

original

No. 35881-6-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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DIVISION II  
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STATE OF WASHINGTON  
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ROBERT VITOUS,

Appellant.

vs.

THOMAS W. AND JODY C. HARPER,

Respondents.

APPELLANT'S BRIEF

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**A. ASSIGNMENTS OF ERROR**

*Assignment of Error No. 1.* The trial court's finding that the defendant Jody Harper was not aware of the surveyed boundary line was not supported by substantial evidence at trial.<sup>1</sup>

*Assignment of Error No. 2.* The trial court's finding that the plaintiff verbally represented and the parties agreed on a boundary line was not supported by substantial evidence at trial.<sup>2</sup>

*Assignment of Error No. 3.* The trial courts' location of a new boundary line based testimony as to the location of a strand of

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<sup>1</sup> CP 22, Findings of Fact, No. 5, "Neither the plaintiff nor the defendant's were aware of the surveyed boundary line between the respective parcels of land."

<sup>2</sup> CP 22, Findings of Fact, No. 6, "Plaintiff... told the Defendant that was where the boundary line is located." Finding of Fact, No. 8, The Defendants agreed with the Plaintiff that the boundary line was at the location as represented by the

barbed wire on the ground and a concrete post was not supported by substantial evidence at trial.<sup>3</sup>

*Assignment of Error No. 4.* The trial court's finding that the defendants relied upon the representation of the Plaintiff in making improvements was not supported by substantial evidence at trial.<sup>4</sup>

*Assignment of Error No. 5.* The trial court erred by establishing a boundary line between the parties' property based upon estoppel in pais.<sup>5</sup>

*Assignment of Error No. 6.* The trial court erred by establishing a boundary line between the parties' property based upon an express agreement.<sup>6</sup>

#### *Issues Pertaining to Assignments of Error*

1. *At trial, the defendant Jody Harper testified that she purchased lot 42 according to the recorded plat and was provided with a copy of the*

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Plaintiff... Defendant's garden encroached beyond the agreed boundary line further onto the Plaintiff's parcel."

<sup>3</sup> CP 22, Findings of Fact, No. 7, "the location of the barbed wire and concrete marker was approximately twenty to twenty-five feet from the surveyed boundary line or up to a fir tree whichever is closest to the surveyed boundary line. Both parties agree that the fir tree was located on plaintiff's parcel."

<sup>4</sup> CP 22, Finding of Fact No.8, "In reliance on the representation, the Defendants made improvements in their backyard area up to and beyond the agreed boundary line."

<sup>5</sup> CP 22, Conclusion of Law, No 2. "The Defendant's have established the boundary line between the Plaintiff's and the Defendant's property based upon estoppel in pais."

<sup>6</sup> CP 22, Conclusion of Law, No 3. "The Defendant's have established the boundary line between the Plaintiff's and the Defendant's property based upon an express agreement."

*surveyed plat map showing the distances and bearings of her lot. The surveyed corners were not difficult to locate; however, the trial court found that Ms. Harper was not aware of the surveyed boundary line between her lot and the plaintiff's parcel. (Assignment of Error No. 1).*

*2. Testimony conflicted as to what Mr. Vitous said to Ms. Harper regarding the location of their common boundary. Evidence failed to establish that Mr. Vitous solemnly acknowledged a particular boundary line. The trial court erroneously found that Mr. Vitous represented to Ms. Harper and the parties agreed to a specific boundary line. (Assignment of Error No. 2).*

*3. Evidence as to the actual location of a loose wire on the ground marking a boundary was ambiguous and required speculation. The wire was not straight or fixed and disappeared; however, the trial court established a straight line and located it twenty to twenty five feet from a surveyed line or up to a fir tree. (Assignment of Error No. 3).*

*4. Ms. Harper had previously expanded her backyard and encroached upon Mr. Vitous' property prior to the only conversation she had with him. Although Ms. Harper claims she relied on Mr. Vitous' representation, she expanded her encroachment beyond the claimed line. (Assignment of Error No. 4)*

*5. There exists no finding by the trial court that Ms. Harper's reliance was reasonable. Ms. Harper possessed actual knowledge of the surveyed boundary line, which was not hard to locate. The Harpers were not misled or induced into improving up to a line. For these reasons, clear cogent and convincing evidence did not support the trial court's conclusion that Mr. Vitous should be estopped out of legal title to a portion of his property.*

*6. The trial court's adjustment of a surveyed boundary line based upon an express agreement between the parties was erroneous since there existed no express meeting of the minds between landowners. Mr. Vitous did not own the land at the time of the conversation. Evidence was clear that the line was never permanently marked, and the Harpers continued their expansion beyond any boundary onto the Vitous' property.*

