72027-9

72027-9

No. 72027-9-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

MARK F. & LINDA H. BRESSLER,
Plaintiffs / Appellants

v.

KEVIN F. & LINDA SULLIVAN,
Defendants / Respondents

v.

GMAC MORTGAGE, LLC &
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.
Defendants

BRIEF OF RESPONDENT

G. Geoffrey Gibbs, WSBA No. 6146
Attorney for Respondents

ANDERSON HUNTER LAW FIRM
2707 Colby Ave., Ste. 1001
Everett, Washington 98201
(425) 252-5161
ggibbs@andersonhunterlaw.com

TABLES

A. TABLE OF CONTENTS

1. Introduction 1

2. Statement of Case by Respondents Sullivan 4

3. Argument 9

   A. Standard of Review; Burden of Proof 10

   B. Abandonment of Easement and Estoppel are not mutually exclusive 10

   C. Good Faith of Sullivans . . 16

   D, E. Substantial Justice & an End to Litigation Have Both Been Accomplished. . . 16

   F. No Undue Hardship on Bresslers . . 19

   G. Award of Attorneys' Fees on Appeal 20

APPENDICES

A. Boat Launch Declaration (referred to as "easement"), Ex. 6

B. Court's Decision, CP 201-210

C. Findings of Fact/Conclusions of Law, CP 19-38

D. Defendants' Declaration Re: Compliance with Court Decision

B. TABLE OF CASES

Heg. v. Alldredge,
157 Wn.2d 154, 137 P.3d 9 (2006) 2, 10, 11, 21

Edmonds v. Williams
54 Wn.App. 632, 774 P.2d 1241 (1989) 3, 11, 15, 21

Eichorn v. Lunn,
63 Wn.App. 73, 77, 816 P.2d 1226 (1991) 10

Humphrey v. Jenks,
61 Wn.2d 565, 379 P.2d 366 (1963). 12-13

Rossi v. Sierchio,
30 N.J. Super. 575, 578 (1954). . . . . f. 5 on 13

Radovich v. Nuzhat,
104 Wn.App. 800, 806, 16 P.3d 687 (2001). 14

Nickell v. Southview Homeowners Association,
167 Wn.App. 42, 52, 271 P.3d 973 (2012) 14

Carpenter v. Folkerts,
29 Wn.App. 73, 80, 627 P.2d 559 (1981). 19

Wash. State Commc'n Access Project v. Regal Cinemas, Inc.,
173 Wn. App. 174, 219, 293 P.3d 413 (2013) 23

INTRODUCTION

The developer of two adjacent parcels of waterfront property on Whidbey Island created an easement (by a document entitled "Boat Launch Declaration" but referred to herein as an easement) that permitted owners of the southernmost property to cross over the other owners land to launch a boat on the sloping concrete boat launch. The easement also stipulated that the 10' width between the two houses could be used by either party for the purpose of getting a boat to the beach. The Boat Launch Declaration is Ex. 11 and a copy is appended hereto as Appendix A. The parties to this action purchased the properties from the developer at the same time.

The Sullivans purchased the home to the south and the Bresslers the home on the north (the home with the concrete ramp).[1] Some years later, there arose some confusion about the existence of the easement and the Sullivans initially erected a fence midway in the 10' strip which effectively blocked the easement. Bresslers hired counsel to draft and present a document "extinguishing" the easement but that document was never executed. Bresslers brought this action to quiet title and terminate the easement. After trial, Judge Churchill ruled that the actions of the Sullivans constituted "abandonment" of the easement but that they could rescind or revoke their abandonment of the easement absent application of the doctrine of equitable estoppel.

---

[1] We use the last names of the parties for clarity under RAP 10.4(e) and intend no disrespect by doing so.

The trial court ruled that so long as the Sullivans removed any obstructions, utilized the easement strictly pursuant to its terms and reimbursed the Bresslers for the limited amount of attorney's fees expended in drafting the proposed but unexecuted "extinguishment", the Sullivans could reinstate the easement. CP 201-210, CP 19-38.

Central to this matter and directly applicable to the case at bar are two Supreme Court cases. The first, Heg v. Alldredge, 157 Wn.2d 154, 137 P.3d 9 (2006) arose out of trial in front of the Hon. Vickie Churchill in Island County Superior Court, the same judge who presided in the trial in this matter. The Supreme Court, in a unanimous decision, sustained Judge Churchill's decisions at trial, reversing the Court of Appeals, stating in part as follows:

> *"Extinguishing an easement through abandonment requires more than mere nonuse--the nonuse "'must be accompanied with the express or implied intention of abandonment.'" (citing authority). . . . An easement appurtenant which runs with the land "'is not a mere privilege to be enjoyed by the person to whom it is granted or by whom it is reserved. It passes by a deed of such person to his grantee and follows the land without any mention whatever.'" (citing authority)* ***Acts evidencing abandonment of an easement must be unequivocal and decisive and inconsistent with the continued existence of the easement.*** *28A C.J.S. Easements § 125 (1996)."* Heg v. Alldredge, *supra at 161 (emphasis added)*

We think it important to emphasize that the Court in Heg commented in its ruling on the fact that there existed alternative means of access. Heg, *supra* at 162-163. The Court also dealt in Heg with the application of

"collateral estoppel" to prevent or estop Ms. Heg from enforcing her easement.

The second case that will likely often be cited to this Court is Edmonds v. Williams, 54 Wn.App. 632, 774 P.2d 1241 (1989). In that case, the Court of Appeals stated in part:

> *"Termination of easements is disfavored under the law. 28 C.J.S. Easements § 52 (1941). Thus, a permanent easement created by grant or reservation is not lost by mere nonuse. Thompson v. Smith, 59 Wn.2d 397, 407, 367 P.2d 798 (1962). Nor is an easement lost by prescription during a period of nonuse, unless the adverse use is clearly inconsistent with the future use of the easement. The owner of the servient estate "has the right to use his land for purposes not inconsistent with its ultimate use for the reserved purpose". Thompson, 59 Wn.2d at 407. In Thompson, the court held that to construct a concrete foundation slab for a small building within an unopened road right of way was not an inconsistent use. In the same vein, it is not an inconsistent use to erect a fence across an unused express easement.*
>
> > *'[W]here an easement has been created but no occasion has arisen for its use, the owner of the servient tenement may fence his land and such use will not be deemed adverse to the existence of the easement until such time as (1) the need for the right of way arises, (2) a demand is made by the owner of the dominant tenement that the easement be opened and (3) the owner of the servient tenement refuses to do so.'*
>
> *(Italics ours.) Castle Assocs. v. Schwartz, 63 A.D.2d 481, 490, 407 N.Y.S.2d 717, 723 (1978). Accord, Annot., supra, 25 A.L.R.2d 1265, § 26, at 1325-30.*

"In this case the record does not reflect that any effort was made to use the parcel A access easement from the time the easement was created in 1969 until well after the City acquired parcel A. The only use of the easement area by Williams that could be considered obstructive to the easement was his construction and maintenance of a fence. This is not a sufficiently inconsistent use of the easement area to constitute adverse possession." Edmonds v. Williams, supra at 636-637.

STATEMENT OF THE CASE BY RESPONDENTS SULLIVAN

Based upon their respective ages and health issues, but with a desire to continuing their water-borne activities that each had done for their entire lives, Kevin and Linda Sullivan expended some substantial effort to find a residence on the water in the Puget Sound area. Deposition of Linda Sullivan at page 151-152, 224. RP 329, lines 5-8. Ultimately they located a newly constructed home on the South end of Whidbey Island with low bank waterfront, a cement bulkhead and easy beach access down a few stairs. A similar house had been built by the same developer next door at the same time and the Sullivan's understood that they would have access to the concrete sloping boat launch on the property next door as a result of an easement. RP 6-8. A strip of land exists between the homes measuring 10' in width, one-half of which is owned by each homeowner . RP 6-8.

The developer installed reinforcing material under the ground to sustain the transit of a light boat trailer across this strip to the boat launch. RP 6-8, RP 51-52. This property appeared to suit their needs beautifully

and the Sullivans purchased the property on July 18, 2006 (denominated Lot 25). Ex. 12. The home constructed by the developer to the north of their home (denominated Lot 26) was purchased by the Bresslers on the same date, July 28, 2006. Ex. 14, RP 33. The nature of the easement benefiting the Sullivans and their property can generally be shown by reference to the survey introduced as Ex. 140, Ex. 2 (page 2) and photographs introduced as Ex. 95 and 100 at trial. Sometime after purchase and occupancy, the Sullivans purchased a small boat with an outboard per the prior intent to continue boating. RP 451, 453. Ex. 126.

Initially, there existed no fence or demarcation of the common boundary between the two properties (RP 66) but it became apparent to the Sullivans that a fence was needed. The Bresslers had a son with special needs for whom boundaries were not terribly important and he often intruded not only onto the Sullivans property but into their house and lives. RP 62-64, Deposition of Linda Sullivan at 167. At some point, the Bresslers also expressed concern about the two dogs owned by the Sullivans which to the Sullivans supported the concept of a fence even further. It should be noted at the time trial began, Bresslers indicated that they were not pursuing claims of nuisance and trespass that had been plead. RP 27.

Having moved to Washington from the East Coast, the Sullivans were not as familiar with laws in our State and wanted to approach location of the fence location and installation properly. They consulted with a local attorney, Douglas Saar. It is worth noting that subsequent to

his representation of the Sullivans, Mr. Saar stipulated to an Order disbarring him from the practice of law[2] and has declared and had his obligations discharged in bankruptcy, including any claims against him by the Sullivans.[3]

Mr. Saar told the Sullivans he would investigate the matter to ensure that an easement across the Bressler property for launching a small boat actually existed. The Sullivans, who had planned the installation of a chain-link fence with a sliding gate facing toward the boat launch, were shocked to be informed by then attorney Saar that no "easement" existed. Ex. 29. Their Statutory Warranty Deed did not make mention of the "boat launch easement" that they understood to exist. Ex. 12. It was later determined that this opinion was totally in error and a "boat launch easement" did, in fact, exist benefiting their property. Ex. 46, October 25, 2011 and Ex. 12. During the interim between being advised that no easement existed and later being advised that one did exist, the Sullivans examined numerous options including the cost and ability to cut through their own concrete bulkhead and install their own boat launch ramp, options that for reasons of environmental laws and costs were simply impractical for the Sullivans to undertake.

Sometime in this milieu, the Bressler retained counsel, Ms. Carolyn Cliff, who initiated contact with the Sullivans through their attorney, Douglas Saar. The Bresslers and Ms. Cliff did believe a "boat

---

2 Supreme Court Case No. 2012141

3 US Bankruptcy Court, Western District of WA, Proceeding 14-01052-KAO

launch easement" did exist and she ultimately provided Mr. Saar with a copy thereof. Ex. 46. The news of this new 180° change in their course again caught the Sullivans by surprise and the fence that they had just sought to have installed down the middle of the 10' strip would therefore block the use of the easement over that portion by either party and would need to be moved on demand. Had they known for certain that their easement existed, the Sullivans would not have looked into the costs of constructing a boat launch through their own bulkhead or have located the fence as they did.

On Nov. 9, 2011, Bresslers, through attorney Cliff, advised the Sullivans that they needed to decide whether to abandon the easement or move their fencing. Ex. 54. While attorney Saar indicated in a responsive e-mail that same day that he believed the Sullivans had a desire to extinguish an easement, there was clearly no agreement as to the form of a document to accomplish that result. See Ex. 55. Clearly there was not a "meeting of the minds" at that point. See also Ex. 56 in which attorney Saar says he will "recommend" to the Sullivans that they sign. While the Sullivans e-mailed their attorney their willingness to sign at some point, it was contingent upon their receipt of $30,000 to cover their out-of-pocket costs and the anticipated costs to construct their own boat launch. Ex. 57 and RP 441, 451, Deposition of Linda Sullivan at page 214 and 348. By December 21, 2011, the Sullivans had made it explicitly clear that there would "not" be signing or agreeing to an extinguishment of the easement. Ex. 74.

However, at this point, the Sullivans relationship with attorney Saar was clearly fractured by his misrepresentations on various issues and they retained new counsel, Christopher Thayer. Deposition of Linda Sullivan at 321-326. Mr. Thayer reinforced the previous notice that the Sullivans did not intend to relinquish or abandon the boat launch easement in an e-mail to attorney Cliff of Feb. 7, 2012. In that communication, he also stated the Sullivans' intent to return the fence to its "original location" so that it did not block or impede Bressler's use of the easement. Ex. 80. Sullivans commenced efforts to accomplish that result. Ex. 81.

Ultimately they did move the location of their fencing more than once but always with the intent to accommodate and recognize the "boat launch easement" that favored their property as well as that of the Bresslers. RP 282-285, 447-450. It was far more important to the Sullivans than the Bresslers to retain the use of this ability to launch a boat since the Bresslers did not own a boat, had no intention of buying a boat and had never owned a boat (RP 277-278) in contrast to the Sullivans who had used boats all of their lives. The Sullivans also took routine measures to ensure that the beach at the end of the launch ramp was clear of sand and driftwood/debris so that the same could be utilized for the stated purpose. RP 287-290, 434-435.

The Bresslers filed an action to Quiet Title on June 8, 2012, amending their Complaint and two occasions, the last time being on October 30, 2012. The Sullivans responded and this matter went to trial over the course of 4 days in Island County Superior Court.

