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No. 70814-7-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JUDITH ANDERSON, a single woman,
Respondent,
v.
RICHARD and MARGARET ANDERSON, husband and wife,
Appellants.

ON APPEAL FROM
SNOHOMISH COUNTY SUPERIOR COURT

APPELLANTS RICHARD AND MARGARET ANDERSON'S REPLY BRIEF

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Table of Contents

Table of Authorities

Cases

Respondent's Cases

Foreign Cases

Law Review Articles

INTRODUCTION

The trial court correctly held the Voorheis Survey was the basis of purchase, sale and development of the Caverly Tracts, but misapplied the non-applicable second "subsequent purchaser" question to Judy,[1] the Original Grantee.[2] The trial court compounded that error by applying an erroneous burden of proof for which it admitted it could find no precedent. Rich and Margaret's appeal should be granted.

Judy agrees with Rich and Margaret that ***Fralick v. Clark County*** is the lead case. Judy admits at page 9, lines 15-17 of her brief that she is the Original Grantee from LeRoy Caverly, the Common Grantor. The parties further agree that Rich and Margaret are "subsequent purchasers." Rich and Margaret contend, however, that Judy, as the Original Grantee, is "bound" to the Voorheis Survey just as Mr. McHugh, the Original Grantee

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[1]Although unrelated, the parties share the same surname. To avoid confusion, the plaintiff/respondent, Judith Anderson, and her late husband will be referred to as Judy and Charlie. The defendants/appellants, Richard and Margaret Anderson, will be referred to as Rich and Margaret. Since Judy filed this lawsuit, her claim at Brief pages 9 and 15 that Rich is an "opportunist" stands the facts on their head. Besides, claiming only to the survey line on appeal eliminates even the access road over the culvert basis for the "opportunist" accusation. *See **infra*** page 7, lines 3-9.

[2] Even Judy's brief, at page 36, lines 15-17, admits that "the second half of the [Common Grantor] Rule, ... operates only to determine whether a boundary at odds with [a subsequent correct survey of] the legal description should also bind subsequent grantees." Rich and Margaret suggested the trial court was confused when it applied what Judy now admits is an inapplicable question. Judy objected at page 7. Yet, at page 19, lines 6-12, Judy admits it was trial court confusion which led the court to twice direct reformation of the legal descriptions and describe the Voorheis Line by the Cascade method. CP 253, lines 6-8 and CP 273, lines 6-8.

in ***Light v. McHugh,*** was bound to his agreed position with Mrs. Dreazy. Judy had actual notice the Voorheis Survey was the basis of the legal description she bought. Judy also had inquiry notice of the visual boundary between the eastern 300 feet of Tract 2 pasture and Tract 4 forest in 1976 when she purchased. And Judy does not directly contest those contentions.

Instead, Judy incorrectly argues that Rich and Margaret (1) accepted all the trial court's Findings of Fact (FOF) and (2) did not "plead" the Voorheis Survey which, Judy asserts, was a "new compulsory counterclaim theory." Judy also argues incorrectly that Rich and Margaret made an irrevocable election of remedies based on "use and possession" and cannot now rely on a survey – even if it was the basis of use and possession according to her own notarized statement in Exhibit 13. Judy also makes the confused and confusing argument, directly contradicted by at least 5 cases, that a survey cannot be the basis for a Common Grantor award because a survey locates a legal description and is not "at odds with" it. Judy further argues, contrary to the undisputed evidence furnished by her own written statements, that the Voorheis Survey was theoretical, hypothetical and fictional. In addition, Judy incorrectly argues that ***Light v. McHugh***, cited and relied upon by ***Fralick v. Clark County***,

is not a Common Grantor case so it is not on point. All of these arguments are urged for adoption by this court in order to affirm the trial court on any basis, even though those bases are not supported by the record.[3]

The disputed area between Tracts 2 and 4 based on the Voorheis Survey on the south and the Cascade Survey on the north should be awarded to Rich and Margaret as was requested of the trial court in CP 141-147.

ARGUMENT

1. The Scope of Appeal Is Narrow: Judy's Brief page 22

Rich and Margaret agree that the scope of this appeal is very narrow. But Judy is incorrect to state that Rich and Margaret did not challenge any of the trial court's FOF. Rich and Margaret filed a comprehensive Objection to many FOF and Conclusions of Law (COL). CP 151-163.

There are, however, undisputed FOF and COL which are material to the issues of this appeal. Those verities, listed in footnote 15 at page 26 of Rich and Margaret's Opening Brief, read as follows:

FOF 14, CP 43, lines 1-3. The parties disagree regarding the location of the boundary line between Tracts 2 and 4. One survey (the

[3] Many statements and cases in Judy's brief are not supported by the record to which she cites. They are summarized in the Appendix.

Cascade Survey) places the boundary slightly northeast of an older survey (the Voorheis Survey).