## B. STATEMENT OF THE CASE

The controversy in this case surrounds the encroachment of an area approximately 20 feet by a 129 foot length of common boundary line. The Respondents, Jody and Tom Harper own Lot 42 of the Cedar Falls No. 2, Phase 3 Subdivision which was created and developed between 1996 and 1998. Ms. Harper acquired Lot 42 sometime in 1998.<sup>7</sup> She subsequently married Thomas Harper whom was added to the title.<sup>8</sup> The Harpers' Lot 42 is located to the South of the Appellant, Robert Vitous' parcel. The Vitous parcel contains his residence on approximately 20 acres.<sup>9</sup> Robert Vitous grew up on the property, and inherited it from his mother on April 28, 1999.<sup>10</sup>

Although Mr. Vitous has resided on his property since 1934,<sup>11</sup> he did not know the location of the surveyed southern boundary until hiring a survey in 2004.<sup>12</sup> Historically, the Vitous' parcel was in a rural setting and abutted undeveloped property to the South. Mr. Vitous recalled that sometime prior to World War II, the abutting landowner of approximately forty acres to the South constructed a fence to contain livestock.<sup>13</sup> This

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<sup>7</sup> RP page 90, line 19.

<sup>8</sup> RP page 90, line 14.

<sup>9</sup> Ex 1, Ex 2, and Ex 3.

<sup>10</sup> RP page 32, line 24.

<sup>11</sup> RP page 22, line 22.

<sup>12</sup> RP page 36, lines 17 – 19.

<sup>13</sup> RP page 23, line 3 – 24.

fence was obliterated by the Columbus Day storm in 1962.<sup>14</sup> Within a year of the storm, both Vitous' parents and the neighbor to the south logged their respective properties.<sup>15</sup> The fence was never reconstructed. Mr. Vitous cleared brush and mowed an area six to eight feet in width in the southern portion of the property for a firebreak.<sup>16</sup> When asked how he determined where to maintain, Mr. Vitous indicates, "Well, I just guessed at it."<sup>17</sup>

The Cedar Falls Subdivision was performed with three separate plats, the first phase in 1993, second phase in 1994, and the third phase containing the Harper's lot 42 in 1996.<sup>18</sup> During this time, Mr. Vitous rarely visited the southern area of the property, as it is not visible from the Vitous family home and one thousand feet away.<sup>19</sup> By the time the development was complete, the Vitous property would share its southern boundary with fifteen separate much smaller parcels.<sup>20</sup>

In 1998, when Ms. Harper purchased Lot 42, the land was cleared and a residence had been constructed. The surrounding landscaping was not complete; the area abutting the Vitous property was leveled out with

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<sup>14</sup> RP page 24, line 15 – 16.

<sup>15</sup> RP page 25, lines 10-18.

<sup>16</sup> RP page 27, line 1 – 11.

<sup>17</sup> RP page 28, line 14.

<sup>18</sup> Ex. 2, notes 2, 3, and 4.

<sup>19</sup> RP page 38, line 20 – 24.

<sup>20</sup> Ex. 1, Ex. 2.

dirt and other debris.<sup>21</sup> The builder did not point out the corners of the lot to Ms. Harper,<sup>22</sup> but told her "the property goes out so far."<sup>23</sup> Ms. Harper did not attempt to locate the surveyed boundary.<sup>24</sup> Ms. Harper went on to put in her yard and landscaping. After the yard was in, Ms. Harper met Mr. Vitous while he was mowing his firebreak.<sup>25</sup> Ms. Harper claims that Mr. Vitous laid out a wire and pointed to a concrete post on the neighbor's property and said that was the property line.<sup>26</sup> By August 1998, Mr. Vitous, concerned about the Harper's expansion onto his land, installed a "Keep Out" sign in Ms. Harper's landscaping.<sup>27</sup>

In approximately 2001, the Harpers extended their back deck from their home, and then put in a hot tub and patio.<sup>28</sup> Their flower bed area continued to expand into the Vitous area.<sup>29</sup> Ms. Harper was aware there was a ten-foot easement in the area<sup>30</sup> and understood at any given point she may have to remove the improvements in the easement area.<sup>31</sup>

In the spring or summer of 2003, Mr. Vitous informed Mr. Harper that he was having trouble getting his mower into the area he maintained

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<sup>21</sup> RP page 90, line 7.

<sup>22</sup> RP page 110, lines 2-5.

<sup>23</sup> RP page 90, line 8.

<sup>24</sup> RP page 111, lines 10-16.

<sup>25</sup> RP page 91, lines 12 – 20.

