70814-7

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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 OPENING BRIEF

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I. INTRODUCTION

This is an appeal arising out of a Common Grantor boundary dispute. As this Court is aware, when a Common Grantor divides his property into 2 or more parcels, and agreement is reached with an Original Grantee about the boundary, that agreed line is binding on both the Common Grantor and the Original Grantee. And that is true even if the legal description they use might be placed in some other position by a surveyor who later uses a more correct method to locate that legal description.[1]

In this case, however, the trial court treated the Original Grantee as if she were a "subsequent purchaser" relying only on visible indications of a boundary. The trial court awarded the Original Grantee property which was not included in the "Voorheis Survey" relied upon by the Common Grantor and Original Grantee. The trial court instead determined ownership based on a "Cascade Survey" – conducted 18 years after the original purchase and sale.

This appeal is by Richard (Rich) and Margaret Anderson who were the Defendants in the trial court. Their appeal is based on the undisputed and indisputable written statements and, in some cases, notarized

[1] Stoebuck and Weaver, 17 WASH PRAC §8.22, p.546 (Thomson/West 2004).

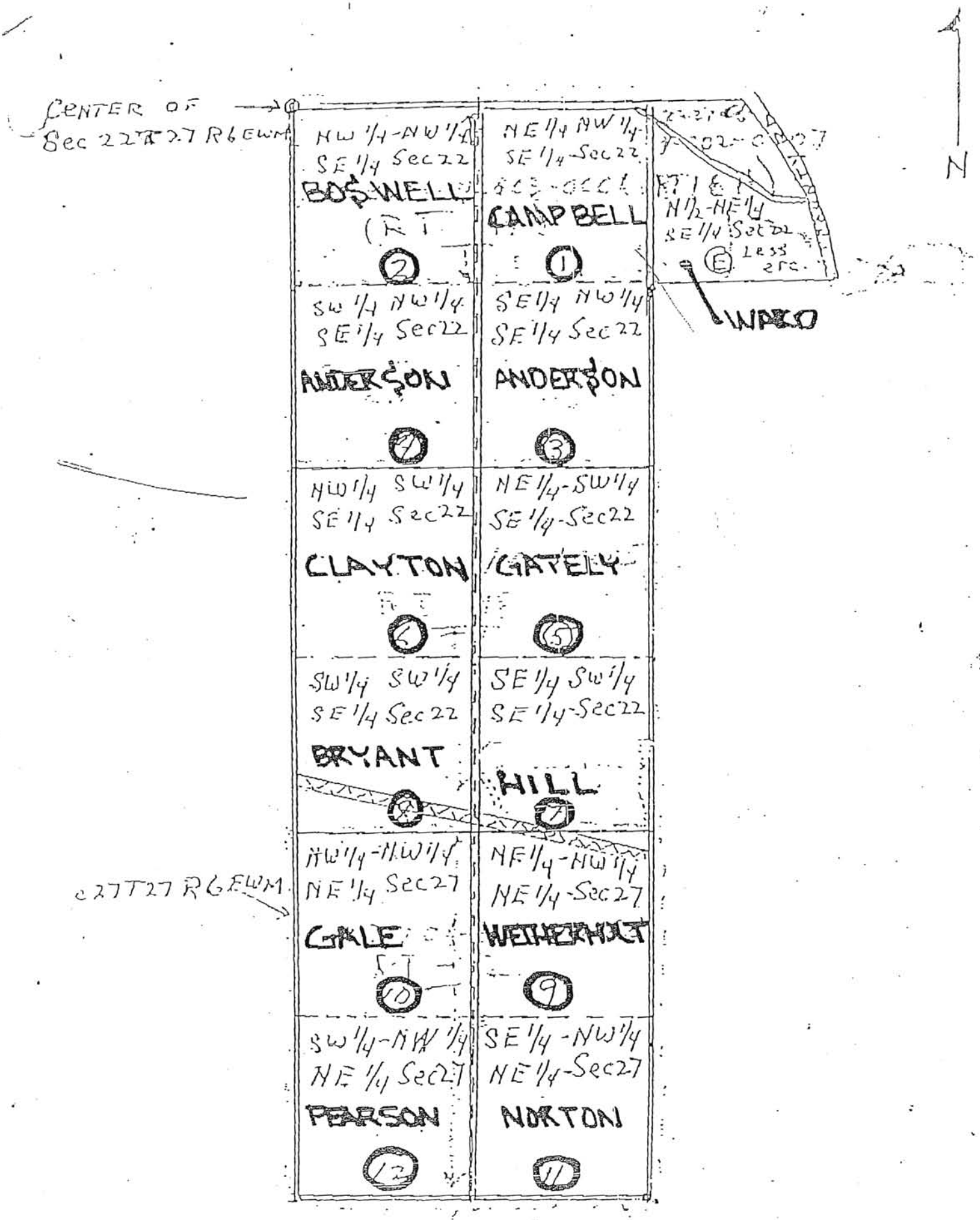
signatures of the Plaintiff/Respondent Judith (Judy) Anderson and her late husband, Charles W. (Charlie) Anderson.[2] Those written statements acknowledged Judy and Charlie's complete reliance upon, and even argued for continued use of, the 1969 Voorheis Survey used to lay out the Tracts. But Judy changed her position.

In the "Conclusion" of her Trial Memorandum, Judy's attorney wrote "All Judy wants is the lot she purchased, as she purchased it." Not so. This lawsuit was filed by Judy in an effort to have a 1995 Cascade Surveying and Engineering (Cascade) survey – commissioned 18 years after she purchased – determine ownership.

Judy and Charlie were the very first purchasers of two of LeRoy Caverly's dozen 10-acre Tracts on March 1, 1976. Trial Exhibit (Exh) 3, reproduced on the next page, documents that Judy and Charlie bought Tracts 3 and 4. By the time Judy filed this lawsuit, Rich and Margaret owned Tract 2, directly north of Judy's Tract 4. It is labeled "Boswell" on the next page because Rich and Margaret bought from Carol Boswell. The boundary line in dispute is between Tracts 2 and 4.

It was 2½ years before Mr. Caverly sold Tract E, and another 8

[2] Because both parties' last name is Anderson, first names will primarily be used. The opposing parties, despite identical last names, are not related. Judy and Charlie's written and notarized statements, including Exhibits 7-19, were identified, authenticated and admitted without objection during Judy's testimony. ***See*** Report of Proceedings from March 25, 2013 (RP 1) *esp.* pp.41 and 75 and, for example, p.68, lines 13-19.


CENTER OF
Sec 22 T27 R6EWM
NW 1/4-NW 1/4
SE 1/4 Sec22
BOSWELL
(RT
2
NE 1/4 NW 1/4
SE 1/4 Sec22
CAMPBELL
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N 1/2-NE 1/4
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E
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ANDERSON
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ANDERSON
3
NW 1/4 SW 1/4
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CLAYTON
6
NE 1/4-SW 1/4
SE 1/4-Sec22
GATELY
5
SW 1/4 SW 1/4
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BRYANT
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HILL
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WETHERBEE
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NORTON
11
c27T27 R6EWM

months before Mr. Caverly sold Tract 1 -- a total of 3½ years after Judy purchased. The sale of all 4 Tracts was based on the Voorheis-Trindle-Nelson (Voorheis) Survey performed in 1969. Even the Trial Court, in its own self-written Finding of Fact (FOF) 31 held that:

> All of the individuals who purchased one of the Tracts numbered 1-4 from Mr. Caverly did so based on Exhibit 20, the original Voorheis Survey. The legal description for each of these parcels is based upon the Voorheis Survey.

The present litigation arose because, despite the evidence leading to the above unchallenged Finding, Judy filed this lawsuit based on the Cascade survey. The Cascade survey differs from the Voorheis Survey because Cascade used a 1974 Government ¼ corner set by the Department of Game 5 years ***after*** the Voorheis Survey was performed. The 1974 ¼ corner was set 48 feet northeast of the previously accepted pipe used by the Voorheis Survey. Obviously then, the Cascade Survey "shifted" the location of legal descriptions established by, and improvements "dimensioned" based on, the Voorheis Survey. Therefore, by filing this lawsuit based on the Cascade Survey, performed 18 years after she purchased, Judy did not seek "the lot she purchased, as she purchased it."

In short, Judy was the Original Grantee from the Common Grantor, LeRoy Caverly. She purchased her Tracts in 1976, based on the 1969 Voorheis Survey – and stated so in writing numerous times. She filed this

lawsuit to gain a windfall of property she never used -- based on the "shifted" boundary as located by the Cascade survey.

The question presented for review is "Why did the trial court (the Honorable Janice E. Ellis), hold that the Common Grantor's 1969 Voorheis Survey did not determine ownership in this case?" The answer is that, although the facts are undisputed, application of the law was erroneous.

Judge Ellis was a former Snohomish County Prosecuting Attorney and Tulalip Tribe criminal prosecutor, with little or no real estate law background who had only recently been appointed to the Snohomish County Superior Court. She had a tremendous work ethic, was extremely attentive and even came down off the bench into the witness box many times in order to closely examine exhibits about which witnesses were testifying. She also took part questioning witnesses herself.[3] Based upon her attentive diligence throughout the trial, Judge Ellis came to understand the factual reasons for a complicated survey discrepancy. Nevertheless, she erroneously held that what she called the second "fact" applicable to the Common Grantor Doctrine was not proven. CP 54, line 15 – CP 16,

[3] Report of Proceeding from June 21, 2013 (RP2), p.12, lines 6-7; p.13, lines 12-13; p.15, lines 13-14; and Report of Proceedings from July 26, 2013 (RP3) p.6, lines 8-20 and p.9, lines 11-17.

line 5 and CP 14, line 5 – CP 15, line 9.

