

6/20/11

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SEP 01 2011

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
JAMES B. WRIGHT & ASSOCIATES, P.C.

THIRD JUDICIAL DISTRICT AT ANCHORAGE

CODY LEE AND STACY DEAN,)
Husband and Wife,)

Plaintiffs,)

v.)

BARBARA KONRAD,)

Defendant,)

Case No. 3AN-08-09772 CI

FINAL JUDGMENT AND ORDER

Pursuant to the Court's Order on Application for Determination of Prevailing Party dated April 27, 2011, Defendant hereby submits her proposed Final Judgment and Order. This Final Judgment and Order incorporates by reference the findings of fact and conclusions of law set forth in the Court's Decision dated January 10, 2011. Therefore,

IT IS ORDERED that judgment shall be entered as follows:

^{defendant} Plaintiff Barbara Konrad shall recover from and have judgment against ~~De-~~ ^{Plaintiffs} ~~endants~~ Cody Lee and Stacy Dean, husband and wife, jointly and severally as follows:

1. Principal Amount \$925.00 *
- ~~2. Prejudgment interest on \$925.00 \$ _____~~

¹ This amount represents the cost of two surveys Defendant paid for which Plaintiffs destroyed by removing the survey markers.

* The Court finds its objection to monetary damages valid. There are no exhibits in evidence supporting this figure.

LAW OFFICE OF MICHAEL J. PATTERSON
810 WEST SECOND AVENUE, ANCHORAGE, AK 99501
PH. (907) 276-7966 FX. (907) 276-0479
MAY 13 2011

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(computed at the annual rate of _____ % from _____ to the date of judgment)

3. Sub-Total \$ ~~0~~
4. Attorney's Fees \$ 16,500.00
- Date Awarded: _____
- Judge: _____
5. Costs \$ ~~1629.29~~ ^{cc} 2671.90
6. Total Judgment \$ ~~1629.29~~ ^{cc} 19171.90
7. Post-Judgment Interest Rate 3.75 %

IT IS FURTHER ORDERED that

1. Defendant is the prevailing party.
2. The survey prepared by John Schuller correctly identified the property line between the parties' properties, Lots 13 and 14.
3. Plaintiffs shall pay Mr. Schuller all reasonable costs necessary to resurvey the property line between Lots 13 and 14.
4. Plaintiffs shall allow Mr. Schuller reasonable access to their property to complete the resurvey.
5. Plaintiffs shall be entitled to the property within their fence in 2006 before it was extended or modified. This portion of land shall extend from the back of the property (non-street side) along the fence line to the furthest discolored fence post(1999 post) from the back of the property, approximately one-third to one-half of the way from the back of the property to the front, at which point

this line shall cease. The new property line shall then extend in a perpendicular line from the foregoing described fence post until it intersects with Mr. Schuller's survey line between Lots 13 and 14, at which point this line shall cease. The property line shall then continue along Mr. Schuller's survey line to the marker at the end of the property line between Lots 13 and 14 on the street side. Defendant shall be entitled to all other property identified within Mr. Schuller's survey on the Lot 14 side of the line.

6. Any license Plaintiff's had under Lot 14's previous owner has been revoked and Plaintiff shall remove all encroaching fill, existing fence and any other material Plaintiffs placed on Lot 14 as identified by the Schuller survey and pursuant to ¶ 5 above.
7. Defendant shall contract with an a reasonable construction company that specializes in the construction of retaining walls to review any plan submitted by Plaintiffs to construct an adequate retaining wall at Plaintiff's cost.
8. Upon such reasonable assurances that Plaintiffs' plan is adequate, Plaintiffs or their contractors, shall build the retaining wall either on Lot 13's side of the fence or directly under Plaintiffs' fence to ensure the retaining wall will not encroach upon Lot 14.
9. All costs of fill and fence removal as well as costs for construction, design and review of design for the retaining wall shall be borne by Plaintiffs.
10. Plaintiffs shall restore the encroached-upon land to an orderly state.

11. Plaintiffs, or their contractors, may have reasonable access to Defendant's lot to clear the encroaching fill, fence and other material, and to design and build the retaining wall.
12. Plaintiffs shall release the *lis pendens* they recorded encumbering Defendant's lot.
13. All work directed under this Final Judgment and Order must be completed by ^{August} July 1, 2011.