FOF 16, CP 43, lines 12-15. With regard to the Voorheis Survey, the firm of Voorheis-Trindle-Nelson completed this survey of a portion of Mr. Caverly's 125-acre parcel in 1969. Exhibit 20. The Voorheis Survey delineates the outside boundary of Tracts 1-8 and some additional land to the east.

FOF 25, CP 47, lines 8-17. As part of its calculations, Cascade used a Department of Game monument that was placed in 1974, after the Voorheis Survey was done. The Department of Game's work established a Section Corner and a Quarter Corner that had previously been placed in a different location by Voorheis. Although Voorheis used an accepted practice to calculate the Section Corner and Quarter Corner when they prepared the 1969 survey, the Department of Game's location of these survey points is now accepted by the survey community as accurate. The discrepancy between the Voorheis work and the Department of Game's work is the source of the boundary line uncertainty present in this case and throughout the Caverly tracts.

FOF 31, CP 48, lines 7-9. All of the individuals who purchased one of the Tracts numbered 1-4 from Mr. Caverly did so based upon Exhibit 20, the original Voorheis Survey. The legal description for each of these parcels is based upon the Voorheis Survey.

FOF 39, CP 50, lines 18-24. On July 15, 1997, Mr. Campbell (Tract 1) wrote Judy and Charles Anderson (Tract 3) regarding their common boundary. Exhibits 17 and 56. He wrote that Mr. Caverly pointed out certain monuments reflected on the Voorheis Survey, that he provided him with a copy of the survey, that he installed a fence around his property pursuant to the survey, and that he has maintained the perimeter of his property according to the survey. Mr. Campbell maintains the Voorheis Survey line is the boundary line that should apply under the doctrines of adverse possession and boundary by acquiescence. *Id.*

FOF 40, CP 51, lines 1-4. On February 28, 1998, Charles Anderson wrote Mr. Cohrs (Tract 5) regarding the boundary between Tracts 3 and 5. Mr. Anderson wrote that he "accepts" the "original survey" (the Voorheis Survey) to establish the north boundary line between Tracts

1 and 3. The letter is a helpful history of the development of the area. Exhibit 13.

FOF 51, CP 53, lines 11-12. Harmsen & Associates, Inc. prepared a location sketch of the south half of Tract 2 on August 10, 2012. The sketch details features testified to during the trial. Exhibit 23.

COL, CP 56, lines 3-4. Charles and Judy Anderson purchased Tracts 3 and 4 in 1976. The legal description of the property was based upon information derived from the 1969 Voorheis Survey. Exhibit 20.

COL, CP 57, lines 20-22. [T]here is substantial evidence that Mr. Caverly intended to deed two square ten-acre parcels to Charles and Judy Anderson and that he did so based upon the best survey available to him at the time – the Voorheis Survey.

COL, CP 58, lines 4-11. The totality of the evidence persuades the Court that … Mr. Caverly clearly expressed his desire to plat 13 ten-acre tracts, that he did so, and that he sold Charles and Judy Anderson Tracts 3 and 4 based upon his rough sketches and his legal description, not upon physical features visible to the common grantor and the buyers.

Accordingly, the Court concludes that Defendants have not established by clear, cogent and convincing evidence[4] that the common grantor established a boundary ***other than the one set forth in the legal description*** [which FOF 31, 39 & 40, as well as all 4 of the above COL, held was based on the Voorheis Survey]. (Emphasis and brackets supplied.)

2. Richard Pleaded the Voorheis Survey Line; Judy's Brief p. 23

Judy's complaint never mentioned the Voorheis Survey. CP 381-390. Rich and Margaret first filed an Answer which included no counterclaims (CP 373-378) but pleaded the Voorheis Survey 2 times at CP 374, line 19 and CP 375, line 18. Moreover, other synonymous terms,

[4] While this incorrect burden of proof was objected to, the Voorheis Survey as the basis of the Caverly Tracts legal descriptions is not.

such as "Caverly monuments," were also pleaded another 12 times.[5]

Later, Rich and Margaret filed an Amended Answer with Counterclaims. It expressly pleaded the Voorheis Survey line 23 times; 17 times before the Counterclaims[6] and 6 times in the Counterclaims.[7]

3. Reply to Judy's "Affirmatively Eliminated" Argument on Page 25.

Judy first asserts that a claim to the Voorheis Survey line would be "broader" than the claim to the survey line. This is incorrect. The Voorheis Survey line is narrower than the swale line, as documented on Judy's Exhibit 6. The Voorheis line is 26.64' south of Cascade's line on the east end and 17.47' south of the Cascade line on the west end. In contrast, the fence corner at the west end of the swale is 59.83' south of the Cascade line; 59.83' – 17.47' = 42.36' narrower.[8]

A narrow strip of property within a wider strip of property is not "broader" than the wider strip. Arguing for the swale line ***in addition to***

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[5] CP 374, lines 20, 23, 25 & 25; CP 375, lines 6, 7, 10, 14 & 18; CP 376, line 4; CP 377, lines 21 & 24 and CP 378, line 3.

