

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

JEFFREY ANDREWS and EILEEN ANDREWS,	)	No. 63507-7-1
	)	
Respondents,	)	
	)	UNPUBLISHED OPINION
v.	)	
	)	
SU HWAN KIM and JANE DOE KIM,	)	
	)	
Respondents,	)	
	)	
v.	)	
	)	
MICHELE DAVIS,	)	
	)	
Appellant.	)	FILED: December 20, 2010
	)	
	)	

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Schindler, J. — This case involves a boundary line dispute between Jeffrey and Eileen Andrews (Andrews), Su Kwan Kim, and Michele Davis, the owners of three contiguous lots in a condominium development. The original developer built a fence between Andrews and Kim and a fence and rockery between Kim and Davis that is inconsistent with the recorded maps and surveys of the lots. In 2007, Andrews filed a lawsuit against Kim to move the fence and quiet title to a strip of land that is adjacent

to Kim's lot in his name. Kim filed a third party complaint against Davis to quiet title to a strip of land adjacent to Davis's lot and to reform the deeds. Before trial, the court granted Davis's motion for summary judgment establishing the boundary line between the Kim and Davis properties based on the common grantor doctrine and quieting title to the disputed strip of land in Davis. However, at trial, because the court found that the common grantor doctrine did not apply to the fence between Andrews and Kim, the court revised the summary judgment order to achieve a fair and equitable resolution, and established the boundary lines between the three contiguous lots according to the recorded maps and surveys.

Davis appeals, arguing the trial court erred in revising the summary judgment order and refusing to find the common grantor doctrine establishes the boundary line between Davis and Kim. In the alternative, Davis contends substantial evidence does not support a number of the findings of fact, including the finding that Davis will have no difficulty "accessing any of her property." Because the summary judgment order was not a final judgment under CR 54(b), we conclude the court did not err in revising the order. We also conclude the court did not abuse its discretion in exercising its equitable authority to establish the boundary lines between the three properties according to the recorded maps and surveys. Except for the finding that Davis will have no difficulty accessing any of her property, we reject Davis's argument that substantial evidence does not support the findings. We remand to determine whether the decision to establish the boundary lines based on the recorded maps and surveys inequitably prevents Davis from accessing her property. In all other respects, we

affirm.

## FACTS

Jeffrey and Eileen Andrews (Andrews), Su Kwan Kim, and Michele Davis own three contiguous lots in Baywood Heights, a condominium development in Lynnwood. Avance Group II, LLC (Avance) was the developer of the project.<sup>1</sup>

In April 1998, Andrews purchased a condominium on lot five from Avance. When Andrews purchased the property, the condominium on lot six was still under construction. Shortly before Kim purchased the condominium on lot six in July 1998, Avance built a fence between lot five and lot six, and built a fence and installed a rockery between lot six and lot seven. In October 2005, Michele Davis purchased the condominium located on lot seven.

Kim's condominium is built on the lot line that divides the Andrews and Kim properties. According to the recorded plat maps, Andrews holds title to a strip of land located adjacent to Kim's condominium. The plat maps show that Kim owns a strip of land located between his lot and Davis's lot.

Andrews holds title to the strip of land to the east of their home that runs between their home and that of defendant Kim. The Kim home is on the true legal lot line that divides the Andrews and Kim properties. Andrews, according to the plat map and legal lot line, should have access to their backyard by traveling over this strip of land.

....

Kim holds title to the strip of land to the east of his residence that runs between his home and that of third-party defendant Davis. Kim, according to the plat map and legal lot line, should have access to his backyard by traveling over this strip of land.

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<sup>1</sup> Avance is no longer in business.

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There is no dispute that the developer incorrectly placed the fence between the Andrews and Kim lots, and incorrectly located the fence and rockery between the Kim

and Davis lots.