June 20, 2011
Date

Andrew Guidi
The Honorable Andrew Guidi
Superior Court Judge

Certificate of Service

I certify that a copy of this document was mailed, faxed,
 hand delivered on May 31st, 2011 to the following:

James B. Wright, Esq.
James B. Wright & Associates, PC
500 L Street, Suite 301
Anchorage, Alaska 99501

By: [Signature]

I certify that on 6/20/11 a copy of the above was mailed to each of the following at their addresses of records:

J. Wright / M. Patterson

[Signature]
Administrative Assistant

I certify that on 8-31-11 a copy of the above was mailed to each of the following at their addresses of records (list names if not an agency)

CSED AG PD DA

[Signature]
Deputy Clerk / Secretary

6/30/11

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

CODY LEE AND STACEY DEAN,)
husband and wife,)
)
Plaintiffs,)
vs.)
)
BARBARA KONRAD,)
)
Defendant.)

Case No. 3AN-08-9772 Civil

MOTION AND MEMORANDUM TO RECONSIDER PARTS OF FINAL JUDGMENT

Judgment was entered June 20, 2011. It included terms that altered the prior law of the case granting adverse possession to the extent of the 2007 fence¹; that substitute a measure of adverse possession by reference to "discolored posts" without presentation of evidence in that regard; that mandate payment for future survey services unperformed in an amount unspecified (Judgment p. 2, item 3) pursuant to an indefinite measure (Judgment p. 2-3, item 5 re "furthest discolored post"); and that mandate payment for future consulting services by an unidentified person as to a retaining wall, in an amount unspecified (Judgment p. 3, items 7-9). Plaintiffs ask that these items be removed.

Civil Rule 77(k) governs motions to reconsider, on grounds stated at subsection (1). Plaintiffs submit that (1)(i), (1)(ii), and (1)(iii), all apply.

¹ "Title will be quieted in favor of Plaintiffs as to property on the Lot 13 side of the 2007 fence ..." May 27, 2010 Order, p. 40.

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3 Plaintiffs submit that the court has misconceived basic principles of law as well
4 as of fact in that the foregoing rulings are not consistent with pleadings, and the
5 evidence. Thus, neither the order on dispositive motions (May 27, 2010) nor the trial
6 decision (January 10, 2011) contain such terms. That fundamental fairness guaranteed
7 by due process, mandated by the state and federal constitutions,² includes meaningful
8 notice of the issues and a reasonable opportunity to be heard as to the issues. The
9 court's recently adopted terms, referenced above, go beyond the pleadings and the
10 evidence, granting relief that was not requested until long *after* the trial and *after* the
11 trial decision six months later. Thus, Plaintiffs were not afforded notice and opportunity
12 to be heard – i.e., to present evidence as to the newly asserted “issues”. This is not at all
13 harmless, and very foreseeably will lead to heightened dispute and dysfunction.
14
15
16

17 For example, prior to trial, Plaintiffs were granted adverse possession to the
18 extent of the 2007 fence. (see above). Accordingly, in reliance on the court, evidence
19 about the color of fence posts, or how many posts existed, was not presented at trial.
20 The issue had already been decided and defined by the 2007 fence line shown in the
21 survey drawings for both sides, which were in evidence. Now, the court has changed
22 the law of the case to adverse possession by reference to what posts are “discolored,”
23 without taking any evidence at all about what posts are discolored, whether they are
24
25

26
27 ² U.S. Const., Amend. XIV; Alaska Const., Art. I, §7 (state due process guarantee is broader
28 than the federal guarantee).

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discolored, whether posts were replaced since 1999 (some were), how far the line of fence posts extended in 1999, or in 2007, etc.

This ruling, altered from the Order of May 27, 2010, is also dysfunctional, in that it invites further controversy. The test now adopted by the court (reference to the color of posts), is an uncertain one, encouraging dispute. The court has ruled that surveyor Schuller shall perform a new survey. There is evidence in the court record that surveyor Schuller bears ill will to Plaintiffs (and vice versa), so much so that, for example, Mr. Schuller defamed Plaintiffs' surveyors in a letter to Ms. Konrad, which led to an ethics dispute between the surveyors involved. To have him do this work by reference to an uncertain standard untested in the evidence invites trouble.