Both opposing counsel cited ***Fralick v. Clark County,*** 22 Wn App 156, 160, 589 P.2d 273 (1978), ***rev.den.*** 92 Wn2d 1005 (1979) as the leading Common Grantor case. It sets forth all aspects of both "questions" applicable to the Common Grantor Doctrine, in relevant part as follows:

> [T]he question of applicability of the common grantor theory presents two problems: (1) was there an agreed boundary established between the common grantor and original grantee, and (2) if so, would a visual examination of the property indicate to subsequent purchasers that the deed line was no longer functioning as "true" boundary?[1]
> ...
>
> x x x
>
> [1] Of course, even in the absence of an on-the-ground marking, a subsequent purchaser with actual notice of the agreement is bound by the line. *Furlow v. Dunn,* 201 Ark 23, 144 SW2d 31 (1940); Browder, ***The Practical Location of Boundaries,*** 56 Mich. L. Rev. 487, 529 (1958).

The first "problem" (later referred to as a "question") relates to the agreement of the Original Parties. Note that "question" number (2) has two alternatives. Note also that both alternatives apply expressly, by their own terms, solely to "subsequent purchasers." The first alternative applies if there is a boundary visible to "subsequent purchasers." The second alternative applies if the "subsequent purchaser" has actual notice of the Original Parties' agreement – in which case, no on-the-ground marking (*i.e.* visible boundary) is required at all.

In short, "subsequent purchasers" are bound either by a visible

boundary or actual notice of the Original Parties' agreement. Moreover, that means actual notice "trumps" a visible boundary because actual notice is more determinative than constructive or inquiry notice from a visible boundary.[4] Obviously, because Judy was the Original Grantee, she had actual notice of her Voorheis Survey agreement with Mr. Caverly. She did not need a visible boundary for the entire 650 foot length of the boundary between Tracts 2 and 4 to be bound. CP 112-115. And 300 of 650 feet was enough anyway. CP 115-117.

The trial court never even recognized there was a second actual notice alternative to the second "question" in Common Grantor cases. Further, the trial court did not notice that both alternatives to the second "question" expressly apply only to "subsequent purchasers." Therefore, the trial court erroneously applied the "subsequent purchaser question," and only the visible boundary portion, to this case about Judy, the Original Grantee. But Rich and Margaret sought to bind Judy, the Original Grantee, not a "subsequent purchaser," to the Voorheis Survey.

There were other legal errors as well. But all errors fell within, contributed to and compounded this over-arching error of applying the

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[4] ***See*** discussion of Browder, ***supra,*** 58 MICH L REV at 529 in ***Piotrowski v. Parks,*** 39 Wn App 37, 43ff, 691 P.2d 591 (1984), ***rev.den.*** 103 Wn2d 1031 (1985).

visible boundary "subsequent purchaser question" to Judy when she was the Original Grantee.[5]

In summary, Judy bought based on the Voorheis Survey and she is bound by it. There is no legal theory by which -- through the 1995 Cascade Survey, commissioned 18 years after she purchased -- Judy can gain a windfall of additional property which she never used. Yet the award of that additional windfall to Judy is the effect of the trial judge's erroneous application of law.

II. ASSIGNMENTS OF ERROR

1. The trial court erroneously held that there are two "facts," which it treated as "elements," to the Common Grantor Doctrine. This is erroneous because caselaw states there are two "problems" or "questions." Further, unlike criminal law, these two "questions" are not treated as

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[5] The other possibility is that the trial court considered Judy a "subsequent purchaser" simply because she bought from Mr. Caverly. This seems unlikely because the caselaw refers to the Original Parties as Common Grantor and Original Grantee, separate from discussion of "subsequent purchaser." ***See e.g. Fralick, supra***, 22 Wn App at 159-160 and ***Winans v. Ross,*** 35 Wn App 238-240, 666 P.2d 908 (1983). Regardless, if that was the mistaken notion under which the trial court was operating, it is error as a matter of law. "Subsequent purchasers" is a term of art for "successors in interest of the original parties." Browder, ***supra,*** 56 MICH L REV at 529-530 (1958). Professor Browder was not only cited as authority in ***Fralick, supra,*** 22 Wn App at 160 n.1 but also in at least three (3) other seminal Washington appellate boundary cases. ***See Lamm v. McTighe,*** 72 Wn2d 587, 592 n.1, 434 P.2d 565 (1967); ***Houplin v. Stoen,*** 72 Wn2d 131, 135 n.6, 431 P.2d 998 (1967) and ***Piotrowski v. Parks, supra,*** 39 Wn App at 42, 43 and 45. As will be argued, however, even if she were a "subsequent purchaser," Judy would still be bound, "even in the absence of an on-the-ground-marking" because she had "actual notice of the [Voorheis Survey] agreement." ***Fralick*** at 160, n.1.

mandatory "elements" in all cases.

2. The trial court erroneously held that what it referred to as two "facts" both had to be proven in this (and, apparently, any other) case. This is erroneous because the second "question" is only applicable, by its own express terms, to "subsequent purchasers." Since Judy Anderson was the Original Grantee, only the first "question" applies in this case.

3. The trial court erroneously listed, considered and applied only the first visible boundary alternative of the second "question." This was error because the second "question" actually has two alternatives – visible boundary or actual notice. Moreover, the second alternative makes it clear that actual notice of the Original Parties' Agreement binds "subsequent purchasers" even in the absence of on-the-ground (*i.e.* visible) markings. Thus "subsequent purchasers" are bound by actual knowledge of the Original Parties' agreement without on-the-ground markings. And Original Parties, who obviously have actual notice of their agreement, are also bound without on-the-ground markings. ***See Light v. McHugh,*** 28 Wn2d 326, 183 P.2d 470 (1947), cited as authority for the first "question" in ***Fralick, supra,*** 22 Wn App at 160.

4. The trial court *sua sponte* erroneously applied the "clear, cogent and convincing" burden of proof as if this were an equitable

reformation case. This was error because the State Supreme Court, in ***Kay Corp. v. Anderson,*** 72 Wn2d 879, 883, 436 P.2d 459 (1967), specifically held that the Common Grantor Doctrine is ***not*** a suit for reformation. Further, no Common Grantor case has ever applied the equitable burden of proof. Indeed, the trial court itself admitted this.[6]

5. The trial court erroneously ignored the undisputed evidence, and its own unchallenged Findings that Judy (as well as all other purchasers of Caverly Tracts 1-4) purchased based on the Voorheis Survey, which was also the basis of Tract legal descriptions. Ignoring this evidence, the trial court held that the Common Grantor Doctrine had not been proven (based upon the foregoing assignments of error) and thereby held *de facto* that Judy's legal description should be determined by the 1995 Cascade survey. The Cascade survey, however, was not performed until 18 years after Judy purchased. Moreover, as late as 1998, 3 years after her own Cascade survey was recorded, Judy signed a notarized Letter of Understanding stating that the Voorheis Survey should govern. She also promised to hire a surveyor to "revise" her legal description, using the

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[6] CP 13, line 19 through CP 14, line 1. The trial court may have been confused by the term of art for "revision" of a legal description in a Common Grantor case. The term of art used by this Division in ***Schultz v. Plate,*** 48 Wn App 312, 313 n.1 and 318, 739 P.2d 95 (1987) is "reforms" and "reformation." ***See also*** CP 295, line 22 – 296, line 4.

Cascade methodology, in order to describe the Voorheis Survey lines. Exh 13; CP 128 and 129.

6. By committing the above errors, the trial court erroneously awarded Judy property between the two surveys' boundaries. This is a strip of property 17.47 to 22.12 feet wide (north to south) by 650 feet long (east to west), constituting over ¼ of an acre. This was error because, not only was this strip not a part of what Judy purchased in 1976, Judy and Charlie also never used this strip of property. Therefore it could not have been awarded to Judy under any common law boundary doctrine.[7]

III. STATEMENT OF THE CASE

In 1969, LeRoy Caverly commissioned the Voorheis Survey of a 125-acre forested portion of his property. Exhs 10, 20 and 65, and CP 42-43, FOF 12 and 16. (Because the Voorheis Survey was performed in 1969, 4 years before the Survey Recording Act in RCW Chapter 58.09 was adopted, it was not recorded.) The Voorheis Survey placed 4x4 cement monuments with brass discs to mark its boundaries. Exhs 13, 17 & 56. ***See***

[7] Judy and Charlie's notarized signatures on Exhs 13 and 14 established the north and south boundaries of their Tract 3 based on the Voorheis Survey. RP1, p.51, lines 13-18. But Judy now seeks the Cascade line, 17-22 feet northeast of the Voorheis Survey line for her Tract 4. RP1, p.55, lines 18-21. In contrast, Rich and Margaret (together with other neighbors) had the legal description of the northern boundary of their Tract 2 revised/reformed to match the Voorheis line. Exhs 34&35. If Judy prevails, Tract 2 will be reduced in size by a Cascade southern line (north of the Voorheis line) and a northern Voorheis line (south of the Cascade line).

also Exhs 10, 15 & 34 and RP1, p.18, line 22 – p.19, line 10. The Voorheis Survey was then used by Mr. Caverly over the next 5 to 7 years to divide the property into a dozen 10-acre Tracts, which he numbered 1-12, and one (1) smaller irregular lot he labeled "Tract E." Exh 3 on page 2A, ***supra***; CP 43, FOF 17. Mr. Caverly also began to clear his most northerly Tracts. Exhs 48 and 51; CP 45, FOF 19a.