The developer of the Baywood Heights development placed the fences that divide the backyards of Andrews and Kim, and the backyards of Kim and Davis, on the wrong side of the homes. The fence between the Andrews and Kim properties was not placed on the boundary line shown on the Survey Map and Plans; and similarly, the fence between the Kim-Davis properties was not placed on the boundary line shown on the Survey Map and Plans.

On July 27, 2007, Andrews filed a lawsuit against Kim to move the fence and quiet title to the strip of land based on the recorded plat and survey maps. Kim filed an answer, affirmative defenses, counterclaim, and a third party complaint against Davis.

In the third party complaint against Davis, Kim alleged that because the original developer built the fences and “[s]uch fences have been recognized as the true boundaries,” the deeds should be reformed to conform to the boundary as established by the fences. However, if the Andrews prevailed, Kim alleged as follows:

In the event the Andrews prevail on their claim and the fence is moved, the fence between the Kim and Davis properties should be moved as well and title to the land between the surveyed line and the fence should be quieted in Kim’s name.

Kim also alleged that title to the “land between Kim’s residence and driveway and the surveyed boundary land . . . . should be quieted in Kim’s name and Davis should be ejected from the property.” Davis filed an answer, affirmative defenses, and counterclaim to the third party complaint, asking the court to apply the common grantor doctrine and enter judgment quieting title to the disputed property in her name.

Davis filed a motion for summary judgment arguing that the fence and rockery

between Davis and Kim established the boundary line under the common grantor doctrine. In response, Kim agreed that the common grantor doctrine applied and that the fence and rockery established the boundary line between the two properties, “with one caveat. If these factors warrant summary judgment with regard to Kim’s east boundary with Ms. Davis, [the common grantor doctrine] necessarily warrant[s] summary judgment on . . . Kim[’s] west boundary with the Andrews.” Kim argued that if the court was unwilling to apply the common grantor doctrine to “both boundaries of . . . Kim[’s] lot,” questions of fact barred summary judgment.

On February 10, the court entered an order granting partial summary judgment as to the Kim and Davis boundary line based on the common grantor doctrine. The court quieted title to the strip of land to property between the fence and the rockery in Davis. The summary judgment order provides, in pertinent part:

[T]he fence and rockery that currently stand as the boundary between the Kim and Davis homes having been installed by the common grantor and recognized and treated as the boundary by Kim and Davis or their predecessors in interest since 1998, are hereby determined to be the true and lawful boundary between the Kim and Davis properties.

The court did not address the question of whether the common grantor doctrine applied to the fence located between Andrews and Kim.

The boundary line dispute and quiet title action between Andrews and Kim proceeded to trial. In his trial brief, Kim argued that the common grantor doctrine applied and the fence established the boundary between Andrews and Kim.

However, if the court decided the doctrine did not apply and moved the west boundary line of Kim’s lot, Kim argued the trial court should revise the summary judgment

decision and move the boundary line between the Kim and Davis properties. Kim asserted the court had the authority to revise the summary judgment decision because the order was not a final judgment under CR 54(b). Andrews agreed with Kim's position that the court had the authority to revise the summary judgment order because the order was not a final judgment.

At the beginning of the trial, Davis's attorney asked the court to modify the summary judgment order and "find that the decision was in fact one that resolved all the claims between Kim and Davis." The court denied Davis's motion. The court ruled that given the "domino effect" of the boundary lines between the three properties, Davis had to participate in the trial. "I think you better stay . . . . I haven't heard the case. But I can't really in good conscience say, don't worry, everything is necessarily resolved, because it well may not be." In lieu of testifying at trial, Davis's attorney submitted the summary judgment pleadings, including Davis's declaration.

Following the trial, the court ruled that the evidence did not support applying the common grantor doctrine to the fence between Andrews and Kim. Finding of Fact 21 states, in pertinent part:

The common grantor theory does not apply as to the Andrews and Kim fence. The evidence on point establishes that the fence did not exist when the Andrews bought and moved into the property, and that the Andrews did not acquire their property with reference to the line later created when the fence was erected.