[6] CP 362, lines 19 & 24; CP 364, line 10, CP365, line 9 – twice – and lines 11, 13, 16 & 17; CP 366, lines 4, 10, 15, 17, 22 & 23; and CP 367, lines 11 & 25.

[7] CP 369, lines 5 & 9; CP 370, line 6; CP 372, lines 4&5; and CP 372, line 17. *See also* CP 369, lines 12-16. The synonym "Caverly monuments" was also used twice at CP 371, lines 22 & 25.

[8] Likewise, based on Judy and Charlie's 1995 Cascade survey (Exhibit 15), that same fence corner is 58.10' south of the Cascade line. And Rich's Exhibit 23 documents that the swale line broadens as it heads west and aims directly at that fence corner, which it indicates is 61.97' southwest of the Cascade line's southwest corner.

the survey line did not "affirmatively eliminate" the survey line.[9]

Second Judy argues that Rich and Margaret's claims were based on "use and occupation", not the Voorheis Survey. But in FOF 32 at CP 48, lines 14-15, the trial court made the unchallenged finding that Rich and Margaret "maintained and improved the path over" the northern culvert. The portion of the path over the culvert and west of it is within the swale line (but not the survey line). *See* Exhibit 23. If Rich and Margaret used south to the culvert and swale line, they also used the entire area north of those locations within the Voorheis Survey line.

Third Judy argues that claiming to the Voorheis Survey line is a "new theory" of the case. This was argued before, but not referenced by, the trial court. *See* CP 82, line 12 - CP 87, line 10, rebutted at CP 64, line 7 – 68, line 9. The claims to the Voorheis Survey line, and south to the swale line, both seek boundary dispute remedies based on the undisputed use and possession found in FOF 32 at CP 48, lines 14-15. The claims are not "repugnant to one another" as argued by Judy at page 27.

Fourth Judy argues at page 30 of her brief that Rich and Margaret

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[9] There certainly is no such trial court language that Judy can point to which suggests that *non sequitur*. Apparently this and Judy's other arguments, not relied on or mentioned by the trial court, are asserted with the hope that the trial court's rulings will be "affirmed on any basis" whether or not supported by the record. This "affirmative elimination" argument is made at pages 29-30 of Judy's brief and "supported" by citation to two inapplicable cases.

are trying to prevail on the weakness of Judy's position, not on the strength of their own. Rich and Margaret agree that Judy's claim to the Cascade line (CP 385, lines 5-8and RP1 at 55, lines 18-21) is weak. In contrast, however, Rich and Margaret's case is supported by multiple documents that Judy and Charlie wrote, signed and, in some cases had notarized (Exhibits 13, 14, 16, fax pages 8-11), as well as written statements of other Caverly purchasers (Exhibits 17&56). As a result, Rich and Margaret's case is overwhelming and undisputed, not weak. Judge Castleberry recognized the Voorheis Survey was the only applicable survey. CP 341. Even the trial court initially "thought" the Voorheis Survey should be used to reform the legal descriptions based on the evidence. CP 253, lines 6-8, CP 273, lines 6-8, CP 232-233 and RP2 24, lines 15-20. Only later was the trial court confused by the arguments of Judy's counsel and the trial court's own erroneous application of the subsequent purchaser question to Judy, the Original Grantee.

4. Reply to Judy's "At Odds With" Argument

One of Judy's oft-repeated arguments is that the Common Grantor Doctrine cannot be based on the straight line of the Voorheis Survey. According to Judy, that straight line would not be "at odds with the boundary legally described in the deed." In other words, Judy argues that a

survey, and the Voorheis survey in particular, is never "at odds with the legal description." ***See e.g.*** Judy's brief at page 34. This is a confused, as well as a confusing and erroneous argument.

First, there are at least five (5) Common Grantor cases which involved two or three surveys. In each case, the earlier survey was challenged by a subsequent survey which revealed that the earlier survey was erroneous. In all five (5) cases, however, the earlier Common Grantor survey prevailed even though erroneous.[10] These five (5) cases establish that the Common Grantor Doctrine has been based on a straight, but erroneous, survey line at least five (5) times. Therefore, the application of the Common Grantor Doctrine can also be based on the straight Voorheis Survey line, which used a now superseded quarter corner.

It is also important, however, to demonstrate how Judy came up with this confusing "at odds with" argument. Judy quotes, and then misquotes, two boundary cases: ***Lamm v. McTighe***[11] and ***Fralick v. Clark***

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[10] ***Winans v. Ross***, 35 Wn App 238, 240-241, 666 P.2d 908 (1983); ***Clausing v. Kassner***, 60 Wn2d 12, 13, 14 and 16, 371 P.2d 633 (1962); ***Angell v. Hadley,*** 33 Wn2d 837, 838, 207 P.2d 191 (1949); ***Windsor v. Boucier***, 21 Wn2d 313, 314 and 316, 150P.2d 717 (1944) where the State Supreme Court stated at 316: "In any event, it would avail appellants nothing to prove that the original survey stakes were erroneously placed "and ***Roe v. Walsh***, 76 Wash 148, 150 and 152, 135 Pac 1031, 136 Pac 1146 (1913). *See* CP 206-208.