By 1974, the east half of Tract 2 was largely cleared to a south line which has remained very visible. Tract 2 was pasture north of the visible line, but Tract 4, south of the visible line remained forested until cleared in 1994. *Compare* Exhs 44-48 and 51-52. By 1976 Mr. Caverly had cleared further to the west creating a curved line between pasture on the north and trees on the south. This curved line also remained visibly unchanged until Tract 4 was cleared in 1994. Again, ***see*** Exhs 44-48 and 51-52.[8]

On March 1, 1976 (recorded March 23, 1976), Mr. Caverly made the first sale of any of his 10-acre Tracts to Judy Anderson and her late husband Charlie Anderson. Exhs 4 and 8; CP 46-47, FOF 21-23. Judy and Charlie wanted to buy Tracts 1 and 2 but, when they were pronounced not for sale, bought Tracts 3 and 4 instead. CP 55, line 19 – CP 56, line 2.

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[8] Rich and Margaret are NOT appealing from the trial court's decision that the curved line was not a Common Grantor agreed line between Mr. Caverly and Judy and Charlie Anderson. CP 57, lines 10-22, CP 205-206 and RP2, p.13, lines 19-23. Nevertheless, appellants do NOT agree with the trial court's curved line analysis. CP 151-163.

Judy and Charlie were also provided a copy of the Voorheis Survey. Exh 13; CP 46, FOF 22; RP1, p.16, lines 2-4. As established by the June 1976 aerial photograph (taken only 3 months after Judy and Charlie purchased), the western portion of Tract 2 had been cleared enough beforehand so that pasture grass was already well established. *Compare* Exhs 44 and 46 with Exhs 46 and 47. (Contrary to Judy's testimony in RP1, p.23, lines 2-19, Tract 3 was also cleared by 1976. Exhs 44 and 45.)

Judy, a CPA (RP1, p.4, lines 10-25), and Charlie, who had 2 engineering degrees and his own construction company (CP 41, FOF 2 and RP1, p.10, line 21 – p.11, line 3), also helped Mr. Caverly establish roads, underground power and fences for the 10-acre Tracts. CP 124-131; Exhs 11, 13, Fax pp. 8-11 of Exh 16 and RP1, pp.29-35, 45-48, 51-53, 59-68 and 70-72. As Charlie and Judy would later put it, the Voorheis Survey, and its 4x4 concrete monuments, were used to "dimension" the roads, electricity and fences. CP 124-131; Exhs 13 and Fax pp. 8-11 of Exh 16; RP1 at 72. Snohomish County also used the Voorheis Survey in 1980 in order to build a new bridge on the County road just east of, but providing access to, the Caverly Tracts. Exh 30 and CP 128, 6th-8th last lines.

In November of 1978, 2½ years after Charlie and Judy purchased Tracts 3 and 4, Sheila Fowler bought Tract E. Eight (8) months later, in

July 1979, John and Christine Campbell bought Tract 1. Exhs 12A and 12; CP 47, FOF 23 and RP1, pp. 37-39 and 41. When Campbells purchased, they were provided a copy of the Voorheis Survey, and its monuments were pointed out to them. Exhs 17and 56. Not until almost 10 years later, in May 1989, did Mr. Caverly sell Tract 2 to Carol Boswell and her fiancé, Charles Vollstedt. Exh 12B; CP 47, FOF 27; RP1 pp.39 and 41.

In the meantime, in 1974, 5 years after the Voorheis Survey was performed, the Washington State Dept. of Game surveyed in the area. It established a 4x4 concrete monument for the East ¼ of Section 22. CP 47, FOF 25. Prior to that new monument, pipe had been recognized as the East ¼ corner of Section 22. Exhs 10, 20, 65, 31 and Fax p.7 of Exh 16. Since the new concrete monument was 48 feet northeast of the pipe, any survey of Mr. Caverly's Tracts which used the new monument, rather than the pipe, to locate Tract descriptions would "shift" the legal descriptions to the northeast of the Voorheis' concrete monuments. Since all roads, electricity and fences were "dimensioned" off of the Voorheis concrete monuments, new surveys of Mr. Caverly's Tracts using the 1974 ¼ corner did not match property lines or improvements based on the Voorheis Survey. Exhs 32, 33 & 15.

The first survey to use the new Department of Game ¼ corner in

Section 22 was related to property east of the Caverly Tracts. The Burgess Interstate Survey, performed by Cascade in 1981, depicted in the center of the map that there were three choices for the East ¼ corner; two pipe and the 1974 Department of Game concrete monument. Exh 31. Cascade rejected the pipe and chose the 1974 monument. But, somewhat inconsistently, Cascade also depicted, in the upper righthand map corner, that it relied on the 1980 "Right-of-Way Plan, Bridge No. 416." Exh 30. This was somewhat inconsistent because that County Bridge survey was based on the Voorheis Survey which relied on the ¼ corner pipe rejected by Cascade. Cascade also noted on its Burgess map that there was a "potential disputed ownership" in the northeast corner of the Burgess parcel; one of the Voorheis concrete monuments was south of where Cascade located the north line of the Burgess legal description. Exh 31.

Five (5) years after the Burgess survey, in 1988 – 12 years after Judy and Charles Anderson purchased Tracts 3 and 4 – Cascade performed a survey for the owner of Tract 6. CP 47, FOF 26. Cascade's map showed two corners inconsistent with its survey which had been established based on the Voorheis Survey. Exh 32. Then, another 6 years later, in 1994 – 18 years after Judy and Charlie purchased – Tract 5, owned by Gateleys, was also surveyed by Cascade. The Cascade map

showed an encroaching fence. It was Charlie and Judy Anderson's fence along the south line of their Tract 3. The fence had been dimensioned off the Voorheis Survey. Exhs 33, 18 and Fax pp. 8, 9 & 12 of Exh 16. From this time forward, Tract owners had to fight for continued recognition of the Voorheis Survey themselves because Mr. Caverly was institutionalized, if not dead. RP1, p.26, lines 8-20; CP 134, p.13, line 25 – p.14, line 14.

Then, also in 1994, after clearing his Tract 4 (RP1, p.24), Charlie decided to have Cascade survey his Tracts 3 and 4, as well as Campbell's Tract 1 and Carol Boswell's Tract 2. Charlie wrote an 8-11-94 Memorandum to Cascade explaining how the Voorheis Survey had been used within the Tracts. Fax pp.10 and 11 of Exh 16; CP 124-125; RP1, p.72. Moreover, Charlie disclosed that, in addition to the survey by Voorheis, Tracts 1-4 had also been surveyed by RMC. Further, RMC had sided with Voorheis and concluded "that their [*sic* there] was an error in the state monument(s) and that they [RMC] had corrected for that error when placing the old monuments." Fax p.10 of Exh 16, ¶3; CP 124. Charlie's Cascade survey was later recorded in 1995. Exh 15; RP1 53-59; and RP1 p.72, lines 14-17.

As noted above, the Gateleys owned Tract 5. Their 1994 Cascade

survey, in conflict with Judy and Charlie's Tract 3 fence brought things to a head. Mrs. Gateley wrote on September 19, 1994, demanding removal of the fence. Exh 18; RP1, 74. Charlie did not write back until July 16, 1995, after his Cascade survey, but continued to explain how everything had been "dimensioned" off the Voorheis Survey. Fax pp.8 and 9 of Exh 16; RP1 at 92; CP 126. Charlie sent copies of his letter to other Tract owners north of him because, if his south line moved, it would affect his north line and their south lines. Fax p.9 of Exh 16; RP1 at 72; PC 127. Mrs. Gateley was unpersuaded. Fax p.12 of Exhibit 16. ***See also*** CP 49, FOF 36.

Everyone knew there was a problem, but no one knew exactly how to solve it. The solution which evolved largely came about as various Tracts were put up for sale. Thus, Mrs. Gateley wrote that she wanted Charlie's and Judy's fence, encroaching on her Tract 5 (according to the Cascade Survey), removed if she sold. Fax p.12 of Exh 16. Apparently, however, it wasn't removed when Gateleys sold to Vern Cohrs. Instead, 2½ years later, Charlie and Judy resolved the issue by writing, and signing with notarization, a February 19, 1998 Letter of Understanding with Mr. Cohrs. Although written 3 years after Charlie's own 1995 Cascade Survey, the Letter of Understanding explained in detail why the Voorheis Survey, *not* the Cascade Survey, should govern. It also promised to "have a

surveyor revise the legal description for each tract accordingly." Exh 13; RP1 at 45-48 and 51-53; CP 128-131.