ARGUMENT

While the Sullivans are not totally dissatisfied with the result of the rulings of the trial court and feel that the Bressler's appeal should be denied, they also believe there is another alternative basis with essentially the same result that is stronger in the law.

The essential effect of the decision at trial is that the "boat launch easement" affecting the property of these parties remains in effect. In making that holding, the trial Judge first found that the easement had been abandoned.

> "The Court finds that installing a fence in the middle of the easement is 'unequivocal and decisive and inconsistent with the continued existence of the easement' Heg v. Alldredge, 157 Wash.2d at 161. At that point, the Sullivans abandoned the easement." CP 19-38 at page 33, a copy appended hereto as Appendix C.

The trial court then found that the central question was whether the Sullivans can "repudiate that abandonment and reinstate the easement" or are equitably estopped from doing so. CP 19-38 at page 34.

> *"Equitable estoppel requires a showing that the party to be estopped (1) made an admission, statement or act which was inconsistent with his later claim; (2) that the other party relied thereon; and (3) that the other party would suffer injury if the party to be estopped were allowed to contradict or repudiate his earlier admission, statement or act. Pub. Util. Dist. No. 1 v. Walbrook Ins. Co., 115 Wn.2d 339, 347, 797 P.2d 504 (1990). The Bresslers, as the parties asserting that the Sullivans are equitably estopped from denying that they abandoned the easement, must prove these elements by "very clear and cogent evidence.' Proctor v. Huntington, 146 Wn.App. 836, 845, 192 P.3d 958 (2008) quoting Sorenson v. Pyeatt, 158 Wn.2d 553, 539, 146 P.3d 1172 (2006), review granted, 165 Wn.2d 1041 2009."* CP 19-38 at page 34.

Dealing now with responses to the Assignments of Error claimed by the Bresslers and argument thereon, Sullivans argue as follows:

A. STANDARD OF REVIEW; BURDEN OF PROOF

Bresslers argue that their action to "quiet title" was one brought in equity, a premise with which Sullivans do not disagree. However, Bresslers argument that claims of errors of law in a trial court's decision are reviewed de novo is not supported by the case law cited. BB at page 30, citing *Eichorn v. Lunn*, 63 Wn.App. 73, 77, 816 P.2d 1226 (Div. I, 1991). While Eichorn did involve an equitable action to quiet title, review was taken from an Order on Summary Judgment, a procedure dissimilar to rulings in equity after trial. Bresslers are not entirely clear on the exact nature of the error of law that they assert underlies the Court's equitable relief.

B. ABANDONMENT OF EASEMENT AND ESTOPPEL ARE NOT MUTUALLY EXCLUSIVE.

Bresslers argue that the trial court, in allowing Sullivans to prove revival or reinstatement of the easement, misapplied Heg v. Alldredge, 157 Wn.2d 154, 137 P.3d 9 (2006). Bresslers argue that once abandonment of an easement is proven, the Sullivans were precluded from arguing its reinstatement or revival.

In Heg, the central question was whether Ms. Heg ever intended to "abandon" the easement. Heg, supra at 162. The Court did not reach the alternative basis of "equitable estoppel" as the record did not contain

evidence of acts by Heg herself (as opposed to her predecessors in interest) that were inconsistent with her claim of the easement. Heg, supra at 166-167. The clear inference in Heg is that even when abandonment has been proven, revival or reinstatement can be shown. Heg, as cited herein, is the second appeal of the issues between those parties. In the first appeal before the Court of Appeals, that Court clearly recognized the right of a party, even after a finding of abandonment of an easement, could seek revival absent application of principles of equitable estoppel. Heg. v. Alldredge, 124 Wn.App. 297, 310-311, 99 P.3d 914 (2004). While the Supreme Court reversed the Court of Appeals, it did so based upon lack of evidence supporting abandonment of the easement and the application of equitable estoppel by the Court of Appeals was not overturned by the Supreme Court in the later appeal. Heg, supra at 167.

In the instant case, although finding acts that constituted evidence of abandonment of the easement, the trial court also found that such actions do not ripen into "irrevocable" abandonment of the easement "until the other individual benefiting from the easement seeks to access it and any barrier is not removed". CP 19-38 at page 34, citing *Edmonds v. Williams*, 54 Wn.App. 632, 636-637, 774 P.2d 1241 (1989). Factually, the Bresslers had never sought to access the easement, did not own a boat and did not intend to themselves use the easement for the stated purpose of a "boat launch". The court found that the argument against the Sullivans by Bresslers was essentially that Sullivans should be equitably estopped from making that argument after evidence of abandonment. *Letter Ruling and*

Decision, Id. The Bresslers argue that at trial they were asserting both equitable estoppel and abandonment as alternative remedies and were not required to prove both. But the Court having found Sullivans abandoned the easement, also found that they had the ability to revise or reinstate it absent being equitable estopped. At that juncture, the burden of proving equitable estoppel did lie with the Bresslers and they failed in that argument.

Bresslers argue that the doctrines of abandonment of an easement and equitable estoppel are not one and the same. BB at page 33 arguing Humphrey v. Jenks, 61 Wn.2d 565, 379 P.2d 366 (1963). They then conclude that if they were successful at proving "abandonment", they should not be held to proving the Sullivans were equitably estopped from asserting revocation of the abandonment. But that is an unwarranted extension of Humphrey to this case and we note that Humphrey was also prior to and cited in Heg. Humphrey did not involve "abandonment" of an easement but rather was based on a factual situation in which the respondents did not join in a petition to vacate a portion of a road upon an easement that burdened both properties. There was no issue of a party first abandoning an easement and seeking to revive it as is the case herein. *Humprhey, Id.*

> *"We conclude that the respondents are not estopped to assert the existence of the easement.*
>
> *"There was no conduct on the part of the respondents or their predecessors manifesting an intent to abandon their easement. Furthermore, even though it be assumed that the petition for a vacation of a portion of the road could be construed as such a manifestation, there was no reliance on the part of the appellants with resulting hardship to them. The trial court did not err when it entered its order establishing the easement as prayed."* Humphrey v. Jenks, 61 Wn.2d 565, 570-571 (Wash. 1963)

The Court, in Humphrey, also found as follows:

> *"It will be seen that the case of Burmeister v. Howard, supra, did not involve a claim of an easement, and that the elements of estoppel were present. There was an act on the part of the plaintiff which manifested his willingness to relinquish his claim to one half of the alley adjoining his property, and as a result of which rights were acquired by others, and acted upon to the extent that it would have been inequitable to allow the plaintiff to repudiate the position taken in his petition."* Humphrey v. Jenks, supra at 569.

Bresslers rely instead upon interpretation of the law by a "comment" within the Restatement of the Law of Property. BB at page 34-35. However, Section 505 is limited to a discussion of the loss of an easement through estoppel, does not deal with express abandonment (which is the actual subject of Section 504 of the Restatement) and there is no evidence that "Comment d" has ever been adopted as authority in Washington or elsewhere other than perhaps New Jersey. [4]

There is a fundamental difference in this case distinguishing it from much of the authority cited by the Bresslers. In this case, the party who has been found to have abandoned the easement through specific actions later repudiated those actions, a de facto return to the original state

---

[4] See Rossi v. Sierchio, 30 N.J. Super. 575, 578 (1954).

of affairs. Here the Court found that there was specific actions taken by the Sullivans , including specific notice in writing, revising the location of their fence, etc. clearly indicating that the Sullivans were not going to execute a formal relinquishment and were going to assert their rights under the easement. See RP 291-292 and Ex. 80. It was at this juncture that the burden fell upon the Bresslers to prove the Sullivans should be estopped from being able to do so. Bresslers could not point to any action they took in reliance on the abandonment or any detriment they suffered, other than the easement remaining in existence. RP 300.

Bresslers assert that once an easement is terminated, it cannot be revived or reinstated except by a writing sufficient to create it in the first place. BB at page 36. For authority on this proposition, they cite *Radovich v. Nuzhat*, 104 Wn.App. 800, 806, 16 P.3d 687 (2001). But in that case, the ownership of the dominant and servient estates came into a common ownership resulting in "extinguishment" of the easement, not abandonment, and the Court did not even reach that issue inasmuch as it found that the easement had been recreated in writing.

> *"It is not necessary to reach the issue of whether the parking easement was previously extinguished by merger. We hold that, even if merger occurred, the easement was recreated by subsequent conveyances.*
>
> *"When an easement has been extinguished by unity, the easement does not come into existence again merely by severance of the united estates. . . . Upon severance, a new easement authorizing a use corresponding to the use authorized by the extinguished easement may arise. If it does arise, however, it does so because it was newly created at the time of the severance. Such a new creation may result, as in other cases of severance, from an express stipulation in the conveyance by which the severance is*

> *made or from the implications of the circumstances of the severance."* Radovich v. Nuzhat, *supra* at 805-806

Bresslers next rely upon *Nickell v. Southview Homeowners Association*, 167 Wn.App. 42, 52, 271 P.3d 973 (Div. II, 2012). That case involved land adversely possessed for more than 20 years and the assertion by the prior owner that adverse possessor should be equitably estopped from claiming the same. The case does not stand for the position that once abandoned, an easement cannot be reasserted, herein by the Sullivans, absent a bar to doing so via equitable estoppel. This is consistent, as the trial court noted, with the long standing principle of law that even fencing or blocking an easement "does not constitute evidence of abandonment until the other individual benefiting from the easement seeks to access it and any barrier is not removed." CP 19-38 at page 34, citing *Edmonds v. Williams,* 54 Wn.App, 632, 636-637, 774 P.2d 1241 (1989). As noted in this case, although the Sullivans, having received bad legal advice that the easement did not exist, erected a fence in the middle of the easement, they subsequently removed and relocated the same in an effort to accommodate the easement rights of the Bresslers, even though the Bresslers did not own a boat and were in no position to assert their rights under this "boat launch easement". We note in this regard that the "Boat Launch Easement" that is the subject of this matter is expressly limited in the purposes to which the property owners can utilize the same:

> *"For the benefit of Lots 25 and 26, Case Group hereby declares an easement FIVE (5) feet in width on each side of the common boundary line . . . for ingress and egress to the easement on Lot 26* ***for the purpose of launching boats****." Ex. 11 at trial, copy appended as Appendix A hereto.*

See also ¶ 2 of the letter from Bresslers' attorney Cliff to attorney Thayer stating and affirming the very limited nature of the acceptable use of the easement. Ex. 85.

C. GOOD FAITH OF SULLIVANS

Bresslers next argue that Sullivans cannot claim denial of their revocation of any abandonment since the relief is not "oppressive" and that Sullivans did not act in good faith. Bresslers point to the testimony that the Sullivans installed a fence in the middle of the easement after being advised that boat launch easement did, in fact, exist. But the Sullivans also testified that they were investigating the ability of installing their own ramp on their property to launch a boat. It was only later that they discovered that changes in the environmental laws and the concomitant increases in cost of doing so were prohibitive to that course of action. Deposition of Linda Sullivan.

D, E. SUBSTANTIAL JUSTICE & AN END TO LITIGATION HAVE BOTH BEEN ACCOMPLISHED

Despite the claims to the contrary by Bresslers, Judge Churchill did accomplish equity and did balance the interests of both parties in her decision.

> "*But the court concludes that they [Bresslers] would not suffer undue hardship if the Sullivans are required to move the encumbrances found by the court to encroach on the easement and to pay the Bresslers' legal expenses. When the Bresslers bought their property, they knew it was encumbered by the boat launch declaration and that they would have to allow their neighbors to use it.*" CP 19-38 at page 35.

The Court essentially taxed the Sullivans for paying all the attorneys' fees incurred by the Bresslers up and until the point that the Sullivans revoked their position with regard to extinguishing the easement. Mr. Bressler testified during that trial that the amount of fees to that point was $2,500.00. RP 299.

It is clear that prior to litigation when the parties were both contemplating an extinguishment of the easement, both parties and their attorneys clearly understood this was only to be accomplished by a form extinguishment in writing and neither was relying upon the actions of the Sullivans with regard to the location of the fencing. Since no such agreement was ever executed, the Court looked rather to the actions of the parties in this regard. But clearly the court felt that the fees incurred by the Bresslers up to that point were occasioned by the actions of the Sullivans and the Bresslers should be reimbursed for this amount. It was clearly the decision of the Bresslers to pursue litigation and trial in this matter, incurring almost $100,000.00 in legal fees for each of the parties and the same should not be simply awarded to the prevailing party absent some legal basis to do so. BB at page 40. None has been adequately stated or provided. Bresslers attempt to claim that but for the "mailbox" placed in the easement area, they would have "kept their mouths shut". BB at page 40. There is no support factually for this contention and it is not supported by the law. Barriers in an easement, removed on demand for its use, do not constitute abandonment of the easement. See Edmonds v. Williams, supra.

That the Sullivans thought the best way to ameliorate conflict between the parties was to install their own boat launch ramp if they could does not mean that the Bresslers were somehow harmed because they might not be able to extinguish the easement. That Sullivans found the costs and legal barriers to be insurmountable for them does not weigh against them in this regard.

