges the trial court's conclusion regarding reasonable necessity, arguing that Edward failed to present evidence of relative costs of substitutes. Absolute necessity is not required to establish an implied easement.²² "The test of necessity is whether the party claiming the right can, at reasonable cost, on

¹⁹ Finding of Fact 23; Clerk's Papers at 510.

²⁰ Findings of Fact 37 and 64; Clerk's Papers at 512, 515.

²¹ Findings of Fact 73 and 80; Clerk's Papers at 516-17.

²² Evich v. Kovacevich, 33 Wn.2d 151, 157-58, 204 P.2d 839 (1949).

his own estate, and without trespassing on his neighbors, create a substitute."²³

Although Edward did not submit cost estimates and the trial court did not make findings regarding costs of substitutes, Michael does not challenge the following findings: (1) the topography of Lot 3, including the hill and a bog prevents vehicle access from Lot 4;²⁴ (2) "There is no other practical or feasible access for vehicles or pedestrians to Lot 3 from a public road other than the shared driveway;"²⁵ (3) Lot 3 contains a single natural building site on top of a rock;²⁶ (4) Edward installed his septic system on Lot 2 because "Lot 3 did not perc";²⁷ and (5) although Edward has installed an alternative system on Lot 3, he is "required by the County" to maintain the Lot 2 location "as a reserve drain field."²⁸ These findings support the trial court's conclusion that Edward's uses of Lot 2 are reasonably necessary. In sum, Michael fails to demonstrate error in the trial court's determination regarding the existence of implied easements serving Lot 3 for use of the driveway and septic system on Lot 2.²⁹

²³ Bays v. Haven, 55 Wn. App. 324, 329, 777 P.2d 562 (1989).

²⁴ Findings of Fact 48-51; Clerk's Papers at 513.

²⁵ Finding of Fact 52; Clerk's Papers at 514.

²⁶ Findings of Fact 53 and 70; Clerk's Papers at 514-15.

²⁷ Finding of Fact 70; Clerk's Papers at 515.

²⁸ Finding of Fact 83; Clerk's Papers at 517.

²⁹ Without relevant authority or compelling argument, Michael claims that the Shoreline Management Act precludes the trial court from finding an implied easement in this case. In the absence of meaningful authority, Michael does not establish grounds for any relief based on the Shoreline Management Act. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (court need not address arguments unsupported by relevant authority).

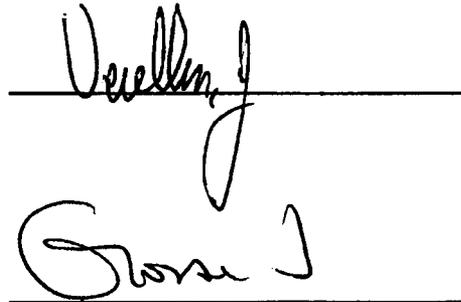
Edward requests an award of attorney fees and expenses for a frivolous appeal.³⁰ An appeal is frivolous “if the appellate court is convinced that the appeal presents no debatable issues upon which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal.”³¹ Given Michael’s failure to challenge all but one of the trial court’s careful and comprehensive findings of fact and the lack of relevant authority or coherent argument to support his claims regarding the trial court’s conclusions, that standard is satisfied here.

Affirmed. Edward is awarded attorney fees subject to compliance with RAP 18.1(d).

WE CONCUR:



A handwritten signature in cursive script, appearing to read "Paul C. J.", written over a horizontal line.



Two handwritten signatures in cursive script, one above the other, both written over horizontal lines. The top signature appears to read "Veellin J." and the bottom signature appears to read "Stone J."

³⁰ RAP 18.9(a).

³¹ In re Marriage of Foley, 84 Wn. App. 839, 847, 930 P.2d 929 (1997).

THE SUPREME COURT OF THE STATE OF WASHINGTON

EDWARD M. GOODMAN and)
BERNICE S. GOOMAN, husband)
and wife,)

Respondents,)

v.)

MICHAEL J. GOODMAN and)
MARY F. GOODMAN, husband)
and wife,)

Petitioners.)

v.)

TYSON GOODMAN single man, and)
CHANCE GOODMAN, a single man.)

Defendants.)

DECLARATION OF SERVICE

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 MAR -5 AM 11:34

I declare under the penalty of perjury that I served the foregoing documents described below to the parties listed by US Mail.

Dated this 4th day of March 2014.

C. Thoomas Moser
1204 Cleveland Avenue
Mt. Vernon, WA 98273

T GOODMAN
Tyson Goodman

- PETITION FOR REVIEW

DECLARATION OF SERVICE -1

Mike Goodman
13785 Goodman Lane
Anacortes, WA 98221