It is for the court to define the boundary, not the adverse surveyor. To adopt an uncertain standard one year after the trial, in effect delegates the court's function to the surveyor while depriving Plaintiffs of their right to be fairly heard as to the new standard.

The Final Judgment includes terms that mandate payment for surveying services as yet unperformed, in an amount unspecified, pursuant to an indefinite measure ("discolored posts"). This relief was not requested prior to or during trial. Accordingly, again, no evidence was taken. It is an afterthought, added without due process to Plaintiffs. It is not a proper exercise of discretion to enjoin a party to pay damages not yet incurred, that are not supported by any evidence that the amount is reasonable. Such

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3 damages were not requested, are not yet disclosed, and in the circumstances not subject
4 to any opportunity for cross-examination or response.
5

6 The Final Judgment includes terms that mandate payment for consulting services
7 as to a retaining wall, as yet unperformed and in an amount unspecified. Again, this
8 relief was not requested prior to or during trial, so no evidence was taken. It is another
9 afterthought, added without due process to Plaintiffs. It is not a proper exercise of
10 discretion to enjoin a party to pay damages that are not supported by any evidence that
11 such damages are reasonable and appropriate, that are not disclosed and in the
12 circumstances not subject to any opportunity for cross-examination or response.
13

14 Plaintiffs had no reason to foresee this "issue," as the ground to be retained
15 varies from a few inches high to a couple of feet (if we ignore the fact that the ground
16 was already sloped before any alleged "trespass by gravel." There are no government
17 standards for a retaining wall of this height, and the court has not specified the standard
18 to be applied by the unnamed "consultant" as to the review of the proffered design of
19 the retaining wall other than reference to the term "adequate." There is no meaningful
20 scope of work. Again, it is an invitation to further dispute.
21

22 Plaintiffs submit that the proper course is to amend the Final Judgment to
23 properly reflect the May 27, 2010 Order and the January 10, 2011³ Trial Decision,
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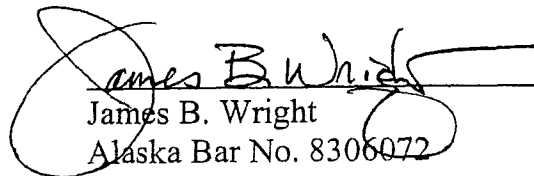
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27 ³ Both the Decision and the certificate of service say "January 10, 2010" – this is plainly error.
28 Trial was in June 2010.

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3 without addition of new items of relief not requested prior to or during trial, which
4 subvert the mandatory disclosure rules as well as the rules of basic due process, and
5 without altering the reference point for adverse possession from "the 2007 fence" to
6 "the furthest discolored fence post," as to do so deprives Plaintiffs of their right to
7 present evidence at trial regarding the new reference point, and otherwise invites new
8 layers of dispute, as explained above.
9
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11 RESPECTFULLY SUBMITTED this 30th day of June, 2011.

12 JAMES B. WRIGHT & ASSOCIATES, P.C.
13 Attorneys for Cody Lee and Stacey Dean

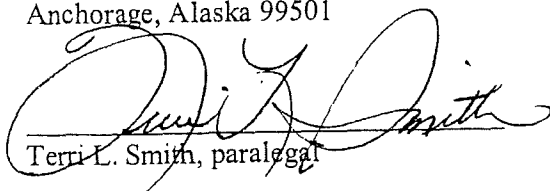
14 
15 James B. Wright
16 Alaska Bar No. 8306072

17 CERTIFICATE OF SERVICE

18 I hereby certify that a true and correct
19 copy of the foregoing was mailed this
20 30th day of June, 2011 to:

21 Michael J. Patterson
22 Law Offices of Michael J. Patterson
23 810 West 2nd Avenue
24 Anchorage, AK 99501

25 Heather Gardner
26 Law Offices of Heather Gardner
27 645 G Street, Suite 100-807
28 Anchorage, Alaska 99501

29 
Terri L. Smith, paralegal

Plaintiff's Motion & Memorandum to Reconsider Parts of Final Judgment
Lee et al. v. Konrad, 3AN-08-9772 Civil

9/19/11

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

CODY LEE AND STACEY DEAN,)
husband and wife,)

Plaintiffs,)

vs.)

BARBARA KONRAD,)

Defendant.)

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SEP 21 2011

JAMES B. WRIGHT &
ASSOCIATES, P.C.