The Court's decision does put an end to this aspect of the litigation, specifically holding the parties to the bargain they made on July 18, 2006 when they purchased their property. The Court established conditions including relocating any fencing that remained in the easement area and payment into the registry of attorney's fees and costs incurred by the Bresslers. Both those conditions were met on a timely basis. See *Defendants' Declaration Re: Compliance with Court Decision*, copy appended as Appendix D.[5]

The Sullivans do not think that the purpose of the trial court's decision was to "avoid undue hardship to the Bresslers" as asserted. BB ¶ E, page 42. That the Court chose not to award $100,000.00 in fees necessitated by the Bresslers taking this matter to trial is not evidence of inequity. There was no basis for the fees through trial although there was a basis for the fees incurred prior to the Sullivans making it clear they were not going to voluntarily extinguish the easement. Bresslers assert no

---

[5] Arrangements will be made to have this filed pleading forward to the Court of Appeals upon the filing of this brief. A corrected brief to accommodate the appropriate reference may be submitted as soon as that is accomplished.

legal basis the Court to award fees had the case simply started where the parties found themselves on Dec. 21, 2011 (no extinguishment will be executed). Ex. 74. *Carpenter v. Folkerts*, 29 Wn.App. 73, 80, 627 P.2d 559 (1981) is not applicable factually or legally to the case at bar.

Bresslers state that the Sullivans would not comply with the requirements until the Court ordered them to do so as part of its rulings. But that is not correct. The Sullivans did, prior to trial and much of the legal action, relocated the fence. However, there is point at which the easement makes a 90° bend to the north to cross the Bressler lot to the boat launch ramp. See Ex. 140. It was the Sullivans understanding that they could, beyond the effective radius of this turn, fence to the actual property line without interfering with the easement. They specifically located a "swinging gate" to accommodate their access to the easement area as shown on the survey referred to. When informed by the Court that the fence had to be outside the boundary of the easement all the way to the water. The Sullivans complied. See *Defendants' Declaration Re: Compliance with Court Decision*, copy appended as Appendix D. [5]

F. NO UNDUE HARDSHIP ON BRESSLERS

Bresslers argue that the trial judge should have required the payment of the entirety of their legal fees in the case as a condition of reinstatement. BB ¶ 2, page 45. This would not have been sustainable legally and certainly not equitably under the facts of this case. Bresslers' brief attempts to utilize claims related to emotional distress, issues with

Bresslers' son, etc. without asserting any basis at law. BB ¶ 2, page 45-46. The Court made no findings that emotional distress was occasioned on the Bresslers. See CP 19-38. The Bresslers offered no objective evidence that any emotional distress was occasioned by actions of the Sullivans, nor did they offer any expert testimony, medical or otherwise in this regard. The Bresslers did not make any claim for emotional distress in the 2nd Amended Complaint, the operative document leading this matter to trial. No such claim was put forward in the original Complaint or the 1st Amended Complaint.

The trial court correctly made it clear to both parties in its rulings the nature of the easement, the limitations imposed on its use, the area included within it and conditions precedent to its renewal. CP 19-38 and 38. Those conditions as noted above have been fully met by the Sullivans and the parties should go into the future with the clarifications in mind.

G. ALTERNATIVE BASIS TO SUSTAIN COURT'S DECISION

There exists, from the record, an alternative basis for the decisions of the trial court to be sustained, to wit, that the actions of the Sullivans did not rise to the level necessary to have "abandoned" the easement under *Heg v. Alldredge* and *Edmonds v. Williams, supra.*

"Acts evidencing abandonment of an easement must be unequivocal and decisive and inconsistent with the continued existence of the easement." Heg, *supra at 161.*

"'[W]here an easement has been created but no occasion has arisen for its use, the owner of the servient tenement may fence his land and such use will not be deemed adverse to the existence of the easement until such time as (1) the need for the right of way arises, (2) a demand is made by the owner of the dominant tenement that the easement be opened and (3) the owner of the servient tenement refuses to do so.' (citing Castle Associates v. Schwartz)." Edmonds v. Williams, *supra at 636-637.*

The Bresslers cannot rely for evidence of Sullivans' intention to abandon the easement on e-mails between Sullivans and their then attorney Saar. Those e-mails are privileged communication and it is clear from the record that they were not shared with the Bresslers or their counsel until after the Complaint(s) in this matter were filed.

The only objective evidence to which the Bresslers could point or identify were the following:

- Email from attorney Saar to attorney Cliff that he was going to "recommend" to the Sullivans that they sign a document to extinguish the lease. This is clearly not "unequivocal" or "decisive" as called for in Heg v. Alldredge. It clearly infers that a decision has not yet been made on the issue. Ex. 55. Subsequent communications, although couched in terms of a positive feeling that Sullivans would sign, clearly denominated conditions (filing a claim with the Title Company), etc. that would have to be first resolved. See Ex. 59, 60, 64 and 68

- That the Sullivans installed their mailbox on a post in the area of the easement and that they erected a fence in the easement area. Up to that point, and to date, the Bresllers had no boat or occasion to use the easement for the limited purpose for which it was created (launching a boat) and had made no demand that the fencing be removed in order that they could use the same. RP 279-281.
- That the Sullivans allowed the grass to grow. RP 281. The same theory applies in that the Bresslers did not own a boat, could not avail themselves of use of the easement to launch a boat and had made no demand supported by an anticipated use.
- That the Sullivans erected a fence but later removed it when the Bresslers asked them to by reason of it being in the easement. RP 282-284. Again, the actions of the Sullivans in moving the fence are clearly indicative that they continued to recognize the easement and the rights of both parties under it, inconsistent with "abandonment".

H. AWARD OF ATTORNEY'S FEES ON APPEAL

As noted, the Bresslers sought an award of attorneys' fees at trial. 2nd Amended Complaint, CP 838-862 at 858. The Court awarded fees to the Bresslers against the Sullivans under the argued theory of equitable estoppel. The court did not find a basis to award to the Bresslers the entirety of their legal fees as argued above. The standard for this Court's review of the reasonableness of the attorney's fee award by the trial court should be "abuse of discretion".

> "*The reasonableness of an attorney fee award is reviewed on appeal for an abuse of discretion. Generally, an appellate court will not disturb a trial court's award of attorney fees unless the trial court abused its discretion. The party challenging the trial court's decision bears the burden of demonstrating that the award was clearly untenable or manifestly unreasonable.*" Wash. State Commc'n Access Project v. Regal Cinemas, Inc., 173 Wn. App. 174, 219, 293 P.3d 413 (2013)

If the Court sustains the decisions of the trial court, the Sullivans should receive an award of attorney's fees on appeal under RAP 18.1. See *Wash. State Commc'n Access Project v. Regal Cinemas, Inc.*, *supra* at 222.

Respectfully submitted this 5th day of January, 2015.

ANDERSON HUNTER LAW FIRM

By: _____
G. Geoffrey Gibbs, WSBA No. 6146
Attorneys for Respondents Sullivan

APPENDIX A

4176808
Page: 1 of 4
07/24/2006 01:34P
ISLAND COUNTY AUDITOR DCL

AFTER RECORDING MAIL TO:

The Law Offices of
Kelly Harvey & Carbone L.L.P.
P.O. Box 290
Clinton, WA 98236

DELCARATION FOR JOINT USE OF A BOAT LAUNCH

GRANTORS: Casa Group, Inc., a Washington State Corporation
GRANTEES: The Public
TAX PARCEL NO's.: S-6400-00-00025-0

This Declaration is made this 18th day of July, 2006, by Casa Group, Inc., a Washington State Corporation, (hereinafter referred to as "Casa Group"), owners of property, currently consisting of two lots, more particularly described as follows:

Lot 25, Plat of Columbia Beach, as per plat recorded in Volume 3 of Plats, page 7, records of Island County, Washington.
EXCEPT that portion, if any, lying within right of way of Columbia Beach Drive.
TOGETHER WITH tidelands of the second class situate in front of, adjacent to, or abutting on said premises.
Situtate in the County of Island, State of Washington.

AND

Lot 26, and the South 10 feet of Lot 27, Plat of Columbia Beach, as per plat recorded in Volume 3 of Plats, page 7, records of Island County, Washington.
EXCEPT that portion, if any, lying within right of way of Columbia Beach Drive.
TOGETHER WITH tidelands of the second class situate in front of, adjacent to or abutting on said premises.
Situate in the County of Island, State of Washington.

Tax Parcel # S6400-00-00025-0

SIPR.1

RECITALS

1. WHEREAS Casa Group desires to establish a joint use of a boat launch on Lot 26 for the use of properties described above; and

2. WHEREAS Casa Group desires to grant access to the boat launch on Lot 26 in order that the boat launch can be accessed for the benefit of Lots 25 and 26 described above; and

3. WHEREAS Casa Group desires that the owners of properties described above to commonly share the boat launch for their mutual benefit;

NOW, THEREFORE, Casa Group hereby declares as follows:

1. DECLARATION OF A MUTUAL EASEMENT. For the benefit of Lots 25 and 26, Casa Group hereby declares an Easement FIVE (5) feet in width on each side of the common boundary line between the properties described above, extending ONE HUNDRED FORTY FEET (140) from the road known as Columbia Beach Drive, Easterly toward the water, Puget Sound, for ingress and egress to the easement on Lot 26 for the purpose of launching boats.

2. DECLARATION OF EASEMENT. For the benefit of Lot 25, Casa Group hereby declares an Easement over and across Lot 26 for ingress and egress across a strip of land TWELVE (12) feet in width from the Easterly end of the above described Easement to the existing boat launch on Lot 26 for the purpose of launching boats. For illustrative purposes, a copy of the survey showing the location of the Easement is attached hereto as Exhibit A, page 4.

3. MAINTENANCE OF THE BOAT LAUNCH. Casa Group declares that the owners of the properties described above shall share equally in the cost of maintaining the boat launch. The owners of the properties will meet annually to determine what maintenance, if any, is required to keep the boat launch in its current or better condition or to determine if a new launch is necessary.

In the event either Owner of Lot 25 or Lot 26 damages the property of the other, said Owner agrees to repair all damage and restore the property of the other to its original condition within THIRTY (30) days of occurrence.

4. DISPUTE RESOLUTION. In the event there is a dispute concerning questions of law or fact arising out of or relating to this Agreement, its performance or alleged breach, which is not disposed of by agreement of the parties, then the parties agree to submit the dispute to mediation. If mediation fails, then the parties agree that any subsequent litigation shall be submitted to the Island County Superior Court.

5. BENEFIT & BURDEN TO RUN WITH THE LAND. It is agreed that the mutual

promises and covenants herein shall bind and inure to the benefit and burden of the properties more particularly described above, and shall run with the land, and bind all subsequent Owners, heirs and successors in interest of the benefited property.

IN WITNESS WHEREOF, the declarant has caused this document to be executed as of the day and year first above written.

Richard Jones, Declarant
President, Casa Group, ~~Inc.~~ Corp.

STATE OF WASHINGTON)
) ss:
COUNTY OF ISLAND)

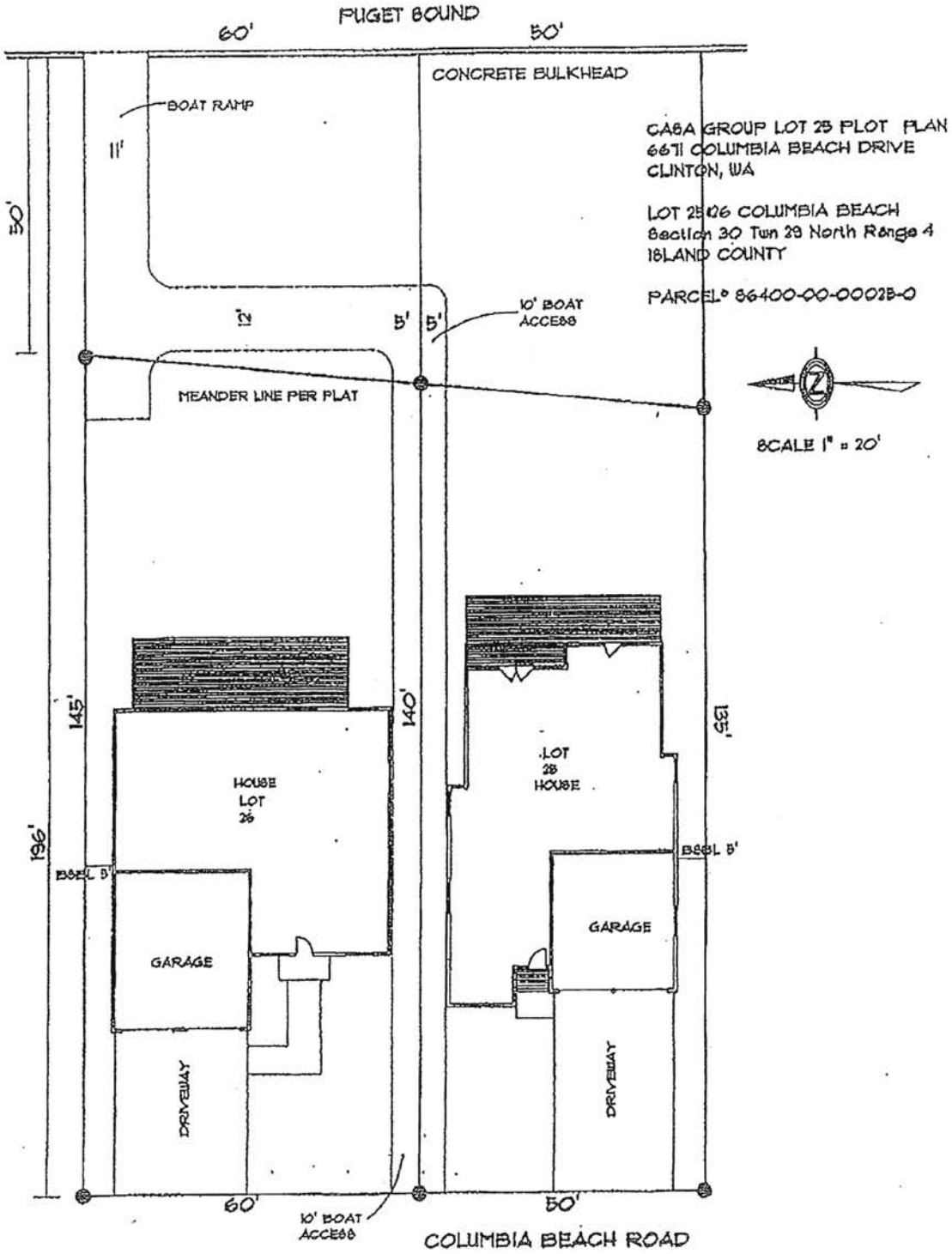
On this 19 day of July, 2006, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Richard Jones, to me known to be the President of Casa Group, ~~Inc.~~, a Washington State Corporation,, the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute the said instrument.