<sup>26</sup> RP page 91, lines 20 – 25.

<sup>27</sup> RP page 114, line 18 – 21; page 34, lines 7-9.

<sup>28</sup> RP page 97, lines 3 –4, Ex. 11.

<sup>29</sup> RP page 34, lines 21- 24.

<sup>30</sup> RP 116, line 22.

as a firebreak due to the Harpers' encroachments.<sup>32</sup> Mr. Vitous then commissioned a professional survey of his property lines, which was recorded in May 2004.<sup>33</sup> The survey disclosed the full extent of the Harper's encroachments.<sup>34</sup> According to the surveyor's testimony, there had been numerous pre-existing surveys of the subject boundary line.<sup>35</sup> Markers had already been in place predating this controversy.<sup>36</sup>

In October of 2004, Mr. Vitous commenced litigation against the Harpers to Quiet Title.<sup>37</sup> The Harpers answered and claimed the disputed property stating as affirmative defenses recognition and acquiescence as well as estoppel in pais.<sup>38</sup>

## **D. ARGUMENT**

### **1. Standard of Review**

The standard for reviewing factual findings by a Court of Appeals is to determine if the trial court's factual findings are supported by "substantial evidence." *State v. Halstien*, 122 Wn.2d. 109, 128-129, 857 P.2d 270, 281 (1993). Substantial evidence exists only if the record

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<sup>31</sup> RP 117, lines 3-6.

<sup>32</sup> RP 130, line 8, 20-23.

<sup>33</sup> Ex. 2.

<sup>34</sup> Ex. 2, Ex. 3.

<sup>35</sup> RP 7, line 19.

<sup>36</sup> RP 12, line 24.

<sup>37</sup> CP 1.

contains “evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.” *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 157-158, 776 P.2d 676 (1989), *RAP* 2.5.

In reviewing legal issues such as estoppel or an express agreement, this court should undertake the same inquiry as the trial court and make an independent determination by reviewing the legal issue de novo. *State v. Campbell*, 125 Wn.2d 797, 888 P.2d. 1185 (1995).

## **2. Estoppel in Pais**

### **2.1 Elements of Estoppel**

Estoppel in Pais, or Estoppel by conduct, was clarified by the 1947 case of *Thomas v. Harlan*, 27 Wn.2d 512, 178 P.2d 965 (1947) and the 1971 case of *Burkey v. Baker*, 6 Wn.App. 243, 492 P.2d 563 (1971).

Estoppel can be summarized by the following elements:

- (a) An admission, act or statement by one of two adjoining landowners inconsistent with a claim later asserted;
- (b) Action by the other party in reasonable reliance on the act, admission or statement;

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<sup>38</sup> CP 5.

(c) "Injury" to the relying party if the first party is allowed to repudiate his or her original position in favor of a claim later asserted. *Burkey*, 6 Wn.App. at 244, 248.

The burden of proof for all of the above is high: Title to real property is a most valuable right, which will not be disturbed by estoppel unless the evidence is clear and convincing. See *Thomas*, 27 Wn.2d at 518.

## **2.2. Objection or Representation?**

In the boundary adjustment context, the case law makes it clear that in order for a neighbor to be estopped out of real property, he or she must make some kind of "representation" to the other neighbor which indicates the boundary is where it is not; in other words, a representation that *induces* or *invites* the neighbor to make improvements over the true line. *Tyree v Gosa*, 11 Wn. 2d 572, 119 P.2d 926 (1941). In general, the principle is that a person shall not be permitted to deny what he or she has once solemnly acknowledged. *Leonard v. Washington Employers, Inc.*, 77 Wn.2d 271, 461 P.2d 170 (1969), citing *Harmon v. Hale*, 1 Wash. Terr. 422 (1874).

Misunderstandings between neighbors and their boundary lines are common throughout case law in Washington. In the *Tyree* case, one party alleged that a neighbor told them that their structure was on the correct

side of the line when in fact it was over. But the neighbor indicated that he told them they were building on his land. The other side then replied that they were relying on stakes set by their vendor. The Supreme Court found that no representations induced the other party to locate their building where they did; instead the Court found some evidence that the party fixed the location of their building upon the representation of their non-party vender.

In balancing the equities, the *Tyree* Court stated: "It is very difficult to see how one can get an equity in the land of another by merely building upon it." *Tyree*, 11 Wn.2d at 580. The Court went on to note the effect of the trial court's finding of estoppel was to condemn a party's strip of land for the private use of another, contrary to the provisions of the constitution relating to condemnation. *Wash. Const. art. 1, § 16*, (amend. 9).

