

No. 66655-0-1

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

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RICHARD AND SHARON CALLAGHAN, husband and wife,

Appellant,

v.

LINDA A. HADLEY, aka LINDA A. MORROW, Trustee of the Linda  
A. Morrow Trust, and JOHN H. HADLEY, JR., Trustee of the John  
H. Hadley, Jr. Trust,

Respondents.

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**RESPONDENTS' BRIEF**

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## I INTRODUCTION

This case involves claims by Appellants Richard and Sharon Callaghan (“the Callaghans”) to quiet title to a portion of their neighbors’, the Respondents’ (“the Hadleys”) real property, under theories of mutual recognition and acquiescence and adverse possession. The parties brought cross motions for summary judgment on the Callaghans’ claims for title to the Hadleys’ property, and the trial court denied the Callaghans’ motion and granted the Hadleys’ motion, dismissing each of the Callaghans’ claims in their entirety.<sup>1</sup>

Following a previous motion for discretionary review that this Court denied, the Callaghans now ask the Court of Appeals to reverse the trial court’s order denying their motion for summary judgment and granting the Hadleys’ motion, on solely the Callaghans’ theory of mutual recognition and acquiescence.<sup>2</sup> In doing so, it is important to note that the Callaghans ask the Court of Appeals to *award them summary judgment*, quieting title to the

---

<sup>1</sup> The Callaghans’ assertion that the summary judgment ruling was “unusual” is ironic, as the parties coordinated and filed *cross* motions for summary judgment, asserting no disputes of material fact. Apps’ Br. at 2.

<sup>2</sup> The Callaghans do not challenge the trial court’s order granting the Hadleys’ motion for summary judgment as to the Callaghans’ adverse possession claim. Therefore, the adverse possession claim is not before the Court of Appeals.

Hadleys' property, despite utterly failing to satisfy their burden of proof.

However, the Callaghans do not appear to argue that the evidence actually considered by the trial court was sufficient to satisfy their burden of proof to establish mutual recognition and acquiescence. Instead, as a prerequisite for considering the summary judgment rulings, the Callaghans first ask the Court of Appeals to first reverse several evidentiary rulings rejecting incompetent evidence. To do so, the Callaghans ask the Court of Appeals to consider new legal theories and arguments not presented to the trial court. Those theories should not be considered for the first time here. But even if considered, they do not survive careful scrutiny.

Further, even if the trial court erred on one or more of the many evidentiary issues raised, it would not support reversal of the ruling on summary judgment. Indeed, even considering *all of the evidence* put forth by the Callaghans, much of which is incompetent, there is insufficient evidence of a specific physical boundary line designated on the ground and recognized by clear and convincing evidence for ten years or more, as is required to establish a boundary line by mutual agreement and acquiescence.

Regardless of the alleged evidentiary error, the Callaghans have not established and cannot establish that the trial court's summary judgment rulings should be reversed.

## II. RESTATEMENT OF ISSUES FOR REVIEW

The issues raised by the Callaghans' appeal are more accurately characterized as follows:

A. Should the Court consider for the first time on appeal whether a successor in title to a decedent can assert the "dead man's statute" against introduction by an interested party of self-serving statements allegedly made by the decedent in contravention of his interest and his successors in title's interest?

B. If the Court of Appeals is willing to consider the issue of "standing" to assert the dead man's statute raised for the first time on appeal, may a successor in interest to decedent, who derived title in real estate from the decedent, assert the dead man's statute's protection against an interested party?

C. Was the "defense" to application of the hearsay rule to exclude statements and gestures made by Hans Berg based on those statements being offered for a "non-hearsay purpose" raised below, and, if so, did the trial court properly rule that statements

offered to prove that Hans Berg agreed or acquiesced to a specific line were inadmissible hearsay?

D. Did the trial court properly rule that three declarants who offered declarations in support of the Callaghans' motion did not have personal knowledge for specifically identified sweeping statements and conclusions made in their declarations?

E. Was sufficient admissible evidence presented before the trial court to establish by clear cogent and convincing evidence that the Callaghans and the Hadleys' predecessors in title agreed or acquiesced to a specific, physical boundary line as the true boundary line between their respective properties for ten years, or even to create a dispute of material fact on that issue?

F. Even if one or more of the trial court's evidentiary rulings was in error, did the Callaghans allege sufficient evidence at summary judgment that if assumed true, would establish by clear cogent and convincing evidence that the Callaghans and the Hadleys' predecessors in title agreed or acquiesced to a specific, physical boundary line as the true boundary line between their respective properties for ten years, or even to create a dispute of material fact on that issue?

G. Did the trial court abuse its discretion in refusing to reconsider the issue of title to the area over which the drain line was placed, including easement therefore, where the Callaghans did not plead a claim or defense for a drain line easement and did not move to amend the pleadings until oral argument on the cross motions for summary judgment on trespass, a year after their claims were dismissed?

H. Even if the trial court abused its discretion in denying the Callaghans' verbal motion to amend their complaint at oral argument on summary judgment a year after each of their claims had been dismissed, should the Court of Appeals still affirm the trial court because the document at issue did not satisfy the statute of frauds and the Callaghans could not establish part performance as necessary to escape the statute of frauds?

### **III. STATEMENT OF THE CASE**

#### **A. History of the Subject Properties.**

The Callaghans purchased their property at 1250 East Juniper Beach Road in 1988. Clerk's Papers ("CP") at 484 (Supplemental Declaration of Richard Callaghan) ¶ 1. In 1997, the Callaghans had a survey of their property performed. CP at 568 ¶ 3 & 570 (Decl. of Kathryn C. Loring attaching survey). The survey

demonstrated that the boundary between the Callaghans' property, 1250 East Juniper Beach Road and what is now the Hadleys' property, 1258 East Juniper Beach Road, was generally along a line of six holly trees running north/south in the upper section of the Callaghans' property. CP at 570. Additionally, the survey revealed that the property line was further west than what the Callaghans now seek to obtain from the Hadleys. *Id.*

Despite having that survey done in 1997 and recorded in 1998, the Callaghans did not take any legal action to establish ownership of the property that they now claim is theirs. CP at 577:14-25 (Deposition of Richard Callaghan). They also did not inform the then owner of 1258, Mr. Hans Berg, of the survey results. *Id.* Instead, Mr. Callaghan wanted to have Mr. Berg agree to the boundary line that Mr. Callaghan preferred, knowingly misrepresenting the true property line. *Id.*

The October 6, 1997 document that Mr. Callaghan ultimately prepared for Mr. Berg to sign, and on which the Callaghans relied almost exclusively in bringing suit, was not an "agreement" to establish any property line. See CP 567, Apps' Br., Appendix K. The document at most granted Mr. Callaghan a license to maintain his drain line if it crossed the Berg property. *Id.*

Hans Berg passed away in 1997. His wife, JoAnne Marie Berg, passed away in 1998.