Witness my hand and official seal hereto affixed the day and year first above written.

- Notary Public -
State of Washington
KATHERINE L. NELSON
MY COMMISSION EXPIRES
OCTOBER 15, 2008

KATHERINE L NELSON
NOTARY PUBLIC in and for the State of Washington, residing in Freeland
My commission expires 10-15-08

EXHIBIT A
TO DECLARATION FOR JOINT USE OF A BOAT LAUCH



APPENDIX B

FILED-COPY
FEB 11 2014
DEBRA VAN PELT
ISLAND COUNTY CLERK

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR ISLAND COUNTY

Law & Justice Facility, 101 NE 6th St, PO Box 5000, Coupeville WA 98239-5000
Phone: (360) 679-7361 Fax: (360) 679-7383

ALAN R. HANCOCK
Judge
VICKIE I. CHURCHILL
Judge
BROOKE POWELL
Court Administrator
ANDREW SOMERS
Assistant Court Administrator

February 10, 2014

Carolyn Cliff
Attorney
120 Second St., Suite C
PO Box 925
Langley, WA 98260

G. Geoffrey Gibbs
Anderson Hunter Law Firm, P.S.
2707 Colby Avenue, Suite 1001
PO Box 5397
Everett, WA 98206-5397

Re: Bressler v. Sullivan, Island County Superior Court, No. 12-2-00469-7

Dear Counsel:

This matter came before the court after a bench trial from December 3-5 and December 12, 2013. The court took the matter under advisement and is now ready to rule.

STATEMENT OF FACTS

Sullivan and Bressler each bought adjoining low-bank waterfront homes on Columbia Beach Drive in Clinton on the same day, July 24, 2006. The Sullivans own Lot 25 and the Bresslers own Lot 26. Both lots are encumbered with a mutual easement over a five-foot strip on either sides of most of their common boundary, while Lot 26 is encumbered with an easement for the benefit of Lot 25 that crosses Lot 26 to the side where the boat ramp is located on Lot 26.

Prior to the Sullivans' and the Bresslers' purchase of their lots, both lots were owned by Casa Group Corporation, a Washington corporation, whose president was Rick Jones. Casa Group installed stone pavers along the corridor between the two houses and reinforcing plastic honeycomb, called "grassy pavers," under the sod at each end of the stone paver corridor,

following the intended easement path between the two lots until it crossed Lot 26 and reached the boat launch. *See* "Declaration for Joint Use of a Boat Launch," Ex. 11. The purpose was to strengthen the ground so vehicles towing boats would not tear up the ground.

The neighbors did not get along for a variety of reasons and over the years both were careful to stay on their side of the easement. There were two exceptions. The Sullivans erected a mailbox in January 2009 in the middle of the easement in front of the houses and, despite acknowledging that the box needed to be moved, did not remove it until after this lawsuit was commenced. Additionally, the Sullivans put in landscaping along the side and in front of their house that encroached on the easement.

The Bresslers sometimes put lawn furniture on the paved boat launch but such use was seasonal. The Sullivans apparently did not like that use but did not complain to the Bresslers. The Bresslers removed the lawn furniture from the boat launch pad when they saw that the Sullivans had a boat.

In August 2009, Ms. Sullivan told Mr. Bressler that she was going to give up her easement rights and install a fence along the property line. Bressler told her it would be inconsistent with the easement, because he did not want to lose his right to use the easement. There was some controversy over where Ms. Sullivan was going to place her fence, but eventually, the chain-link fence she installed was five feet from the mid-point of the easement, and there was no encroachment on the easement.

Early September 2011, the Sullivans brought a small aluminum boat and stored it inside their fence. On September 5, 2011, Ms. Sullivan emailed her attorney with questions about how to begin using her easement shared with Bressler. Ex. 131. Unfortunately, Ms. Sullivan was told that no easement existed, even though she believed an easement existed from the time she and her husband purchased the property and even though her neighbor, Bressler, had continuously affirmed the existence of an easement. In fact, in August 2007, the Sullivans paid one-half the cost of repairs to the boat launch, acknowledging the existence of a joint-use agreement and easement.

There were some minor confrontations between the neighbors about use of the easement area, but it did not escalate until January 2009 when Ms. Sullivan moved onto the property and brought her dogs to stay with her. She had her mailbox installed on the easement in January 2009 and kept it there, despite Mr. Bressler telling her it was in the middle of the easement. She agreed to move the mailbox but never did until this lawsuit occurred.

At the end of August 2009, Ms. Sullivan decided to put up a fence because of some problems with her dogs and another neighbor's dogs. At one point, she told Mr. Bressler that she would have to give up her easement in order to put her fence on the property line. Mr. Bressler reminded Ms. Sullivan that it would be inconsistent with the easement and that she could not do that. Mr. Bressler told one of the contractors installing the fence that there was an easement, and

Ms. Sullivan came up and told the contractor, "Don't listen to what he says. I'm going to put my fence anywhere I want."

Even though Ms. Sullivan eventually placed her fence five feet from the midpoint of the easement so that it did not encroach on the easement, it is apparent to this court that she was aware that an easement existed and its location.[1]

Mr. Bressler had placed a single rope from where Ms. Bressler's fence ended and attached it to the bulkhead to give his autistic child a verbal reminder of the limits of Mr. Bressler's yard. Ex. 95. In October 2009, Ms. Sullivan removed part of the rope fence and told Mr. Bressler that he could not put the rope fence on that portion because it blocked her easement, saying, "As you know, the easement does not go down this far." Again, Ms. Sullivan knew about the location of the easement and its existence.

On September 8, 2011, the Sullivans contacted an attorney to draft a letter to the Bresslers, informing them they intended to start using the easement. Ex 172. The easement was not mentioned in the Sullivan's Statutory Warranty Deed, Ex. 12, and for whatever reason, the attorney was unable to find the easement in the title records, possibly because it was called "Declaration for Joint Use of a Boat Launch." Ex. 11.

On September 27, 2011, the Sullivans purchased a small aluminum boat and stored it inside their fence. Ex. 30. Mr. Bressler, who saw the boat, immediately moved his outdoor furniture off the boat pad. The Sullivans also made arrangements to install a sliding gate on their fence in preparation to move their boat from their property to the boat launch. With the exception of the mailbox and some plantings alongside the house and in the front yard, there was no encroachment on the easement.

On September 29, 2011, Ms. Sullivan's attorney advised her there was no recorded easement, and Ms. Sullivan took immediate action to move her fence to the middle of the easement. Ex. 31. On October 5, 2011, the poles were set in concrete in the ground. Ex. 36. By October 12, 2011, all the fence posts were placed in concrete in the middle of the easement, including the six-foot-high wooden posts between the two houses. The Sullivans had to remove the grassy pavers along the easement, as well as the stone pavers between the two houses in order to install the fence posts.

When the Bresslers came to the property after October 12, 2011, and saw the new fence and poles, Mr. Sullivan came up to him and gave him cards from his attorneys. Ex. 142. Mr. Bressler then hired his own attorney, who contacted the Sullivan's attorney. The Sullivans learned by email dated October 19, 2011, that the easement existed. Ex. 39. Even though the Sullivans' attorney thought the Bresslers were probably wrong about the easement, he suggested to the Sullivans that they might be able to record a mutual easement, since both parties believed one

[1] The Sullivans allowed grass, weeds and wildflowers to grow on their side of the easement. Ex. 108. When they finally cut the grass, the grass had a yellow or newly-mown look, which can be seen in Ex. 113.

existed. *Id.* Ms. Sullivan responded, "I am not interested in sharing anything with Mark Bressler..." *Id.* Ms. Sullivan authorized her fence contractor to continue with the installation of the wooden fence between the two houses, which only had the posts installed at that point. Ex. 98, 110, 111.

On October 24, 2011, the Bresslers, via their attorney, wrote to the Sullivans' attorney and demanded that the fence and mailbox be removed from the easement no later than November 4, 2011, or alternatively, they would agree to extinguish the easement. Ex. 45. An easement was supposedly attached.

Unfortunately, the Bresslers' attorney attached the wrong document, not the easement, to the letter. However, by email a day later on October 25, 2011, the easement was emailed to the Sullivans' attorney. Ex. 46. The Sullivans' attorney sent the easement to the Sullivans by email on October 26, 2011. Ex. 47. Ms. Sullivan responded on October 27, 2011, advising her attorney not to say anything to the Bresslers' attorney, but to, "Keep them humming..." *Id.*

The court finds that the Sullivans intended to stall the Bresslers from taking any action to enforce the easement. The Sullivans' later actions are also consistent with this finding.

Then followed a group of emails between the Bresslers' attorney and the Sullivans' attorney in which the Sullivans' attorney represented that the Sullivans wanted to extinguish the easement. Exs. 55, 56, 59, 60, 64, 67, 68 and 70. The extinguishment agreement had been provided to the Sullivans' attorney on November 9, 2011, Ex. 54, and the Sullivans kept their fence installed in the middle of the easement. In addition to the emails between the two attorneys, the Bresslers told their attorney in an email dated November 11, 2011, that they agreed to sign the papers to relinquish the declaration. Ex. 57. Ms. Sullivan is not credible when she said at trial that she never wanted to sign the relinquishment. The court finds that she expressly and impliedly communicated her acquiescence to her attorney.

The court finds that the Sullivans were aware that their attorney was working on an extinguishment and that neither she nor her husband advised their attorney to stop representing them or to add conditions to the extinguishment. The court further finds that the Bresslers were entitled to rely on the representations made by the Sullivans' attorney.

The Sullivans originally wanted either the property seller, Ex. 38, the Casa Group, and its owner, Rick Jones, or the title company to pay for a boat launch on their property. *Linda Sullivan's deposition,* page 413, lines 4-24. On October 16, 2011, the Sullivans even got an estimate for partial costs of installing a boat ramp on their property, $23,914. Ex. 39. When the easement was found, their claim against the property owner was no longer possible, leaving only the title company as a possibility.

On November 21, 2011, the Sullivans' attorney advised the Sullivans that they were not entitled to recapture from the title company the costs for installing a boat ramp or the fence and that it

was unlikely the title company would reimburse the Sullivans' attorney fees. Ex. 61. At that point, Ms. Sullivan testified that she felt that their attorney was no longer working on their behalf. *Linda Sullivan's deposition,* page 413, lines 4-24. The Sullivans did not respond to the email.

Eventually, the Sullivans' attorney emailed them again, inquiring as to when they could sign the extinguishment agreement prepared by the Bresslers' attorney. Ex. 62. On November 30, 2011, Ms. Sullivan responded that they were "unavailable until mid-December." *Id.* However, the Sullivans were actually at home when they said they were "unavailable." Ex. 69.

On December 8, 2011, the Sullivans' attorney wrote them a letter explaining that their attorney fee claim against the title company for not including the easement in the title policy issued to the Sullivans was rejected but that the attorney would try again to recoup the attorney fees. Ex. 72. On December 19, 2011, the Sullivans' attorney emailed the Sullivans that the title company was willing to pay $3,951 for attorney fees to settle their claim. Ex. 73.

On December 20, 2011, one day after being informed that the title company would only reimburse $3,951, the Sullivans sent a letter to their attorney, with a copy to the Bresslers' attorney, that they would not sign the extinguishment agreement. Ex. 74.

Later, the Sullivans' second attorney represented that the Sullivans wanted the title company to reimburse them for the costs of relocating their fence as well as attorney fees and were upset that their attorney had not included the fence relocation claims. Ex. 89. However, the court finds that contrary to Ms. Sullivan's reasons at trial, her main purpose in stalling the Bresslers and her own attorney was to determine whether she could get reimbursed for a separate boat launch on her own property that she would not have to share with the Bresslers. Until she knew the outcome of that question, she did not want to move her fence out of the easement area and incur additional fence expenses.