[11] 72 Wn2d 587, 591, 434 P.2d 565 (1967).

County[12] at page 33 of her brief. The operative language of ***Lamm v. McTighe*** (a mutual recognition and acquiescence case, not Common Grantor case) in 72 Wn2d at 591 is:

> Boundaries between adjoining properties, ***at odds with the true boundary as revealed by subsequent survey,*** may be established, under appropriate circumstances, through the following [5] doctrines, all of which have been recognized in this state: ... (Emphasis supplied)

Two phrases are key to deciphering Judy's erroneous argument. "True boundary" means the location on the ground of the deeded legal description based on a correct survey. "Subsequent survey" means a correct survey of the deeded legal description performed after establishment of a boundary which is "at odds with" the correct subsequent survey. In other words, the "at odds with" language is describing a boundary to which claim is made, but which conflicts with the subsequent correct survey's location on the ground of the deeded legal description. The ***Lamm*** court called that subsequent correct survey location of the deeded legal description the "true boundary."

Throughout her brief, however, Judy incorrectly transforms this ***Lamm*** "at odds with the true boundary as revealed by subsequent survey"

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[12] 22 Wn App 156, 160-161, 589 P.2d 273 (1978).

language into "at odds with the legal description."[13] Judy does so by only partially quoting a COL at CP 58, line 10, at the bottom of page 34 of her brief. That COL held, as to the curved swale line, that Richard and Margaret had not proven "the common grantor established a boundary ***other than*** the one set forth in the legal descriptions." (Emphasis supplied.) Judy then ignores FOF 31, 39 and 40 and COL at CP 56, 57 and 58, each of which held that the legal descriptions for each of the Caverly parcels was based on the Voorheis Survey. By combining these unrelated pieces of text, based on the similarity of the phrases "at odds with" and "other than," Judy creates her own phrase: "at odds with the legal description." She then argues incorrectly that since a survey cannot be "at odds with the legal description," the Voorheis Survey cannot support a Common Grantor award.

The facts are that after the Department of Game established a new East quarter corner for the Section in 1974, 5 years after the Voorheis Survey was performed. After passage of several years, the Voorheis Survey became "at odds with the true boundary [*i.e.* correctly surveyed deeded legal description] as revealed by [Cascade's] subsequent survey."

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[13] Judy's brief, page v, line 13, p.4, lines 6-7, p.7, lines 6-7; p.23, lines 16, 21-22; p.28, line 12; p.34, lines 10-11; p.35, line 5, p.36, lines 9-10 and 14-15; p.39, line 20 and p.40, line 12.

Therefore, contrary to Judy's legal alchemy, the Voorheis Survey does meet ***Lamm's*** "at odds with" language.

The second part of Judy's "at odds with" argument is based on quotation of the ***Fralick*** case which also uses the term "true boundary," although in a somewhat different context. In 22 Wn App at 161, as it lists the visual examination alternative to the subsequent purchaser question, ***Fralick*** asks:

> [W]ould a visual examination of the property indicate to subsequent purchasers that ***the deed line was no longer functioning as "true" boundary?*** (Emphasis supplied.)

Fralick asks whether ***Lamm's*** subsequent correct survey of the deeded legal description is "at odds with" the visually established boundary; *i.e.* is the "at odds" visual boundary, as opposed to the subsequent correct survey line, "functioning as 'true' boundary?"

In this case, the trial court expressly held in its own self-written FOF 31, 39 and 40 (as well as COL at CP 56-58 quoted earlier) that the Voorheis Survey was the basis of the legal descriptions conveyed to owners of Caverly Tracts 1 through 4. Moreover, Exhibits written and signed by and, in two cases, notarized for Judy and Charlie Anderson, establish that the Voorheis Survey -- and its 4x4 concrete monuments with brass discs, as well as other markers set by Mr. Caverly based on those

monuments -- determined ownership and development of lots, fences, roads, structures and underground power.[14] Other aerial and ground photo and survey exhibits also established visual occupation lines based on the Voorheis Survey.[15] All of these exhibits establish Voorheis Survey lines "at odds with" the Cascade survey lines. And they all also establish that the Voorheis Survey lines were "functioning as 'true' boundary".

In summary, there were two surveys of the same legal description; one by Voorheis and one by Cascade. Neither is "at odds with" the legal description because both use the same legal description. But the two surveys are "at odds with" one another because they started from a different location for the East quarter of the Section. They, therefore, locate the same legal description in two different places on the ground. Cf. CP 68, line 10 – CP 69, line 19. Ultimately, over time, the Cascade method was accepted as correct – even though it could not have been used in 1969 when Voorheis did its work.