The Hadleys purchased the properties at 1258 and 1266 East Juniper Beach Road from the Berg family in December 2004. CP at 543 (Decl. of John Hadley) ¶ 3. At the time, as the undisputed evidence presented at summary judgment through photos and survey maps demonstrated, there was no physical boundary between 1250 and 1258, nor was there a boundary line except for a row of holly trees. CP at 544 (Decl. of John Hadley) ¶ 5. The Callaghans represented to the Hadleys that the boundary line between their respective properties (1250 and 1258) was several feet east of a row of holly trees. CP at 544 (Decl. of John Hadley) ¶ 6.

**B. The Subject Dispute.**

In approximately 2007, the Hadleys had 1258 surveyed. CP at 545 (Decl. of John Hadley) ¶ 9. Based on that survey, it was evident that the actual property line was several feet west of where the Callaghans had represented it to be, and very close to the line of holly trees. *Id.* The survey also demonstrated that the entire “gulley” that the Callaghans’ had represented was in between the

parties' properties was solely on the Hadleys' property and that the holly trees were planted approximately on the property line. *Id.*

A boundary dispute ensued and the Callaghans filed suit to quiet title to the disputed area based on claims of (1) adverse possession and (2) mutual recognition and acquiescence. The Hadleys counterclaimed for trespass and sought a permanent injunction requiring the Callaghans to remove encroachments from their property and cease trespassing.

**C. Procedural History.**

**1. Summary judgment on the Callaghans' claims.**

In November 2009, the parties filed cross motions for summary judgment on the Callaghans' claims for adverse possession and mutual recognition and acquiescence. The motions were heard by the trial court, the Honorable Alan R. Hancock presiding, on December 4, 2009.

At summary judgment, the Callaghans filed several declarations. Richard Callaghan filed an initial declaration asserting what Hans Berg had represented and agreed to, as well as a supplemental declaration. CP at 633-44; 484-92. The Callaghans filed a declaration from the Bergs' daughter, Heidi

Hanson, making general averments about what her family “understood” the boundary line to be and how the family generally had treated the line. CP at 627-29. The Callaghans also filed a statement by a former tenant at 1258, Randy Stuart. CP at 630-32. Mr. Stuart made statements regarding where Hans Berg believed the location of the property line was.

The Hadleys moved to strike portions of Mr. Callaghan’s declarations as violating the deadman’s statute, and other specifically identified portions of each of the declarations as containing inadmissible hearsay, improper opinions, and statements not supported by personal knowledge. CP at 502-508 (Defs’ Mem. in Opp’n to Pls’ Mot. for Summ. J. and in Supp. of Defs’ Mot. to Strike). In doing so, the Hadleys specifically identified each declaration paragraph to be stricken and the legal basis for each request. *Id.*

The trial court agreed with the Hadleys on each request:

The defendants Hadley moved to strike various portions of declarations of Mr. Callaghan, Randy Stuart, and Heidi Hanson. I’ll first address the motion to strike relating to the Dead Man’s Statute.

. . . There is no doubt that the Callaghans . . . are parties in interest. They are certainly interested parties and would not be able to testify to transaction or statements with Mr. Berg – transactions with Mr.

Berg or statements by Mr. Berg, as the statute makes abundantly clear.

. . .  
And so I grant the motion to strike in all respects with regard to the Dead Man's Statute and its effect with regard to any transactions with Mr. Berg or statements by Mr. Berg with one exception, and that is the agreement itself. . . .

. . .  
On summary judgment, of course, it's clear beyond any question that the Court can only consider such facts as would be admissible in evidence and must apply the Rules of Evidence.

So the defendants are correct that in each and every case a statement made in these three declarations that are sought to be stricken, the statements are incompetent. They're either opinions which are inadmissible unless there's some specific opinion that might be received – and none of these opinions would be the kinds that could properly be received by the Court – or they are statements that are clearly not within the personal knowledge of the declarant. The declarant cannot testify to what other people think or what other people saw or heard or otherwise perceived through the senses. The Rules of Evidence make it plain that as far as factual evidence is concerned people can only testify to what they have within their personal knowledge; that is to say, what they personally perceive through the senses, essentially. And so all of this evidence is inadmissible. There's a lot of argumentative statements here that are not really evidentiary in any sense but simply arguing the case.

I just want to make it clear that I have reviewed each and every one of the statements that are sought to be stricken from consideration by the Court here and each and every one of them is inadmissible because either they are argumentative or set forth opinion testimony, they are not based on personal

knowledge of the witness, or they are based on what the witness has heard from others which would, in effect, be hearsay, and to some extent they are barred by the Dead Man's Statute, as I referenced previously. So I am granting the motion to strike in all particulars with the exception of the 1997 agreement that's been referred to here between Mr. Callaghan and Mr. Berg.

...  
MR. GILDAY: Sure. Can I just ask for a clarification on one point?.

THE COURT: Yes.

MR. GILDAY: You said the only thing admissible about the agreement is the agreement itself and that the testimony from Heidi Hanson would be barred by the Dead Man's Statute. She's not a person of interest so the Dead Man's Statute wouldn't apply to her.

THE COURT: Okay. Let me just take a quick look at that again, if there's some issue about that. As I recall, there were other problems with Ms. Hanson's testimony. Just a moment.

MR. SKINNER: If I may, Your Honor, the basis for the motion with regard to Heidi Hanson was lack of personal knowledge and hearsay and conclusory statements.

THE COURT: That is correct. Anything else, Mr. Gilday?

...  
THE COURT: . . . The point is, as Mr. Skinner correctly points out, Ms. Hanson wasn't there. There's no showing, at least, that she was there for the signing of the agreement or that she participated in the negotiations, if any, with regard to the agreement. Anything that she knows about the

agreement is based on either hearsay from others, such as Mr. Berg, or she doesn't have personal knowledge of that. So I'm adhering to my decision.

Verbatim Report of Court's Oral Ruling ("12/4/09 VRP") at 2:8-21; 4:8-12; 7:15-10:10.

Based on the admissible evidence, the trial court then denied the Callaghans' motion for summary judgment and granted the Hadleys' motion for summary judgment. The court's formal order to that effect was entered on January 6, 2010.

The trial court granted the Hadleys' motion on the mutual recognition and acquiescence claim because the Callaghans had not established the parties agreed or acquiesced to a specific, physical boundary line. In fact, the Callaghans asserted different "lines" as the boundary line agreed to in various briefs filed for summary judgment, as is outlined below in Argument.

The pertinent portions of the trial court's oral ruling as it pertained to the claim for mutual recognition and acquiescence, are as follows:

In order to establish a boundary line by recognition and acquiescence, there must be a well-defined line which is in some fashion physically designated upon the ground, and, in the absence of an express agreement between the adjoining owners or their predecessors in interest establishing the designated line as a boundary, they must have in

good faith manifested by their acts, occupancy, and improvements with respect to the respective properties a mutual recognition and acquiescence of the designated line as the true boundary line, and the mutual recognition and acquiescence must last for the requisite ten-year period.

Now, as we discussed in colloquy here, it was difficult to determine exactly what the line was that the Callaghans are claiming to be the property line that should be established by adverse possession and/or by mutual recognition and acquiescence.

