

No. 35881-6-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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ROBERT VITOUS,

Appellant,

vs.

THOMAS W. AND JODY C. HARPER

Respondents.

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STATE OF WASHINGTON  
COUNTY OF KING  
DEPT. OF  
BR-2

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RESPONDENTS' BRIEF

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## A. STATEMENT OF THE CASE

In 1998, Respondent, Jody Harper, purchased a parcel of property with a home constructed on it located at 141 Ruby Place, Kelso, Washington. At the time of purchase, the backyard to the property was unfinished and not landscaped. Ms. Harper's adjoining neighbor, to the north, is Robert Vitous, the Appellant. RP 89, lines 10-22; RP 112, lines 2-6; RP 109, lines 14-17; CP22, Findings of Fact., No. 3.

In 1999, Respondent, Jody Harper, married Respondent Tom Harper. Prior to the marriage, in the summer of 1998, the Respondent, Jody Harper, had a conversation with the Appellant regarding the location of the boundary between their respective properties. At the time of the conversation, the location of the common boundary was unknown. RP 90, lines 13, 14; RP 96; lines 18-24; RP 36; lines 17-23.

During the conversation, the Appellant pointed to a strand of barbed wire, that ran the width of the Harper parcel, and told Jody Harper this is where the boundary line is. Further, the Appellant pointed to a concrete monument placed by him at the southeast corner of his parcel and told Jody Harper that the monument

marked the boundary line. The concrete monument, located approximately 50 feet from the Respondent's property, was in line with the strand of barbed wire approximately 20 feet north of a survey line established in 2004, by Hampstur Corporation. RP 91, lines 6-25; RP 92, lines 1-16; RP 54, lines 14-18; RP 74, lines 24-25; RP 75, lines 1-4.

Jody Harper was in agreement that the boundary line was where the Appellant showed it to her. RP 92, lines 1-11.

In reliance on the Appellant's representations regarding the location of the boundary, the Respondents developed their backyard. They built a patio, extended a deck, installed a hot tub, built a fence, and cultivated a flower garden. RP 96, line 25; RP 97, lines 1-24.

In reliance on the Appellant's representation regarding the location of the boundary, the Respondents spent approximately \$5,000.00 in developing their backyard.

At no time prior to 2003, did Mr. Vitous, demand, request, or otherwise communicate to the Respondents that their backyard improvements were encroaching upon his boundary line. RP 54, lines 9-13. The issue came up on only one occasion. In 2003, while Mr. Vitous was mowing, he stopped to let Mr. Harper know that he

had trouble getting his mower through because the Harper's garden had expanded. RP 130, lines 1-25; RP 131, lines 1-14.

Historically, the boundary as pointed out by Mr. Vitous is in the area of an old animal fence line. The animal fence is referenced on the survey done in 2004, by the Hampstur Corporation. RP 47, lines 23-25. The location of the old animal fence line is consistent with the location of the Appellant's southern boundary with respect to other adjoining parcels to the west of the Appellant's property. RP 47, lines 11-25.

Prior to 2004, an adjoining landowner to the west, by the name of Larry Lewis, reached an agreement with Mr. Vitous regarding the Appellant's common southern boundary so that Mr. Lewis could build a fence. The fence was constructed along the old animal fence line. After the survey by Hampstur Corporation was completed in 2004, the Appellant discovered that the fence was constructed north of the survey line. Therefore, the Appellant paid Mr. Lewis to move the fence to conform to the 2004 survey line. RP 45, lines 8-13, RP 47, lines 11-25.

The 2004 Hampstur Corporation survey locates the Appellant's southern boundary line approximately 20 feet south of where the Appellant showed the boundary line to Mrs. Harper. Ex.

2. The boundary line on the 2004 survey plat intersects the Respondents' completed backyard, including the patio, the deck, the garden, and the hot tub. Ex. 2.

After trial, the court quieted title to the disputed property, in favor of the Respondents.

## B. ARGUMENT

### 1. Standard of Review

In *Pilcher v. Dep't of Revenue*, 112 Wn, App. 428, 435, 49 p.3d 947 (2007), the Court of Appeals stated the substantial evidence standard as follows:

"[C]hallenged findings will be binding on appeal if they are supported by substantial evidence in the record. '*In re Contested Election of Schoessler*, 140 Wn.2d 368, 385, 998 P 2d 818 (2000)." Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *Schoeseller*, 140 Wn. 2d at 385 (quoting *State v. Hill*, 123Wn.2d 641, 644, 870 P2d 313 (1994)).