Case No. 3AN-08-9772 Civil

ORDER UPON RECONSIDERATION, AMENDING AWARD OF COSTS

THIS COURT, upon Defendant's Motion for Reconsideration, and any Opposition thereto, finds defendant's Motion persuasive. Upon reconsideration, it is the Order of this Court that the following amendments shall be made:

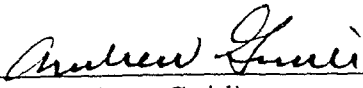
1. The taxation of costs pertaining to the expert testimony of Eric Simons shall be reduced from \$1,575 to \$525 (\$150 per hour x 3.5 hours), or a reduction of \$1,050, as allowed by A.R.Civ.P. 79(f) and Administrative Rule 77(c), defining allowable costs.

2 The Final Judgment, item "5. Costs" shall be reduced from \$2,671.90 to \$1,621.90, a reduction of \$1,050, reflecting the adjustment of costs stated in the preceding section of this Order.

SEP - 6 2011

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SO ORDERED this 19th day of Sept., 2011 at Anchorage, Alaska.



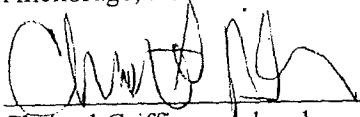
Hon. Andrew Guidi
Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed this 19th day of September, 2011 to:

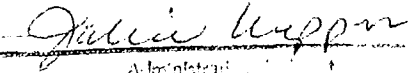
Michael J. Patterson
Law Offices of Michael J. Patterson
810 West 2nd Avenue
Anchorage, AK 99501

Heather Gardner
Law Offices of Heather Gardner
645 G Street, Suite 100-807
Anchorage, Alaska 99501



Christel Griffin, paralegal

that on 9/20/11
the above was mailed to each of the following
their addresses of records:
H. Gardner / M. Patterson / S. Wright



Julie Kupper
Administrator

Janice B. Wright & Associates, P.C.
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Anchorage, Alaska 99501
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10/7/11

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

CODY LEE AND STACEY DEAN,)
husband and wife,)
)
Plaintiffs,)
vs.)
)
BARBARA KONRAD,)
)
Defendant.)

Case No. 3AN-08-9772 Civil

**MEMORANDUM IN SUPPORT OF MOTION TO STAY ENFORCEMENT OF
JUDGMENT PENDING APPEAL AND APPLICATION FOR APPROVAL OF
SUPERSEDEAS BOND**

Plaintiffs/Appellants Cody Lee and Stacey Dean, pursuant to A.R.Civ.P. 62(c) and (d), hereby request that the Court stay the Final Judgment entered on June 30, 2011 and subsequently modified on August 31 and September 19, 2011, because Plaintiffs/Appellants intend to file an appeal.

The Final Judgment contains declaratory and injunctive relief: a declaration of where the boundary line between the parties' residential lots shall be, coupled with a variety of injunctive terms. The Final Judgment in fact changes the history of usage between Lots 13 and 14, the two lots at issue, arguably involves the partial destruction of Plaintiffs' fence and patio, as well as the mandatory alteration of Plaintiffs' lot (including but not limited to the forced construction of a retaining wall), and injunctions

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3 to pay future undefined money damages to Defendant. The Final Judgment also enjoins
4 Plaintiffs to perform labor on Defendant's side of the boundary line, and to surrender
5 certain statutory legal rights by withdrawing the *lis pendens* now in effect – that is,
6 withdrawing record notice to the public that part of Defendant's lot is the subject of
7 ongoing litigation, a development that could foreseeably compromise or forfeit
8 Plaintiffs' rights relative to third parties who may rely on the public record, as the law
9 encourages them to do.
10
11

