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

Gregory R. Zaputil, a married man as his separate estate; and
Rudolph Zaputil and Gregory R. Zaputil as co-trustees of the
Rudolph Zaputil Living Trust U/A dated June 15, 2006,
Appellants,

v.

51st Avenue, LLC, a Washington Limited Liability Company, Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

This appeal arises from an underlying lawsuit in which Plaintiffs Gregory Zaputil and Rudolph Zaputil, as co-trustees of the Zaputil Living trust (hereinafter “Appellants”), brought an action for trespass and relief under RCW 58.04.020 to establish an alleged lost or uncertain boundary with their neighbor, 51st Avenue, LLC (hereinafter “Respondent”). The central issue in determining the correct location of the boundary between Appellants’ and Respondent’s neighboring properties is a quarter corner established by King County in 1964. Although both Appellants and Respondents purchased their properties long after and in reference to that government-established quarter corner in 1964, Appellants now contend that their ownership of their property purchased in 1978 should be adjusted by 10 more feet from Respondent’s property, purchased in 1998, in accordance to a 1907 land plat which allegedly references another monument than the 1964 King County quarter corner.

II. ASSIGNMENTS OF ERROR

The trial court dismissed the underlying lawsuit on summary judgment finding that no relief can be granted under RCW 58.04.020 because the court cannot challenge or change the location of a government-established monument, and that there was no dispute as to

where the location of the monument from which the legal descriptions of the properties were measured. Respondent contends that there are no assignments of error in the trial court's decision.

III. STATEMENT OF THE CASE

A. Summary of Facts

Appellants and Respondent own abutting properties located in King County, Washington. Appellants' property lies east of Respondent's property. (Opening Brief, Appendix A) All of the properties at issue were originally part of a plat known as Young's Half Acre Tracts. Young's Half Acre Tracts was comprised of ten tracts. CP 34. The properties currently owned by Appellants that abut Respondent's were part of Young's Half Acre Tract numbers 5 and 6. The properties currently owned by Respondent that abut Appellants' were part of Young's Half Acre Tract numbers 7 and 8. CP 35.

Prior to Appellants' and Respondent's purchase of their respective properties, King County surveyors established a quarter corner as the East monument in 1964. CP 56-57. The establishment of this East monument as the quarter corner is not in dispute as Appellants acknowledge this fact. (Opening Brief p. 4)

Prior to Appellants' purchase of their properties, tracts 5 and 6 were subdivided. A short plat was prepared by licensed professional land surveyor Wayne E. Chastain on September 13, 1977, recording number 7710140681 (also referred to in Appellants' Opening Brief as Tukwila Short Plat). CP 36-39. Mr. Chastain also filed a *Record of Survey* dated April 8, 1977, recording number 7706039009, of the same short plat property. CP 40.

Appellants purchased the properties at issue in July 1978. CP 41-44. Mr. Chastain's short plat survey of September 13, 1977, recording number 7710140681, was used to verify and establish the boundaries of the properties purchased by Appellants.

Respondent purchased its property abutting Appellants' west boundary in 1998. Respondent took ownership and possession by two conveyances: (1) Statutory Warranty Deed, dated April 10, 1998, recording number 9804141358, and (2) Statutory Warranty Deed, dated June 25, 1998, recording number 9807020968. CP 45-48; CP 49-51.

In October 1998, Respondent filed a "Lot Consolidation" of its properties, recording number 9812102336. CP 52-55.

In November 2008, Appellants commenced the underlying lawsuit seeking to re-establish their property line from a so-called

“Reference Monument” or “West monument,” rather than from the 1964 government-established East monument quarter corner.

B. Procedural History

On November 26, 2008, Appellants brought an action in King County Superior Court (action No. 08-2-41034 KNT) for establishing boundary under RCW 58.04.020 and trespass (hereinafter “underlying lawsuit”). CP 1-7.

On December 24, 2008, Respondent filed an Answer and Counterclaims for quieting title, trespass and ejectment, acquiescence of boundary, and wrongful recording of lis pendens. CP 8-13.

On March 13, 2009, Respondent filed a Summary Judgment Motion with supporting exhibits. CP 16-79.

On April 14, 2009, Appellants filed a Response to the Summary Judgment Motion. CP 85-103.

On May 15, 2009, Respondent filed a Rebuttal in support of its motion with additional exhibits. CP 104-148.