In the present case, Ms. Harper testified that after purchasing the home, she commenced landscaping activities in the northern portion of her property up to some trees and vegetation based upon her perception of the way the land was laid.<sup>39</sup> She testified that:

I purchased the house from the builder, and he just told me that the back yard was – it was flattened out already, but there was debris on it and things, and he just said the property goes out so far, and it was pretty level with Tom

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<sup>39</sup> RP 112, lines 2-6, 21-25.

Paine's already, and level all the way down to the other properties, as you see down Cedar Falls, and I was okay with that.<sup>40</sup>

She was not concerned about the surveyed boundaries at the time.<sup>41</sup> Ms. Harper did not ask for Mr. Vitous' permission to landscape in the area that included their common boundary.<sup>42</sup>

It was subsequent to some of the landscaping improvements in 1998 that Ms. Harper had a single conversation with Mr. Vitous—a conversation that serves as the basis for the trial court's ruling. Mr. Vitous was working on his firebreak at the time. Ms. Harper testified on direct examination that Mr. Vitous:

put this barbed wire fence, just laid it on the ground, and it was kind of jagged and, you know, I mean, it wasn't straight, but it was, you know, could kind tell where the line was. And he pointed over to the post and he said this was the property line, and I was okay with that...<sup>43</sup>

Ms. Harper at times speaks to the barbwire as a fence although admits that she never saw a fence in the area.<sup>44</sup>

Mr. Vitous' recollection of the conversation with Ms. Harper was different. He did not recall any specific statements that he made to Ms. Harper, testifying: “It’s just casual, idle talk, I’m running my tractor and

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<sup>40</sup> RP page 90, lines 5 – 11.

<sup>41</sup> RP page 112, lines 12 – 13.

<sup>42</sup> RP page 20 –21.

<sup>43</sup> RP page 91, line 20 – 25.

<sup>44</sup> RP 115, lines 114.

my mower."<sup>45</sup> Mr. Vitous explained that he put in a concrete post in an area where he thought his Southeastern boundary corner was because he was concerned that the Harper's landscaping was continually getting bigger.<sup>46</sup> On cross examination, Mr. Vitous indicated that he did point out the wire to Ms. Harper as a boundary, but the Harpers "...didn't believe me, otherwise they'd of stayed on the other side."<sup>47</sup> Soon after the conversation, by August 1998, Mr. Vitous placed the "keep out" sign in the middle of Ms. Harper's garden.<sup>48</sup> It was not until the survey work was done in 2004, that Mr. Vitous realized that the Harpers had made additional expansion to their backyard area such as installing their hot tub.<sup>49</sup>

Mr. Vitous' one time remarks to Ms. Harper do not amount to such a "solemn acknowledgment" that is apparent in other estoppel cases. *Leonard*, 77 Wn. 2d at 80. Nor should it have induced Ms. Harper to make improvement over and beyond the "keep out" sign. It would be more probable that as in the *Tyree* case, Mr. Vitous was simply objecting to the Harper's location of landscaping and demonstrating that enough was

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<sup>45</sup> RP page 31, lines 25, page 32, lines 1-5.

<sup>46</sup> RP 50, lines 1-3.

<sup>47</sup> RP page 51, lines 17-19.

<sup>48</sup> RP page 68, lines 6-10.

<sup>49</sup> RP page 40, lines 2-13.

enough. As such Mr. Vitous' remarks do not amount to a representation as to the boundary. The trial court's finding of such is erroneous.

### **2.3. Speculation as to actual Location of New Line**

The trial court in this case was presented with the Harper's argument to depart from a pre-existing surveyed line and locate a boundary line based upon evidence of barbed wire temporarily strung out on the ground. The court noted in its closing remarks, "...a piece of wire on the ground doesn't help me determine a boundary line at all. It's not there any more. It wasn't secured."<sup>50</sup> Regardless of this comment, the trial court did establish a new line as "approximately 20-25 feet from the surveyed boundary line or up to a fir tree, whichever is closest to the surveyed boundary line."<sup>51</sup>

A well-defined boundary must be established in boundary disputes. For example, when courts analyze the alternative implied boundary agreement doctrine of mutual recognition and acquiescence, failure to prove a well-defined line is fatal to the claim. *Scott v. Slater*, 42 Wn.2d 366, 369, 255 P.2d 377 (1953). Much of the case law in Washington State where boundaries have been established by estoppel, involve certain definite monuments demarcating and defining line. See *Thomas v. Harlin*,

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<sup>50</sup> RP page 160, line 11 – 13.