As a result of the "incorrect fence placement," the court found:

[T]he Davis lot appeared to increase in size since the Kim and Davis fence was over Kim's property line; this left Kim with no side yard to the east. The location of the Andrews and Kim fence caused Kim to have no side yard to the east, but a side yard to the west, all of which is on the Andrews property.

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Kim may have thought he was crossing over his own property to access his backyard, but in fact that property was owned by Andrews.

....

The Andrews have been accessing their backyard by traversing across the property of their neighbors to the west. In doing so, the Andrews had to walk up the neighbor's driveway, and then follow a pathway that passed within about a foot of the neighbor's front porch . . . in order to gain entry into their backyard.

The court also found that Andrews and Kim owned the disputed strips of land.

Finding of Fact 25 states:

As to the strip of land in dispute between the Kim and Davis properties, it is Kim who paid for that [land and] has paid taxes on it. Similarly, as to the strip of land in dispute between the Andrews and Kim properties, it is the Andrews who paid for that [land and] have paid the taxes on it; yet the Andrews have not had the enjoyment of a compensatory piece of land on the west side of their home.

The trial court ruled that using the fences to establish the boundary lines was unreasonable. Finding of Fact 26 states:

To force either the Andrews or Kim to have zero lot lines on both sides of their home is unreasonable, and would leave that party with property which would be exceedingly difficult to sell and its market value would likely substantially diminish.

The court found:

If the fence between the Andrews and Kim properties is not moved to the boundary line shown on the Survey Maps and Plans, Andrews will have no useful access to their backyard.

Accordingly, the court concluded the "equitable and other defenses" asserted by Kim and Davis "are not a basis to leave the fence between the Andrews and Kim properties in its current location." While the court recognized the common grantor doctrine could apply to the fence and rockery between the Kim and Davis properties,



in order to achieve a “fair and equitable resolution of this case,” the court revised the summary judgment order and established the boundary lines between the three properties according to the recorded maps and surveys. The court quieted title to the disputed strip of land between Andrews and Kim in Andrews, and quieted title to the strip of land between Kim and Davis in Kim.

The conclusions of law provide, in pertinent part:

6. The fair and equitable resolution of this case requires the fence between the Andrews and Kim properties to be moved to the boundary line shown on the Survey Map and Plans, and similarly, the fence between the Kim and Davis properties to be moved to the boundary line shown on the Survey Map and Plans (as further shown on Trial Exhibits 8 and 9).
7. Title and ownership of the disputed strip of land between the Andrews and Kim properties is confirmed to be held by Andrews.
8. Title and ownership of the disputed strip of land between the Kim and Davis properties is confirmed to be held by Kim.

The court further ordered:

[T]he Andrews have the right to move the fence between the Andrews and Kim properties to the boundary line shown on the Survey Map and Plans (as further shown on Trial Exhibits 8 and 9).

.....

It is further the Order of this Court that Kim has the right to move the fence between the Kim and Davis properties to the boundary line shown on the Survey Map and Plans (as further shown on Trial Exhibits 8 and 9).

Davis filed a motion for reconsideration. Davis argued that the court erred in revising the summary judgment order. Davis also asserted that the court mistakenly moved the boundary lines more than five feet. In support, Davis submitted her declaration stating there is ten feet between the Andrews and Kim condominiums.

Davis also stated that based on the court's decision there would be less than three feet at the narrowest point between her condominium and the boundary line with Kim. The court denied the motion for reconsideration. The order expressly states that the court did not consider the additional evidence Davis submitted.