On June 25, 2009, Appellants filed a Motion to Appoint Commissioners. CP 173-213.

On June 29, 2009, Respondent filed a Supplemental Memorandum of Law in Support of its Summary Judgment Motion. CP 149-153.

On July 6, 2009, Respondent filed its Opposition to the Motion to Appoint Commissioner. CP 154-158.

On July 13, 2009, Appellants filed a Response in support of their Motion to Appoint a Commissioner. CP159-161.

On July 17, 2009, Respondent filed a Rebuttal in support of its Supplemental Memorandum of Law for Summary Judgment. CP 167-169.

On July 24, 2009, the Honorable Laura G. Middaugh held the summary judgment hearing and granted Respondent's summary judgment motion in its entirety and dismissed the case. RP 1-37.

On August 17, 2009, the Order Granting Defendant's Motion for Summary Judgment and Final Judgment Dismissing all Plaintiffs' Claims was entered. CT 170-172.

IV. ARGUMENT

A. Summary Judgment Should Be Affirmed Because Respondent Is Entitled to Judgment As a Matter of Law Since the Court Does not Have Authority to Grant Relief Under RCW 58.04.020 In This Case

1. Standard of Review

The standard of review on appeal of a summary judgment is de novo, with the reviewing court performing the same inquiry as the trial

court. *Ski Acres, Inc., v. Kittitas County*, 118 Wash.2d 852, 854 (1992), citing *Herron v. Tribune Pub 'g Co.*, 108 Wash.2d 162 (1987).

A court shall grant summary judgment if there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. CR 56(c). *Ski Acres, supra*. The nonmoving party avoids summary judgment when it “set[s] forth specific facts which sufficiently rebut the moving party’s contentions and disclose the existence of a genuine issue as to a material fact.” *Meyer v. Univ. of Wash.*, 105 Wash.2d 847, 852 (1986).

In reviewing a ruling on a motion for summary judgment, the appellate court engages in the same inquiry as the trial court and will consider only evidence and issues called to the attention of the trial court. *Zaleck v. Everett*, 60 Wash.App.107 (1991) .

2. Under RCW 58.04.020 the Superior Court Properly Refused to Grant Relief Because The Boundary in Dispute Is Not Obliterated or Obscure and Appointment of Commissioners Under RCW 58.04.030 Is Futile

After reviewing the evidence and the legal arguments in conjunction with the summary judgment motion, Judge Middaugh properly dismissed the case based on the following findings: in 1964 the government set the quarter corner as the East monument and there

is no dispute as to where that quarter corner is located; the plat mentioned in Appellants' and Respondent's deeds references the quarter corner; therefore, a court's order of a survey to determine the quarter corner and the boundary in question would be meaningless.

RP 34-36.

a. The Boundary in Question Is Not
Obscure nor Uncertain as to Warrant
Relief Under RCW 58.04.020

Appellants have brought the underlying lawsuit in order to establish a new boundary line between their property and Respondent's property pursuant to RCW 58.04.020. This statute provides in relevant part:

(1) Whenever the boundaries of lands between two or more adjoining proprietors *have been lost*, or by time, accident or any other cause, *have become obscure, or uncertain*, and the adjoining proprietors cannot agree to establish the same, one or more of the adjoining proprietors may bring a civil action in equity, in the superior court, for the county in which such lands, or part of them are situated, and that superior court, as a court of equity, may upon the complaint, order such *lost or uncertain boundaries to be erected and established and properly marked*.

(Emphasis added.)

Appellants contend that the boundary line between their and Respondent's property should be determined by measuring the legal descriptions in the deed from the West Reference Monument rather than the East monument established by King County in 1964. Appellants' claim, although brought under RCW 58.04.020, *supra*, does not fit the requirements for application of this code section because they failed to introduce any evidence that such boundary has become lost or uncertain since 1978 when they purchased their property.

The case at bar is similar with *Stewart v. Hoffman*, 64 Wash.2d, 37 (1964), where the court held RCW 58.04.020 inapplicable to a situation where one party insisted that present surveyed boundary was correct, while the other party contended that new survey would place the boundary at a different location, while failing to bring any evidence of a lost boundary.