...

That appears to be the present claim as noted on the survey that was performed for the Hadleys which the Callaghans then used to show their marking of what they now claim to be the property line.

So it appears to be this rod at the so-called bluff edge, up to the tree 110 feet north, and then to a tree 15 feet north of that.

There is some – let's face it, there is some merit to the Hadleys' argument that the difficulty of showing what the line actually is is problematic for the Callaghans as to their claims to establish a property line other than the property line as established by the survey of the property line between the parcels.

I want to talk now for a moment about the 1997 document that appears to be an agreement between Mr. Berg and Mr. Callaghan as to the use of this drainage line, Mr. Callaghan [sic.] being the Hadleys' predecessor in interest.

...

This is not a document that establishes a property line. It is a document that establishes the Callaghans' right to encroach onto the – what was then Mr. Berg's property to maintain the old existing drainage line.

...

So I think it's clear beyond peradventure that that document cannot be construed to be an agreement to establish a property line between the Callaghans and what is now the Hadley properties. It is what it is, an agreement to allow the Callaghans to maintain the old and improve the old drainage line to the extent that the old drainage line goes onto the Callaghan property.

...

That in and of itself is not an express agreement to establish a line different from the actual survey property line; I think that must be noted. And that is – this is the only document or the only evidence, really, that would be evidence of any line that might be established by adverse possession or mutual recognition and acquiescence. And, again, this is not any kind of express agreement about a boundary line but at most would set forth some misunderstanding by the parties about where the true property line is.

So I must conclude that there is no express agreement, there being no other evidence in the record that would support any finding of an express agreement between the Callaghans and the Bergs or Mr. Berg, the Hadleys predecessor in interest, about the establishment of a line.

...

As far as the doctrine of mutual recognition and acquiescence is concerned . . . whatever usage there is, it must be done with reference to the established line. There must be dominion and control and – or there must be a clearly defined line. And so the question arises whether the Callaghans have borne their burden of proving the necessary well-defined, clearly established line in the present case.

...

In my judgment and in my view, the matter of a drainage pipe, a tree and another tree would not

represent the necessary well- and clearly defined line that must be shown to establish the doctrine of mutual recognition and acquiescence.

That element has not been shown, even construing the evidence in a light most favorable to the nonmoving party here, the Callaghans, in terms of the defendants' Hadleys motion for summary judgment. . . . **[S]ince there's no express agreement in the present case, there must be some kind of line shown on the ground that would be evidence to anyone going out onto the property to see that, that there would be an implied boundary line shown on the ground. That clearly is not the case here and the Callaghans have not shown that.**

The Callaghans bore the burden of presenting evidence that is clear, cogent, and convincing to establish their claim. There's no question but that the Callaghans' motion for summary judgment must be denied. They clearly did not meet their burden.

It's somewhat more difficult in terms of the Hadleys' motion for summary judgment, but I must conclude, based on the evidence that's admissible here before the Court on these matters, that the Hadleys have borne their burden of proving that the Callaghans have not proven their claim by clear, cogent, and convincing evidence that they're entitled to title to the disputed strip by adverse possession or by the doctrine of mutual recognition and acquiescence.

Again, I want to make it clear that I am assuming the truth of the evidence in the record submitted by the Callaghans in connection with their claim, but, again, only that which was admissible in evidence after the motion to strike was heard and that evidence was excluded and even assuming the truth

of all of that evidence, the Callaghans have not made the necessary showing.

...

There is a presumption of permissive use and that must be applied here and accepted by the Court, it having not been rebutted. **It does take more than this to basically wrest the title to property away from someone who would otherwise be entitled to property**, particularly in this day and age where records of property are clearly maintained, surveys must be filed for record, and people can with little effort, if they put their minds to it, determine what the property boundaries are. It takes more than the Callaghans have shown here to establish title by adverse possession or by mutual recognition and acquiescence.

12/4/09 VRP at 13:6-24; 14:21-15:18; 16:2-6, 17-24; 17:8-23; 22:6-18; 24:10-25:24; 26:12-23.

## **2. Proceedings subsequent to summary judgment.**

The parties subsequently stipulated to an order of dismissal of the Callaghans' claims in exchange for a dismissal with prejudice of the Hadleys' counterclaim for trespass. Nonetheless, the Callaghans filed a notice of appeal. Following substantial briefing on whether the stipulation of dismissal terminated the case, the trial court vacated the dismissal and the Callaghans moved this Court for discretionary review of the summary judgment rulings on the Callaghans' claim of mutual recognition and acquiescence. This Court denied discretionary review on August 11, 2010.

### **3. Summary judgment on the trespass counterclaim.**

In October 2010, the parties each moved for summary judgment with respect to the Hadleys' trespass counterclaim, the only claim remaining. In the Callaghans' reply brief, they asserted for the first time as a defense to the trespass claim that the 1997 handwritten document signed by Hans Berg created an easement for the drain line. When the Hadleys pointed out that no claim or defense based on an easement for the drain line had been pleaded and that each of the Callaghans' claims for title had been dismissed nearly a year before, the Callaghans' counsel made a verbal motion at the summary judgment hearing to amend the pleadings to assert a claim for a drain line easement. See 11/29/10 VRP at 56:12-24; 62:24-25; 65:1-13.

In Judge Hancock's December 3, 2010 letter ruling, attached to the Appellants' Opening Brief as Appendix F, the trial court denied the verbal motion to amend the pleadings. CP at 45. In doing so, the Court concluded that the purpose of prohibiting claim splitting and the policy behind the doctrine of res judicata would apply, despite the fact that the claims at issue—for title to the disputed area and later for an easement in the disputed area for the

drain line—were made in the same case rather than in two separate actions. *Id.* The trial court also held that the Callaghans' motion to amend was in effect a motion for reconsideration of the original summary judgment rulings, brought too late:

The court will first address plaintiffs' argument that the Berg/Callaghan agreement created a drain line easement, and plaintiffs' oral motion to amend their pleadings accordingly. The court is constrained to conclude that this argument and motion are untimely and must be rejected.

The court is mindful of CR 15, which provides for amendments to pleadings and amendments to conform to the evidence. Under ordinary circumstances, the court might be constrained to permit plaintiffs to amend their pleadings to assert an easement. Under the circumstances of the present case, however, there is a more fundamental reason, beyond the criteria of CR 15, why this cannot be permitted.

In their complaint in the present case, plaintiffs claimed title to the disputed property under the doctrines of adverse possession and mutual agreement and acquiescence. They did not make any alternative claim for an easement. The defendants denied plaintiffs' claims and asserted a counterclaim for trespass. The plaintiffs denied the defendants' counterclaim, but did not assert any counterclaim against them.

The court considered the parties' cross motions for summary judgment on their respective claims regarding the disputed property, denied plaintiffs' motion, and granted defendants' motion. Formal judgments to this effect were entered. Defendants

Hadley own the property, and plaintiffs have no interest therein.