Another sale occurred when Rich and Margaret Anderson purchased Carol Boswell's Tract 2 in 1997. Carol Boswell explained in her Real Estate Contract with Rich and Margaret that there was a discrepancy between the "1970's" (Voorheis) and Cascade survey lines. She also advised that Charlie Anderson had taken down the "common boundary fence between" her Tract 2 and Charlie's Tract 4. Carol Boswell's resolution was to sell "where is, as is" and "subject to questions of survey and boundary." Page 3 of Exhs 1 and 53 and CP 49-50, FOF 37.

A third resolution occurred when John and Christine Campbell wanted to sell their Tract 1 in 1997. They wrote virtually identical letters to Charlie Anderson (Exh 17, RP1 at 73-75) and Rich Anderson (Exh 56). Both letters explained how Mr. Caverly provided Campbells with a copy of the Voorheis Survey and pointed out the Voorheis concrete monuments and other property markers when he sold to Campbells. Mr. Campbell further explained that he had used these markers to replace the fence that existed on his property when he purchased. Accordingly, he wrote, "The appropriate boundary lines are those reflected by the cement monuments, the Voorheis survey, and the fence." Charlie and Judy demonstrated their

agreement by executing a November 1998 recorded Survey/Property Line Acknowledgement Affidavit with their notarized signatures. It recognized the Campbell fence, based on Voorheis monuments, as the property line between Campbells' Tract 1 and their Tract 3. Exh 14; RP1 pp.48-51. ***See also*** monuments on Exhs 15 and 34.

Most importantly, 3 years after Charlie's Cascade survey (Exh 15), the 1998 Letter of Understanding (Exh 13) and the Property Line Affidavit (Exh 14), together established the north and south lines of Judy and Charlies' Tract 3 based on the Voorheis Survey. RP1 at 51, lines 5-18. The Cascade survey was REJECTED.

The most widespread resolution finally occurred between 2000 and 2002 when owners of Tracts 1, 2 and E, together with owners north of them, entered into a series of Quit Claim Deeds, a Record of Survey and Affidavits of Correction. These documents "revised" the written legal descriptions so that Voorheis occupation would be described based on the 1974 Department of Game monument first used by Cascade. Exhs 34 and 35 and CP 49, FOF 35. There was an attempt by now deceased Surveyor, Vern Bower, who did these "revisions," to also resolve the line between Charlie and Judy Anderson's Tract 4 and Rich and Margaret Andersons' Tract 2. Exhs 19 and 60. Charlie and Judy, however, never participated in

what had been their 1998 promise to Mr. Cohrs; "to revise the legal description for each tract accordingly". Exh 13; CP 128-131.

After the nearly neighborhood-wide resolution was completed in 2002 (in which Rich and Margaret also had their northern line revised; Exhs 34 and 35), Rich and Margaret tried again to achieve a Voorheis resolution with Charlie and Judy on Tract 2's southern line.[9] Rich and Margaret's attorney, Dennis Jordan, wrote a letter claiming a Common Grantor line based on the Voorheis Survey. Charlie and Judy's attorney, Christopher Frost, responded on July 2, 2003. Exh 16. He included 5 attachments, consisting of 7 pages. Two (2) of these attachments, Fax pp.8 and 9 and Fax pp.10 and 11, were Charlie Anderson's August 16, 1995 correspondence with Mrs. Gateley and Charlie's August 11, 1994 Memorandum to Bill Loyd (*sic* Lloyd) of Cascade Surveying. Both attachments explained how the Voorheis Survey determined the property lines and improvements. Yet, contrary to these attachments to his own letter, attorney Frost's letter denied the Voorheis line governed. Mr. Frost insisted that the Cascade line applied.

With respect to the "common boundary fence" mentioned by Carol

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[9] It was important to Rich, Margaret and their daughter because they bought two 10-acre lots to the west, which they accessed over the road crossing the older northerly culvert. Exhs 23, 39, 57 and 63 #8, 9 & 10; CP 42, FOF 10-11; and RP1, pp.24-28, line 9.

Boswell on page 3 of Exhs 1 and 53, attorney Frost wrote on page 2 of his Exh 16 letter 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. Mr. [Charlie] Anderson's fence was not in a straight line, ...
>
> x x x
>
> At the time that Mr. Vollstedt and Ms. Boswell purchased the property, there was a barbed wire fence meandering between the [Charlie and Judy] Anderson property and the Boswell property.[10]

On page 3, attorney Frost's letter continued by stating that:

> In 1994, my client [Charlie Anderson] began clearing his Parcel 4, adjacent to the Vollstedt/Boswell property. Mr. Anderson removed the containment fence when he began logging, because it was stapled to trees. Ms. Boswell 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

[10] These written statements about the fence between Tracts 2 and 4 are not consistent with the trial court's FOF 37 on CP 50, lines 4-11. CP 155, ¶14 – CP 157, ¶17.Moreover, the trial court's Conclusions of Law (COL) at CP 56, lines 13-17, are erroneous in their analysis of "permission." CP162-163. The 1976 aerial, taken only 3 months after Judy purchased, establishes that Tract 2 could not have been cleared and already become well-established pasture up to the curved line within only 3 months after Judy purchased. Therefore, Judy and Charlie could not have given Mr. Caverly "permission" to clear part of Tract 4 when he still owned Tract 4 between 1974 (Exh 51 and 48) and early 1976 (Exh 44, 45 and 48). However, this issue is WAIVED in this appeal. Nevertheless, the erroneous analysis is a further example of the trial court's lack of experience with boundary law. CP 162, line 9 – CP 163, line 13. Even if such permission were possible, it would establish Judy and Charlie's actual knowledge of clearing south of the agreed Voorheis line. That line, according to Exhibit 13's notarized statement, had markers on the western boundaries of Tracts 2, 4 and 6 as well as the eastern boundaries of Tracts 1, 3 and 5. And Judy and Charlie, like Campbells after them (Exh 17), had been given a copy of the Voorheis map and had its concrete monuments pointed out to them. Further, as Charlie advised Cascade in his August 1994 memo (Fax p.10 of Exh 16), the location of the Voorheis line was confirmed by a second RMC survey of Tracts 1-4.

established.

Most importantly -- and in direct contravention of Charlie's memo to Bill Lloyd and letter to Mrs. Gateley (Fax pp.8-11 of Exh 16; CP 124-127), as well as Charlie and Judy's notarized Letter of Understanding with Vern Cohrs (Exh 13; CP 128-131) and Charlie and Judy's notarized and recorded Property Line Affidavit with John and Christine Campbell (Exh 14) – attorney Frost concluded page 3 of his letter by writing that:

> Prior to Mr. Vollstedt's and Ms. Boswell's purchase of the property, it was well-known to all of the owners in the area that the Voorhees [*sic* Voorheis] survey was wrong and that the Cascade survey was correct.

Even more astounding in light of Exhs 13, 14, 34 and 35, attorney Frost also wrote at page 3 that:

> All of the other parcel owners have agreed to adjust property lines in accordance with the most recent Cascade survey, or they have agreed to mutual variations upon written agreement.

Attorney Frost's statements are incorrect, if not completely false. What all the other property owners agreed to do – and Judy and Charlie also promised Vern Cohrs they would do – was to have the legal descriptions of their Voorheis property lines rewritten using the Cascade methodology. Occupation lines were not adjusted; legal descriptions were "revised" using the Cascade ¼ corner methodology to describe the

Voorheis Line. Exhs 34 and 35 and CP 49, FOF 35. One of those revisions was that Rich and Margaret had their northern property line rewritten. Exh 64. This was consistent with both Judy and Charlie's Letter of Understanding with Vern Cohrs (Exh 13; CP128-131) and Property Line Affidavit with Campbells (Exh 14), both of which maintained the Voorheis Lines on the north and south ends of their Tract 3. RP1 at 51, lines 5-18. However, Judy's lawsuit, which claims to the Cascade line on the north end of Judy's Tract 4, the boundary she shares with Rich and Margaret Anderson, is inconsistent with resolution of every other boundary. RP1 at 55, lines 18-21 and CP 381-390, *esp.* CP 390.

Despite attachments to his own letter, attorney Frost inconsistently concluded his letter at page 4 by writing that:

> Based on the factual history of the parties and the knowledge of the parties concerning the erroneous Voorhees [*sic* Voorheis] survey, Mr. [Charlie] Anderson submits that the boundary line should be established according to the most recent Cascade survey. This is what has been accepted as correct by all other owners of the parcels in the plat established by Mr. Caverly.[11]

After Charlie Anderson died in July 2006 (RP1 at 10 and CP 41, FOF 2) -- and despite all the above described documents written and signed, if not notarized and, in one case, recorded -- Judy Anderson filed

[11] If these conflicts are consistent with Judy's testimony at trial, it is hard to understand how that testimony was persuasive and credible. CP 52, FOF 47; CP 57, line 3.

this lawsuit in 2007. Judy sought ownership based on the Cascade survey. RP1 at p.5 lines 18-21 and RP2 at 25, lines 19-21. To that end, the Complaint attached a copy of the 1995 Cascade survey for Charlie Anderson, but never mentioned -- or even made any indirect reference to -- the Voorheis Survey. CP 381-390.