Pursuant to the boat launch easement, the Bresslers requested mediation. The Sullivans finally agreed to mediate on February 27, 2012, and shortly thereafter on March 1, 2012, Ex. 83, moved the majority of their fence back to its original configuration, five feet from the middle of the easement. However, the Sullivans left a 12-foot portion of the fence inside the easement where the 10-foot swinging gate was installed. Ex. 81. The Sullivans' current configuration requires both the Bresslers and the Sullivans to drive over part of the Bresslers' reserve area for their drainfield. The Bresslers' attorney again advised the Sullivans' new attorney that the Sullivans were blocking the easement but the Sullivans did nothing to rectify the situation. The new fence configuration continues to extend into the easement to this day.

Ms. Sullivan testified that the easement only extended 140 feet from Columbia Beach Drive and that her fence was placed five feet from the midline of the easement until that point, after which the fence was placed on her property line. She argued that her fence did not encroach on the easement. The court disagrees with Ms. Sullivan. As the diagram presented by Ms. Sullivan to

her fence installers show, the fence is placed in the middle of the easement where a vehicle towing a boat would have to turn. Ex. 81. The court finds that the Sullivans' fence encroaches on the easement for 12-feet where the 10-foot sliding gate is installed.

Mediation, which did not occur until April 4, 2012, was not successful, and the Bresslers filed this lawsuit on June 8, 2012. After the lawsuit was filed, the Sullivans used the boat ramp numerous times. However, they did not comply with the boat launch easement agreement in several respects. The boat launch agreement provides that the easement is to be used for "ingress and egress to the easement on Lot 26 for the purpose of launching boats." Instead, the Sullivans often tied their boat up on the Sullivans' tidelands or stored their boat on the boat ramp. Exs. 120-126, Ex. 182.

In addition, they authorized third parties to use the easement to remove driftwood from the beach below the boat launch without notifying or obtaining the Bresslers' agreement and then demanded that the Bresslers pay half the bill even though they had not followed the terms of the boat launch declaration. They enlarged the river rock bed on the property facing the Bresslers' property, and expanded their front yard landscape further into the easement area. Ex. 142. The Sullivans took out stone pavers in the easement and installed plants that have the potential of intruding into the easement area by five feet if trimmed and by 10 feet if left untrimmed. Ex. 130 and Ex. 139.

The Sullivans have dropped their counterclaims and stipulated that they do not intend to ask the court to amend their pleadings to add "the public" as a necessary party.

The facts above are mostly undisputed, but where they might be disputed, the court adopts the above as findings.

DISCUSSION

In order to find that an easement has been abandoned, the court must find more than mere nonuse. *Heg v. Alldredge,* 157 Wash.2d 154, 161, 137 P.3d 9 (2006). The nonuse "must be accompanied with the express or implied intention of abandonment." *Id., citing Netherlands Am. Mortgage Bank v. E. Ry. & Lumber Co.,* 142 Wash. 204, 210, 252 P.916 (1927). "Acts evidencing abandonment of an easement must be unequivocal and decisive and inconsistent with the continued existence of the easement." *Heg v. Alldredge*, 157 Wash.2d at 161.

In this case, the parties acknowledged the existence of the easement and kept obstructions outside the width of the easement. The exception to this was Ms. Sullivan's mailbox which she placed in the middle of the easement and refused to move it for years, even while acknowledging that it was in the easement. When Ms. Sullivan was told by her attorney in 2011 that was no recorded easement, within six days she had the fence posts set in concrete in the middle of the easement. She was even unwilling to negotiate with the Bresslers to establish a mutual easement because she was not "interested in sharing anything with Mark Bressler ...." Ex. 39.

The Sullivans were notified that the recorded easement existed on October 19, 2011, and were provided a copy of the boat launch declaration on October 25, 2011. The Sullivans' actions in relocating the fence to the inside of the easement when they were mistakenly told there was no recorded easement appears to have been done in the mistaken belief that the easement had not been executed or recorded, as acknowledged by the Bresslers. Ex. 45. However, the Sullivans' actions after being advised that an easement was recorded were intentional.

After receiving verification that the easement was recorded, Ms. Sullivan, nevertheless, continued with the installation of the fence inside the easement. Her representation that she thought the wooden posts which were already installed would be dangerous standing alone is not credible. The court finds that installing a fence in the middle of the easement is "unequivocal and decisive and inconsistent with the continued existence of the easement." *Heg v. Alldredge*, 157 Wash.2d at 161. At that point, the Sullivans abandoned the easement.

The Sullivans' actions continued to be inconsistent with the continued existence of the easement. The Sullivans' actions in relocating the fence to the inside of the easement when they were mistakenly told there was no recorded easement appears to have been done in the mistaken belief that the easement had not been executed or recorded, as acknowledged by the Bresslers. Ex. 45. However, the Sullivans' actions after being advised that an easement was recorded were intentional. The Bresslers, through their attorney, notified the Sullivans, also through their attorney, that either the fence and mail box must be removed by November 4, 2011, or, alternatively, the Bresslers would prepare paperwork to extinguish the easement. The Sullivans did neither. Instead, they instructed their attorney not to say anything to the Bresslers and to stall them, or in Ms. Sullivan's words, "Keep them humming...." Ex. 47.

Even though the Sullivans unequivocally told the Bresslers that they intended to sign the relinquishment agreement prepared by the Bresslers, they stalled from October 25, 2011, until December 20, 2011, when they finally notified their own attorney and the Sullivans' attorney that they would not sign the relinquishment. The fence and mailbox remained in the middle of the easement. The court finds that the Sullivans' continued encroachments were "unequivocal and decisive and inconsistent with the continued existence of the easement." *Heg v. Alldredge*, 157 Wash.2d at 161.

The Sullivans did not remove portions of the fence until March 1, 2012. A 12-foot portion of the fence was left inside the easement. Not only did this portion of the fence continue to encroach on the easement, but it forced anyone using the easement from the street to the boat launch pad to drive over part of the Bresslers' reserve area for their drainfield. The Sullivans continued to keep the mailbox in the middle of the easement.

The Sullivans argued that they moved their fence back five feet from the midpoint of the easement until they were 140 feet from Columbia Beach Drive, as required in the boat launch declaration. Ex. 11. As the Sullivans' own diagram shows, Ex. 81, in order to make the turn onto

the 12-foot easement leading to the boat pad, a person towing a boat would need to drive over the Bresslers' reserve drainfield which begins 50 feet from the bulkhead, Ex. 3, right where the Bresslers' fence encroaches. The court has already made the finding that the Sullivans' fence encroaches on the easement for 12-feet where the 10-foot sliding gate is installed. Based on the diagram used by the Sullivans, they knew or should have known that they were encroaching on the easement. The Sullivans were notified of their continued violations of the easement in a letter dated May 24, 2012, yet the fence remains in its present configuration today.

The Bresslers filed their complaint on June 8, 2012, after offering the Sullivans the opportunity to mediate the controversy. The Sullivans finally moved their mailbox outside the easement in November 2012, months after the lawsuit was commenced by the Bresslers.

Ms. Sullivan contends at trial that she will move any encroachments found by the court. The court has found that the fence encroaches on the easement at the point where the easement makes a turn, that the bushy plants in the easement between the two houses encroach on the easement, and that the front landscaping encroaches on the easement.

Estoppel

The question that concerns the court is, after abandoning the easement as the Sullivans did, whether the Sullivans can now repudiate that abandonment and reinstate the easement. Courts have long held that blocking the way of an easement does not constitute evidence of abandonment until the other individual benefiting from the easement seeks to access it and any barrier is not removed. *Edmonds v. Williams,* 54 Wn.App. 632, 636-637, 774 P.2d 1241 1989).

In anticipation of this position, the Bresslers argue that the Sullivans should be equitably estopped from denying that they abandoned their easement. Equitable estoppel requires a showing that the party to be estopped (1) made an admission, statement or act which was inconsistent with his later claim; (2) that the other party relied thereon; and (3) that the other party would suffer injury if the party to be estopped were allowed to contradict or repudiate his earlier admission, statement or act. *Pub. Util. Dist. No. 1 v. Walbrook Ins. Co.,* 115 Wn.2d 339, 347, 797 P.2d 504 (1990). The party asserting equitable estoppel must prove these elements by " 'very clear and cogent evidence.' " *Proctor v. Huntington,* 146 Wn.App. 836, 845, 192 P.3d 958 (2008)(quoting *Sorenson v. Pyeatt*, 158 Wn.2d 523, 539, 146 P.3d 1172 (1006)), *review granted,* 165 Wn.2d 1041 (2009).

The Sullivans' admissions, statements and acts after learning that the easement was recorded are inconsistent with their claim at trial. Additionally, the Bresslers relied on those statements by incurring attorney fees to prepare a legal document to relinquish the easement and to get the relinquishment signed. The Sullivans, even after receiving proof of the recorded easement, finished installation of the fence and continued to represent that they would sign the relinquishment. They even enlarged their landscaping so it extended further into the easement. Thus, the first two prongs of equitable estoppel have been met.

The third prong focuses on the injury the other party would suffer if the servient tenant, in this case the Sullivans, were allowed to contradict or repudiate their earlier admissions, statements or acts.

> "An easement may be extinguished by conduct of the owner of it even though he had no intention to give up the easement. This is due to the general principle that the owner of an easement will not be permitted to change a position once taken by him if the change would cause undue hardship to the owner of the servient tenement."

Humphrey v. Jenks, 61 Wn2d 565, 379 P.2d 366 (1963), (quoting from 2 *American Law of Property* 305, §8.99). (Emphasis added.)

Obviously the Bresslers have incurred attorney fees in drafting the extinguishment agreement and attempting to have it executed. The Bresslers have also incurred ongoing attorney fees because of the continued encroachment by the Sullivans, even after those encroachments were called to the Sullivans' attention. Most of the encroachments had been removed by time of trial, but the fence and landscaping encroachments remain. The continued presence of the fence in the easement area threatens the integrity of the Bresslers' reserve drainfield. However, the fence can be easily removed, as shown by the number of times the Sullivans moved their fence; and the landscaping can be removed.

The court finds that the Bresslers will suffer no undue hardship if the Sullivans are required to move the encumbrances found by the court to encroach on the easement and to pay the attorney fees incurred by the Bresslers. When the Bresslers bought their property, they knew it was encumbered by the boat launch declaration and that they would have to allow their neighbors to use it. The fact that the neighbors are contentious is unfortunate.

Trespass

Trespass is an intentional tort. *Broughton Lumber Co. v. BNSF Ry. Co.,* 174 Wn.2d 619, 630, fn. 9, 278 P.3d 173 (2012). Even though the Bresslers allege that the Sullivans left a pile of dog waste on their tidelands, there is insufficient evidence for the court to find that it was the Sullivans who placed it there. However, the court finds that the Sullivans have intentionally left their boat on the boat launch pad for periods of time not consistent with ingress and egress and that they have intentionally tied their boat up on the Bresslers' tidelands. Nevertheless, the court cannot find that the Bresslers suffered any damages.

CONCLUSION

The court will enter findings of fact and conclusions of law consistent with this letter opinion. The court will entertain further argument on the issue of attorney fees.

Sincerely,

Vickie I. Churchill

VICKIE I. CHURCHILL
Judge

Copy: Clerk

APPENDIX C

FILED-COPY

MAY 12 2014

DEBRA VAN PELT
ISLAND COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF ISLAND

MARK F. and LINDA H. BRESSLER, husband and wife, Plaintiffs, vs. KEVIN F. and LINDA SULLIVAN, husband and wife, GMAC MORTGAGE, LLC, & MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Defendants,	File No. 12-2-00469-7 FINDINGS OF FACT & CONCLUSIONS OF LAW

This matter came before the court on a duly-noted presentation motion filed in accordance with Civil Rule 54(b) and based on the court's letter opinion filed on February 11, 2014, after the trial in this case on December 3-5 and December 12, 2013. Having considered the materials filed with the presentation motion on the issue of fees identified in the court's letter opinion and having heard argument from Carolyn Cliff, attorney for Mark and Linda Bressler, and from G. Geoffrey Gibbs, attorney for Kevin and Linda Sullivan, the court now ENTERS the following findings of fact and conclusions of law.

Findings of Fact

1. Sullivans and Bresslers each bought adjoining low-bank waterfront homes in Island County, Washington, on Whidbey Island, on Columbia Beach Drive in Clinton

COPY

COPY TO CLIENT 5/13/14 (K)

Carolyn Cliff
Attorney
120 Second St., Suite C
P.O. Box 925
Langley, WA 98260
360-221-3313
FAX: 360-221-0781

on the same day, July 24, 2006. The Sullivans own Lot 25 and the Bresslers own Lot 26. Both lots were encumbered with a mutual easement over a five-foot strip on either sides of most of their common boundary, while Lot 26 is encumbered with an easement for the benefit of Lot 25 that crosses Lot 26 to the side where the boat ramp is located on Lot 26. Both easements are set forth in the "Declaration for Joint Use of a Boat Launch" that was recorded with the Island County Auditor on July 24, 2006, under Auditor's file number 4176808. Ex. 11.

2. Lot 25 is legally described as Lot 25, Plat of Columbia Beach, as per plat recorded in Volume 3 of Plats, page 7, records of Island County, Washington, EXCEPT that portion, if any, lying within right of way of Columbia Beach Drive, and TOGETHER WITH tidelands of the second class situate in front of, adjacent to, or abutting on said premises. Lot 26 is legally described as Lot 26, and the South 10 feet of Lot 27, Plat of Columbia Beach, as per plat recorded in Volume 3 of Plats, page 7, records of Island County, Washington, EXCEPT that portion, if any, lying within right of way of Columbia Beach Drive, and TOGETHER WITH tidelands of the second class situate in front of, adjacent to, or abutting on said premises.