CR 18(a) permits joinder of as many claims as a party has against an opposing party. On its face, it would appear that the rule is permissive, such that a party may make certain claims against another party in one lawsuit, and then make additional claims against that party in another lawsuit. However, claim splitting is prohibited under Washington law.

...

As previously noted, title to the disputed property has been conclusively decided. Plaintiffs never previously asserted any claim for an easement for the drain line based on the Berg/Callaghan agreement or otherwise. The assertion of any such claim at this stage of the proceedings is untimely.

...

There is no doubt that the four elements of the res judicata doctrine are present here. (See the analysis of the four elements in Landry, supra, at 783-85). If plaintiffs had wanted to pursue a cause of action for an easement, they were required to assert this claim prior to the time the court ruled on the summary judgment motions regarding title to the disputed property. The court has already entered judgment dismissing plaintiffs' claims to the disputed property, and to assert a claim for an easement at this stage of the proceedings is untimely.

Plaintiffs might argue that they are not precluded from now asserting a claim or counterclaim for an easement because of the fact that there has been no final, appealable judgment entered with regard to the court's orders on summary judgment as to title to the disputed property. Such an argument would be ironic, since plaintiffs at one time stipulated to the entry of

such a final judgment. It was only after the court allowed them to withdraw their stipulation that this litigation proceeded at all, thereby potentially allowing them to appeal the court's orders when this litigation is completed, something they would not have been able to do had the court not allowed them to withdraw their stipulation.

It is true that the cases in which res judicata and the doctrine against claim splitting have been applied involved separate cases, rather than the situation involved in the present case, in which the court ruled on summary judgment motions and then proceeded with the remaining claim. **However, the same policy reasons apply in the present case as they would have had that Callaghans brought a separate lawsuit to assert a drain line easement over the Hadley property.**

**Moreover, if the court were to allow the Callaghans to assert their easement claim at this stage of the proceedings, the court would, in effect, be allowing the summary judgments previously entered to be reopened and reconsidered. Yet motions for reconsideration must be filed not later than 10 days after entry of the judgment or order in question. CR 59(b). No such motion for reconsideration was made, and no such motion can now be asserted.**

...

On the basis of the foregoing, the court denies the plaintiffs' oral motion to amend their pleadings to assert a claim for a drain line easement.

CP at 43-45; Apps' Br., Appendix F at 5-7 (12/4/10 Letter Ruling) (emphasis added). The court went on to grant the Hadleys motion for summary judgment, holding that a trespass had occurred, but

the court did not require the Callaghans to remove the drain line because they had had permission when it was installed. CP at 35-38; Apps' Br., Appendix D (1/24/11 Order) at 3.

The Callaghans subsequently appealed the trial court's rulings to the Court of Appeals.

#### **IV. ARGUMENT**

##### **A. The Trial Court's Evidentiary Rulings Were Not in Error.**

The Hadleys agree that evidentiary rulings are legal issues that are reviewed on appeal de novo. But the Hadleys ask the Court of Appeals to only consider arguments properly raised before the trial court, which are only a handful of the arguments now put forth. But even considering each of the Callaghans' evidentiary arguments, the Court of Appeals should affirm that the trial court was correct in rejecting incompetent and inadmissible evidence improperly presented at summary judgment.

##### **1. The Trial Court Correctly Applied the "Deadman's Statute"**

The Callaghans assert that the trial court improperly struck portions of declarations offered by the Callaghans at summary judgment on grounds they violated the deadman's statute, RCW 5.60.030. Apps' Br. at 17-18. The Callaghans cannot establish error in the trial court's application of the statute.

a. The issue of “standing” to assert the deadman’s statute was improperly raised for the first time on appeal and should not be considered.

The Callaghans assert that “the Hadleys are not an adverse party under the statute, entitled to assert the bar on testimony.” Apps’ Br. at 18. But the Court of Appeals should disregard this issue improperly raised for the first time on appeal.

An appellant may not raise a new issue or legal theory for recovery for the first time on appeal. RAP 2.5(a); *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 482 (1992); *State v. Smith*, 130 Wn. App. 721, 728, 123 P.3d 896 (2005). To do so would deprive the Hadleys’ an opportunity to respond to the argument before the trial court and would deprive the trial court the opportunity to rule on the issue. *State v. Avendano-Lopez*, 79 Wn. App. 706, 710, 904 P.2d 324 (1995)

It is undisputed that the argument of “standing” of the Hadleys to move to strike declaration statement pursuant to RCW 5.60.030 was not raised in November 2009 when the parties cross moved for summary judgment. Indeed, the argument was not raised until the Callaghans’ moved for discretionary review before

the Court of Appeals in 2010. Therefore, it is inappropriate to consider this legal theory, raised only for the first time on appeal.

b. Even if the Court of Appeal considers this issue raised for the first time on appeal, the Hadleys were entitled to assert the protections of the deadman's statute because they derived title from the deceased.

The Deadman's Statute, RCW 5.60.030, states in pertinent part that:

[I]n an action or proceeding where the adverse party sues or defends . . . as deriving right or title by, through or from any deceased person . . . then a party in interest or to the record shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased . . . .

(Emphasis added). The purpose of the deadman's statute is to prevent interested parties from giving self-serving testimony regarding transactions with a decedent. *Thompson v. Henderson*, 22 Wn. App. 373, 379-80, 591 P.2d 784 (1979). Both the express language and the purpose of the statute apply here.

The language of the statute expressly makes it available for use by a party who derives title from the deceased person. RCW 5.60.030. One who derives title from a deceased person stands in the same shoes as the deceased persons with respect to the titled property. Indeed, the secondary authority cited by

Appellants directly supports this conclusion: “The dead man statute bars the testimony of a party in interest only when the adverse party sues or defends as a representative or successor of a deceased....” Apps’ Br. at 19 (quoting Tegland, 5a Wash. Prac. § 601.18 (5<sup>th</sup> Ed.)).

First, despite Appellant’s assertion, the Hadleys did acquire the property from the Berg estate. However, consideration of this issue bears out the problem of considering issues for the first time on appeal—it was not necessary for the Hadleys’ to file documents pertaining to their chain of title or title report in the trial court because the fact that they took title to the property from the Berg estate was not challenged. Still, the Callaghans admitted numerous times before the trial court that the Hadleys’ took title to their property from the Berg estate, and that issue is not in dispute now. See 11/29/10 VRP at 45:15-18 (where the Callaghans’ counsel stated that the Hadleys were the “next person in the chain of title” following the Berg estate); at 46:8-9 (where the Callaghans’ counsel stated that all the Hadleys were the “successor in title” to the Berg estate).

The courts have allowed parties who acquire property previously owned by the deceased to assert the protections of the

statute in several situations. See, e.g., *In re Estate of Shughnessy*, 97 Wn.2d 652, 655-56, 648 P.2d 427 (1982) (allowing parties who obtained real property from a decedent by intestate laws to assert the deadman's statute against persons asserting the existence of a valid will under which they would take the property); *Fies v. Storey*, 21 Wn. App. 413, 419-20, 585 P.2d 190 (1978), *rev'd on other grounds by*, *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984) (reasoning that a party asserting an ownership interest based on deed from decedent would be "adverse party" under the deadman's statute).