On appeal, we view the evidence in the light most favorable to the prevailing party. *Bennett v. Dep't of Labor & Indus.*, 95 Wn.2d 531, 534, 627 P2d 104 (1981). Under the substantial evidence standard, we "will not substitute our judgment for that of the fact finder. Instead, [this Court] accept[s] the fact finder's views regarding the credibility of witnesses and the weight accorded to reasonable but competing

inferences." *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 99 Wn. App. 127, 133-34, 990 P.2d 429 (1999), *review granted*, 141 Wn.2d 1011 (2000).

In, *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 157, 776 P.2d 676 (1989), the Washington Supreme Court stated the substantial evidence rule as follows:

Where the trial court has weighed the evidence our review is limited to determining whether the findings are supported by substantial evidence and, if so, whether the findings in turn support the trial court's conclusions of law and judgment. Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.

## **2. Substantial Evidence Supports the Trial Court's Determination of Estoppel in Pais**

### **2.1 Elements of Estoppel in Pais**

Estoppel in pais is a method by which boundaries between adjoining parties may be established. The establishment of a boundary by estoppel requires three elements:

- 1) An admission, statement, or act inconsistent with the claim afterwards asserted,
- 2) Action by the other party on the faith of such admission, statement or act, and
- 3) Injury to such other party resulting from allowing the first party to contradict or repudiate such admission statement or act.

The burden of proof required to establish estoppel in pais is clear and convincing evidence.

*Lilly v Lynch*, 88 Wn. App. 306, 318, 945 P.2d 727 (1997)

## **2.2 Admission/Statement/Act**

There is an abundance of evidence in the record to establish the admission/statement/act elements. During cross-examination, the Appellant stated in part as follows:

Q: Is it not true that as part of that conversation you had with Mrs. Harper, you stretched out a piece of barbed wire?

A: No, never stretch out any wire. There had been a wire there and they covered it all up. I put that wire there long before any development ever started up there.

Q: When did you put the barbed wire there?

A: Well, probably four or five years before any development started in there.

Q: So, before 1990?

A: I suppose.

Q: Did you point to that barbed wire and tell Mrs. Harper, "This is where the boundary line is."?

A: I pointed to it, yes. And they exceeded that, they just [inaudible] it at all. That's why we're here, Mr. Ammons, they just went past that.

. . . .

Q: Did you convey to her that's where the boundary was?

A: But they didn't believe me, otherwise they'd of stayed on the other side and none of us would be here today.

Q: The question is: Did you convey to her that's where the boundary was?

A: Yeah, right.

Q: And that piece of wire –

A: They didn't believe it.

Q: That piece of barbed wire pretty much ran the entire width of the Harper line; correct?

A: It probably did. You remember that they filled over that and probably pushed it quite a ways when the contractor put the fill material in, covered it all up, you could hardly see any of it any more.

RP 50, lines 24, 25; RP 51, lines 1-25; RP 52, lines 1-5.

During direct examination, the Respondent, Jody Harper, testified in part as follows:

Q: Now, at some point, you had a conversation with Mr. Vitous?

A: Right.

Q: About the – your back boundary line?

A: Right

Q: I want you to tell the Court what happened – strike that.

How did that conversation come up?

A. Well, Bob always mows back there along the line.

Q: When you talk about “Bob” you’re talking about Mr. Vitous?

A: Mr. Vitous.

Q: Okay.

A: He mowed a couple times a year, just flattened the grass around there. And I was having a yard put in, and I happened to be out there, and he came – he was with his tractor, and he happened to be out there and he was mowing it, and then

he was blading it, to make like a drop off from where my property comes, and to – kind of drops off, and then where – where a fire line, or wherever the brush was, and he was out there he was blading it, and then he had 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, I was just afraid, because my kids, at that time, were twelve and eight, that the barbed wire was kind rusty and that they would – might get their feet on it. If they were playing ball back there, they could step on it. And I told Bob, you know, my kids might step on that, and he said, no, they'll be fine. He said they can

come over and pick blackberries whenever they want.

So, we agreed that that was the line, and that's what I always went by. I, you know, put flower beds in there, and we continued to mow our grass and he continued to do his mowing, and nothing came up.

Q: When you say he pointed to a post, what post are you talking about?

A: It was a big, white – big, white cement post that was over here in Tom Paine's area, about right here, in that area

MR. FREY: I'm sorry, I apologize, but I couldn't see where she pointed.

Q: (By Mr. Ammons:) Why don't you go ahead and point so Counsel can see.

A: (Witness indicating.) It was right along Tom Paine's – up here, where this dotted line is, about right there.

Q: Okay. Do you know where the survey line is now?

A: Yes.

Q: About how far north of the survey line, or the survey marker on Tom Paine's property, was the concrete post?

A: It was rough – about twenty, twenty-five feet.

Q: The barbed wire that was strung out, did it run the width of your property?

A: Um-hum; right.