Therefore, the Voorheis Survey boundary, its monuments and the markers established based on it in Exh 10, are "at odds with the true boundary as revealed by subsequent survey" performed by Cascade, which is now accepted as the correct method for locating record deeded legal

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[14] ***See*** Exhs 10, 11, 13, 15, 16 (fax pp.8-11), 17, 20, 30, 32, 33, 34 and 56.
[15] ***See*** Exhs 44-48, 50-52 and 61-63.

descriptions. Nevertheless, the Voorheis Survey boundary was the basis for the purchase and sale between LeRoy Caverly, the Common Grantor, and Judy Anderson, his Original Grantee. The Voorheis Survey also was the basis of use and occupation so that the Cascade Survey was never "functioning as 'true' boundary." CP 115-116. Even Judy advocated the Voorheis Survey for 22 years, until at least 1998, three (3) years after her own 1995 Cascade Survey was recorded. Exh 13.

5. *Light v. McHugh* Is A Common Grantor Case; Judy's Brief at p.36

Fralick v. Clark County, supra, 22 Wn App at 160, cites ***Light v. McHugh*** as its ***sole authority*** for the "first question" applicable to what ***Fralick*** calls the Common Grantor "theory;" namely, whether there was an agreed boundary established between the original parties, the Common Grantor and Original Grantee. That makes ***Light v. McHugh*** a Common Grantor case whether or not the term "Common Grantor" was used. Moreover, in support of its own decision in ***Light v. McHugh, supra,*** 28 Wn2d at bottom of 331, the State Supreme Court cited four cases, three of which were Common Grantor cases.[16]

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[16] ***Turner v. Creech,*** 58 Wash 439, 108 Pac 1084 (1910) expressly used the term Common Grantor in its headnotes as well as at 442, 10 lines from the bottom and at 443, at the end of the first paragraph. This may have been the first use of the term in Washington caselaw. ***Roe v. Walsh***, 76 Wash 148, 135 Pac 1031, 136 Pac 1146 (1913) expressly used "common grantor" and followed the Rule at 151 middle and 156 bottom. ***Rose v Fletcher,*** 83 Wash 623, 145 Pac 989 (1915) was a parol agreement case which did

In short, ***Light v. McHugh*** was cited as sole authority for the "first question" in Common Grantor cases by ***Fralick v. Clark.*** It also cited and relied on 3 Common Grantor cases. In addition, it involved Mrs. Dreazy, as the Common Grantor who sold a part of her original parcel to the Original Grantee, Mr. McHugh. ***Light v. McHugh*** is a Common Grantor case.

Not surprisingly, Judy attempts to distinguish ***Light v. McHugh's*** result because it is dispositive of this case. The Original Grantee is bound by actual knowledge of the original agreement which led to a legal description which was later located somewhere else by a subsequent survey. Judy is bound by the original, albeit superseded, Voorheis Survey which was used to write the legal description now located elsewhere by the subsequent Cascade survey. Mr. McHugh was bound by his original agreement to a location mis-described in the legal description according to a subsequent survey. So is Judy. As the State Supreme Court put in at 331:

> [Mr. McHugh] purchased a piece of property, and he secured just that definite parcel of real estate which was pointed out to him at the time he purchased it. [He] was not

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not involve a common grantor. It was probably cited because it involved an agreement between adjoiners about how and where a boundary between them would be located. It became binding on the original parties even though a subsequent survey of the deeded legal description would have placed the boundary elsewhere. ***Windsor v. Bourcier,*** 21 Wn2d 313, 150 P.2d 717 (1944) used "Common Grantor" in its headnotes, twice at 314, in the 2nd and 3rd paragraphs and in the final paragraph at 316.

> misled, or in any way injured. He secured just what he bargained for and cannot now complain.

Likewise, especially since Judy's attorney wrote at CP 328, line 9 that "All Judy wants is the lot she purchased, as she purchased it", Judy should secure just what she bargained for; namely, Tract 4 based on the Voorheis Survey – not the Cascade Survey.

6. Reply to Judy's Argument About Binding Richard

At page 37 of her brief, Judy tries to make binding Richard the issue. It is not. Rich and Margaret's counterclaim sought to bind Judy to the Voorheis Survey, which they "pleaded" over 20 times because Judy never even mentioned it in her complaint. Carol Boswell, Rich and Margaret's seller, expressly advised them on page 3 of Exhibit 1 (and 53) that her Tract 2, as well as Mr. Caverly's other Tracts, were "platted in the 1970's." She added that:

> A recent survey by Cascade Surveying and Engineering, Inc. discloses a possible deviation of 20'+/- between lines of occupancy and the deed boundary lines as surveyed by Cascade.