12 In these circumstances, a stay is necessary in order to preserve the *status quo*
13 pending appeal. In effect, the denial of a stay would constitute a denial of Plaintiffs'
14 right to a meaningful appeal, as Plaintiffs may be irreparably harmed by enforcement of
15 the Final Judgment prior to a decision on appeal. Enforcement would have the effect of
16 permanently altering the land, and the fixtures upon the land, in addition to the more
17 typical concern regarding execution on Plaintiffs' assets pending appeal. On the other
18 hand, Defendant will suffer no apparent hardship by granting the stay, subject to an
19 appropriate bond.
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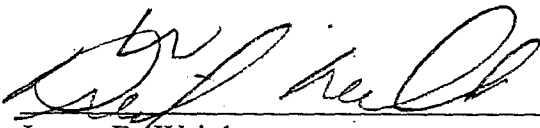
22 Plaintiffs/Appellants, pursuant to Ak.R.Civ.P. 80 and Ak.R.App.P. 204(d), offer
23 to this Court for approval a *supersedeas* bond in the form of a cash bond to be deposited
24 with the Clerk of Court in the amount of the Final Judgment. The Final Judgment
25 contains no award of damages, so that the actual amount of the judgment is limited to
26 the award of costs and fees, in the total amount of \$18,121.90, entered by the Clerk of
27

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3 Court on August 31, 2011 (and subsequently modified by the Court's Order Granting
4 Reconsideration as to the Award of Costs, dated September 19, 2011), with interest
5 thereon at the rate of 3.75% until paid, and costs on appeal as awarded by the Supreme
6 Court up to the maximum liability of \$750. Plaintiffs/Appellants respectfully request
7 that the Court approve the amount of supersedeas bond for purposes of appeal. Upon
8 approval of this Court of the amount of the supersedeas bond (\$18,121.90),
9 Plaintiffs/Appellants will deposit said amount with the Clerk of Court, at which such
10 time the stay of enforcement of the Final Judgment shall be in effect.

11
12
13 RESPECTFULLY SUBMITTED this 7th day of October, 2011.

14
15 JAMES B. WRIGHT & ASSOCIATES, P.C.
Attorneys for Cody Lee and Stacey Dean

16
17 
18 For James B. Wright
Alaska Bar No. 8306072

19
20 **SUPERSEDEAS BOND**

21 We, Cody Lee and Stacey Dean (Principal), jointly and severally acknowledge
22 that we are jointly bound to pay to Defendant Barbara Konrad, the actual amount of the
23 judgment entered by this Court on June 30, 2011 in the amount of \$ (zero), plus
24 prejudgment interest in the amount of \$ (zero), plus costs awarded in the amount of
25 \$1,621.90, together with Civil Rule 82 attorneys fees in the amount of \$16,500, for an
26 aggregate amount of \$18,121.90, with interest thereon at the rate of 3.75% from August

27 Plaintiffs' Motion for Stay & Application for Approval of Supersedeas Bond (Memo)
28 Lee et al. v. Konrad, 3AN-08-9772 Civil

29 Page 3

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31, 2011 forward (herein after the 'Final Judgment'), until paid, and costs on appeal as awarded by the Alaska Supreme Court. We do not admit, and in fact deny, that such amounts were properly or will properly be awarded, either in damages, interest, costs, attorneys fees, or otherwise.

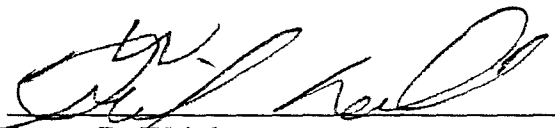
The condition of this bond is that, if Plaintiffs/Appellants Cody Lee and Stacey Dean shall pay the amount of the Final Judgment herein as affirmed, or modified on appeal or following post-trial motions, together with all costs and interest that may be awarded, then this cash bond deposited with the Clerk of Court is void and will be returned to Plaintiffs/Appellants, otherwise to be and remain in full force and effect.

Pursuant to Ak.R.Civ.P. 80(g) (Cash Deposit in Lieu of Bond), Plaintiffs/Appellants consents to and agrees to be bound by the provisions of Ak.R.Civ.P. 80(f) as though those provisions were set out herein. The Clerk of Court is to send all notices required by this rule to:

James B. Wright & Associates, P.C.
500 L Street, Suite 301
Anchorage, AK 99501

JAMES B. WRIGHT & ASSOCIATES, P.C.
Attorneys for Cody Lee and Stacey Dean

Dated: 10/7/11


For James B. Wright
Alaska Bar No. 8306072

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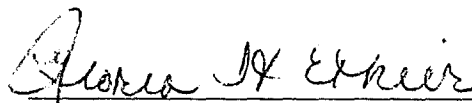
AFFIDAVIT OF CODY LEE

State of Alaska)
) ss.
Third Judicial District)

Cody Lee being duly deposed and sworn, says that he is the Plaintiff/Appellant, and has the authority to enter into the obligation set out above for the purposes therein mentioned.