By that time Richard and Margaret Anderson knew about the Voorheis Survey from Carol Boswell's Real Estate Contract with them. Exhs 1 and 53. They had also received Mr. Campbell's letter. Exh 56. Rich and Margaret had also received Mr. Frost's letter (Exh 16) with its attached copies of Charlie Anderson's 8/11/94 memo to Bill Lloyd of Cascade and Charlie's 7/16/95 letter to Mrs. Gateley. Fax pp.8-11 of Exh 16; CP 124-127.[12] But Mr. Frost's letter had not included Exhibits 13 or 14 written, signed and notarized in 1998, 3-4 years after documents Mr. Frost did include. RP1, p.70, line 19 – p.71, line 19. Therefore, Rich and Margaret did not know about Charlie and Judy's notarized signatures on, much less the content of, the Letter of Understanding with Vern Cohrs (Exh 13; CP 128-131), or the Survey/Property Line Acknowledgement Affidavit with John and Christine Campbell. Exh 14; RP1 at 70-71. These

[12] Having now viewed Exhibits 13 and 14, as well as Fax pp.8-11 of Exhibit 16 several times, please note that Judy's attorney's statement that these documents only applied to Judy's Tract 3, not to Tract 4, are incorrect. RP2 at p.28, lines 13-18.

were only discovered by title searches as well as visits and phone conferences with neighboring property owners.

When sued, Rich and Margaret Answered by simply referencing the Common Grantor's Voorheis Survey. CP 373-390. Based upon all these documents, as well as certified aerial photographs of past years, however, Rich and Margaret later filed an Amended Answer with Counterclaims for Adverse Possession and Mutual Recognition and Acquiescence – both of which require a visible line – as well as the Common Grantor Doctrine. CP 361-372. Then they prepared a "Motion for Summary Judgment" to defend against Judy's lawsuit by presenting their Counterclaims.[13]

Rich and Margaret argued their Motion for Summary Judgment before now retired Judge Ronald Castleberry. After argument, Judge Castleberry entered an Order (CP 337-345) which concluded with a handwritten paragraph (CP 341) which held that:

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[13] Before the Motion could be argued, however, Judy scheduled her own Summary Judgment. It argued that Rich and Margaret had no standing to file an Answer and Counterclaim based on the Voorheis Survey. Also, since Rich and Margaret had sold the portion of their property north of the Cascade Survey line (in order that their purchasers not be dragged into this lawsuit), Judy argued the issue was moot. When the Superior Court granted Judy's Motion, Rich and Margaret appealed. (This means, of course, that this is the second time Rich and Margaret have had to appeal Judy's lawsuit.) This Court reversed and remanded this case for trial stating, among other things, that trial should concern "the disputed property between the Cascade survey's boundary line [on the north] and the Voorheis survey's boundary [on the south]." 2010 WL4595972, page 3, bottom of second column, headnote 3. CP 40, line 9 – CP 41, line 8.

> 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. If the Common Grantor Doctrine, Mutual Recognition & Acquiescence and/or Adverse Possession are found to be applicable based on a survey, it would be the Voorheis Survey. Any award of property under any of those three boundary doctrines should then be legally described using the Cascade Survey methodology. Other than this foregoing Order, Defendants' [Rich and Margaret's] Motion for Summary Judgment is denied.

Where the Common Grantor's Voorheis Survey line was located, and whether property south of the Voorheis Survey line had also been used and possessed sufficiently to establish ownership under one or more of three (3) boundary doctrines, was to be determined by trial. Clearly, however, the Cascade survey was ruled ***not*** to be the ownership line. Nevertheless, the trial court in this case determined ownership to be based on the Cascade survey because it held both "facts" of the Common Grantor Doctrine had to be, but were not, proven. CP 54-55.

Thus, although Judy's Trial Memorandum concluded by stating that "All Judy wants is the lot she purchased, as she purchased it" (CP 328, line 9), Judy was *de facto* "awarded" property based on the 1995 Cascade Survey. That 1995 survey did not even exist until 19 years after Judy purchased in 1976. Exh 15. Therefore, the Cascade line was not a lot line when Judy purchased. In fact, the Cascade line was one which she and

her late husband advocated against in a 1998 notarized Letter of Understanding with Vern Cohrs. Exh 13, CP 128-131. And that letter was written, signed and notarized 3 years ***after*** Judy and Charlie's own 1995 Cascade Survey was recorded. Exh 15.[14] Perhaps most astonishingly, the trial court ruled the Cascade survey determined ownership despite several of its own Findings of Fact, including No. 31 at CP 48, which reads:

> All of the individuals who purchased one of the Tracts numbered 1-4 from Mr. Caverly did so based on Exhibit 20, the original Voorheis Survey. The legal description for each of these parcels is based upon the Voorheis Survey.[15]

Based upon all the uncontroverted evidence leading to the above unchallenged Findings that the Voorheis Survey was the basis of Mr. Caverly's sales to his purchasers, it was error to rule that the Cascade Survey would determine ownership. That error is based on the trial court's mistaken belief that what it called the second "fact" regarding the Common Grantor Doctrine – applicable by its own express terms only to "subsequent purchasers" – needed to be, but was not proven. CP 54, line

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[14] Based on Judy's current position that the Cascade Survey governs, the Letter of Understanding is a statement against interest. To ignore Judy's notarized signature on that letter and hold that Judy's testimony about the Cascade line was persuasive and credible, appears clearly erroneous as a matter of law.

[15] ***See also*** CP 43, FOF 14, lines 1-3 and FOF 16, lines 12-15; CP 47, FOF 25; CP 50, FOF 39; CP 51, FOF 40; CP 53, FOF 51 and Exh 6 as well as Exh 23; CP 56, lines 3-4; CP 57, lines 20-23; and CP 58, lines 10-11 "... the common grantor established a boundary [as] ... set forth in the legal description [based on the Voorheis Survey as described by FOF 31 at CP 48]."

14 – CP 55, line 5 and CP 14, line 5 – CP 15, line 9.

Because Judy and Charlie Anderson were Mr. Caverly's very first purchasers, the Original Grantees, they were not – are not – "subsequent purchasers". They are bound by their purchase agreement. That is what the Common Grantor Doctrine is about. Even if a later survey places a deeded legal description in a location different than that which existed at the time of purchase, the Common Grantor's agreement with the Original Grantee is binding on both Original Parties per 17 WASH PRAC §8.22, ***supra***.

That is as far as legal analysis of this case goes because this case only seeks to bind Judy, as the Original Grantee, to "the lot she purchased, as she purchased it." CP 328, line 9. While the Common Grantor Doctrine can also bind "subsequent purchasers" if either alternative of the second "question" is met, neither form of the second "question" is even applicable here. Accordingly, this appeal is not a factual appeal at all. It is a purely legal appeal. The facts are undisputed and undisputable. Misapplication of the law is the only issue on appeal.

IV. ARGUMENT

1. The Trial Court's Confusion.

The trial court was apparently confused by or about at least three issues, two of which were not specifically segregated within Trial

Memorandum Common Grantor discussion. The first issue was that two possible Common Grantor lines were involved. CP 205-206; RP2 p.12, line 21 – p.14, line 18 and p.21, line 20 – p.27, line 22. Second, what the trial court called the second Common Grantor "fact," which caselaw calls the second "question," had to be proven as far as the trial court was concerned. CP 54, line 22 – CP 55, line 5. But both forms of the second "question" apply by their own express terms only to "subsequent purchasers." This made both forms of the second "question" inapplicable to Judy, who is the Original Grantee. The third issue was that most Common Grantor cases involve "subsequent purchasers." It therefore may have appeared to the trial court that both "questions" were involved in every case. They are not.

A. Two Common Grantor Lines

Unlike their initial Answer based solely on the Common Grantor's Voorheis Survey (CP 373-378), Rich and Margaret's adverse possession and mutual recognition and acquiescence Counterclaims sought more property than that encompassed by the Voorheis Survey line. By their elements, they sought title to a very visible line which followed the Voorheis line from east to west about ½ the 650 foot length between Tracts 2 and 4, but then dipped to the southwest for the remaining 300

feet, more or less. Exh 23; CP 137. Since this curved line has been visible since 1976, it also was a possible Common Grantor line. It was visible from 1976 until 1994 because there was pasture north of the line but trees were south of it. Exhs 44, 45, 48 and 52. Then from 1994 to the present, this line continued to be visible as a swale. Exhs 46, 47, 48, 50 and 52. ***See also*** Exhs 61-63.

Based on Carol Boswell's information, a common boundary fence separated the pasture on the north from the trees on the south until Charlie Anderson removed the fence while clearing his Tract 4 in 1994. Page 3 of Exhs 1 and 53 and Exh 16, p.3,¶3. Moreover, at the far western end, remnants of a fence corner continue to exist. Exhs 6, 15, 27 and 28; RP1, p.55, line 22–p.56, line 25. Most importantly, a 4x4 concrete monument with a brass disc, like those used by Voorheis, exists at the bottom of the remnant fence corner at that westernmost end. Exhs 63, #5-7 and 62, #12&13. Rich and Margaret therefore believed LeRoy Caverly established a fence along the curved visible line as the southern boundary of Tract 2 before he ever sold Tract 4 to Judy and Charlie Anderson in 1976. Attorney Frost's letter, Exh 16, top of page 2 confirms that fence. In any event, Rich and Margaret's use to this line for 10 years also supported claims for adverse possession and acquiescence. CP 48, FOF 32, lines 14-

15. That curved line claim is now WAIVED.

Nevertheless, it appears that the trial court was confused and believed this curved line was the ***only*** Common Grantor line in issue. It certainly was the only mutual recognition and acquiescence line and the only adverse possession line sought by Rich and Margaret. But Judy filed this lawsuit contending the 1995 Cascade line should govern and continued to take that position at trial. CP 381-390; RP1, p.55, lines 18-21; RP2, p.12, lines 21 – p.13, line 15 and p.25, line 11 – p.26, line 16. Consequently, Rich and Margaret spent the first day and a half of trial with Judy, and then their expert surveyor witness. Exhibit after exhibit was entered establishing why there was a survey discrepancy and how Judy and Charlie – along with purchasers of Tracts 1, 2 and E – recognized the Voorheis Survey as the proper line. CP 329-332 up to 2:20 p.m. and Exhs 7-40; RP1, p.5, line 9 – p.75, line 16. And when Judy called her own surveyor expert on the third day of trial, this material was reviewed again. CP 334 from 2:24 – 4:33 p.m.