### ANALYSIS

Davis argues: (1) the trial court erred in revising the summary judgment order that established the boundary line between the Kim and Davis properties under the common grantor doctrine, and (2) the court abused its discretion in refusing to establish the boundary line between Kim and Davis based on the common grantor doctrine.<sup>2</sup> In the alternative, Davis contends substantial evidence does not support the trial court's findings.<sup>3</sup>

#### Summary Judgment Order

Under CR 54(b), unless a court expressly finds that the order is a final order, an order that "adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action," and is subject to revision before

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<sup>2</sup> In the brief of respondent Andrews and in his motion on the merits, Andrews claims Davis lacks standing to appeal the trial court's ruling as to the boundary line between the Andrews and Kim properties because: (1) Davis is not an aggrieved party under RAP 3.1, (2) Davis is not a "real party in interest" under CR 17, and (3) Davis cannot maintain a quiet title action as to the disputed area between the Andrews and Kim lots under RCW 7.28.010. We reject Andrews' arguments. Because the trial court's ruling clearly affects Davis's property interests, she is an aggrieved party and a real party in interest. Here, unlike in Polygon Nw. Co. v. Am. Nat'l Fire Ins. Co., 143 Wn. App. 753, 189 P.3d 777 (2008), Davis is a party directly affected by the trial court's ruling. Moreover, Davis has a "valid subsisting interest in real property" under RCW 7.28.010.

<sup>3</sup> Davis filed a motion to strike Andrews' statement of additional authorities. We grant the motion to strike to the extent it contains improper argument. We decline to award Davis attorney fees. See RAP 10.8.

entry of judgment as to all the parties.<sup>4</sup> Davis asserts the summary judgment order was not subject to revision because the order states, “[T]here is no just reason for delaying the entry of the foregoing determinations and judgment of the Court regarding the Kim/Davis boundary.” We disagree.

It is well-established that use of the language in an order stating there is “no just reason for delay” does not comply with the requirement that the court must make express findings under CR 54(b) that the order is a final order, unless the record shows “hardship or injustice that could be alleviated by immediate appeal.” Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 300, 840 P.2d 860 (1992) (quoting Fox v. Sunmaster Prods. Inc., 115 Wn.2d 498, 503, 798 P.2d 808 (1990)).

The record also does not support Davis’s argument that Kim and Andrews agreed the order is a final judgment. In the trial briefs, Kim and Andrews each asserted that if the trial court did not apply the common grantor doctrine to establish the boundary line based on the fence between the Andrews and Kim lots, the court had the authority under CR 54(b) to revise the order on summary judgment.<sup>5</sup> The trial

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<sup>4</sup> CR 54(b) provides:

**Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the courts own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

<sup>5</sup> Moreover, at the beginning of trial, Davis asked the trial court to enter the requisite findings under CR 54(b). Recognizing the “domino effect” of the boundary lines between the three contiguous

court correctly concluded that it had the authority under CR 54(b) to revise the summary judgment order, and the record does not show “hardship or injustice that will be alleviated by immediate appeal.”<sup>6</sup>

### Common Grantor Doctrine

Davis asserts the trial court erred in refusing to apply the common grantor doctrine to the boundary line between Kim and Davis. Under the common grantor doctrine:

A common grantor may establish a binding boundary line if the grantor sells the land with reference to such line, and the grantor and grantees agree to the identical tract of land to be transferred by the sale. The common grantor theory applies if: (1) an agreed on boundary was established between the common grantor and original grantee; and (2) a visual examination of the property would show subsequent purchasers that the deed line was no longer functioning as a “true” boundary.

MacDonald v. Tobias, 124 Wn. App. 1015, 2004 WL 2650713, at \*1 (citing Strom v. Arcorace, 27 Wn.2d 478, 481, 178 P.2d 959 (1947); quoting Fralick v. Clark County, 22 Wn.App. 156, 160, 589 P.2d 273 (1978)).

A quiet title action is a claim for equitable relief. Kobza v. Tripp, 105 Wn. App. 90, 95, 18 P.3d 621 (2001). Trial courts have broad discretion to fashion equitable remedies. In re Foreclosure of King County Liens, 123 Wn. 2d 197, 204, 867 P.2d 605 (1994). Whether the trial court erred in establishing the boundary lines between

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lots, the court denied Davis’s motion.