The case cited by Appellants, *Aetna Life Ins. Co. v. Boober*, 56 Wn. App. 567, 575, 784 P.2d 186 (1990), is wholly inapposite and the facts there are distinguishable from this situation. In that case, a former and current spouse disputed the distribution of life insurance proceeds from the deceased. Neither woman stood in the shoes of the deceased, either as representative or successor in interest deriving title from the deceased, as is the case here.

Regardless of whether the party is a "representative" for the estate, the key element of the Deadman's statute required to qualify as an adverse party is standing in the same shoes as the decedent

because the adverse party derives “right or title by, through or from any deceased person.” RCW 5.60.030.

Even if the Court considers this issue, the Hadleys derived title from Hans Berg and are his successors in interest. Therefore they were an “adverse” party pursuant to the statute, while the Callaghans were interested parties barred from asserting statements by the deceased Berg.

c. The Callaghans incorrectly assert error in application of the statute to the other declarants.

The Callaghans assert that the deadman’s statute should not have barred declaration statements by Randy Stuart and Heidi Hanson as to statements made by the decedent Hans Berg because they were not parties in interest. Apps’ Br. at 20. The Hadleys do not disagree. But *only* portions of Richard Callaghan’s declaration were stricken based on violation of the deadman’s statute; the other declaration statements at issue were stricken for other reasons.

12/4/09 VRP at 9:10-10:10.

2. The Trial Court’s Hearsay Ruling Was Not in Error.

The trial court ruled that he was granting the Hadleys’ motion to strike in all respects. 12/4/09 VRP at 8:14-9:1; see *also* Apps’

Br., Appendix C (Order Granting Motion to Strike). The Hadleys asserted the following statements were hearsay:

- Paragraph 3 of the Declaration of (tenant) Randy Stuart stated that “Hans Berg pointed out to me the property line between 1258 and 1250, which was roughly 5 feet east of a swale on the ground . . . .” (Emphasis added). CP at 505 & 630 ¶ 3.
- The same paragraph stated, “He said the property line then continued down the center of the Gorge to the beach.” CP at 505 & 631 ¶ 3.

Appellants assert that the trial court improperly excluded the statements as hearsay because the statements were admitted for the non-hearsay purpose of what Mr. Berg “believed,” not to locate the actual boundary line between the properties. Apps’ Br. at 21.

First, the Callaghans are not entitled to raise this issue because they did not assert at summary judgment that the statements were offered for a non-hearsay purpose. They are not entitled to raise the issue for the first time on appeal. RAP 2.5(a).

But regardless, the Callaghans incorrectly assert that the statements were offered for a non-hearsay purpose. In doing so, the Callaghans misunderstand and misrepresent the analysis under the Callaghans’ claim for mutual recognition and acquiescence.

The “truth” of the matter being asserted at summary judgment on the mutual recognition and acquiescence claim was not where the boundary line actually was, it was where Mr. Berg believed or had agreed the boundary line to be—precisely the purpose for which the statements were provided. The statements, both verbal and non-verbal, were offered to prove the truth of the matter asserted—that Hans Berg had agreed or acquiesced to that specific boundary line. Therefore, both statements were properly excluded as inadmissible hearsay. ER 802(1)(a),(c).

3. Declarants Had Insufficient Personal Knowledge.

The trial court struck numerous statements in the Callaghan, Hanson, and Stuart declarations because they sweepingly asserted what had “always” been the understanding of the properties owners and what issues had “never” been disputed, by pointing to information they were “aware of” or “believed” rather than making any specific observations based on demonstrated personal knowledge. See CP at 505-508 (Motion to Strike); CP 627-636 (declarations). Appellants assert that the trial court erred in excluding statements as improper opinion, argumentative, or not based on personal knowledge. Apps’ Br. at 21.

Living at or visiting a subject property does not give

declarants sufficient personal knowledge to make sweeping, generalized statements about what “never” or “always” happened. A witness may only testify to conclusions if the conclusions are based on that person’s personal knowledge. See *State v. Wigley*, 5 Wn. App. 465, 468, 488 P.2d 766 (1971). Generally, a witness may not testify about another person’s state of mind. See *State v. Stockhammer*, 34 Wash. 262, 265, 75 Pac. 810 (1904). Statements by a declarant that he or she is “aware of” or “familiar with” certain facts is not sufficient to establish personal knowledge of the fact. *Guntheroth v. Rodaway*, 107 Wn.2d 170, 178, 727 P.2d 982 (1986). Statements by a declarant that he or she believes a certain fact to be true based on conversations with others is not supported by personal knowledge. *State v. Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 506-07, 546 P.2d 75 (1976).

While Appellants point out that the declarants *may have been* competent to testify as to what property line they each personally recognized based on their experience with the property, that is not the nature of the statements that were stricken. See CP 627-636 (declarations); 12/4/09 VRP at 10:11-24.

Further, the Callaghans cite no legal authority for their position that the trial court has an obligation to correct and

reconstrue declarations offered by a non-moving party on summary judgment and there is no such obligation. Apps' Br. at 22. Declarations at summary judgment must be based on personal knowledge, and summary judgment rulings are made with respect to only *admissible evidence*. CR 56(e). While the declarants *could have* testified as to what they personally observed or experienced, they did not, and the statements were properly excluded.

**B. Even Assuming that all of the Callaghans' Evidence Was Admissible, the Callaghans Have Not Shown Summary Judgment in Favor of the Hadleys Was in Error.**

"When a boundary has been defined in good faith by the then-interested parties and thereafter is acquiesced in and acted upon, and improvements are made with reference to the boundary over a long period of time, such a boundary will be considered the true dividing line and will govern the property rights of adjoining landowners." Wash. Real Property Deskbook, 3d ed. § 70.3(5)(a), at 70-12 (Wash. State Bar Ass'n 1996); *see also Scott v. Slater*, 42 Wn.2d 366, 368, 255 P.2d 377 (1953). "Acquiescence in a boundary line must be established by a bilateral act." Wash. Real Property Deskbook, 3d ed. § 70.3(5)(a), at 70-13 (citing *Houplin v. Stoen*, 72 Wn.2d 131, 137, 431 P.2d 998 (1967)).

A claimant seeking to quiet title to property through the doctrine of mutual recognition and acquiescence must establish by *clear, cogent and convincing* evidence that both parties to the action recognized a physical boundary as a true line, not just a barrier, for the statutory period necessary to establish adverse possession. *Muench v. Oxley*, 90 Wn.2d 637, 641, 584 P.2d 939 (1978) *overruled on other ground*, *Chaplin v. Sanders*, 100 Wn.2d 853, 861, n.2, 676 P.2d 431 (1984). The claimant must establish the following elements by clear, cogent and convincing evidence:

(1) The line must be certain, well defined, and in some fashion physically designated upon the ground, e.g., by monuments, roadways, fence lines, etc.; (2) in the absence of an express agreement establishing the designated line as the boundary line, the adjoining landowners, or their predecessors in interest, must have in good faith manifested, by their acts, occupancy, and improvements with respect to their respective properties, a mutual recognition and acceptance of the designated line as the true boundary line; and (3) the requisite mutual recognition and acquiescence in the line must have continued for that period of time required to secure property by adverse possession.