After all the undisputed evidence, the trial court seemed to recognize that Judy's written, signed and notarized statements established that the Voorheis Survey line was the basis of purchase and development. Accordingly, the trial court's initial Findings and Conclusions twice

directed that:

> ... the boundary line between Tracts 2 and 4 be reformed to use the Voorheis Survey line, calculated using the Cascade Survey methodology, ... CP 253, lines 6-8

And:

> The Court further directs that the legal description for the boundary line between Tracts 2 and 4 shall be reformed to use the Voorheis Survey line, calculated using the Cascade Survey methodology. CP 273, lines 6-8.

But Judy's attorney then moved for reconsideration and argued that the trial court's ruling -- that the burden of proof for the Common Grantor Doctrine had not been met -- meant the Court's direction to reform the legal descriptions could not be effectuated. CP 234-251. In response, the trial judge explained that:

> I believed both parties asked the court to determine whether the boundary line should be reformed and, if so, how. Although that issue is not an element of any of the counterclaims ... the court has the authority to address issues that are tried with the express or implied consent of the parties under CR 15(b). CP 232-233.

The trial judge also thought she recalled a stipulation by both attorneys to the Voorheis line. RP2, p.24, lines 15-20. Regardless, she almost certainly thought both parties consented because all of Charlie's and Judy's written statements, through at least 1998, stated the Voorheis line was the correct one and that they would hire a surveyor to revise legal

descriptions accordingly. Exh 13, 14 and Fax p.8-11 of Exh 16; CP 124-131. There was also Judge Castleberry's handwritten Order, which stated that "Both counsel agree..." CP 341.

More importantly, however, to conclude the Voorheis Survey line was not part of the Common Grantor Counterclaim establishes that the trial court was confused about what the first half of the case concerned. Judy filed this lawsuit claiming the Cascade line determined ownership and continued to take that position at trial. RP1, p.55, lines 18-21; RP2, p.12, line 21 – p.13, line 15 and p.25, line 11 – p.26, line 16. Judy's Complaint did not even mention the Voorheis Survey. CP 381-390. The first part of Rich and Margaret's Answer and Counterclaim was to establish the Voorheis Survey as the basis for Mr. Caverly's Tracts. CP 329-332, 361-372 and 352-360; RP2, p.13, line 10 – p.14, line 18 and p.21, line 9 – p.27, line 14. Only after this first part did the case proceed to the second part. That second part sought to establish a Common Grantor, adverse possession and/or mutual recognition and acquiescence line which followed the Voorheis Survey line for the east 300 feet +/- but then curved to the southwest for the west 300 feet +/-. CP 332 from 2:20 p.m. until 4:35 p.m. and Exhs 42-52.

The trial court was the fact finder and had the right and duty,

which this appeal does not contest, to rule that the curved line was not an agreed line.[16] CP 57, lines 12-19. The trial court erred, however, by assuming that the actual Voorheis Survey line was not part of the Common Grantor Counterclaim. CP 232-233; RP2, p.14, lines 8-15. The first day and a half of trial concentrated on the reason for the discrepancy between the two surveys and how the multiple Cascade surveys all documented the Tract corners established based on the Voorheis Survey. CP 329-332, up until 2:15 p.m. and Exhs 10, 13, 14, 17, 20, 30, 31, 32, 33, 34, 56&65. Surveyors for both parties also presented maps documenting where the Voorheis and RMC line was. Exhs 6 and 23; CP 137; CP 124.

Most ironically, the trial judge almost certainly "believed" both sides "agreed" because exhibit after exhibit documented Charlie's and Judy's explanations, and advocacy, about the Voorheis Survey as the one upon which purchases and development were based. Exhs 13, 14 and Fax pp.8-11 of Exh 16; CP 124-131. Indeed, the trial court found that to be the case regarding the purchases of Tracts 1-4. CP 48, FOF 31.

B. *Fralick's* Second "Question" Deals With "Subsequent" Purchasers," Not Original Parties

[16] Nevertheless, the trial court's conclusion that Charlie Anderson gave Mr. Caverly "permission" was factually and legally impossible because the curved line was cleared before Charlie and Judy purchased based on aerial photography. Exhs 44 and 45. Also, attorney Frost's letter admits Mr. Caverly started a fence on the line between Tracts 2 and 4. Exh 16, p.2 top.

Again, to be fair, ***Fralick's*** second "question" regarding "subsequent purchasers" was not separately discussed or briefed. Frankly, it was not because, after all the testimony and exhibits it was obvious that Judy was the Original Grantee. CP 46, line 18 – CP 47, line 2, FOF 21-23. In contrast, both alternatives to the second "question" apply exclusively, by their own express terms, only to "subsequent purchasers." In its attempt to be "disciplined" (RP2, p.20, lines 21-25), however, the trial court assumed and held that both "facts" applied and had to be proven. CP 54, line 14 – CP 55, line 5. Because of that "discipline," the trial court overlooked and did not recognize the lack of logic, injustice and error in throwing out the Voorheis Survey line -- a line which the court repeatedly found was the basis of the deeded legal descriptions which were purchased and sold. CP 48, FOF 31 and other FOF and COL set forth in footnote 14.

C. Most Common Grantor Cases Involve "Subsequent Purchasers"

The third issue which probably helped confuse the trial court relates to the fact that most Common Grantor cases involve "subsequent purchasers." Therefore, ***Fralick's*** second "question" was involved in those cases.[17] That apparently made it appear to the trial court that both

[17] ***See e.g. Levien v. Fiala,*** 79 Wn App 294, 902 P.2d 170 (1995); ***Schultz v. Plate, supra,*** 48 Wn App 312; ***Winans v. Ross***, 35 Wn App 238, 666 P.2d 908 (1983); ***Fralick***

"questions" have to be proven in all cases. But they do not.

First, it should be no surprise that "subsequent purchasers" are involved in most Common Grantor cases. The Original Parties know what their agreement is and usually have no interest in upsetting that agreement. But when they sell, and if a purchaser decides to commission a survey which plots the deeded legal description somewhere other than in the originally agreed location, someone gains and someone loses. This often leads to litigation.

Moreover, several of the "subsequent purchaser" cases involve 2 or more surveys which conflict with one another. In such cases the Common Grantor's original survey governs[18] – as the entire neighborhood recognized was the case here. Exhs 34 and 35. Thus "subsequent purchaser" cases where the Common Grantor's original survey governed

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v. Clark, supra, 22 Wn App 156; ***Kronawetter v. Tamoshan, Inc.,*** 14 Wn App 820, 545 P.2d 1230 (1976); ***Kay Corp. v. Anderson, supra,*** 72 Wn2d 879; ***Clausing v. Kassner,*** 60 Wn2d 12, 371 P.2d 633 (1962); ***Martin v. Hobbs,*** 44 Wn2d 787, 270 P.2d 1067 (1954); ***Beck v. Loveland,*** 37 Wn2d 249, 222 P.2d 1066 (1950), ***overruled on other grounds, Chaplin v. Sanders,*** 100 Wn2d 83, 861 n.2, 676 P.2d 431 (1984); ***Booten v. Peterson,*** 34 Wn2d 563, 209 P.2d 349 (1949), ***overruled on other grounds, Chaplin v. Sanders, supra,*** 100 Wn2d at 861 n.2; ***Angell v. Hadley***, 33 Wn2d 837, 207 P.2d 191 (1949); ***Atwell v. Olson,*** 30 Wn2d 179, 190 P.2d 783 (1948); ***Thompson v. Bain***, 28 Wn2d 590, 183 P.2d 785 (1947); ***Strom v. Arcorace***, 27 Wn2d 478, 178 P.2d 959 (1947); ***Windsor v. Boucier***, 21 Wn2d 313, 150 P.2d 717 (1944); ***Roe v. Walsh***, 76 Wash 148, 135 Pac 1031, 136 Pac 1146 (1913); ***Hruby v. Lonseth***, 63 Wash 589, 116 Pac 26 (1911) and ***Turner v. Creech***, 58 Wash 439, 108 Pac 1084 (1910).