Q: And do you know where the survey line is today?

A: Yes.

Q: Approximately how far north of the survey line was the barbed wire strand, laid by Mr. Vitous?

A: From the – where the survey is now?

Q: Correct.

A: To where the – where the barbed wire was?

Q: Yes.

A: It's about twenty, twenty-five feet.

RP page 90, lines 24-25; RP page 91, lines 1-25; RP 92, lines 1-25; RP 93, lines 1-14.

A: So, the barbed wire came across here and then it kind of goes down, you know, so it just laid along there, and then there's this big tree there, it's a pretty massive tree.

Q: Okay. Did it go all the way to the tree?

A: Yes.

Q: And you saw Mr. Vitous lay this barbed wire?

A: Yes, I did. I had a conversation with him about my kids.

Q: Did you have any question in your mind that that was going to be the boundary line for the back of your property?

A: I just felt that Bob – Mr. Vitous – knew what – he's lived there a lot longer than I

have, and I just – the – all the property along there lined up with that, and – from, you know, if you look from Tom Paine's area down, it looked like it lined up all the way down Cedar Falls. So, I was okay with that. I didn't question him; didn't say, are you sure?; I just – that was fine.

Q: Were you in agreement with him?

A: I was in agreement with him.

RP 95, lines 22-25; RP 96, lines 1-17.

It is clear, from the testimony, that the Appellant made a statement/admission as to the location of the boundary in 1998. The Appellant also acted in physically pointing to the barbed wire and the concrete post to represent the location of the boundary to Ms. Harper.

### **2.3 Reliance Upon the Appellant's Representation**

There is ample evidence in the record to support the Court's determination that the

Respondents relied on the Appellant's representation of the boundary line. During direct examination, the Respondent, Jody Harper, testified in part as follows:

Q: And you saw Mr. Vitous lay this barbed wire?

A: Yes, I did. I had a conversation with him about my kids.

Q: Did you have any question in your mind that was going to be the boundary line for the back of your property?

A: I just felt that Bob – Mr. Vitous – knew what – he's lived there a lot longer than I have, and I just – the – all the property along there lined up with that, and – from, you know, if you look from Tom Paine's area down, it looked like it lined up all the way down Cedar Falls.

So, I was okay with that. I didn't question him; didn't say, are you sure?; I just – that was fine.

Q: Were you in agreement with him?

A: I was in agreement with him.

RP 96, lines 3-17.

Q: When you made these improvements, did you rely on Mr. Vitous's representation with the barbed wire where the boundary line was?

A: Yes. Again, I didn't – we'd never went over that with our deck, our hot tub, or our patio area. It was the flower bed that just sloughed off a little bit. You know flower beds grow as the dirt sloughs off, and that's you know, when he says that I went over his area, it was just a –

Q: Prior to this lawsuit being filed, did Mr. Vitous complain to you, in any way, that your improvements were on any party of his property?

A: Never, ever. I would see him out there mowing, and I'd wave at him. I mean, we were nice to each other.

RP 99, lines 6-19.

The Respondents made the improvements to their backyard based upon the boundary location as represented by the Appellant.

**2.4 Reliance on Appellant's Representation of the Boundary was Justified.**

The Respondents reliance on the Appellant's representation of the boundary was justified. Several witnesses, including the Appellant, testified that the location of the boundary between the Appellant's and Respondents' property was unknown. The Appellant, Robert Vitous, testified in part as follows:

Q: (By Mr. Frey:) Did you employ Hamstur [sic] to perform a survey?

A: Yes.

Q: Why did you do that?

A: Because we – there was a dispute on  
where the property line was, apparently.

Q: Okay. Did you –

A: So, I thought that if I don't know where it  
is and the Defendants don't know where it  
is, we better find out for sure.

Q: Okay. And, so, prior to this survey, did  
you have knowledge where the exact  
boundary line was –

A: No.

Q: - between your property –

A: No.

Q: - and the Defendants?

A: No.

RP 36, lines 7-23

#### CROSS-EXMINATION

BY MR. AMMONS

Q: Prior to the survey done by Mr. Hamstur  
[sic], how did you know where the  
boundary was to your property, meaning  
your southern boundary?

A: I wouldn't know, for sure. That's why I called for a survey.

RP 43; lines 12-16.

Q: Anyway, let's go back to the fence that you paid to help move. I want you to tell the court why you had – you paid to help have this fence moved?

A: Because we reached an agreement. He came to my front door, Your Honor, and asked where the boundary – I thought the boundary was. So, we went down there and we picked out a spot and that's where he built his fence. Then when the survey showed it was off, we moved the fence.

Q: And the spot you picked was along the old animal fence line; correct?

A: Basically.