Rich and Margaret relied on the Voorheis Survey, ***20'+/-*** south of the Cascade line, and bought based on that line of occupancy. They also wanted Judy to be bound to the Voorheis Survey line which was the basis of the 1970's "plat" and the lines of occupancy. Judy's argument to the

contrary turns the record in this case upside down.

7. The Furlow Case Is Only Applicable By Analogy

Furlow v. Dunn, 201 Ark 23, 144 S.W.2d 31 (1940) was cited by ***Fralick v. Clark County, supra,*** 22 Wn App at 160 n.1. in support of the actual knowledge second alternative to the Common Grantor subsequent purchaser question. At pages 39-40 of her brief Judy says ***Furlow*** and its ruling are not applicable. That is partially correct. It is only applicable by analogy because the instant case seeks to bind Judy, as the Original Grantee, not a subsequent purchaser.

But ***Furlow*** is applicable by analogy because, in ***Furlow,*** the visual boundary which had existed in the past had disappeared as a result of a fire and natural attrition over a period of 25 years between a 1914 agreement and 1939 breach. 144 SW2d at 32. Nevertheless, the subsequent purchaser, Furlow, was bound even though he had not purchased until 1933, a year after the fire which destroyed structures built along the visual boundary, making the boundary invisible. As the Arkansas Supreme Court put it in 144 SW2d at 34:

> The testimony also shows that appellant Furlow had known of the existence of the dividing line, as one witness testified, since he was a small boy.[17]

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[17] Browder, *The Practical Location of Boundaries,* 56 MICH L REV 487, 529 (1958), was cited in the same ***Fralick*** footnote which cited the ***Furlow*** case. Professor Browder cited

As Original Grantee, Judy also had actual knowledge of the original Voorheis Survey agreement. Even if, after Charlie's 1994 clearing, the Voorheis Survey line had no longer been visually marked by a clear difference in use as pasture to the north and forest to the south, Judy has known since 1976 that the Voorheis Survey line was the boundary and is bound by it. If a subsequent purchaser with actual knowledge, like Furlow, is bound, so much more so is Judy as the Original Grantee.

Moreover, the eastern 300 feet of the swale that was visible after Charlie's 1994 clearing is on the Voorheis Survey line. Exhibit 23 and CP 137. Consequently, Rich and Margaret, as well as Judy, all had plenty of visual inquiry notice "even if" the visual examination first alternative to ***Fralick's*** subsequent purchaser question were applicable. CP 115-117. Judy is bound by the Voorheis Survey line. CP 369, lines 21-22.[18]

Furlow in support of his statement that "it has been held that [subsequent purchasers] will be bound if they had actual knowledge of the line." ***Fralick*** therefore cited ***Furlow*** as well as Professor Browder.

[18] ***Levien v. Fiala,*** 79 Wn App 294, 302, 902 P.2d 170 (1995) is cited for the proposition that the policy of the Common Grantor Doctrine is to protect innocent original good faith grantees. Therefore, it is argued, asking that Judy be bound is using the Doctrine as a sword against, rather than a shield for, Judy. But just because ***Levien*** was protecting an Original Grantee does not mean there is a one way policy. Mr. McHugh was an Original Grantee and the Doctrine was applied against him in order to protect Mrs. Dreazey, his seller, the Common Grantor.

8. The Voorheis Survey Line Is Not "Fictional," "Theoretical" and/or "Hypothetical"

Another of Judy's arguments is that ordering award of the disputed property north of the Voorheis Survey line between Caverly Tracts 2 and 4 and south of the Cascade survey line between those Tracts would be "speculative" because that line is a "fiction" and/or a mere "theoretical" or "hypothetical" line.[19] This assertion is also repeated throughout Judy's brief.[20] The argument is contrary to the entire record.

First, there is Judy's Exhibit 6, a large survey map exhibit prepared by Judy's survey expert, Bill Lloyd of Cascade. In the lower right corner Exhibit 6 documents that it was created on "7/27/2009" and checked by "WJL," William J. Lloyd, whose "7-28-09" dated stamp appears in the middle of the left margin. These are dates 4 months before the 11/20/09 first appeal of this case (Case #64504-8-1) because Exhibit 6 was originally part of Judy's response to Rich and Margaret's Summary

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[19] Judy argues that binding her to the Voorheis Survey would be too speculative. Brief page 45. Ironically, Judy then invites this Court, as she did the trial court, to speculate about where a surveyor in 1976, 2 years after the Department of Game's new quarter corner was established, might have located Judy's legal description. Judy argues that "Such speculation would likely be resolved in Judy's favor." Brief page 47, line 13. The argument ignores Charlie's revelation in 1994 that RMC had also surveyed Tracts 1-4 but agreed with Voorheis, finding that "their [*sic* there] was an error in the [1974] state monument." Exh 16, fax p.10 and CP 124. It also ignores the trial court's response to this argument in RP2, p.29, lines 5-6: "We're not going to deal with hypotheticals." (Emphasis added.)