27 Wn.2d 512 (1947) (an old fence line); *Burkey v. Baker* 6 Wn.App. 243 (1971) (row of trees along badminton court). The *Thomas* court noted occupation to a "certain line" as well. *Thomas*, 27 Wn.2d at 518.

The coincidence between the distance where the Harpers and their witness chose to locate the wire from the surveyed measurement of their encroachment was convenient and self-serving. Mr. Vitous' trial exhibit shows the extent of landscaping to be 25.31 feet north of the surveyed line.<sup>52</sup> This was relied upon by the Harper defense and no other point of reference or measurement was made available by the Harpers. Ms. Harper was asked to mark on the exhibit where she believed the barbwire was located. She testified, "Well, it's kind of hard to tell, but it was kind of like that."<sup>53</sup> When asked about the concrete post distance from the survey line, Ms. Harper concluded, "It was rough-about 20, 25 feet."<sup>54</sup> She also indicated the barbwire was about 20-25 feet from the survey line.<sup>55</sup>

The Harpers called their neighbor from the adjacent lot in the plat whom had discussed the boundary location with them. When asked about the barbed wires location, he indicated, "I hate to guess, I mean...I

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<sup>51</sup> CP 22, Finding of Fact No. 7.

<sup>52</sup> Ex 3.

<sup>53</sup> RP Page 94, lines 22-23.

<sup>54</sup> RP Page 93, line 2.

<sup>55</sup> RP Page 93, lines 12-14.

couldn't really tell you, exactly."<sup>56</sup> The neighbor estimated that a concrete post, located east of the Harpers Lot along Mr. Vitous' and the neighbor's eastern boundaries was approximately 20-25 feet from where the survey marker is today, however the post was removed before the survey was marked.<sup>57</sup>

In departing from the preexisting surveyed line, the trial court was forced to arbitrarily establish a line and in so doing, fashioned a straight line parallel to the surveyed line. The evidence did not support this finding. Even Ms. Harper testified that the wire "just laid it on the ground, and it was kind of jagged and, you know, I mean, it wasn't straight, but it was, you know, could kind tell where the line was."<sup>58</sup> On cross-examination, Ms. Harper testified:

Q: (By Mr. Frey) And, so, you testified that this barbed wire was not straight?

A: Right, it's not. It wasn't straight.

Q: (referring to exhibit) But here, you've drawn it straight?

A: Well, barbed wire – it was a used barbed wire, it was rusty, and there's no way you can, you know, straighten it. It's curvy barbed wire, it was old.

Q: It was laying on the ground?

A: It was laying on the ground, in the dirt.

Q: Did it go into the dirt, disappear, and come back up?

A: No, it was just – he laid it just jaggedy (sic).<sup>59</sup>

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<sup>56</sup> RP Page 77, lines 18-20.

<sup>57</sup> RP Page 74, lines 24-25, Page 75, lines 1-4, 22-24.

<sup>58</sup> RP page 91, line 20 – 25.

<sup>59</sup> RP page 106, lines 7 – 17.

There was no physical evidence presented as to the measured distance of the wire from the line, since as Ms. Harpers explained, the wire disappeared.<sup>60</sup> Ms. Harper expressed concern about the danger the wire posed to her young children whom played in the area<sup>61</sup> but she did not know how long the wire was there after her one conversation with Mr. Vitous.<sup>62</sup> Her husband, Mr. Harper testified that his recollection was that the wire could have been there at least three weeks or four weeks<sup>63</sup> although he was not a party to the one conversation between Mr. Vitous and Ms. Harper.<sup>64</sup>

The court had to guess to locate a new line, by speculating on distances and ultimately decided to create a straight line with unrebutted evidence to the contrary. This decision is not supported by the high burden of proof on the Harpers. "It requires very clear, cogent, and convincing evidence is required to estop an owner out of legal title to real property." *Tyree*, 11 Wn.2d at 578.

#### **2.4. Harper Did Not Change Position or Rely on Vitous**

Estoppel case law suggests that someone in the Harpers' position must be misled or deceived by the objective manifestations of Mr. Vitous

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<sup>60</sup> RP page 101, line 11 –12.

<sup>61</sup> RP page 92, lines 2 – 6.

<sup>62</sup> RP page 101, line 11 – 12.

<sup>63</sup> RP 128, lines 1-23.

<sup>64</sup> RP 127, line 20.

into believing that she could make changes without his objection. *Burkey*, 6 Wn.App at 248. As discussed in detail below, Ms. Harper purchased Lot 42 and was not concerned with its boundaries.<sup>65</sup> She instituted landscaping based upon the homebuilder's remarks and her perception of the lay of the land and brush.<sup>66</sup> Her one conversation with Mr. Vitous came subsequent to her encroachment upon his property. Hypothetically, had the parties never met, the Harpers would have continued in the expansion and development of their yard based on the perception of the land. The installation of a deck and hot tub closer to their residence some years later would have resulted since neither cared to measure out the distances prescribed for their lot on the plat.