*Draszt v. Narccarato*, 146 Wn. App. 536, 543, 192 P.3d 921 (2008) (emphasis added) (quoting *Lamm v. McTighe*, 72 Wn.2d 587, 593, 434 P.2d 565 (1967)); *see also Merriman v. Cokeley*, 168 Wn.2d 627, 630, 230 P.3d 162 (2010). To establish mutual recognition

and acquiescence by clear and convincing evidence, the evidence presented must “show the ultimate facts to be highly probable.”

*Merriman*, 168 Wn.2d at 630.

1. Even considering all of the Callaghans’ evidence, the Callaghans did not put forth clear and convincing evidence of a specific, established boundary line designated on the ground.

Washington cases evaluating this doctrine expressly require an established line on the ground. Indeed, the Washington Supreme Court recently reiterated that more than even survey markers and adjacent posts is required to establish a specific, well-defined physical boundary—a “fence, a pathway, or some other object or combination of objects clearly dividing the two parcels must exist.” *Merriman*, 168 Wn.2d at 631.

In *Merriman*, the Washington Supreme Court reversed the Court of Appeals and specifically rejected the conclusion that a survey marker at the road at the front of a lot, another survey marker at the top of a bluff, one survey marker midway between those two, and wooden posts next to the two corner markers and a metal stake halfway along the line was a sufficiently designated physical line by which to claim property through mutual recognition and acquiescence. *Id.* at 629, 631.

Washington Courts have consistently required more. See, e.g., *Waldorf v. Cole*, 61 Wn.2d 251, 377 P.2d 862 (1963) (rockery against dirt bank insufficient marker); *Scott v. Slater*, 42 Wn.2d 366, 255 P.2d 377 (1953) , *overruled on other ground*, *Chaplin v. Sanders*, 100 Wn.2d 853, 861, n.2, 676 P.2d 431 (1984) (row of pear trees along a purported line was not a sufficient marker); *Lloyd v. Montecucco*, 83 Wn. App. 846, 924 P.2d 927 (1996) (no boundary by acquiescence when it was marked only by underwater blocks that shifted position and by activities not in fixed locations).

The Court of Appeals recently found insufficient to define a boundary line by mutual recognition and acquiescence a retaining wall constructed of railway ties that extended only part way into a disputed area because there were no other “monuments, roadways, or fence lines” along the disputed boundary. *Green v. Hooper*, 149 Wn. App. 627, 642, 205 P.3d 134 (2009), *rev. denied* by 166 Wn.2d 1034, 217 P.3d 782 (2009). Indeed, walls and fence lines are the general subject of application of this doctrine. See, e.g., *Draszt*, 146 Wn. App. at 543 (holding that the wall of an intruding building and the fence line that stretched from its corner were “well defined.”).

Even taking the facts alleged by the Callaghans regarding the history and treatment of the so-called boundary line as true for purposes of summary judgment, the Callaghans do not and cannot point to an established and well-defined physical line. Indeed, during the summary judgment pleadings, the Callaghans appeared to differ in the manner by which they defined the “line” and the property to which they were seeking to quiet title.

The Callaghans first asserted that the “recognized” property line between 1250 and 1258 East Juniper Beach Road was “roughly 5 feet east of a swale on the ground that ran North and South. The line continued down through the center of the gorge, which was marked with an aluminum pipe.”<sup>3</sup> CP at 696 (Declaration of Richard Callaghan) ¶ 4. Likewise, the Callaghans’ described the line as marked because it: “paralleled a drain line that was marked with a swale in the ground. Marked by a tree on the north end, and a rod placed on the edge of the bluff on the top of the bluff, continuing down the center of the bluff through a large diameter aluminum pipe. For years it was also marked by an east/west fence along the bluff, which ended at the road marker.”

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<sup>3</sup> In Appellants’ Opening Brief, the Callaghans now state that “the eastern edge of the swale between Lots 6 and 7 marked the recognized property boundary on the upper bluff. An aluminum pipe marked the boundary on the lower bluff.” Apps’ Br. at 23.

CP at 536-37 (Memorandum of Law in Response to Plaintiffs' Motion for Summary Judgment) at 5-6 (internal citations omitted).

But in Plaintiffs' Memorandum of Law in Response to Defendants' Motion for Summary Judgment, the Callaghans asked the Court to quiet title to "the disputed property as shown on attachment A." CP at 543-43. Attachment A depicted a "disputed area" defined by one continuous line far west of the center of the ravine and far west of the so-called aluminum pipe in the middle of the ravine. *See id.* The line depicted in Attachment A was not the same line asserted by the Callaghans prior to the litigation or in Mr. Callaghan's declaration. CP at 455 (Reply Declaration of John Hadley) ¶ 7.

It's not clear which "line" the Callaghans sought to quiet title to, but even if the original "line" is considered, it is not well-defined and it is by no means physically marked on the surface.

The line was described as being "roughly five feet from" a "swale" that no longer exists.<sup>4</sup> The only physical evidence of the

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<sup>4</sup> Further, the asserted "swale" that is supposed to form the basis for an agreed property line differs in width in the Callaghans' various pleadings, as does the relationship of the "line" to the so-called swale. In the photographs provided to the trial court, the swale is a narrow indentation directly next to the row of holly trees.

"swale" is a photograph that shows only a slight indentation in the ground immediately adjacent to the holly trees. See CP at 639.

The single iron pipe placed at the top of the gorge by Mr. Callaghan does not physically define a certain, well-defined *line*, as there are no other iron pipes or monuments along the alleged line. There is no evidence that the pipe was mutually placed or recognized and there is absolutely no evidence that the "tree on the north end" was ever mutually recognized as forming part of a line. Additionally, the alleged "east/west" fence along the bluff has no relation whatsoever to the alleged agreed north/south line. It is not a boundary fence, but is perpendicular to the asserted boundary.

The Callaghans attempted to cobble together various items to demonstrate a boundary line, but those items do not refer to a certain, well defined, physically designated line, and there is no evidence that each item was actually recognized as forming part of such line.

Further, the "swale" never continued into the ravine, which is a large portion of the so-called "disputed area." The only alleged physical designation of the boundary line in the ravine is a piece of aluminum drain pipe that was discarded in that area. That aluminum drain pipe does not form part of a continuous line with

the items alleged to form the line in the upper/northern section of the disputed area and there is no evidence that it was recognized as defining an agreed boundary line.