Cody Lee, Plaintiff/Appellant

SUBSCRIBED AND SWORN to before me this 7th day of October 2011.


Notary Public in and for the State of Alaska
My Commission Expires: 04-17-2014

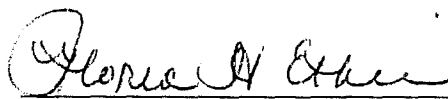
AFFIDAVIT OF STACEY DEAN

State of Alaska)
) ss.
Third Judicial District)

Stacey Dean being duly deposed and sworn, says that she is the Plaintiff/Appellant, and has the authority to enter into the obligation set out above for the purposes therein mentioned.


Stacey Dean, Plaintiff/Appellant

SUBSCRIBED AND SWORN to before me this 7th day of October 2011.


Notary Public in and for the State of Alaska
My Commission Expires: 04-17-2014

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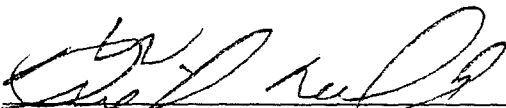
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APPROVAL BY ATTORNEY

Examined and recommended for approval as provided in Rule 80 of the Alaska Rules of Civil Procedure.

JAMES B. WRIGHT & ASSOCIATES, P.C.
Attorneys for Cody Lee and Stacey Dean

Dated: 10/7/11

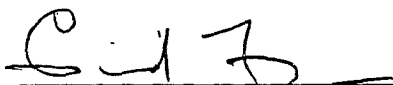

For James B. Wright
Alaska Bar No. 8306072

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed this 7 day of October, 2011 to:

Michael J. Patterson
Law Offices of Michael J. Patterson
810 West 2nd Avenue
Anchorage, AK 99501

Heather Gardner
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Terri L. Smith, paralegal

James B. Wright & Associates, P.C.
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10/25/11

FILED
STATE OF ALASKA
APPELLATE COURTS

IN THE SUPREME COURT FOR THE STATE OF ALASKA

2011 OCT 25 PM 4:17
CLERK, APPELLATE COURTS

CODY LEE AND STACEY DEAN,)
husband and wife,)
)
Appellants,)
)
vs.)
)
BARBARA KONRAD,)
)
Appellee.)

BY: _____
DEPUTY CLERK

) Supreme Court No.: S- _____
) Superior Court No. 3AN-08-9772 Civil

STATEMENT OF POINTS ON APPEAL

Plaintiffs Cody Lee and Stacey Dean, husband and wife, submit the following points on appeal from the Court's Order of May 27, 2010, the Order dated January 10, 2011, Order dated April 27, 2011, Order dated May 16, 2011, the Final Judgment dated June 20, 2011, Order dated August 16, 2011, Order On Plaintiffs' Motion for Reconsideration dated August 26, 2011 and Final Judgment and Order dated August 31, 2011 and Order Denying Amendment To Final Judgment dated October 3, 2011:

1. Whether the court selected the correct property line, ignoring the historical expectations among and between Lot 13 and Lot 14.
2. Whether the line identified by surveyor Ken Lang for Lot 14, mutually agreed to between Lot 13 and Lot 14 owners and occupiers since at least 1992, was the correct property line, used by the adjoining lot owners accordingly.
3. Whether the line identified by Plaintiffs' (Lot 13) surveyor, Lantech, was the correct property line, varying by just inches from the Ken Lang line.

Lee and Dean vs. Konrad, Supreme Court Case No. _____
Statement of Points on Appeal

James B. Wright & Associates, P.C.
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Fax: (907) 277-6181

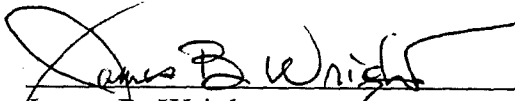
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- 4 4. Whether the court properly altered the May 27, 2010 ruling, after the trial, by
- 5 substituting the last discolored fence post as the measure for adverse possession, rather
- 6 than the decision quieting title in Plaintiffs' favor to the extent of the Lot 13 side of the
- 7 2007 fence line.
- 8
- 9 5. Whether the law and the evidence supported the court's finding of a continuing
- 10 trespass.
- 11
- 12 6. Whether the court properly ordered Plaintiffs to pay future undefined expenses for a
- 13 consultant specializing in retaining walls.
- 14
- 15 7. Whether the court properly ordered Plaintiffs to pay future undefined expenses for
- 16 Defendant's surveyor, Mr. Schuller, to conduct a follow-up survey of the property.
- 17
- 18 8. Whether the court properly ruled that Defendant was the prevailing party on the
- 19 main issue in the case.
- 20
- 21 9. Whether the court erred in adopting a fictional rate of attorney's fees.
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- 23 10. Whether the court erred by enjoining Plaintiffs to withdraw their *lis pendens*.
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RESPECTFULLY SUBMITTED this 25 day of October, 2011.