3. Prior to the Sullivans' and the Bresslers' purchase of their lots, both lots were owned by Casa Group Corporation, a Washington corporation, whose president was Rick Jones. Casa Group installed stone pavers along the corridor between the two houses and reinforcing plastic honeycomb, called "grassy pavers," under the sod at each end of the stone paver corridor, following the intended easement path between the two lots and across Lot 26 down to the boat launch. *See* "Declaration for Joint Use of a Boat Launch,"

Carolyn Cliff
Attorney
120 Second St., Suite C
P.O. Box 925
Langley, WA 98260
360-221-3313
FAX: 360-221-0781

Ex. 11. The purpose was to strengthen the ground so vehicles towing boats would not tear up the ground.

4. The neighbors did not get along for a variety of reasons, and, over the years, both were careful to stay on their side of the easement. There were two exceptions. Ms. Sullivan had her mailbox installed on property that is subject to the easement in January 2009 and kept it there, despite Mr. Bressler telling her it was in the middle of the easement. She agreed to move the mailbox, but she never did until after this lawsuit was filed. Additionally, the Sullivans put in landscaping along the side and in front of their house that encroached on the easement.

5. The Bresslers sometimes put lawn furniture on the paved boat launch but such use was seasonal. The Sullivans apparently did not like that use but did not complain to the Bresslers. The Bresslers removed the lawn furniture from the boat launch pad when they saw that the Sullivans had a boat.

6. There were some minor confrontations between the neighbors about use of the easement area, but it did not escalate until January 2009, when Ms. Sullivan moved onto the property and brought her dogs to stay with her. At the end of August 2009, Ms. Sullivan decided to put up a fence because of some problems with her dogs and another neighbor's dogs. At one point, she told Mr. Bressler she was going to give up her easement rights in order to put the fence along the property line. Mr. Bressler did not want to lose his right to use the easement and reminded Ms. Sullivan that it would be inconsistent with the easement and that she could not do that. Mr. Bressler told one of the contractors installing the fence that there was an easement, and Ms. Sullivan came up

Carolyn Cliff
Attorney
120 Second St., Suite C
P.O. Box 925
Langley, WA 98260
360-221-3313
FAX: 360-221-0781

and told the contractor, "Don't listen to what he says. I'm going to put my fence anywhere I want." The chain-link fence that she installed was five feet from the mid-point of the easement, and there was no encroachment on the easement. It is apparent to this court, and this court finds, that Ms. Sullivan was aware that an easement existed and its location.

7. After Ms. Sullivan moved onto the property and brought her dogs to stay with her, Mr. Bressler placed a single rope, set back five feet from the property line. to give his autistic child a visual reminder of the limits of Mr. Bressler' s yard. Ex. 107. After Ms. Sullivan put up the chain-link fence, in October of 2009 Mr. Bressler placed a single length of the rope, attached to his post at the bulkhead, for the same reason. Ex. 95. While he was doing so, Ms. Sullivan told Mr. Bressler that he could not put it there because it blocked the easement. But Mr. Bressler reminded her that the easement did not go down that far. Here again, Ms. Sullivan knew about the existence of the easement and was on notice about its location. The Sullivans thereafter allowed grass, weeds and wildflowers to grow on their side of the easement. Ex. 108. When they finally cut the grass, the grass had a yellow or newly-mown look, which can be seen in Ex. 113.

8. In September 2011, the Sullivans bought a small aluminum boat and stored it inside their fence. On September 27, 2011, the Sullivans got their vessel registration. Ex. 30. On September 5, 2011, Ms. Sullivan emailed her attorney with questions about how to begin using her easement shared with Bressler. Ex. 131. Unfortunately, Ms. Sullivan was thereafter told that no easement existed, even though she had believed that an easement existed from the time she and her husband purchased the

Carolyn Cliff
Attorney
120 Second St., Suite C
P.O. Box 925
Langley, WA 98260
360-221-3313
FAX: 360-221-0781

property and even though her neighbor, Mr. Bressler, had continuously affirmed the existence of an easement. In fact, in August 2007, the Sullivans paid one-half the cost of repairs to the boat launch, acknowledging the existence of a joint-use agreement and easement.

9. On September 8, 2011, Ex. 172, the Sullivans met with an attorney to draft a letter to the Bresslers, informing them they intended to start using the easement. The easement was not mentioned in the Sullivans' Statutory Warranty Deed, Ex. 12, and for whatever reason, the attorney was unable to find the easement in the title records, possibly because it was called "Declaration for Joint Use of a Boat Launch." Ex. 11.

10. When Mr. Bressler saw the boat stored inside the Sullivans' fence, he immediately moved his outdoor furniture off the boat pad. The Sullivans also made arrangements to install a sliding gate in their fence in preparation to move their boat from their property to the boat launch. With the exception of the Sullivans' mailbox and some of their plantings alongside the house and in the front yard, there was no encroachment on the easement at this time.

11. On September 29, 2011, Ms. Sullivan's attorney advised her there was no recorded easement, and Ms. Sullivan took immediate action to move her fence to the middle of the easement. Ex. 31. By October 5, 2011, poles had been set in concrete in the ground along the property line east of the corridor between the two houses. Ex. 36. By October 12, 2011, a solid chain-link fence had been placed along those poles. Ex. 113. Fence posts were thereafter placed in concrete all along the property line in the middle of the easement, including six-foot high wooden posts between the two houses.

Carolyn Cliff
Attorney
120 Second St., Suite C
P.O. Box 925
Langley, WA 98260
360-221-3313
FAX: 360-221-0781

The Sullivans had to remove some of the grassy pavers along the property line, as well as some of the stone pavers between the two houses, in order to install the fence posts.

12. When the Bresslers came to the property after October 12, 2011, and saw the new fence and poles, Mr. Sullivan came up to Mr. Bressler and gave him cards from his attorneys. Ex. 142. The Bresslers then hired their own attorney, who contacted the Sullivans' attorney. The Sullivans learned by email dated October 19, 2011, that the easement did exist. Ex. 39. Even though the Sullivans' attorney thought the Bresslers were probably wrong about the easement, he suggested to the Sullivans that they might be able to record a mutual easement, since both parties believed one existed. *Id.* Ms. Sullivan responded, "I am not interested in sharing anything with Mark Bressler ..." *Id.*

13. On October 24, 2011, the Bresslers, via their attorney, wrote to the Sullivans' attorney and demanded that the fence and mailbox be removed from the easement no later than November 4, 2011, or alternatively, they would agree to extinguish the easement. Ex. 45. An easement was supposedly enclosed. Unfortunately, the Bresslers' attorney enclosed the wrong document, not the easement. However, by email a day later on October 25, 2011, the easement was provided to the Sullivans' attorney. Ex. 46. The Sullivans' attorney sent the easement to the Sullivans by email on October 26, 2011. Ex. 47. Ms. Sullivan responded on October 27, 2011, advising her attorney not to say anything to the Bresslers' attorney, but to, "Keep them humming . .." *Id.* Ms. Sullivan authorized her fence contractor to continue with the installation of the wooden fence between the two houses, which only had the posts installed at that point, even after learning that the Bresslers' attorney had provided the easement.

Carolyn Cliff
Attorney
120 Second St., Suite C
P.O. Box 925
Langley, WA 98260
360-221-3313
FAX: 360-221-0781

14. The court finds that the Sullivans intended to stall the Bresslers from taking any action to enforce the easement. The Sullivans' later actions are also consistent with this finding.

15. Then followed a group of emails between the Bresslers' attorney and the Sullivans' attorney in which the Sullivans' attorney represented that the Sullivans wanted to extinguish the easement. Exs. 55, 56, 59, 60, 64, 67, 68 and 70. An extinguishment agreement, prepared by the Bresslers' attorney, had been provided to the Sullivans' attorney on November 9, 2011, Ex. 54, and the Sullivans kept their fence installed in the middle of the easement. In addition to the emails between the two attorneys, the Sullivans told their attorney in an email dated November 11, 2011, that they agreed to sign the papers to relinquish the declaration. Ex. 57. Ms. Sullivan is not credible when she said at trial that she never wanted to sign the relinquishment. The court finds that she expressly and impliedly communicated her acquiescence to her attorney.

16. The court finds that the Sullivans were aware that their attorney was working on an extinguishment and that neither she nor her husband advised their attorney to stop representing them or to add conditions to the extinguishment. The court further finds that the Bresslers were entitled to rely on the representations made by the Sullivans' attorney.

17. The Sullivans originally wanted either the property seller, Ex. 38, the Casa Group, and its owner, Rick Jones, or the title company to pay for a boat launch on their property. *Linda Sullivan's deposition,* page 413, lines 4-24. On October 16, 2011, the Sullivans even got an estimate for partial costs of installing a boat ramp on their property,

Carolyn Cliff
Attorney
120 Second St., Suite C
P.O. Box 925
Langley, WA 98260
360-221-3313
FAX: 360-221-0781

$23,914. Ex. 39. When the easement was found, their claim against the property owner was no longer possible, leaving only the title company as a possibility.

18. On November 21, 2011, the Sullivans' attorney advised the Sullivans that they were not entitled to recapture from the title company the costs for installing a boat ramp or the fence and that it was unlikely the title company would reimburse the Sullivans' attorney fees. Ex. 61. At that point, Ms. Sullivan testified that she felt that their attorney was no longer working on their behalf. *Linda Sullivan's deposition,* page 413, lines 4-24. The Sullivans did not respond to the email.

19. Eventually, the Sullivans' attorney emailed them again, inquiring as to when they could sign the extinguishment agreement prepared by the Bresslers' attorney. Ex. 62. On November 30, 2011, Ms. Sullivan responded that they were "unavailable until mid-December." *Id.* However, the Sullivans were actually at home when they said they were "unavailable." Ex. 69.

20. On December 8, 2011, the Sullivans' attorney wrote them a letter explaining that their attorney fee claim against the title company for not including the easement in the title policy issued to the Sullivans was rejected but that the attorney would try again to recoup the attorney fees. Ex. 72. On December 19, 2011, the Sullivans' attorney emailed the Sullivans that the title company was willing to pay $3,951 for attorney fees to settle their claim. Ex. 73.

21. On December 20, 2011, one day after being informed that the title company would only reimburse $3,951, the Sullivans sent a letter to their attorney, with a

Carolyn Cliff
Attorney
120 Second St., Suite C
P.O. Box 925
Langley, WA 98260
360-221-3313
FAX: 360-221-0781

copy to the Bresslers' attorney, that they would not sign the extinguishment agreement "at this time". Ex. 74.

22. Later, the Sullivans' second attorney represented that the Sullivans wanted the title company to reimburse them for the costs of relocating their fence as well as attorney fees and were upset that their attorney had not included the fence relocation claims. Ex. 89. However, the court finds that, contrary to Ms. Sullivan's reasons at trial, her main purpose in stalling the Bresslers and her own attorney was to determine whether she could get reimbursed for a separate boat launch on her own property that she would not have to share with the Bresslers. The court finds that, until she knew the outcome of that question, she did not want to move her fence out of the easement area and incur additional fence expenses.

23. On December 29, 2011, the Bresslers notified the Sullivans that they believed that the easement was no longer enforceable, and, pursuant to a term in the declaration, requested mediation. Ex. 77. The Sullivans finally agreed to mediate on February 27, 2012, and shortly thereafter, on March 1, 2012, Ex. 83, moved the majority of their fence back to its original configuration, five feet from the middle of the easement. However, the Sullivans intentionally left an @12-foot portion of the fence inside the easement where the 10-foot swinging gate was installed. Ex. 81. The Bresslers' reserve drainfield begins 50 feet from the bulkhead, Ex. 3, right where the encroaching portion of the fence was left. The Sullivans' current configuration requires both the Bresslers and the Sullivans to drive over part of the Bresslers' reserve area for their drainfield to get a boat to or from Columbia Beach Drive to the boat ramp. The Bresslers' attorney again

Carolyn Cliff
Attorney
120 Second St., Suite C
P.O. Box 925
Langley, WA 98260
360-221-3313
FAX: 360-221-0781

advised the Sullivans' new attorney that the Sullivans were blocking the easement, Ex. 85, but the Sullivans did nothing to rectify the situation. The new fence configuration continued to extend into the easement through trial.

24. Ms. Sullivan testified that the easement only extended 140 feet from Columbia Beach Drive and that her fence was placed five feet from the midline of the easement until that point, after which the fence was placed on her property line. She argued that her fence did not encroach on the easement. The court disagrees with Ms. Sullivan. As the diagram presented by Ms. Sullivan to her fence installers show, the fence is placed in the middle of the easement where a vehicle towing a boat would have to turn. Ex. 81. The court finds that the Sullivans' fence encroaches on the easement for more than 12 feet where the 10-foot sliding gate is installed (14.13 feet, according to the surveyor. Ex. 140).

25. Mediation, which did not occur until April 4, 2012, was not successful, and the Bresslers filed this lawsuit on June 8, 2012. After the lawsuit was filed, the Sullivans used the boat ramp numerous times. However, they did not comply with the boat launch easement in several respects. The boat launch easement provides that the easement is to be used for "ingress and egress to the easement on Lot 26 for the purpose of launching boats." Instead, the Sullivans often tied their boat up on the Bresslers' tidelands or stored their boat on the boat ramp. Exs.120-126, Ex. 182.