Finally, the drain line itself does not in any way designate or define the asserted line. Indeed, in the upper/northern section of the "disputed area," the drain line barely encroaches onto the Hadleys' property, and does so on a very slight angle. The Callaghans seek "roughly five feet east" of the drain line in the upper area. And in the lower/southern portion of the "disputed area" the drain line bears severely east and encroaches onto over half of the Hadleys' property. The Callaghans have asserted that they do not seek the entire area under the drain line in the bluff area of the Hadleys' property. CP at 10 (Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment) ¶ 4. The drain line did not define the asserted "agreed" property line.

The Callaghans' attempt on appeal to have the Court of Appeals rely on aerial photographs at CP 123-26 and Appendix L to the Appellants' Opening Brief should be rejected because those photographs were not provided to the trial court on the parties' cross motions for summary judgment on the Callaghans' title claims. It was not until the parties moved for summary judgment on

the Hadleys' trespass counterclaim approximately *a year later* that the Callaghans filed the aerial photographs, primarily in an attempt to pad the record for appeal. The photographs should not be considered in evaluating the trial court's ruling on the parties' first summary judgment motions because they were not considered by the trial court. Further, there was absolutely no evidence presented at summary judgment that a "line" was recognized for a period of "more than 40 years," and the Callaghans noticeably fail to cite any support for that assertion in the brief here. See Apps' Br. at 26.

The Callaghans have failed to cite to one case where a court determined that an asserted boundary line was sufficiently certain, well defined, and physically designated, where there was no barrier, improvement, or line on the ground defining the boundary line at issue. The Callaghans simply cannot show that the asserted line—"roughly five feet east" of a "swale" that no longer exists in the northern portion of the property, and along a pipe (not in a continuous line with the alleged swale) in the ravine portion of the property—is sufficient to establish by clear, cogent, and convincing evidence, entitlement to a large portion of the Hadleys' property by mutual recognition and acquiescence.

It may well be that there was never a dispute with the Berg family regarding the property line between 1250 and 1258 and that the Callaghans and Bergs could agree to maintenance and use of the property between the residences at 1250 and 1258. But there can be no question that there was never a well-defined, physically designated line, nor is there one now, as is required by Washington case law applying the doctrine of mutual agreement and acquiescence.

2. Even taking all of the Callaghans' evidence, the Callaghans did not put forth clear and convincing evidence that the Hadleys' predecessors in interest—now deceased—agreed to a specific line as a boundary line, for ten years or more.

The Callaghans likewise could not demonstrate at summary judgment by clear, cogent and convincing evidence that they and the Bergs recognized and acquiesced to the asserted boundary line as the true boundary line for a period of ten years. As stated above, the vast majority of the evidence provided by the Callaghans to show an agreement, either written or simply understood, was inadmissible as hearsay, lacking personal knowledge, or violating the deadman's statute. But even if that evidence had been admitted, it does not establish by clear, cogent,

and convincing evidence that the asserted line was recognized and acquiesced to as the true property line for 10 years.

The document signed by Hans Berg was signed in 1997, the same year that he died and only one year before his wife died. Apps' Br., App. K. If the so-called agreement and acquiescence began with that document, it did not and could not have continued for ten years. Further, that document does not demonstrate that Mr. Berg was agreeing to any boundary line—it expressly states that he was agreeing to give Mr. Callaghan permission to repair the drain line and to maintain the drain line on his property.

The additional declarations submitted by Randy Stuart and Heidi Hanson also could not satisfy the Callaghans' burden in this regard. Neither statement referred to a well-defined, physically designated, or consistent line. Randy Stuart never had authority to agree to any line and only offered inadmissible hearsay statements regarding what Mr. Berg allegedly communicated to him. Ms. Hanson's declaration also did not support the existence of an actual agreement between her father and Mr. Callaghan as to a specific boundary line by clear, cogent and convincing evidence.

The Callaghans simply could not satisfy their burden of proof at summary judgment and the Hadleys are entitled to a ruling

affirming the trial court's denial of the Callaghans' motion for summary judgment and grant of the Hadleys' motion for summary judgment.

**C. The Trial Court Properly Rejected the Callaghans' Too-Late Assertion for An Easement for the Drain Line.**

The trial court properly rejected the Callaghans' argument for an easement for the drain line because: (1) a claim for an easement was never plead and was not raised until nearly one year after the Callaghans' title claims were dismissed; and (2) the purported agreement between Callaghan and Berg did not satisfy the statute of frauds or the partial performance exception thereto and could not establish an easement.

1. The trial court properly refused to allow the Callaghans to amend their complaint nearly a year after the original summary judgment ruling to assert an easement to the drain line.

At oral argument on the parties' second cross motions regarding the Hadleys' trespass counterclaim, the Callaghans asked the trial court to amend their complaint to add a claim for an easement to the drain line, despite the fact that the Callaghans' claims had been dismissed nearly a year before. The trial court properly rejected that attempt.

Contrary to the Callaghans' assertion, the trial court's refusal to allow amendment of the pleadings is reviewed for abuse of discretion. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006).

The Callaghans cannot establish that Judge Hancock *abused his discretion* by refusing to allow amendment of the pleadings to add a claim for title to an easement more than one year after the Callaghans' claims for title to the disputed area were dismissed. The trial court had three separate reasons for its decision—that amending the pleadings to add the claim would violate the policies behind Washington's bar on claim splitting and the doctrine of *res judicata*, and that doing so would allow an untimely motion for reconsideration of the court's January 6, 2010 order dismissing the Callaghans' claims for title. See CP at 44-45 (Letter Decision at 5-7).

On each basis, the trial court found the motion to amend untimely. Denying a motion to amend as untimely in order to protect the parties from prejudice has been held not to be abuse of

discretion. See *Del Guzzi Const. Co., Inc. v. Global Northwest Ltd., Inc.*, 105 Wn.2d 878, 889, 719 P.2d 120 (1986).

Further, the trial court was correct that allowing the Callaghans to amend their pleadings to add a claim for title to a drain line easement a year after their claims for title had been dismissed would violate the principles of prohibiting claim splitting and the policy behind res judicata, even if the issue arose in the same case in which the original claims were made. The policy underlying res judicata is that a person should be entitled to only one fair adjudication of an issue and not more. See *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 858-60, 726 P.2d 1(1986). “The doctrine of claim preclusion prohibits claim splitting as a matter of policy, primarily in order to conserve judicial resources and to ensure repose for parties who have already responded adequately to the plaintiff’s claims.” *Babcock v. State*, 112 Wn.2d 83, 93, 768 P.2d 481 (1989).