JAMES B. WRIGHT & ASSOCIATES, P.C.
Attorneys for Appellants Cody Lee and Stacey Dean


James B. Wright
Alaska Bar No. 8306072

Lee and Dean vs. Konrad, Supreme Court Case No. _____
Statement of Points on Appeal

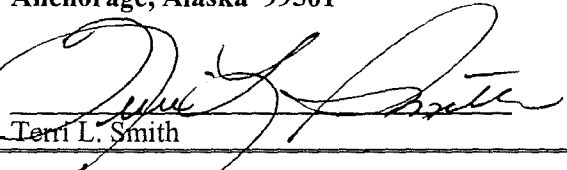
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I hereby certify that a true and correct copy of the foregoing was faxed hand delivered and/or mailed this 25th day of October, 2011 to:

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Lee and Dean vs. Konrad, Supreme Court Case No. _____
Statement of Points on Appeal

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

CODY LEE AND STACEY DEAN,)
husband and wife,)
Plaintiffs,)
vs.)
BARBARA KONRAD,)
Defendant.)
Case No. 3AN-08-9772 Civil

PLAINTIFFS' NOTICE TO COURT RE: CASE MOTION #32 IS RIPE; AND REQUESTING A RULING

On or about June 30, 2011, Plaintiffs presented their Motion To Reconsider Parts Of Final Judgment (Case Motion #32), which explained that:

[I]t is not appropriate to: 1) alter the prior law of the case granting adverse possession to the extent of the 2007 fence¹, substituting a measure of adverse possession by reference to "discolored posts" without presentation of evidence at trial in that regard; 2) to mandate payment for future survey services unperformed in an amount unspecified (Judgment p. 2, item 3) pursuant to an indefinite measure (Judgment p. 2-3, item 5 re "furthest discolored post"), relief that was not requested until long after trial; and 3) to mandate payment for future consulting services by an unidentified person as to a retaining wall, in an amount unspecified (Judgment p. 3, items 7-9), again relief that was not requested until long after trial. Plaintiffs asked that these items be removed.

Reply brief dated July 25, 2011, p. 1 (summarizing the issues in the motion). The Court granted the motion to reconsider by Order dated July 6, 2011, ruling that "This Court

¹ "Title will be quieted in favor of Plaintiffs as to property on the Lot 13 side of the 2007 fence ..." May 27, 2010 Order, p. 40.

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3 **will reconsider the parts of the Final Judgment at issue.”** A briefing schedule was
4 established. Those briefs are now in, and the motion is ripe for decision.

5 The substance of the motion asks the court to alter or amend a judgment.
6 Compare A.R.Civ.P. 77(k) (reconsideration of any ruling) with A.R.Civ.P. 59(f) (to
7 alter or amend the rulings in a judgment); see also, e.g., United States Fire Ins. Co. v.
8 Schnabel, 504 P.2d 847, 853 fn. 18 (Alaska 1972) (a motion for post-judgment relief
9 made within 10 days after entry of judgment should ordinarily be treated as having been
10 made under Rule 59(f)); Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d
11 §2817, p. 182-83 (2d ed. 1995): “In general, in determining whether a motion is brought
12 properly under Rule 59(e), courts look beyond the form of the motion to the substance
13 of the relief requested.”² Hannon v. Maschner, 981 F.2d 1142, 1145 fn. 2 (10th Cir.
14 1992) (re such a motion, the court looks beyond the form to the substance of the relief
15 requested, and disregards the label); Simmons v. Ghent, 970 F.2d 392, 393 (7th Cir.
16 1992) (“Any motion seeking to alter or amend the judgment, however the motion be
17 labeled, is deemed a Rule 59(e) motion, provided it is served within ten days.”)³ Such
18 a motion must be expressly ruled on. Again, the Court has expressly stated that it “will
19 reconsider the parts of the Final Judgment at issue.” That has not yet occurred.