The Harpers failed to demonstrate a change in position after Ms. Harper's conversation with Mr. Vitous. This comes in contrast to so many of the estoppel cases where improvements are substantial. See *Thomas v. Harlan, supra* (garage built on line), *Magart v. Fierle*, 35 Wn.App. 264, 666 P.2d 386 (1983) (cabin, structures, retaining wall). Case law requires injury if Mr. Vitous is allowed to repudiate his position; however, the improvements made by the Harpers were not of a permanent nature as required. *Roy v. Cunningham*, 46 Wn.App 409, 731 P.2d 526 (1986), rev. den. 108 Wn.2d 1018 (1986). Ms. Harper acknowledged at any point in

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<sup>65</sup> RP Page 112, lines 12-13.

time, she believed she could be forced to remove the landscaping because an underlying easement existed along the course of her boundary.<sup>67</sup>

#### **2.4. No Finding of Reasonable Reliance Fatal to Harper's Claim**

Although elements of a statement or act inconsistent with a claim afterwards asserted, action by the other party on the faith of such statement, and injury are necessary to establish estoppel, they are not necessarily alone sufficient. "Absent fraud or misrepresentation, only those who have reasonably relied upon the act or representation may raise an estoppel. Further, the party claiming estoppel must have been misled by the representation made." *Burkey*, 6 Wn.App. at 248, citing *Leonard v Washington Employers, Inc.* 77 Wn 2d 271, 461 P.2d 538 (1969), and *Den Adel v. Blattman*, 57 Wn.2d 337, 357 P.2d 159 (1960).

Critical to the analysis in the present case is the court's finding that the parties' surveyed common boundary was not hard to locate.<sup>68</sup> So when focusing on reliance, this Court should examine the reasonableness of reliance and the right to rely on the objective manifestations of the other party. In the *Leonard* case, an employee had relied on a draft employee

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<sup>66</sup> RP Page 111.

<sup>67</sup> RP page 117, lines 3-6.

<sup>68</sup> CP 22, Finding of Fact No. 9. "The surveyed boundary line was not hard to find. The Plaintiff's South East corner had been established long ago, and referred to in many previous surveys of record."

contribution plan, which was subsequently modified when finalized. The employee disclaimed ever receiving a copy of the final plan, although conceded that a copy was available for his scrutiny at any time. *Leonard*, 77 Wn.2d at 276. The Court mandated that in order to create an estoppel, it is necessary to prove that:

the party claiming to have been influenced by the conduct or the declarations of another to his injury was himself not only destitute of knowledge of the state of facts, but was also destitute of any convenient and available means of acquiring such knowledge; and that where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.

*Leonard*, 77 Wn.2d at 280, citing 11 *Am. & Eng. Ency. Law* (2d Ed.) p. 434. See also *Geoghegan v. Dever*, 30 Wn.2d 877, 194 P.2d 397 (1969).

Similarly, Estoppel does not apply in this case because the Harpers had the means and ability to determine where their surveyed boundaries were at any time; they were not hard to find.<sup>69</sup> Moreover, contrary to the trial court's finding that Ms. Harper was not aware of the surveyed boundary, the undisputed evidence was that the Ms. Harper purchased Lot 42, knowing it was a portion the Cedar Falls 2 Phase 3 Subdivision.<sup>70</sup> She knew she owned a specific lot 42 out of the subdivision.<sup>71</sup> In fact the plat

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<sup>69</sup> CP Finding of Fact No. 9.

<sup>70</sup> RP Page 110, lines 15-17.

<sup>71</sup> RP Page 110, lines 18-20.

map shows both precise distances and bearings for lot 42.<sup>72</sup> Ms. Harper was cross-examined concerning the subject:

Q: You knew that Lot 42 meant this area on this map?

A: Right, okay.

Q: You had that with your title insurance package?

A: Probably.

Q: And from this – this map, you could see clearly seventy point three nine feet?

A: I didn't look at those.

Q: You didn't look at the –

A: Well, I mean, a single mother, why would I go and look and go – I'm going to measure each thing out? I did not do that.

Q: You just went ahead and put in the lawn based on the way it looked?

A: Well, the way that it was measured up to Tom Paine and the people down the road, yes.

Q: And what measurements were those?