The present action involves the same fact pattern as *Stewart, supra*: Appellants contend that despite the myriad of existing surveys using the East monument as quarter corner (CP CP 36-40; 62-68; 70-72) and the clear evidence of the 1964 quarter corner established as the East monument, an appointment of commissioners is needed under RCW 58.04.030. CP 173-204. However, Appellants failed to present any

evidence of a lost monument or other evidence of obliterated or lost boundary. The facts as well as Appellants expert evidence fails to prove that such boundary has become lost or uncertain, or that the 1964 establishment as the East monument as the quarter corner is erroneous. The legal descriptions of the parcels in questions can be readily determined from existing monuments, and such determination has been effectuated in numerous boundary surveys done since 1964. CP 36-40; 62-68; 70-72. Appellants' claim boils down to one request before the court: to use the West Reference monument rather than the East monument set by King County as the quarter corner in determining the boundary line between the properties in question. Such request does not warrant relief under RCW 58.040.020 and RCW 58.040.030, and the trial court properly found that Respondent is entitled to judgment as a matter of law.

b. Appointment of Commissioners Under RCW 58.04.030 Is Not Warranted

Appellants brought a Motion to Appoint Commissioner to be heard the same day as the summary judgment motion. CP 174-213. Judge Middaugh postponed such hearing after the summary judgment motion hearing when she reached the conclusion that this request is

futile since the case was dismissed in its entirety. RP 2-3; CP 170-172.

Appellants' Motion to Appoint Commissioner was brought under RCW 58.04.030 which provides:

Said court may, in its discretion, appoint commissioners, not exceeding three competent and disinterested persons, one or more of whom shall be practical surveyors, residents of the state, which commissioners shall be, before entering upon their duties, duly sworn to perform their said duties faithfully, and the said commissioners shall thereupon, survey, erect, establish and properly mark said boundaries, and return to the court a plat of said survey, and the field notes thereof, together with their report. Said report shall be advisory and either party may except thereto, in the same manner as to a report of referees. RCW 58.04.030

Under this provision, courts may appoint commissioners in cases where the boundaries are lost and cannot be determined by the actual surveys. In *Snell v. Stelling*, 83 Wash.248 (1915), the court determined that the actual surveys regarding two properties with disputed boundaries were only partial, and they did not reflect a complete survey; thus the court held that "Since the action has been reduced in its essence to one to restore a lost or uncertain boundary, we think the case is one peculiarly calling for the appointment of a commissioner to make a complete

survey of both tracts upon the ground, with a view to establishing the common boundary between the two tracts.” *Snell* at 259.

This is not the case here, the boundaries are not lost or obliterated and there are plenty of complete surveys to establish the quarter corner (as evidenced by Appellants’ and Respondent’s exhibits to the Summary Judgment Motion CP 36-40; 62-68; 70-72). A “court commissioner cannot correct the United States government surveys, or establish government corners at points other than those fixed by the government surveyors; that in an attempt to establish an original survey, the purpose should be to follow the footsteps of the government surveyor as nearly as possible [...]. It is undoubtedly the duty of the commissioner to ascertain, if possible, where the original government monuments had been actually located and established rather than where he might think they ought to be located or established.” *Strunz v. Hood*, 44 Wash. 99, 105-106 (1906).

Similarly, in *Hale v. Ball*, 70 Wash. 435, 441 (1912), the court refused to appoint a commissioner since the quarter corner in dispute was not lost or destroyed or uncertain when defendant built a fence eighteen or twenty years previous to the dispute, and even if a corner was lost or obliterated, “a court will direct the establishment of a corner under the rule stated or any other rule, for the law establishes an obliterated corner where the surveyor actually located it, and not where it ought to be located by a correct survey.”

Here the quarter corner is not lost, obliterated or destroyed in any way and Appellants failed to introduce any evidence to this effect. In fact, Appellants did not dispute the exhibits establishing such quarter corner as the East monument set by King County in 1964. CP 86. Further, they do not dispute the existence of the 1964 quarter corner as the East monument; rather, they argue that such monument should be disregarded and instead the West Reference monument should be used for measuring the boundary between their and Respondent's properties. However, Appellants fail to introduce any evidence to show that the location of the 1964 quarter corner is erroneous.

Appellants' action is based on the argument that a different monument than the 1964 government-established one should be used in determining the boundaries to Appellants' property line. Such argument has no basis and support under RCW 58.04.030. Therefore, the trial court properly did not address this issue since it was futile. RP 2-3; 34-36.

3. The Trial Court Properly Held that It Did Not Have the Authority to Change the Location of a Government -Established Monument

Another legal obstacle in Appellants' request for relief is that the superior court lacked the authority to grant such relief because it does not have the inherent power to move or even question the location of government-established monuments.