[18] ***Winans v. Ross, supra***, 35 Wn App at 240-241; ***Clausing v. Kassner, supra,*** 60 Wn2d at 13, 14 and 16; ***Angell v. Hadley, supra,*** 33 Wn2d at 838; ***Windsor v. Bourcier, supra,*** 21 Wn2d at 314, 316; and ***Roe v. Walsh, supra,*** 76 Wash at 150 and 152. ***See*** discussion of these cases in CP 206-208.

were cited and argued to the trial court. CP 206-208. Unfortunately, this may simply have given more reason for the trial court to become confused about whether the second "question" had to be proven in every case.

Nevertheless, there are at least two Washington Common Grantor cases where one of the Original Parties contested the agreed line in the hope of gaining a property windfall. The first/earliest case involved the Common Grantor seeking to gain more property than he had under his original agreement. He lost and rightly so. ***See Windsor v. Sarsfield,*** 66 Wash 576, 119 Pac 1112 (1912). CP 102, lines 11-13. Even in that case, however, the Common Grantor opposed a "subsequent purchaser" who relied on a very visible fence line built by the Original Parties.

The second, more recent, case involved the Original Grantee seeking to gain more property than he had purchased under his original agreement. He also lost, and rightly so. ***See Light v. McHugh, supra***, 28 Wn2d 326, 183 P.2d 470 (1947). CP 102, lines 9-11. But this is the only reported case which only involved the Original Parties. There were no "subsequent purchasers" at all. And no visible boundary.

The point is that the instant case, like ***Light v. McHugh***, involves an Original Grantee, Judy. And Judy is seeking to gain more property than she purchased under her original agreement to buy Tract 4 based on the

Voorheis Survey. Judy did so by claiming the Cascade survey, performed 18 years after she purchased, governs. CP 381-390; RP1, p.55, lines 18-21 and RP2, p.25, lines 19-21. The trial court apparently overlooked Judy's Original Grantee (with actual notice) status because the cases the court relied upon all involved "subsequent purchasers." CP 54-55.

2. The Over-Arching Error: *Fralick's* Two "Questions" Were Not Both Applicable In This Case.

Fairness constrained the above acknowledgement that, until Judy moved for Reconsideration, there was no separate discussion of the two possible Common Grantor lines. CP 205-206; RP2, p.13, line 10 – p.14, line 15; p.21, line 20 – p.24, line 5. There was, however considerable effort made during argument of Judy's Motion about the incongruity of the trial court's ruling based on its own unchallenged FOF 31. RP2, p.12, line 21 – p.13, line 10; p.15, lines 12-19; p.18, lines 1-7; p.21, line 9 – p.27, line 14.

Fairness also constrains the admission that, until Rich and Margaret moved for Reconsideration, there was no discussion of the inapplicability of the "subsequent purchaser question," or the applicability of ***Light v. McHugh***. But that lack of specific discussion was remedied when Richard and Margaret brought a Motion for Reconsideration. CP 98-121. The discussion in Rich and Margaret's motion is referenced and

summarized below.

Judy's attorney, as well as Rich and Margaret's attorney, both cited and quoted from ***Fralick v. Clark County, supra,*** 22 Wn App 956, 160, 589 P.2d 273 (1978), ***rev. den.*** 92 Wn2d 1005 (1979) as the chief authority regarding the Common Grantor Doctrine. CP 312-313 and CP 290-291. The trial court, however, seems chiefly to have relied upon ***Winans v. Ross, supra,*** 35 Wn App at 241, a "subsequent purchaser" visible line case. CP 54, line 23 – CP 55, line 5. The trial court did cite ***Fralick,*** but not properly. It did not note that the Supreme Court had denied review of ***Fralick.*** CP 54, lines 17&21 and CP 55, line 5. Moreover, ***Winans***, specifically relied upon ***Fralick***. CP 55, line 5. Therefore, the governance of ***Fralick*** should not have been overlooked. Reliance on ***Winans*** led to three inter-related errors.

First, the trial court entirely missed the fact that ***Fralick, supra,*** 22 Wn App at 160 held the first "question" regarding the Original Parties' agreement was established based upon ***Light v. McHugh***, ***supra.*** Second, the trial court missed the fact that the second "question" regarding "subsequent purchasers" has two alternative forms; one involving a visible line, the other actual notice even without a visible line. CP 55, lines 1-4. ***Fralick*** provides the alternative form in footnote 1 at 22 Wn App 160.

Third, the trial court also missed the fact that both ***Fralick's*** actual notice form of "question" 2, as well as the visible line form of "question" 2 the court quoted, expressly relate exclusively to "subsequent purchasers," not Original Parties.

Perhaps if the trial court had relied more upon ***Fralick,*** and studied it more closely -- because both legal counsel had cited ***Fralick***, because the Supreme Court denied review, and because ***Winans*** cited ***Fralick,*** – the trial court may have recognized the specific use of the phrase "subsequent purchasers." Then it might have realized that, because Judy was the Original Grantee, neither form of the second "question" applied in this case at all.

3. *Light v. McHugh*

Each of these inter-related errors is covered in Rich and Margaret's Motion For Reconsideration. The first issue discussed here is ***Fralick's*** citation of ***Light v. McHugh*** in support of ***Fralick's*** statement that "[W]e answer the first question in the affirmative." 22 Wn App at 160. CP 99, 102, 104 and 110-115. In other words, in ***Fralick*** there was "an agreed boundary established between the common grantor and original grantee" just as had been true in ***Light v. McHugh.*** More specifically, ***Light v. McHugh*** was cited by ***Fralick*** in support of the Original Parties

"question" because ***Light v. McHugh*** only involved Original Parties. It did not involve any "subsequent purchasers."

Still more specifically, as is true in the instant case, the Original Parties in ***Light v. McHugh*** had actual notice of their agreed boundary even though there were no on-the-ground markings. Because the Original Parties knew what their agreed boundary was, how the boundary was determined, where it was measured from, and, thus, where it was located, there was a meeting of the minds as to the identical tract of land to be transferred by the sale – even though it was not marked on the ground. And because that was true, the seller, Mrs. Dreazy in ***Light v. McHugh***, and her purchaser, Mr. McHugh, "accepted" and "agreed" that they measured the distances conveyed in the legal description from a fence they assumed – erroneously – was on a government survey line. 28 Wn2d at 329.

There is nothing in ***Light v. McHugh*** to indicate that stakes were driven to visibly mark the boundary on the ground. Moreover, the case diagram in 28 Wn2d at 328 indicates the parties measured ***past*** a private road running less than one-half the distance across that property, ***not*** to its northern edge. Therefore, there were no on-the-ground markings. Nevertheless, Mr. McHugh was bound by his agreement. As the State

Supreme Court put it in 28 Wn2d at 331:

> [Mr. McHugh] secured just what he bargained for and cannot now complain.

Likewise in this case, Judy bought Tracts 3 and 4 based on the Voorheis Survey. Her Trial Memorandum concluded by stating that "All Judy wants is the lot she purchased, as she purchased it." CP 328, line 9. That being the case, the Voorheis Survey line for the southern boundary of Tract 2 and the northern boundary of Tract 4 was the agreed common boundary. Exhs 6 and 23; CP 137. The agreed boundary was not the Cascade survey line -- which didn't even exist until 18 years after Judy and Charlie purchased. Exhs 28 and 15. Judy also testified that she thought Mr. Caverly had moved and may have been dead by 1994. RP1, p.26, lines 8-20. Therefore, he couldn't have "agreed to" or "accepted" the Cascade line.

4. *Fralick's* Second "Question" Only Applies To "Subsequent Purchasers"

The second inter-related error was the trial court's requirement that the second "question" regarding "subsequent purchasers" also be proven. CP 54, line 22 – CP 55, line 5. As Rich and Margaret's Motion For Reconsideration sought to explain in detail, the second "question" is only applicable to "subsequent purchasers." In contrast, Rich and Margaret's

Common Grantor Counterclaim sought to bind Judy, as Mr. Caverly's Original Grantee, to her purchase agreement based on the Voorheis Survey. CP 106-115; RP2, p.12, line 21 – p.13, line 16 and p.25, line 11 – p.26, line 16.

What is particularly important about relying on ***Fralick*** regarding this issue is that both the Fralicks and Clark County were "subsequent purchasers." Therefore, both in 28 Wn App 159, and again at 160, the ***Fralick*** court specifically noted that Clark County was the second "subsequent purchaser" and that the County's seller, Harrison, "did *not* in any way indicate" the lower falls boundary and that "There is nothing in the record that indicates that the County, through its agents, had any knowledge of the 'lower falls boundary.'" In contrast, Judy Anderson was clearly *not* a "subsequent purchaser' who lacked actual notice that the Voorheis Survey was the basis of her boundary. Exh 13. This is completely contrary to Clark County which had absolutely no knowledge of the "lower falls" as the basis of the boundary in ***Fralick***. CP 111. The trial court may have noticed this contrast if it had relied upon and thereby studied ***Fralick.***

5. Subsequent Purchasers With Actual Notice Are Bound Even In the Absence of An On-The-Ground Marking.

Further, if the trial court had studied ***Fralick,*** it might also have realized that there is a second actual notice alternative to the second "question;" namely, that "even in the absence of an on-the-ground marking, a subsequent purchaser with actual notice of the agreement is bound by the line." 22 Wn App at 160 n.1. This too was covered in Rich and Margaret's Motion For Reconsideration. CP 112-113. ***Winans*** was a visible boundary case that did not deal with the actual notice alternative. Therefore, it never mentioned the "actual notice in the absence of on-the-ground markings" second alternative. CP 110-111. But ***Fralick*** did have facts which required consideration of that actual notice alternative. CP 111-113.