[20] ***See*** p.4, last line, p.7, line 10; p.18, 3rd to last line; p.20, 5th to last line; p.24, line 12; p.28, line 17, p.31, line 8; p.43, line 6, p.46, line 13.

Judgment Motion which was filed, but not argued, before that first appeal.

As the record in this case documents, Judy's counsel was arguing there were, north to south, three possible lines at issue; (1) the Cascade line which is furthest north, (2) the Voorheis line and (3) the swale line which follows the Voorheis line for the first 300 feet +/- on the east end before curving to the southwest. (Note: the swale turns south of the Voorheis Survey line and, therefore, is even further south of the Cascade line.) CP 115, lines 13-20, CP 119, lines 17-21 and CP 202, lines 7-16. Consequently, when Rich and Margaret's Summary Judgment Motion was argued in 2011, ***after the first appeal,*** before now retired Judge Castleberry, he required a hand-written paragraph that excluded the Cascade line altogether because:

> Both counsel agree and the Court concludes that the only survey in existence when the parties' properties were subdivided by the Common Grantor, LeRoy F. Caverly, was the Voorheis Survey. CP 341.

The point is that Judy and her counsel were certainly not arguing in 2009 that the Voorheis Survey line was a hypothetical or theoretical fiction. They were providing an exhibit to document with a dashed line where that Voorheis Survey line was located. Thus, Judy's Exhibit 6 "Detail," in the upper left hand corner documented a fence corner at the base of which was a concrete monument (pictured in Exhibits 62-12&13

and 63-5,6&7). It is 42.36 feet south of the Voorheis Survey corner separating Tracts 2 and 4. That same "Detail" also documents that the Voorheis line is 17.47 feet south of the Cascade line at that point.

And there are at least five (5) other exhibits which establish the Voorheis Survey line between Tracts 2 and 4 as an existing fact. First is Exhibit 10, a copy of the Voorheis Survey map which Mr. Caverly labeled the "Caverly Reference Copy." As the trial court's own FOF 17 at CP 43-44 documents, Mr. Caverly marked Tract corners he set, and in some cases initialed and dated in 1975. They are highlighted on Exhibit 10.

Second, chronologically, is Charlie Anderson's memorandum to Bill Lloyd of Cascade dated 8/11/94. Fax pp. 10 and 11 of Exhibit 16; *see also* CP 124-125 and RP1, p.72. Charlie Anderson specifically wrote that:

> There was [*sic* were] ***two*** previous surveys completed for tracts 1, 2 3 & 4, by Voorhes [*sic* Voorheis] ***and RMC*** as well as those completed by your firm for the parcels to the east of us [a reference to the Burgess Interstate Survey by Cascade, Exhibit 31]. The existing fence lines were established by monuments set from the [two] previous surveys [plural] that obviously differ from the new [Gately] survey [Exhibit 33]. (Emphasis and brackets supplied.)[21]

[21] *See also* Exhibit 17 and fax pages 8 &9 of Exhibit 16 at CP 126-127 where Charlie advises Mrs. Gately that "Fence lines, driveways, building structures, Puget Power's electrical supply lines etc. were dimensioned and placed on [***all***] these parcels [to the North of your parcel] based on the survey performed by the Voorhes [*sic* Voorheis] Engineering firm." (Emphasis and brackets supplied.)

Chronologically, the third exhibit is Judy and Charlie's notarized Letter of Agreement with Vern Cohrs who bought Gatelys' Tract 5 adjoining the south boundary of Judy's Tract 3. Exh 13 (and CP 128-131) is dated February 28, 1998, almost 2½ years after Charlie's Cascade survey (Exh 15) was recorded and nearly 3½ years after the field work for that survey was performed in October of 1994 (Exh 28). The Letter of Understanding is full of notarized assertions by Judy and Charlie that establish the Voorheis Survey line between Tracts 2 and 4 was an existing established fact. They include the following, beginning at CP 128:

> Judy and I bought our two tracts in 1978 [*sic* 1976] ... When we purchased the tracts Mr. Caverly (the seller) provided us with the Voorheis-Trindle-Nelson Engineers survey and pointed out their cement monuments. ... These monuments formed the Northeast corner of Campbells [Tract 1], the southeast corner of Campbells which is my northeast corner [of Tract 3], my southeast corner which is your [Tract 5] northeast corner (east boundaries of tracts 1, 3 & 5). ***They also placed monuments on the west property line of tracts 2, 4 and 6.*** (Emphasis supplied.)
>
> The fences were installed based on this survey and the monuments they installed. All of our power lines and vaults coming in from the county road were installed per this survey. The county also used this survey when they constructed the curved concrete bridge on High Bridge road [as documented in Exhibit 30].