<sup>6</sup> We also reject Davis’s argument that Andrews and Kim violated Snohomish County local court rule (SCLCR) 7(b)(1)(A) by requesting the court to revise the partial summary judgment order. SCLCR 7(b)(1)(A) governs presentation of the same motion on the same facts.

the three contiguous properties is reviewed for abuse of discretion. King County Liens, 123 Wn.2d at 204. A trial court abuses its discretion only if its ruling is based on untenable grounds or reasons. Wilcox v. Lexington Eye Inst., 130 Wn. App. 234, 241, 122 P.3d 729 (2005). Unchallenged findings of fact are verities on appeal. Davis v. Dep't of Labor & Indus., 94 Wn.2d 119, 123, 615 P.2d 1279 (1980).

Here, while the trial court recognized that the common grantor doctrine could apply to the boundary line between Kim and Davis, the unchallenged findings of fact establish that the common grantor doctrine did not apply to the Andrews and Kim fence. The court expressly addressed the effect of applying the common grantor doctrine to establish the boundary lines, and concluded it was unreasonable because it would “force either the Andrews or Kim to have zero lot lines on both sides of their home . . . and . . . its market value would likely substantially diminish.” The court determined that in order to fashion a fair and equitable resolution, the recorded maps and surveys should be used to establish the boundaries. We hold the trial court did not abuse its discretion in using its equitable authority to establish the boundary lines between the three properties based on the survey maps and plans.

### Substantial Evidence

In the alternative, Davis contends substantial evidence does not support several of the findings of fact.<sup>7</sup> We review the trial court's findings of fact following a bench trial to determine whether the findings are supported by substantial evidence

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<sup>7</sup> Davis also asserts that the court's findings of fact do not support the conclusions of law because the findings establish that the fence and rockery between the Kim and Davis condominiums is the lawful boundary under the common grantor doctrine. As discussed, the court acted within its discretion in deciding to establish boundary lines between the three properties based on the survey maps and plans.

and whether those findings support the conclusions of law. Dorsey v. King County, 51 Wn. App. 664, 668-69, 754 P.2d 1255 (1988). Substantial evidence is the quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). The trial court's determination of the credibility of the witnesses and what weight to give the evidence is not reviewed on appeal. Burke v. Pepsi-Cola Bottling Co., 64 Wn.2d 244, 246, 391 P.2d 194 (1964).

Davis challenges the finding that Andrews did not know that the fence the developer built was incorrectly located on his lot until 2007. Finding of Fact 18 states:

The evidence does not establish that the Andrews knew there was a problem as a result of the incorrect placement of the fence . . . when the fence was constructed, nor that Andrews [k]new at that time that the fence was not located on the true property line. The fence was constructed after the Andrews acquired title to, and took possession, of their property.

Davis points to the testimony of Jeffrey Andrews, “[w]e believed originally that [the fence] was always in the wrong spot,” to argue that Andrews did not act with due diligence.<sup>8</sup> Andrews testified that although he believed the fence was “in the wrong spot,” he did not learn that the boundary line did not comply with recorded maps and surveys until 2007.

Q So in your complaint you say you learned for the first time that the fence between your property and the Kims, you learned for the first time in 2007 that that was placed wrong.

A We thought what we found to be proof that it was put in the wrong spot in 2007.

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<sup>8</sup> There is no dispute that none of the parties can establish a claim of adverse possession because the lawsuit was brought before there were 10 years of possession of any disputed area of property. Miller v. Anderson, 91 Wn. App. 822, 827, 964 P.2d 365 (1998).

Q Well, you said in 3.7 that you learned for the first time. Is that right or wrong?

A We had proof in 2007 what we believed to be the proof that it was put in the wrong spot. We believed originally that it was always in the wrong spot.

The trial court considered and rejected the argument that Andrews did not act with due diligence.<sup>9</sup>

The fact that a neophyte homeowner may have a belief that there is a problem which he is unable to flesh out at the time does not equal knowledge in the legal sense, necessarily. While a reasonable fact-finder could find such knowledge under the facts of this case, this reasonable fact-finder does not.