Appellants brought the underlying lawsuit based on their dissatisfaction with the location of the 1964 King County-established quarter corner, and were asking the court to change the 45-year old quarter corner from the East monument to the West monument in order to gain 10 feet of land. The trial court properly refused to grant such request because it lacked the authority to change a government-established monument. RP 33-36.

It has been long established that courts cannot correct government surveys and establish government corners at points other than points located by government. *Squire v. Greer*, 2 Wash. 209 (1891). In *Squire* the court held that “the investigation of the court must be directed towards ascertaining the fact where the government corners are actually established, and not where they ought to have been established.” *Id.* at p. 214. Further, the Supreme Court revisited the issue in 1947 and affirmed that “the official surveys made by the government are not open to collateral attack in an action at law between private parties.” *Kalin v. Lister*, 27 Wash.2d 785, 790 (1947). The court explained that “the mistakes and abuses which have crept into the official surveys of the public domain form a fruitful theme of complaint in the political branches of government. The correction of these mistakes and abuses has not been delegated to the judiciary.” *Kalin* at p. 789.

The Washington Supreme Court has established that a true quarter corner is where the government actually establishes it, and an alleged error in the location of the quarter corner is not subject to

correction by the courts. *Roads v. Stangair*, 41 Wash. 583, 583 (1906) and *Milwaukee Land Co. v. Weyerhaeuser*, 106 Wash. 604, 607 (1919).

“The true corner is at the place where the government surveyor actually located it, and when this is definitely shown it will prevail over distances, courses, blazes or the calls of the official field notes. **Nor is error in the location of the corner, however plainly shown, subject to correction by the courts.**” *Milwaukee Land Co.* at 607 (emphasis added).

The government survey and notes establish the quarter corner as the East monument and the West monument being only a “reference monument.” CP 56-57. It was established before Judge Middaugh that the location of the 1964 quarter corner as the East Monument is not disputed. CP 56-57; RP 33, 34-35; Opening Brief p.4. As such, the trial court properly held that the court has no power to change a government-established quarter corner and therefore relief under RCW 58.04.020 and RCW 58.04.030 was impossible because the afore-mentioned provisions did not apply to this case. RP 19, 33-37.

Appellants’ reliance on *DD &L, Inc. v. Burgess*, 51 Wash.App. 329 (1988) is misplaced because that case did not involve a government-established monument. In *Burgess*, a landowner filed an action against adjoining landowner for trespass, and the dispute over the boundary of their properties included a railroad track as a monument. The parties disputed over the location of the center line of the railroad track. *Burgess* at 335. In fact, *Burgess* is supportive of Respondent’s

position since the court held in its analysis that “where it is shown by competent evidence that a monument does not accord with a survey or a plat, the monument as established on the ground must control.” *Burgess* at 336, citing *Martin v. Neely*, 55 Wash.2d 219 (1959).

Therefore, under *Burgess, supra*, the 1964 King County quarter corner as the East monument controls over an earlier allegedly established monument in the 1907 plat.

Similarly, Appellants’ reliance on *Erickson v. Wick*, 22 Wash.App. 433 (1979) is equally distinguishable since that case involved a dispute over the location of a meander line and did not involve a government-established monument. In comparing the variance between the plat involved and the field notes, the court found that the plat controls. *Erickson* at 436. But such finding is inapposite here since there is a government-established quarter corner which location is not in dispute. And again, *Erickson* is not helpful to Appellants’ position because the court specifically held that “Defendants cite no cases in which government survey lines have been redrawn by a court to achieve acreage designations shown on the official plat. The general rule is that, while it may be considered, the designated quantity of land called for is the least reliable of all descriptive particulars and the last to be resorted.” *Erickson* at 438. The *Erickson* court denied the very request made by Appellants in this action.

Appellants failed to prove and provide legal support that a court can change the location of a government-established quarter corner in

existence at the time Appellants purchased their property, in order to give Appellants the acreage described in a 1907 plat.