20 Plaintiffs have informed the trial court of their intent to file an appeal. Plaintiffs’
21 counsel has inquired of the appellate court, and was advised that an appeal is premature

22 ² A.R.Civ.P. 59(f) corresponds to F.R.Civ.P. 59(e).

23 ³ Similarly, see, e.g., Richardson v. Oldham, 12 F.3d 1373, 1377-78 (5th Cir. 1994) (timely
24 motion to reconsider judgment *is* a motion to alter or amend the judgment); Motor Vehicle
25 Mfrs. Ass’n of the U.S., Inc. v. New York State Dep’t of Environmental Conservation, 831
26 F.Supp. 57, 60-61 (D. N.Y. 1993), *aff’d in part and reversed in part on other grounds*, 17 F.3d
27 521 (2nd Cir. 1994) (motion to reconsider a judgment *is* a motion to alter or amend the
28 judgment); Cooper v. Singer, 689 F.2d 929, 930 (10th Cir. 1982), citing 9 Moore’s Federal
29 Practice ¶ 204.12(1), at 4-67 (2d ed.) (A motion which draws into question the correctness of a
judgment is a Rule 59 motion, no matter what the label). Cf., Munden v. Ultra-Alaska Assoc.,
849 F.2d 383, 386 (9th Cir. 1988) (look to the substance of the relief requested).

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3 so long as a motion to reconsider to alter or amend the final judgment is outstanding.
4 Given the prior ruling that the trial court "will reconsider ... the Final Judgment,"
5 appellate court personnel surmised that the failure to rule is/was an oversight, and
6 transferred the call to the trial court. Plaintiffs thereupon inquired of the trial court staff
7 to determine the status of Case Motion #32. No answer has been forthcoming.

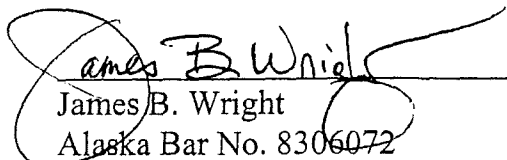
8 The first inquiry, by attorney James Wright on September 19th, involved
9 discussion first with the appellate court, then with a law clerk at the trial court level,
10 who advised that trial court staff (the "J.A.") will look into it and get back to Plaintiffs'
11 counsel. However, Mr. Wright received no response, and was soon required to be in
12 Ohio on other business (between September 20 and September 24).

13 The second inquiry, by associate attorney David Murrills, involved discussion
14 with a person thought to be the judge's secretary, on September 23, who pointed out
15 that the court had issued rulings on motions to reconsider, suggesting that all such issues
16 were resolved. Mr. Murrills explained that one such motion remained undecided. He
17 understood from the discussion that the person he was speaking with did not have the
18 file in front of her, but would pull the file for the judge. We have not heard back.

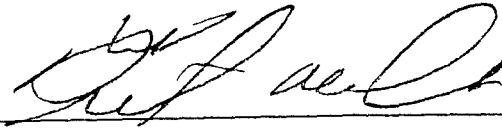
19 On September 19 the appellate court clerk had noted the option of filing a notice
20 with the trial court that the motion is ripe and undecided. This is that notice. In the
21 circumstances presented, we ask the Court to rule on Case Motion #32. If a hearing
22 would be helpful to the Court, then we ask that the hearing be set.

23 RESPECTFULLY SUBMITTED this 25th day of September, 2011.

24 JAMES B. WRIGHT & ASSOCIATES, P.C.
25 Attorneys for Cody Lee and Stacey Dean

26 
27 James B. Wright
28 Alaska Bar No. 8306072

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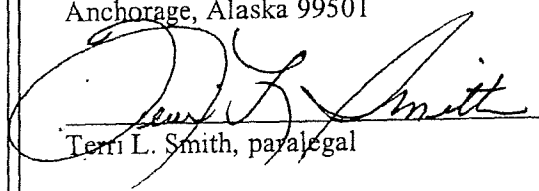
David W. Murrills
Alaska Bar No. 9306034

CERTIFICATE OF SERVICE

I hereby certify that a true and correct
copy of the foregoing was mailed this
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Terri L. Smith, paralegal