A: Just butted up to Tom Paine's, and it was – the way that it was down the Cedar Falls. It was the same –

The trial court's decision rewarded Ms. Harper's ignorance and lack of diligence concerning the location of her true boundary. From the above testimony, it can be concluded that Ms. Harper had actual and constructive notice of the recorded and surveyed plat. See *Kendrick v. Davis*, 75 Wn.2d 456, 452 P.2d 222 (1969).

The court's decision unfairly shifted the burden to Mr. Vitous to establish the boundary for Ms. Harper's landscaping, even though she was the party making improvements on the land she knew to be surveyed. It would not be reasonable to rely on a neighbor's statement in light of the

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<sup>72</sup> Ex. 1.

above. Interestingly, the trial court failed to note that at the time Ms. Harper claims to have been shown the boundary by Mr. Vitous in 1998, he did not own the property; he inherited it in April 1999.<sup>73</sup> Such an absence of reasonableness, with no specific finding of reasonable reliance on the part of Ms. Harper should be fatal to the claim of estoppel.

### **3. Express Agreement**

#### **3.1. Theory Not Pled by Harpers**

The final argument in Appellant's brief is to the trial court's legal conclusion that the Harpers have established the boundary line based upon an express agreement.<sup>74</sup> The Harpers did not plead this theory as a counter claim or as an affirmative defense.<sup>75</sup> Affirmative defenses that are not properly pled are deemed waived. *DeYoung v. Cenex Ltd.*, 100 Wn.App. 885, 1 P.3d 587 (2000). The record does not indicate that the Harpers moved to amend their pleadings to include the theory, nor was there a finding by the trial court that the Harpers' pleadings were deemed amended to conform to the evidence. The Harpers were allowed to argue for an express agreement, and both sides argued the theory on summation.

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<sup>73</sup> RP page 32, line 24.

<sup>74</sup> CP 22, Conclusion of Law No. 3.

<sup>75</sup>CP 5.

### 3.2. Elements of Express Agreement

The elements of a boundary adjustment made by an express agreement have been established as follows:

(a) There must be either a bona fide dispute between two property owners as to where their common boundary lies upon the ground or else both parties must be uncertain as to the true location of such boundary;

(b) the owners must arrive at an express meeting of the minds to permanently resolve the dispute or uncertainty by recognizing a definite and specific line as the true and unconditional location of the boundary;

(c) they must in some fashion physically designate that permanent boundary determination on the ground; and

(d) they must take possession of their property by such occupancy or improvements as would reasonably give constructive notice of the location of such boundary to their successors in interest;

*Johnston v. Monahan*, 2 Wn.App. 452, 457, 469 P.2d 930, 933 (1970).

### 3.3. No Uncertainty or Bona Fide Dispute between Owners

As argued above, contrary to the court's finding, Ms. Harper had actual knowledge that her Lot 42 had been surveyed and the corners were not hard to find. She had the precise dimensions and bearings of her Lot 42 available at all times during this controversy.<sup>76</sup> The only reason that the Harpers would be uncertain as to the location of their boundary was that they failed to examine their deed, accompanying plat map or make any attempt to locate its corners. When asked if she ever attempted to locate her Northwest corner (which would abut Vitous' property), Ms. Harper answered, "No... Hun-uh. Like I said it drops off down there.

Just like Bob said, why would you want to go down to the drop-off area?"<sup>77</sup> Such would not have been bona fide uncertainty, rather, by not locating her boundary; Ms. Harper was free to assume her back yard was much larger than it actually was. Uncertainty, to the extent "to warrant the calling of a surveyor" is required. *Rose v. Fletcher*, 83 Wn. 623, 628, 145 P. 989 (1915).

Mr. Vitous, on the other hand, inherited his parcel that was not part of the Cedar Falls plat. As discussed above, it was not until the Harpers' expansion started blocking his mower, that Mr. Vitous' uncertainty warranted calling for a surveyor. This was done in 2004.

This is not a case with evidence of a bona-fide dispute between landowners. The testimony was that Ms. Harper met Mr. Vitous, they had some discussion of a line, and Ms. Harper, "was okay with that"<sup>78</sup> just as she had been when the builder indicated to her that the property went out so far.<sup>79</sup> Ms. Harper and Mr. Vitous did not discuss the line again, even after Mr. Vitous came into ownership of the parcel. There exist no bona fide dispute or uncertainty "between property owners" so the theory should fail. See *Johnston*, 2 Wn.App. at 457.

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<sup>76</sup> RP page 111, 2-9.

<sup>77</sup> RP page 107, lines 10 – 18.

<sup>78</sup> RP page 91, lines 24 – 25.