Charlie and Judy also added the following notarized statements (at CP 128 bottom and CP 129 top):

> [T]he appropriate boundary lines are those reflected by the cement monuments, the Voorheis survey, and the fences.
>
> x x x
>
> [W]e will have a surveyor revise the legal description for each tract accordingly.[22]

Clearly, based on Charlie and Judy's written and notarized statements, together with Exhibits 10, 16 (fax p.10) and 31, there were survey markers establishing the common line between Tracts 2 and 4 as a result of (1) the Voorheis survey, (2) the Caverly Reference Copy and (3) the RMC survey. Further, the 1974 aerial photograph shows that the east 300 feet of the line between Tracts 2 and 4 was already established pasture on 2 but forest on 4 by then. Exh 51. That 300 feet is also an extension of the Voorheis Survey line between Tracts 1 and 2 to the east.

Chronologically, the fourth exhibit is a letter written by Mr. Frost, Judy and Charlie's attorney, dated July 2, 2003. Exhibit 16 states on page 2 that:

> [A] small portion of ***the fence between Parcel 2 and Parcel 4 was put in initially by Mr. Caverly***, and then Mr. [Charlie] Anderson extended his fence off of the Caverly fence. (Emphasis supplied.)

On page 3 Mr. Frost adds that:

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[22] At page 47 of her brief, Judy incorrectly asserts that other neighbors "reformed their boundaries based on the accurate Cascade survey." **The neighbors had their Voorheis boundaries described using the Cascade methodology.** Exhs 34 and 35.

> Mr. [Charlie] Anderson removed the containment fence when he began logging, ... [in 1994]. Ms. Boswell [Tract 2] expressed her concern and Mr. [Charlie] Anderson informed her that ***the fence would be replaced*** when the logging was finished and when the property line was established. (Emphasis supplied.)

Since Charlie and Judy were advocating the Voorheis Survey line in 1998, 4 years after removal of the fence and Ms. Boswell's expression of concern in 1994, replacement of the fence and establishment of the property line in 1994 meant the Voorheis Survey line. Moreover, Ms. Boswell sold to Rich and Margaret Anderson in 1997. Exhs 1 and 53 and 2 and 54; CP 222. That was the year before Charlie and Judy's 1998 Letter of Understanding advocating the Voorheis Survey. Exh 13.

Chronologically, the fifth piece of evidence is Exhibit 23 also supplied as CP 137. It is a survey exhibit provided by Rich and Margaret Anderson. In its lower righthand corner it is dated 8/10/12. This should be contrasted with the 2009 date of Exhibit 6 furnished by Judy's surveyor. Exhibit 23 shows the Voorheis Survey line south of the Cascade line. It also documents that the swale (and, therefore, the tree line before Charlie Anderson's 1994 clearing) is on the Voorheis Survey line for its easterly 300 feet. And whether or not the Caverly/Anderson fence removed in 1994 during clearing was also on that line, as Carol Boswell asserted at page 3 of Exhibits 1 and 53, the Voorheis Survey line between Tracts 2

and 4 was certainly visible and known. The pasture usage on its northern side was entirely different than the trees or bush on its southern side. Exhibit 23, together with Exhibits 44-48, 50-52 and 61-63 prove the line was neither a hypothetical nor theoretical fiction.[23]

CONCLUSION

Judy is the Original Grantee. She is not a "subsequent purchaser." Therefore, neither of the "subsequent purchaser questions" applies. Even if they did, however Judy has actual notice of, and is bound to, her original Voorheis Survey line. That line is also visible for 300 of its 650 feet. Exh 23. Judy has agreed to be bound by the north and south Voorheis lines for her Tract 3. She is also bound by the Voorheis Survey line between Tract 2 and her Tract 4. The trial court's error should be reversed and the case remanded for entry of an Order like that proposed in CP 141-147.

DATED this 12th day of May, 2014.

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[23] In ***Schultz v. Plate,*** 312, 317, 739 P.2d 95 (1987) the Court held that a "barn and fence remnants were sufficient to put the purchaser on notice of an agreed boundary… Schultz was put on notice by the very existence of the structure and could have ascertained the agreed boundary by inquiry." Accordingly, the tree and swale line in this case would have bound Judy's purchaser, based on inquiry notice, if she had sold. It certainly binds her as Original Grantee as well.

No. 70814-7-1

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JUDITH ANDERSON, a single woman, Plaintiff/Respondent, v. RICHARD ANDERSON and MARGARET ANDERSON, husband and wife, Defendants/Appellants.	DECLARATION OF SERVICE

Gary W. Brandstetter, declares as follows:

1. I am the attorney for Defendants/Appellants Rich and Margaret Anderson, a United States citizen, over the age of eighteen (18) years and am competent to testify to the matters set forth herein.

2. On the 12th day of May, 2014, I caused Defendants/Appellants' Reply Brief to be filed with the Court of Appeals, Division 1, and delivered to:

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by ABC Legal Messenger.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 12th day of May, 2014.

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