We conclude sufficient evidence supports the trial court's determination that Andrews acted with due diligence.

Davis also challenges the finding that Andrews would have "no useful access to their backyard," and that Andrews had to use the neighbor's property to access the backyard. Finding of Fact 14 states:

Also as a result of the incorrect fence placement, the Andrews have no access to their backyard over their own land to the east. The fence on the west side of the Andrews property was not incorrectly placed.

Finding of Fact 16 states:

The Andrews have been accessing their backyard by traversing across the property of their neighbors to the west. In doing so, the Andrews had to walk up the neighbor's driveway, and then follow a pathway that passed within about a foot of the neighbor's front porch (which faces to the east). Andrews had to trespass in order to gain entry into their backyard.

Finding of Fact 19 states:

The Andrews clearly do not have ample land of their own on the west side of their house to access their backyard. That strip of land is 18 to

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<sup>9</sup> The court incorporated the oral decision into the written findings and conclusions, "where not otherwise inconsistent."

24 inches wide and slopes downward away from their house. Even absent any vegetation, this strip of land does not provide the Andrews with reasonable access to their backyard along the west side of their home.

There is no dispute that Andrews accessed the backyard by crossing over his neighbor's property. Jeffrey Andrews testified that there was only "18 to 24 inches" to the west of his condominium and the land dropped off "about a foot, foot and a half." The trial court rejected the argument that Andrews could access his backyard using the west side. Substantial evidence in the record supports the court's findings that the Andrews could not reasonably access their backyard.

Davis also challenges the finding that Kim would have

no useful access to his backyard . . . . [i]f the fence between the Andrews and Kim properties is moved to the boundary line shown on the Survey Maps and Plans, and the fence between the Kim and Davis properties remains in its current location.

Although there was conflicting evidence about the distance between the three properties, there is no dispute that if the fence between Andrews and Kim is moved to comply with the recorded maps and surveys, but the court used the fence and rockery between Kim and Davis to establish that boundary line, Kim would have no access to his backyard.

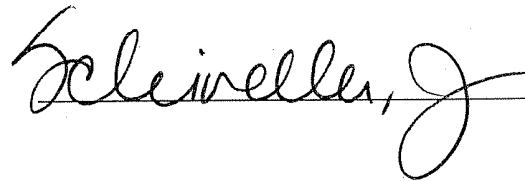
Finally, Davis challenges the finding that she "has had no difficulty accessing any of her property and will have none no matter what the court decides." We agree substantial evidence does not support this finding of fact. The testimony at trial focused almost exclusively on the area between Andrews and Kim and access to their



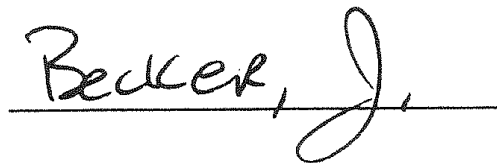
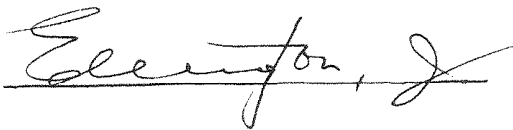
properties. While the court found that “the Davis lot appeared to increase in size since the Kim and Davis fence was over Kim’s property line,” and Davis may in fact have no difficulty accessing her backyard, there is insufficient evidence in the record to support the finding.<sup>10</sup>

CONCLUSION

We affirm the trial court’s decision to revise the order on summary judgment and use its equitable authority to establish the boundary lines between the three contiguous properties. Except for the court’s finding that Davis will have “no difficulty accessing any of her property and will have none no matter what the court decides,” we conclude substantial evidence supports the findings Davis challenges on appeal. We remand for further proceedings consistent with our opinion.



WE CONCUR:



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<sup>10</sup> Accordingly, we need not address Davis’s argument that the court abused its discretion in failing to consider the new evidence submitted in her motion for reconsideration.