26. In addition, the Sullivans authorized third parties to use the easement to remove driftwood from the beach below the boat launch without notifying or obtaining the Bresslers' agreement and then demanded that the Bresslers pay half the bill, even

Carolyn Cliff
Attorney
120 Second St., Suite C
P.O. Box 925
Langley, WA 98260
360-221-3313
FAX: 360-221-0781

though they had not followed the terms of the boat launch declaration. After this case was filed, the Sullivans enlarged the river rock bed on the property facing the Bresslers' property, and expanded their front yard landscape further into the easement area. Ex. 143. The Sullivans also took out stone pavers in the corridor between the two houses and installed plants that have the potential of intruding into the easement area by five feet if trimmed and by 10 feet if left untrimmed. Ex. 130 and Ex. 139.

27. The Sullivans' trial attorney advised the court on the first day of trial that the Sullivans were dropping their counterclaims and stipulating that they did not intend to ask the court to amend their pleadings to add "the public" as a necessary party.

28. The foregoing facts are mostly undisputed. Ms. Sullivan contends at trial that she will move any encroachments found by the court. The court has found above that Sullivans' fence encroaches on the easement at the point where the easement makes a turn, that the Sullivans' bushy plants planted in and extending into the corridor between the two houses encroach on the easement, and that the Sullivans' front landscaping encroaches on the easement.

29. The Sullivans' installation of a fence along the property line, down the middle of the easement, was unequivocal, decisive, and inconsistent with the continued existence of the easement. At that point, the Sullivans abandoned the easement. The Sullivans' decision to relocate the fence to the middle of the easement after they were mistakenly told that there was no recorded easement appears to have been done in the mistaken belief that the easement had not been executed or recorded, as acknowledged by the Bresslers. Ex. 45. However, the Sullivans' actions after being advised that an

Carolyn Cliff
Attorney
120 Second St., Suite C
P.O. Box 925
Langley, WA 98260
360-221-3313
FAX: 360-221-0781

easement was recorded were intentional. After receiving verification that the easement was recorded, Ms. Sullivan nevertheless continued with the installation of the fence inside the easement. Her testimony that she thought the wooden posts which were already installed would be dangerous standing alone was not credible.

30. The Sullivans' actions after they received verification that there was a recorded easement continued to be inconsistent with the continued existence of the easement. The Bresslers, through their attorney, notified the Sullivans, also through their attorney, that either the fence and mail box must be removed by November 4, 2011, or, alternatively, the Bresslers would prepare paperwork to extinguish the easement. The Sullivans did neither. Instead, they instructed their attorney not to say anything to the Bresslers and to stall them, or in Ms. Sullivan's words, "Keep them humming . ..." Ex. 47. The Sullivans unequivocally told the Bresslers that they intended to sign the relinquishment agreement prepared by the Bresslers, but they stalled from October 25, 2011, until December 20, 2011, when they finally notified their own attorney and the Sullivans' attorney that they would not sign the relinquishment. Even then, their fence and mailbox continued to remain in the middle of the easement.

31. The Sullivans did not remove portions of the encroaching fence until March 1, 2012, and left an @12-foot portion thereof inside the easement, blocking off a portion of their own property that is subject to the easement and forcing anyone getting a boat from the street to the boat launch pad to drive over part of the Bresslers' reserve area for their drainfield. Based on the Sullivans' own diagram, Ex. 81, they knew or should have known that they were continuing to encroach on the easement. The Sullivans were

Carolyn Cliff
Attorney
120 Second St., Suite C
P.O. Box 925
Langley, WA 98260
360-221-3313
FAX: 360-221-0781

notified of that continued violation of the easement in a letter from the Bresslers' attorney dated May 24, 2012, Ex. 85, but took no corrective action.

32. The Bresslers filed their complaint on June 8, 2012, after offering the Sullivans the opportunity to mediate the controversy. The Sullivans finally moved their mailbox outside the easement in November 2012, months after the lawsuit was commenced by the Bresslers. The fence installed by the Sullivans on March 1, 2012, of which an @ 12-foot portion encroaches into the easement, remains in its current configuration.

33. The Bresslers incurred attorney fees in reasonable reliance on the representations that were made on behalf of the Sullivans, in drafting the extinguishment agreement and attempting to have it executed. The Bresslers have also incurred ongoing attorney fees because of the continued encroachments by the Sullivans, even after those encroachments were called to the Sullivans' attention. Most of the fence that the Sullivans placed along the property line had been removed by time of trial, but an @ 12-foot portion in the vicinity of their sliding gate and the landscaping encroachments found above remain. The continued presence of the fence in the easement area threatens the integrity of the Bresslers' reserve drainfield. However, the fence can be easily removed, as shown by the number of times the Sullivans moved their fence, as can the encroaching landscaping.

34. There is insufficient evidence for the court to find the Sullivans placed a pile of dog waste on the Bresslers' tidelands. The court does find that the Sullivans have intentionally left their boat on the boat launch pad for periods of time that are not

Carolyn Cliff
Attorney
120 Second St., Suite C
P.O. Box 925
Langley, WA 98260
360-221-3313
FAX: 360-221-0781

consistent with ingress and egress and that they have intentionally tied their boat up on the Bresslers' tidelands. But the court cannot find that the Bresslers suffered any financial damage by reason of these intentional trespasses.

35. Based on the materials submitted pursuant to the court's letter opinion, the court finds that the Bresslers have actually incurred legal fees and associated costs of $108,224.97 as a result of this controversy, from the time that Mr. Sullivan handed Mr. Bressler the business cards for the Sullivans' first attorneys to the date of the hearing on the presentation motion. But that total includes the taxable costs identified in Finding 36 below. Furthermore, the Bresslers acknowledge that a portion of their legal fees and associated costs is attributable to the Sullivans' nuisance counterclaims, which they dropped at the opening of the trial. The court finds that the Bresslers must be reimbursed for 2,500 - $99,476.62 of the legal fees and costs that they have actually incurred to avoid the undue hardship that they would otherwise suffer if the Sullivans are to be permitted to repudiate their abandonment of the easement.

36. Based on the cost bill portion of the declaration of the Bresslers' counsel filed with the presentation motion, the court finds that $1,755.95 of the Bresslers' legal expenses are properly characterized as taxable costs, consisting of $240 filing fee, $39 service of process fee, $579.75, which is 20% of the transcription cost for Linda Sullivan's deposition, and the $897 transcription cost for Douglas Saar's deposition.

Carolyn Cliff
Attorney
120 Second St., Suite C
P.O. Box 925
Langley, WA 98260
360-221-3313
FAX: 360-221-0781

Conclusions of Law

1. In order to find that an easement has been abandoned, the court must find more than mere nonuse. *Heg v. Alldredge,* 157 Wash.2d 154, 161, 137 P.3d 9 (2006). The nonuse "must be accompanied with the express or implied intention of abandonment." *Id., citing Netherlands Am. Mortgage Bank v. E. Ry. & Lumber Co.,* 142 Wash. 204, 210, 252 P.916 (1927). "Acts evidencing abandonment of an easement must be unequivocal and decisive and inconsistent with the continued existence of the easement." *Heg v. Alldredge* , 157 Wash.2d at 161.

2. In this case, the easement was laid out on the ground with the stone and grassy pavers before the parties bought their properties. The parties acknowledged the existence of the easement and kept obstructions outside the width of the easement. Before October of 2011, the only exception to this was Ms. Sullivan's mailbox, which she placed in the middle of the easement and refused to move it for years, even while acknowledging that it was in the easement. But, after Ms. Sullivan was told by her attorney in 2011 that there was no recorded easement, within six days she had fence posts set in concrete in the middle of the easement. She was even unwilling to negotiate with the Bresslers to establish a mutual easement because she was not "interested in sharing anything with Mark Bressler." The court has found that the Sullivans' installation of a fence along the property line was unequivocal, decisive, and inconsistent with the continued existence of the easement and that, at that point, the Sullivans abandoned the easement. The Sullivans' actions in finishing the fence installation after receiving

Carolyn Cliff
Attorney
120 Second St., Suite C
P.O. Box 925
Langley, WA 98260
360-221-3313
FAX: 360-221-0781

verification that the easement had been recorded were intentional. Their continued encroachments into the easement thereafter were also unequivocal and decisive and inconsistent with the continued existence of the easement. *Heg v. Alldredge* , 157 Wash.2d at 161.

3. But the question that has concerned the court is that, after abandoning the easement as the Sullivans did, whether the Sullivans can now repudiate that abandonment and reinstate the easement. Courts have long held that blocking the way of an easement does not constitute evidence of abandonment until the other individual benefiting from the easement seeks to access it and any barrier is not removed. *Edmonds v. Williams,* 54 Wn. App. 632, 636-637, 774 P.2d 1241 (1989).

4. Equitable estoppel requires a showing that the party to be estopped (1) made an admission, statement or act which was inconsistent with his later claim; (2) that the other party relied thereon; and (3) that the other party would suffer injury if the party to be estopped were allowed to contradict or repudiate his earlier admission, statement or act. *Pub. Util. Dist. No. 1 v. Walbrook Ins. Co.,* 115 Wn.2d 339, 347, 797 P.2d 504 (1990). The Bresslers, as the parties asserting that the Sullivans are equitably estopped from denying that they abandoned the easement, must prove these elements by "'very clear and cogent evidence.' " *Proctor v. Huntington,* 146 Wn. App. 836, 845, 192 P.3d 958 (2008)(quoting *Sorenson v. Pyeatt,* 158 Wn.2d 523, 539, 146 P.3d 1172 (2006)), *review granted,*165 Wn.2d 1041 (2009).

5. The Sullivans' admissions, statements, and acts after learning that the easement was recorded are inconsistent with their claim at trial. Additionally, the

Carolyn Cliff
Attorney
120 Second St., Suite C
P.O. Box 925
Langley, WA 98260
360-221-3313
FAX: 360-221-0781

Bresslers relied on those statements by incurring attorney fees to prepare a legal document to relinquish the easement and to attempt to get the relinquishment signed. After receiving proof of the recorded easement, the Sullivans finished installation of the fence and continued to represent that they would sign the relinquishment, and even enlarged their landscaping long after this case was filed so it extended further into the easement. Thus, the first two prongs of equitable estoppel have been met.

6. The third prong of equitable estoppel focuses on the injury the other party would suffer if the owner of the easement, in this case the Sullivans, were allowed to contradict or repudiate their earlier admissions, statements or acts:

> "An easement may be extinguished by conduct of the owner of it even though he had no intention to give up the easement. This is due to the general principle that the owner of an easement will not be permitted to change a position once taken by him if the change would cause undue hardship to the owner of the servient tenement."

Humphrey v. Jenks, 61 Wn2d 565, 379 P.2d 366 (1963), (quoting from 2 *American Law of Property* 305, §8.99) (emphasis added).

7. As things stood at trial, the Bresslers would suffer undue hardship if the Sullivans were allowed to repudiate their abandonment and reinstate the easement. But the court concludes that they will not suffer undue hardship if the Sullivans are required to move the encumbrances found by the court to encroach on the easement and to pay the Bresslers' legal expenses. When the Bresslers bought their property, they knew it was encumbered by the boat launch declaration and that they would have to allow their neighbors to use it. The fact that the neighbors are contentious is unfortunate.

Carolyn Cliff
Attorney
120 Second St., Suite C
P.O. Box 925
Langley, WA 98260
360-221-3313
FAX: 360-221-0781

8. ~~The Bresslers have not sought, and the court has not determined, that the Bresslers are entitled to an award of their reasonable legal fees. The amount of the Bresslers' legal expenses that the Sullivans must reimburse to reinstate the~~ easement does not include the amount attributable to the Sullivans' nuisance ~~counterclaims, which were dropped on the first day of trial, and is less than an award of reasonable attorney's fees would be that is~~ computed using a lodestar analysis.

9. Whether the Sullivans comply with the court's requirements to reinstate the easement by removing the encroachments and paying the Bresslers' legal expenses is up to the Sullivans. The Sullivans should be required to satisfy those requirements within a reasonable period of time in order to reinstate the easement. The court concludes that a period of 20 days is a reasonable period of time in which to satisfy these requirements, having in mind that the Sullivans started installing their fence along the property line 6 days after they were told that there was no recorded easement and that the Bresslers gave notice to the Sullivans' attorney on February 13, 2014, of the approximate amount of fees and costs they would seek based on the court's letter opinion filed February 11, 2014.

10. The court having concluded that the Sullivans abandoned the easement and having established material requirements for the Sullivans to reinstate the easement, the court concludes that the Bresslers are the prevailing party herein and that the Bresslers are entitled to an award of statutory attorneys fees and taxable costs in the amount of $1,755.95.