Here, the Callaghans claims for title to the Hadleys’ property were definitively resolved in the Hadleys’ favor by January 6, 2010. Then, during the November 29, 2010 hearing on the parties’ cross motions on the Hadleys’ trespass counterclaim, the Callaghans sought to amend the pleadings to add a claim for title to an

easement. The Callaghans had already had a full opportunity to resolve their claims for title, and the trial court did not abuse its discretion in refusing to allow the Callaghans to amend the pleadings a year later to reconsider the dismissal and raise a new title claim.<sup>5</sup>

Additionally, this is not the case, as Appellants appear to assert, where the issue of whether the Hadleys were entitled to an easement for the drain line was considered by the express or implied consent of the parties or where the claims should conform to the evidence. Apps' Br. at 34-35, 38. In the parties 2009 briefing on their cross motions for summary judgment, the Hadleys pointed out that an easement could not be established, even if a claim for one had been made, which it had not. CP at 517 n.3. The Callaghans did not challenge that assertion nor ask the trial court to consider a claim for a drain line easement. It was not until one year

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<sup>5</sup> Appellants assert without legal authority that a claim for easement does not involve a transfer of title. See Apps' Br. at 37. That assertion is false. While a license, which is revocable, does not transfer title, an easement does transfer title to a specific estate in property, just not the fee simple estate. See, e.g., *Gold Creek North Ltd. Partnership v. Gold Creek Umbrella Ass'n*, 143 Wn. App. 191, 200, 177 P.3d 201 (2008) (holding that an easement conveys an interest in property and must be conveyed by deed); see also William Stoebuck, 17 Wash. Prac., *Real Estate: Property Law* sec. 2.12 at 118 (1995) (reasoning that one cannot have an easement over her own property because the two title interests merge).

later that the Callaghans, through new counsel, asked the trial court to amend the pleadings during the oral argument on new motions for summary judgment related to the Hadleys' trespass counterclaim. Even then, the Callaghans did not assert the "partial performance" defense to the statute of frauds until oral argument. The trial court did not abuse its discretion in refusing to allow amendment.

2. The so-called agreement could not create an easement because it did not satisfy the statute of frauds.

The document signed by Hans Berg on October 6, 1997, is not alone sufficient to grant an easement over the Hadleys' property as it does not comply with the statute of frauds because it was not notarized. See RCW 64.04.010 ("Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed"); RCW 64.04.020 ("Every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by this act to take acknowledgments of deeds").

The difference between an easement and a license is that "an easement is a right and a license is a privilege." *Proctor v. Huntington*, 146 Wn. App. 836, 852, 192 P.3d 958 (2008), *aff'd by*

169 Wn.2d 491 (2010) (quoting William B. Stoebuck and John W. Weaver, 17 *Wash. Prac.: Real Estate* § 2.1 at 82 (2d Ed. 2004)). “Unlike an easement, a license is revocable, nonassignable, and created by the licensor’s oral, written, or implied consent.” *Id.* An easement is a property right, and any “contract creating or evidencing an easement must be in writing and comply with the statute of frauds set forth in RCW 64.04.010.” *Id.* The Hans Berg agreement at most created a license, which does not run with the land and may be revoked.

Even if the Court holds that the trial court should have allowed amendment of the pleadings to assert a drain line easement, the Callaghans cannot establish a defense to the statute of frauds and failed to even articulate that defense until the summary judgment hearing.

The partial performance exception to the statute of frauds can only apply if there was in fact an agreement to create an easement rather than a license. *See Proctor*, 146 Wn. App. at 853. The existence of an agreement must “be proven by evidence that is clear and unequivocal and which leaves no doubt as to the terms, character, and existence of the contract.” *Miller v. McCamish*, 8 Wn.2d 821, 829, 479 P.2d 919 (1971). The statute of frauds was

designed to prevent fraud from uncertainty in agreements that did not satisfy its criteria. *Id.* “If there is any ambiguity as to the existence of an easement, we determine the intention of the parties by examining such factors as the construction of the pertinent language, the circumstances surrounding the transaction, the situation of the parties, the subject matter, and the subsequent acts of the parties involved.” *Kirk v. Tomulty*, 66 Wn. App. 231, 238, 831 P.2d 792 (1992).

Here, Plaintiffs cannot establish an agreement to create a license by clear and unequivocal evidence. The October 6, 1997 document simply gives permission for the drain line to cross Mr. Berg’s property “if” it does in fact cross onto his property line (the location of which was misrepresented by Mr. Callaghan, as was the location of the drain line that would be installed). The 1997 document does not create a clear, unequivocal agreement to create an easement (or reciprocal easements) that would run with the land. There is not sufficient evidence of such intent. There was no formality in the execution of the document. The document was not recorded and no easement was referenced in the deed transferring the Berg property to Defendants. The very purposes of the statute

of frauds are served here by refusing to apply the doctrine of part performance, and the Court can affirm on this basis alone.

Finally, even if the Court finds sufficient evidence of an agreement to consider the elements of part performance, as a matter of law, the Callaghans cannot satisfy those elements— (1) actual and exclusive possession; (2) consideration; and (3) permanent improvement. See *Berg v. Ting*, 125 Wn.2d 544, 555, 886 P.2d 564 (1995). There is absolutely no evidence of consideration—in fact, the evidence reflects that Mr. Berg did not even know precisely what it is he was agreeing to. Further, the Callaghans in no way took actual and exclusive possession of the area.

Because this Court can affirm on any ground, the Hadleys ask the Court to affirm the trial court's ruling denying the motion to amend to add an easement claim because as a matter of law, the Callaghans cannot prove that the 1997 document created an easement.

## **V. CONCLUSION**

While Appellants Callaghan have attempted to make this appeal complicated by including multiple legal issues with numerous theories that were not considered by the trial court, the

issues for consideration on this appeal are relatively simple.

Did the Callaghans establish that the trial court erred in excluding incompetent evidence from the record at summary judgment in 2009? No, they did not. If not, then the Court of Appeals need go no further and can affirm the trial court's summary judgment rulings.

But even if this Court determines that the trial court erred on one or more evidentiary issues—even considering all of the evidence put forth at summary judgment—the Callaghans cannot satisfy their steep burden to prove by clear cogent and convincing evidence that they and Mr. Berg recognized and accepted as a true boundary line a specific line physically designated on the ground.

Finally, the Callaghans have not established that the trial court abused its discretion in refusing to allow them to amend the pleadings nearly a year after their claims were dismissed in order to allege a drain line easement.

The Hadleys therefore ask the Court of Appeals to affirm the trial court in all respects.

Respectfully submitted this 19<sup>th</sup> day of August, 2011.

  
CHRISTON C. SKINNER, WSBA # 9515  
KATHRYN C. LORING, WSBA # 37662

No. 66655-0-1

IN THE COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

RICHARD CALLAGHAN and  
SHARON CALLAGHAN, husband  
and wife,

Plaintiffs,

vs.

LINDA HADLEY aka LINDA A.  
MORROW, Trustee of the Linda A.  
Morrow Trust; JOHN H. HADLEY,  
Jr. and LINDA R. HADLEY,  
husband and wife,

Defendants.

Island County  
Superior Court  
Cause No. 09-2-  
00395-0

DECLARATION OF  
SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 19<sup>th</sup> day of August, 2011, via U.S. mails, I delivered, with proper postage affixed thereon, true and correct copies of the following documents:

1. Respondents' Brief; and
2. Declaration of Service;

to:

Philip Buri  
Buri Runston Mumford PLLC  
1601 F Street  
Bellingham, WA 98225

Signed this 19<sup>th</sup> day of August, 2011 at Friday Harbor,  
Washington.

  
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Lisa Henderson