### 3.4. No Express Agreement with Physical Monumentation

The requirement for some express meeting of the minds with the intent to permanently locate, or forever resolve the dispute or uncertainty is not present. It was undisputed that Mr. Vitous placed a "keep out" sign inside the Harpers' landscaping sometime after their meeting. The wire referenced in their conversation soon disappeared. The *Johnston* court indicated that neighbors must "physically designate" their agreed line on the ground." *Johnston*, 2 Wn.App. at 457. The trial court's finding was that the Harpers made improvements in their backyard area up to and beyond the agreed boundary line.<sup>80</sup> There existed no fence or other monumentation to clearly mark any line. In fact, the Harper's garden encroached beyond any agreed boundary further onto Mr. Vitous' parcel.<sup>81</sup>

Another distinction by the *Johnston* case was that the Court did not adjust the boundary based upon an express agreement because the agreed line was marked only at one end by a large piece of concrete. The Court writes, "to mark one point only on a line is to not mark it at all." *Johnston*, 2 Wn.App. at 459. The trial court in the present case references a concrete post located on a neighbor's property and a wire, which was only

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<sup>79</sup> RP page 8 – 11.

<sup>80</sup> CP 22, Finding of Fact No. 8.

<sup>81</sup> CP 22, Finding of Fact No. 8.

temporarily placed. Such evidence does not meet the criteria for an express agreement.

The Division II appellate decision in *Piotrowski v. Parks*, 39 Wn.App. 37, 691 P.2d 591 (1984) indicates that the line agreed upon must not only be physically designated on the ground, but "by the erection of a structure capable of evoking inquiry as to its significance." *Piotrowski*, 39 Wn.App. at 43 and 46. Certainly no structure existed sufficient to raise inquiry notice of the location of the line.

Finally, the trial court's decision to find an agreed line and an express agreement is not warranted given that Mr. Vitous did not hold legal title to any of the property at the time of the conversation with Ms. Harper in 1998. The trial court's conclusion begs the question: can a non-owner make an agreement, which effectively conveys land as an exception to the Statute of Frauds?

#### **D. Conclusion**

Mr. Vitous is losing valuable land based upon one conversation he had with Ms. Harper that took place before he even owned the subject property. The Harpers are being rewarded with valuable land for disregarding the pre-existing surveyed distances of their Lot 42, and making improvements without regard or concern of land boundaries. Ms.

Harper had already encroached by landscaping outside of her surveyed land, prior to meeting Mr. Vitous.

The trial court's ruling is not equitable or supported by sufficient evidence. The trial court fashions a new boundary line by guessing at the location of a loose wire that had been temporarily placed on the ground. It failed to address whether it would be reasonable to rely on a single conversation instead of a survey. The court's conclusion is not supported by the clear, cogent and convincing evidence required to adjust boundaries by estoppel. Nor is the court's conclusion that an express boundary line agreement had been made since no line was permanently marked and the Harpers made continued expansion beyond any boundary line and further into Mr. Vitous' property.

DATED: May 25, 2007

Respectfully Submitted,



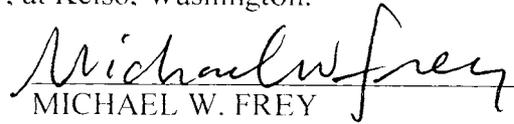
MICHAEL W. FREY  
WSBA# 26087  
Attorney for Defendant  
Robert Vitous

CERTIFICATE

I certify that on this day, I caused a copy of the foregoing Brief of Appellant to be delivered, and mailed, postage prepaid to Respondent's attorney, addresses as follows:

Darrell Ammons  
1315 14<sup>th</sup> Avenue  
Longview, WA 98632

DATED this 25<sup>th</sup> day of May, 2007, at Kelso, Washington.

  
MICHAEL W. FREY

**DECLARATION OF MAILING**

On the 25<sup>th</sup> day of May, 2007, I caused one true and correct copy to be served on DARREL S. AMMONS, JR., by mail and personal service and one original and two copies of the APPELLANT'S BRIEF to be served upon the WASHINGTON STATE COURT OF APPEALS DIVISION TWO listed below at their respective address as follows:

DARREL S. AMMONS, JR.  
PO Box 2567                      fax: 425-7883  
Longview, WA 98632

WASHINGTON STATE COURT OF APPEALS  
DIVISION TWO                      fax 253-593-2806  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

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STATE OF WASHINGTON  
BY \_\_\_\_\_ DEPUTY

by depositing same, in a properly addressed and postage paid envelope, with the United States Postal Service containing a copy of the document on which this declaration appears.

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

Executed at Kelso, Washington, on the 25<sup>th</sup> day of May, 2007.

  
DIANA L. DEWEY