Carolyn Cliff
Attorney
120 Second St., Suite C
P.O. Box 925
Langley, WA 98260
360-221-3313
FAX: 360-221-0781

11. Trespass is an intentional tort. *Broughton Lumber Co. v. BNSF Ry. Co.*, 174 Wn.2d 619, 630, fn. 9, 278 P.3d 173 (2012). The court has found that the Sullivans have intentionally left their boat on the boat launch pad for periods of time not consistent with a right of ingress and egress, have tied their boat up on the Bresslers' tidelands on portions thereof that are not subject to any easement, and have authorized third parties to enter onto the Bresslers' property to remove driftwood without following the terms of the boat launch easement. The court concludes that these actions constitute trespass. The court has not found that any damages resulted from these trespasses. But the court concludes that, if the Sullivans timely comply with the requirements imposed by the court to reinstate the easement, they should also be required, in using the easement, not to enter any portion of the Bresslers' property that is not subject to the easement, to use the portion of the Bresslers' property that is subject to the easement only for ingress and egress for the purpose of launching boats, and to comply with the term of the easement regarding an opportunity to meet and confer before any maintenance work is done.

DATED this 12th day of ~~March~~ May, 2014.

VICKIE I. CHURCHILL

Judge Vickie I. Churchill

AGREED AS TO FORM

~~PRESENTED BY:~~

CAROLYN CLIFF
Attorney for Mark and Linda Bressler

/s/ Cliff

WSBA No. 14301

Carolyn Cliff
Attorney
120 Second St., Suite C
P.O. Box 925
Langley, WA 98260
360-221-3313
FAX: 360-221-0781

COPY RECEIVED:

ANDERSON HUNTER LAW FIRM, P.S.
Attorneys for Kevin and Linda Sullivan

/s/ Gibbs

G. Geoffrey Gibbs
WSBA No. 6146

Carolyn Cliff
Attorney
120 Second St., Suite C
P.O. Box 925
Langley, WA 98260
360-221-3313
FAX: 360-221-0781

APPENDIX D

FILE COPY

ANDERSON HUNTER LAW FIRM, P.S.

2707 COLBY AVENUE, SUITE 1001
EVERETT, WASHINGTON 98201
(425) 252-5161
FAX: (425) 258-3345
www.andersonhunterlaw.com

AMY C. ALLISON
JEFFREY H. CAPELOTO
GLENN PAUL CARPENTER
BRADFORD N. CATTLE
TIMOTHY C. CHIANG-LIN
THOMAS R. COLLINS
KRISTI FAVARD
G. DOUGLAS FERGUSON
JOHN A. FOLLIS

G. GEOFFREY GIBBS
PATRICK F. HUSSEY
C. MICHAEL KVISTAD
SARAH O'FARRELL MCCARTHY
VICKIE K. NORRIS
LAURIE UMMEL
JEFFREY C. WISHKO
O.D. ANDERSON (1892-1961)
JAMES P. HUNTER (1915-1988)

May 28, 2014

Ms. Carolyn Cliff
120 Second Street, #C
P. O. Box 925
Langley, WA 98260

Re: Bressler v. Sullivan

Dear Carolyn:

Enclosed is a copy of the receipt reflecting deposit into the Court Registry of $4,455.95 pursuant to the Court's Order. Also enclosed is a copy of our client's Declaration regarding removal of obstacles to the use of the easement.

Respectfully,

ANDERSON HUNTER LAW FIRM, P.S.

G. Geoffrey Gibbs
ggibbs@andersonhunterlaw.com

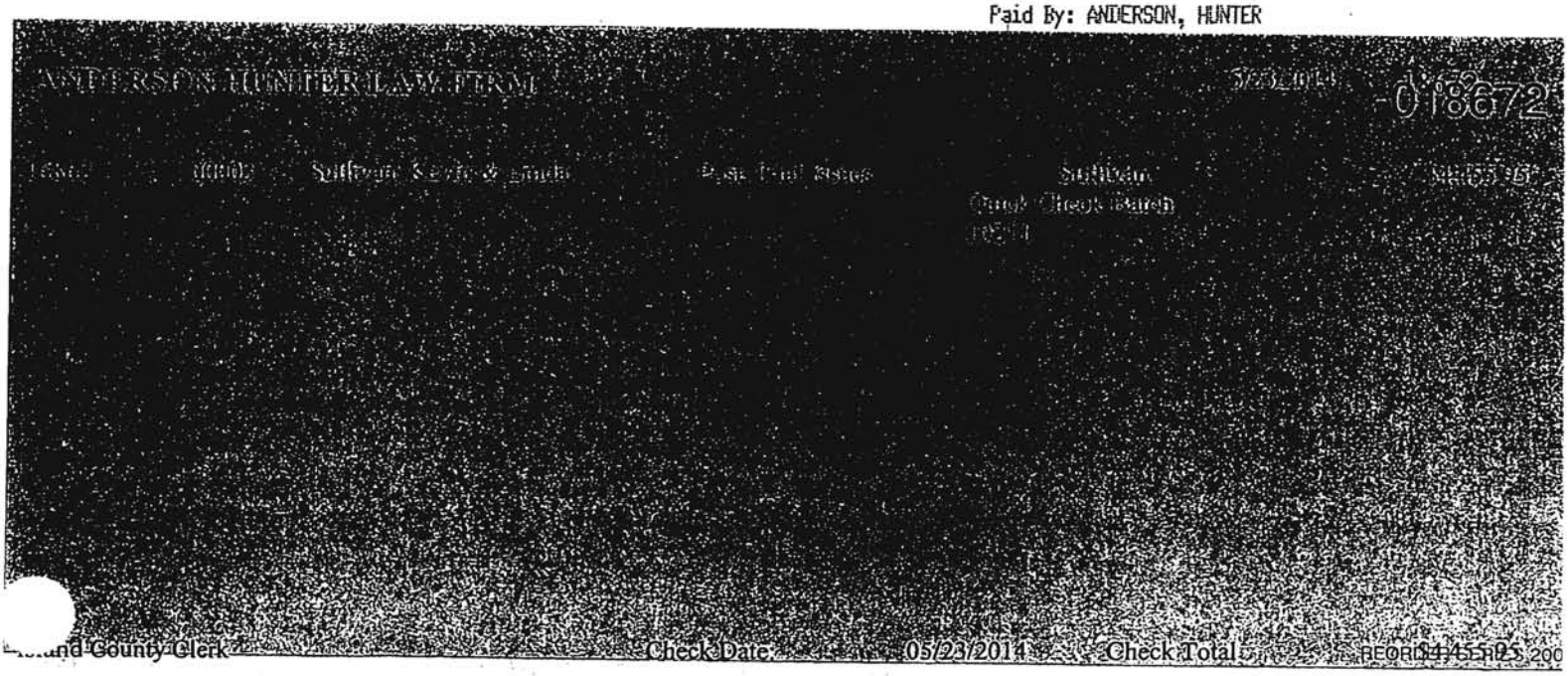
GGG:tae
cc: Clients

ISLAND COUNTY SUPERIOR COURT
COUPEVILLE WA
Debra VanPelt
COUNTY CLERK

Rcpt. Date: 05/27/2014
Acct. Date: 05/27/2014
Receipt #: 2014-01-04512
Cashier ID: PAC
Time: 08:53 AM

Item	Case Number	Amount
01	12-2-00469-7	$4,455.95
	3150: Trust-Tender	
	$TRT	
	BRESSLER VS SULLIVAN	
Total Due:		$4,455.95
Check Tendered:		$4,455.95
Change Due:		$0.00

Paid By: ANDERSON, HUNTER



...nd County Clerk Check Date: 05/23/2014 Check Total: RECORDED 05/23/2014

SUPERIOR COURT OF WASHINGTON FOR ISLAND COUNTY

MARK F. and LINDA H. BRESSLER, husband and wife,, Plaintiffs, vs. KEVIN F. and LINDA SULLIVAN, husband and wife, and GMAC MORTGAGE, LLC,, Defendants.	No. 12-2-00469-7 **DEFENDANTS' DECLARATION RE: COMPLIANCE WITH COURT'S DECISION**

Linda Sullivan, on the of the defendants herein, under penalty of perjury under the laws of the State of Washington, hereby declares as follows:

1. Although entry of the "findings" and judgment of the court were delayed, my husband and I took all appropriate steps to bring our fencing and property into compliance with the court's decision. The relocation of the fence was accomplished many weeks ago.

2. Our sliding gate and fence have been moved outside of the boat launch easement area as shown in Exhibit 1 hereto.

3. Other than downspouts are similar fixtures on both houses (as shown in the photographs attached as Exhibit 2), the boat launch area is free from obstacles or obstructions and is fully available to both properties for us.

Dated this 12th day of May, 2014.

/s/
Linda Sullivan

ANDERSON HUNTER LAW FIRM, P.S.
2707 COLBY AVENUE, SUITE 1001, P.O. BOX 5397
EVERETT, WASHINGTON 98206-5397
TELEPHONE (425) 252-5161
FACSIMILE (425) 258-3345

Exhibit 1

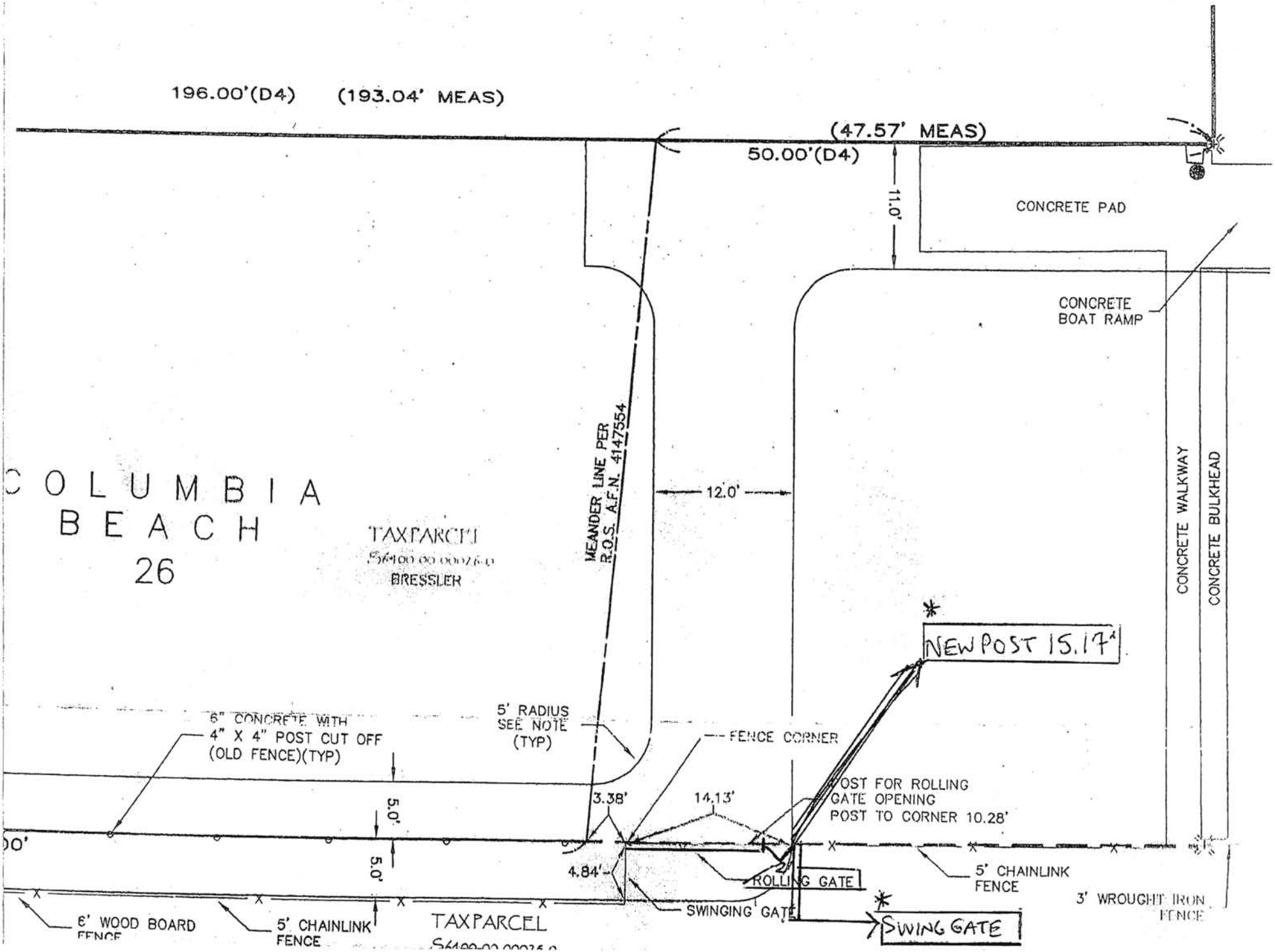

196.00'(D4) (193.04' MEAS)
(47.57' MEAS)
50.00'(D4)
11.0'
CONCRETE PAD
CONCRETE BOAT RAMP
CONCRETE WALKWAY
CONCRETE BULKHEAD
COLUMBIA BEACH 26
TAXPARCEL
BRESSLER
MEANDER LINE PER R.O.S. A.F.N. 4147554
12.0'
NEW POST 15.17'
5' RADIUS SEE NOTE (TYP)
6" CONCRETE WITH 4" X 4" POST CUT OFF (OLD FENCE)(TYP)
FENCE CORNER
POST FOR ROLLING GATE OPENING POST TO CORNER 10.28'
3.38'
14.13'
5.0'
5.0'
4.84'
ROLLING GATE
SWINGING GATE
SWING GATE
5' CHAINLINK FENCE
3' WROUGHT IRON FENCE
6' WOOD BOARD FENCE
5' CHAINLINK FENCE
TAXPARCEL

Exhibit 2