Fralick twice mentioned that Clark County lacked any knowledge about the "lower falls" boundary. 22 Wn App at 159-160. It was stated twice to emphasize that point. ***Fralick*** also thereby emphasized the opposite; *i.e.* ***Clark County would have been bound by the lower falls boundary had it been pointed out to County agents.*** CP 112. Thus, even in the absence of a sufficient on-the-ground markings of a boundary, a "subsequent purchaser" with actual notice of the agreed boundary will be bound based on the alternative second "question." 22 Wn App at 160 n.1.

If the trial court had considered ***Fralick's*** very important double

emphasis, it may also have recognized that, even though the Voorheis Survey line was not marked on the ground for the entire 650 foot distance dividing Tracts 2 and 4, Judy had actual notice that the Vooheis Survey line was the agreed boundary based upon which she purchased. Then, even if the trial court still failed to recognize that the "second question" did not even apply, it might nevertheless have recognized that no on-the-ground markings are needed at all to bind someone with actual notice of an agreed line under the Common Grantor Doctrine. CP 115-117. As it was, a straight visible line 300 feet +/- on the Voorheis line did exist. CP 137. Also, Charlie and Judy wrote that there were markers on the western boundary of Tracts 2, 4 & 6, from RMC's survey of Tracts 1-4, if not the Voorheis Survey. Exh 13 and fax p.10 of Exh 16; CP 124 and 128.

6. The Equitable Burden of Proof Does Not Apply

Another facet of the trial court's confusion was to apply the "clear, cogent and convincing" burden of proof applicable to equitable suits. CP 54, line 23; CP 58, lines 9-12 and n.9; and CP 13, line 19 – CP 14, line 4. The trial court came up with that burden all by itself. CP 13, line 20 – CP 14, line 1. It was never pleaded by either party. CP 352-390. Neither attorney even suggested that burden was applicable. CP 312-324 and 290-296. Judy's attorney even seemed to admit that burden was not applicable

during argument of his Motion for Reconsideration. RP2, p.6, lines 7-11 and CP 241-243. (He was, of course, nevertheless happy to analyze why the court was correct about Reformation not being proven. RP2, p.3, line 20 – p.7, line 4 and CP 239 and 241.)

The trial court apparently became confused because this Division used the terms "reforms" and "reformation" when granting Common Grantor relief in ***Schultz v. Plate, supra,*** 48 Wn App at 313 n.1 and 318. This use of the term of art was cited to the trial court. CP 295, line 22 – CP 296, line 55. Nevertheless, that term of art use was clarified in post-trial documents and argument which the trial court either ignored or continued to misunderstand. CP 203-205; CP 119-120; RP2, p.12, line 21 – p.13, line 10 and RP2, p.16, line 14-17 referencing Stoebuck and Weaver, ***supra,*** 17 WASH PRAC §8.22 in last sentence at p.548, cited and explained at CP 204, line 22 – CP 205, line 7.

Regardless, this only compounded the trial court's error. It did not cause it. If the trial court had recognized that the "subsequent purchasers question" did not apply, the burden of proof error would have made no difference. Given the uncontroverted evidence that Mr. Caverly sold, and Tracts 1-4 owners purchased, based on the Voorheis Survey, the equitable burden was met. Likewise, since FOF 31 was unchallenged, the equitable

burden was met. CP 48, lines 7-9.

V. Other Miscellaneous Trial Court Errors

Rich and Margaret took exception to a large number of other trial court mistakes, from typographical errors to misunderstanding of basic facts to misinterpretation of law. They were catalogued in a Formal Objection. CP 151-163. Many are irrelevant to the issues in this appeal, but are relevant to demonstrate two facts. First, Judy never pointed out any mistakes even though correcting various typographical errors and factual mistakes would have made defending the trial court's ruling easier. It was convenient, however, to just reinforce the trial court's confusion rather than try to correct mistakes.

Second, in contrast, Rich and Margaret wanted to be fair to a trial judge who had worked very hard. Report of Proceedings July 28, 2013 (RP3) p.6, lines 8-17. It was hoped that pointing out errors would lead to some re-thinking based upon the work ethic the trial court had exhibited throughout trial. RP3, p.6, line 18 – p.9, line 17. That was not successful.[19]

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[19] But a few examples in other areas of this real estate case may persuade this Court there was indeed confusion. First, paragraph 27 at CP 159, especially when compared with Mr. Gliege's testimony at CP 136, pp.35&36, establishes the trial court completely reversed the facts. The rock kept improvement of the drainage swale north longer, rather than forcing it south. Second, CP 155, line 5 – CP 156, line 21 (paragraphs 14-16), when compared with CP 135, page 21, line 17 – p.24, line 23, establishes a similar misunderstanding of the evidence and how it depicted topography and vegetation.

VII. Judy's Response to Rich and Margaret's Motion for Reconsideration

Three quick points should be noted about Judy's Response to Rich and Margaret's Motion. First, nowhere did Judy even mention, must less contest, that ***Fralick's*** second "question" concerning "subsequent purchasers" should not have been applied to Judy as the Original Grantee. CP 75-97.

Second, Judy's Response principally complained that the Motion should have been filed long before. There was little contention that it could not be filed within 10 days after entry of judgment. Judy simply tried to sound like it was inequitable to have taken so long. That was no doubt done to piggyback on the trial court's mistaken belief that a Motion For Reconsideration was not even available after judgment. RP3, p.4, line 17 – p.5, line 6 and p.9, lines 19-21.

The delay occurred, however, because Rich and Judy's attorney simply could not figure out for an extended period of time what the trial court's analysis was and why he and the trial court were "talking past one another." RP3, p.5, line 16 – p.7, line 1. The court's "discipline" comment on June 21 (RP3, p.6, lines 2-16 and RP2, p.20, lines 21-25) was the window which led to the visible boundary conclusion which, based on the Order Denying, appears to have been correct. CP 14, lines 5-16.

VIII. Trial Court's Response

The trial court's response to Rich and Margaret's Motion For Reconsideration was limited. It did make a number of corrections to typographical and/or factual errors suggested by Rich and Margaret. *Compare* CP 12, line 22 – CP 151-163. But where these corrections were to be located was almost entirely incorrect. CP 13, lines 1-14.

Substantively, the trial court admitted it came up with the "clear, cogent and convincing" burden of proof entirely on its own; "the court has not identified published precedent to apply" that standard of proof. CP 13, lines 20 – CP 14, line 1. Otherwise, the chief basis for ignoring the total inapplicability of the "subsequent purchaser" language to an Original Grantee was the assertion that "this is inconsistent with the position taken by Defendants in their Trial Memorandum... [and] throughout the trial..." CP 14, line 5-16.

For the sake of argument, the attempt to focus the trial court's attention on the visible curved line claim -- because it applied to adverse possession and mutual recognition and acquiescence as well as the Common Grantor Doctrine -- is admitted. But the failure to "break down" the two Common Grantor "questions" for the court, was given an apology. RP3, p.8, line 21 – p.9, line 5. Nevertheless, courts follow the law, not the

parties' (allegedly) incorrect statements of it. Moreover, the trial court never even considered or responded to the actual notice issue. Judy had and has actual notice of the Voorheis Survey whether or not marked and, frankly, it was marked halfway on the ground by a swale, and at the west corner by RMC as well as Voorheis. CP 124 and CP 115-117.[20]

CONCLUSION

As the trial court's FOF 31 stated, Tracts 1-4 were created, and their legal descriptions drafted, based on the Voorheis Survey. As Judy and Charlie's self-written and notarized Exhibit 13 professed, they had actual knowledge that markers were at the western boundary of Tracts 2, 4 and 6, as well as the eastern boundary of Tracts 1, 3 and 5. Exhibit 13 also admitted that Judy and Charlie, like Campbells after them (Exh 17), were provided a copy of the Voorheis map and had actual notice of its 4x4 cement monuments which were pointed out when they purchased. As Charlie also explained to Cascade in fax page 10 of Exhibit 16, a second RMC survey was performed on Tracts 1-4. RMC confirmed the Voorheis locations based on the original ¼ corner. RMC also believed the 1974 Department of Game ¼ corner was in error. All of this was actual notice.

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[20] The trial court was attentive enough on its own to note that Rich and Margaret filed an Answer and then an Amended Answer with Counterclaims. CP 40, lines 15-18. If the court had read the first Answer, it would have seen that only the Common Grantor Voorheis Survey was pleaded. CP 374 lines 10-25ff.

Just as significantly, Judy and Charlie were the Original Grantees, who purchased 2-3 years before anyone else. They had actual notice that the Voorheis Survey was the basis of the sale and directed all development. Judy is bound by her actual knowledge of the original agreement. Like Mr. McHugh, she should secure "just that definite parcel of real estate which was pointed out to [her] at the time [she] purchased it." 28 Wn2d at 331. Or, to put it as Judy's counsel did, Judy should get "the lot she purchased, as she purchased it." CP 328, line 9.

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 accepted the Voorheis lines for her Tract 3. She must also accept it 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 14th day of March, 2014.

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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 14th day of March, 2014, I caused Defendants/Appellants' Opening Brief to be 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 14th day of March, 2014.

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