4. Respondent's 1998 Lot Consolidation Did Not Create a Basis for Relief under RCW 58.04.020 in Favor of Appellants

In 1998 Respondent bought its property in two separate transactions, by way of two separate deeds. CP 45-48; CP 49-51. That same year Respondent had a Lot Consolidation performed. CP 52-55. The lot consolidation was intended as a simple way to eliminate interior property lines of contiguous parcels under a common ownership to create one larger parcel for tax assessment and building permit purposes. Despite Appellants' claims that such process revised the properties lines in Respondent's favor, the assertion is simply not supported by any evidence. On the contrary, Respondent's expert, Rodney Hansen, establishes that such lot consolidation is immaterial to the issues raised by Appellants. CP 113. In turn, Appellants' expert failed to prove otherwise.

In fact, Respondent could not have used the West Reference monument in the description of the new parcel because the deeds mentioned the Tukwila Short Plat (Wayne Chastain Survey) of 1977 which used the 1964 East monument quarter corner. CP 36-39. In

addition, a number of surveys have been performed to date, all of which used the same East monument as the quarter corner. CP 36-40; 62-68; 70-72. Lastly, since Respondent purchased the properties and performed the Lot Consolidation in 1998, they were bound by the established government-set quarter corner in 1964. Therefore, Appellants' claim that somehow Respondent purposely changed the legal description of its property to their advantage is simply not true and is not supported by any evidence.

Appellants failed to raise an issue of material fact which would preclude Respondent from being entitled to summary judgment as a matter of law. Appellants failed to introduce any evidence that the boundary between their property and Respondent's has become obscure or lost as to warrant relief under RCW 58.04.020. Further, Appellants failed to introduce a legal basis for the court's authority to change a government-established monument. Therefore, the trial court's grant of summary judgment in favor of Respondent should be affirmed.

B. Appellants' Claim is Not Supported by Equity Principles

RCW 58.04.020 expressly states that when considering claims of lost or uncertain boundaries, the court is acting "as a court of equity." RCW 58.04.020(1). Under equity principles, Appellants are

not entitled to relief due to their notice of the existing King County 1964 east monument quarter corner and their failure to dispute its location at any time since they purchased their property in 1978.

Appellants were aware of the alleged inaccuracy in the establishment of the boundary since July, 1978, when they purchased the property, and when they were on constructive and actual notice of the recorded survey of September 13, 1977, recording number 7710140681 (CP 36-40). Appellants admit in their discovery responses that *“in the summer of 1978 we commenced building and set foundations of our buildings off survey pins along the front of the property (Presumably set by Wayne Chastain in 1977).”* CP 79. Therefore, Appellants were aware of the Chastain recorded short plat and survey since 1978; however, they failed to raise any issues with such documents, and now, 30 years later, they claim that the Chastain documents are faulty since they use an incorrect quarter corner (East monument rather than the West “reference” monument). Even though Appellants claim that *“we were unable to contact Chastain,”* they failed to bring the issue before the court to clarify their complaint.

Appellants knowingly delayed this action, which is further evidenced by sequence of events as they described it in their responses: *“In 1998 the Defendant created plans shifting all property lines 10 feet to the east.[...] We commenced research, but upon learning the project was not moving forward, decided not to go the expense of a survey.”* CP 79. Appellants further state in their

Response to the Summary Judgment Motion that they “*brought the present action to establish the disputed boundary after they learned that Defendant had recorded a new legal description,*” when Defendant/Respondent allegedly shifted the new boundary, referring to the Lot Consolidation of 1998. CP 92.

Appellants had a clear second change in 1998 to bring this issue before the court; however, they chose not to incur the expense of a land survey themselves; instead they decided to wait an additional 10 years and cause Respondent to incur the expense of defending a lawsuit and an appeal in addressing a 30-year old issue which was created independent of Respondent and long before Respondent even bought its property.

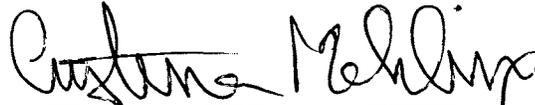
V. CONCLUSION

Based on the foregoing arguments, Respondent respectfully requests that the trial court’s granting of summary judgment be affirmed, since the underlying action was properly dismissed because no relief could be granted under RCW 58.04.020 and accompanying provisions. The location of the government-established quarter corner is not in dispute and the change of that location as requested by Appellants is not within the court’s power to perform.

Appellants' dissatisfaction with the location of the quarter corner in 1964 is not a proper basis for the underlying lawsuit and this appeal brought 30 years after Appellants purchased property. Both legal and equitable principles require that such summary judgment dismissal be affirmed.

RESPECTFULLY SUBMITTED this 30th day of October, 2009.

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