Q: In fact, that old animal fence line is where you thought this boundary was before this Hampton survey; correct?

A: I thought it was in the area, so I missed on  
his a little bit, you're right.

RP 47, lines 11-25; RP 48, line 1

Q: Now approximately twenty feet north of this  
survey corner, you put a post there, didn't  
you?

A: Right.

RP 48, lines 7-9.

Q: So you put that post because that's where  
you thought the corner was; correct?

A: I thought it was in the area.

RP 48, lines 23-25

Regarding her knowledge of the location of the  
boundary line, Jody Harper testified in part as follows:

Q: When you purchased this property, did  
you know where the north boundary line  
was?

A: Not really.

Q: Did anybody show you where the north boundary line was?

A: Just – 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 Paine's already, and level all the way down to the other properties, as you see down Cedar Falls, and so I was okay with that. And he told me that there was an easement in there, and then I was fine.

RP 90, lines 4-12

Q: The builder never pointed out the corners of your lot to you?

A: No, he did not. I have two people on each side of me, I just went with that.

RP 110, lines 2-5

Q: Okay. But the builder didn't tell you where your corners were?

A: No.

Q: The builder didn't represent any boundaries to you?

A: No.

RP 112, lines 7-13

Regarding knowledge of the boundaries, Tom Paine testified at the trial in part as follows:

Q: Okay. And do the Harpers live right next door to you?

A: Yes.

Q: So they would be directly west of you?

A: Right, 42.

RP 73, lines 21-24.

Q: Has Mr. Vitous ever said anything to you about where your north boundary line is to the property?

A: When we were putting in our yards in '98, he put in a big, concrete post down there, and I was in the yard, and he said, "This is the line."

RP 74, lines 10-14.

Q: This concrete post, do you know approximately how far north it is, or was?

A: I'm going to say approximately about twenty – twenty feet.

Q: From the survey marker where it is today?

A: Right.

Q: Do you know how this conversation came up with Mr. Vitous where he showed you and said, "This is the line."?

A: I think he just wanted to make sure everybody knew where it was, and that's why he put the post in there.

Q: Did you know where the boundary line was before that?

A: You know, I wasn't sure exactly where it was. The lot kind of runs up into the woods right there, and I had an idea where it was, but not exactly.

RP 74, lines 24-25; RP 75, lines 1-13.

It is clear from the testimony of the witnesses at trial, including the Appellant, that the location of the true boundary line was unknown. Because the Appellant, having lived on the property most of his life, appeared to have superior knowledge where the actual boundary line was, it was reasonable and justifiable for the Respondents to have relied on the Appellant's representation of the boundary line. Everyone was okay with the boundary as represented by the Appellant until the 2004 survey.

**2.5 Injury to the Respondents by the Repudiation of the Appellant's Representation of the Boundary.**

Based upon the representations by the Appellant of the boundary, the Respondents made

substantial improvements to their backyard, including extending the deck, building a patio, installing a hot tub, cultivating a garden and erecting a fence. In her testimony at trial, Jody Harper describes the improvements in part as follows:

Q: Approximately when did you put the patio in?

A: We had extended the deck, and then we put the patio in the year after that, so it probably was 2003, 2002.

Q: You put the patio in before the survey was done?

A: Yes. The new survey? Yes.

Q: And when did you put the extension on the deck?

A: A year prior to that, so I'd say 2001. Yeah, 2001.

RP 97, lines 1-8.

Q: Did you put a picket fence in?

A: Yes. It was a picket fence that was between me and my neighbor on the west side, so –

Q: Where's the picket fence line here?

A: It's this star and straight line here. It's just a picket fence, a white picket fence that I have a – another flower bed garden area on this side of my home. So, it's just kind of a – because, again, it slopes off so rapidly, it's just kind of to give you a marking to where the flower bed area is.

Q: Do you have a ballpark figure as to what you believe the cost of the improvements that you put into your back yard are?

A: I would say roughly between five and eight thousand dollars.

RP 97, lines 21-25; RP 98, lines 1-10.

Q: (By Mr. Ammons:) Do you have any idea what the expense might be to remove these improvements, if you had to do it?

A: Well, most of it would be labor to pick up all – because the patio isn't – it's not a cement patio, it's more like I've put in these cobblestones, so it's these cobblestone and it's labor to take them out and move 'em, and the hot tub would have to be moved to a different area and taking out the deck. So, it's more labor and to just, you know, fix it to where it looks nice again.

Q: When you made these improvements, did you rely on Mr. Vitous's representation with the barbed wire where the boundary line was?

A: Yes. Again, I didn't – we'd never went over that with our deck, our hot tub, or our patio area. It was the flower bed that just sloughed off a little bit. You know, flower

beds grow as the dirt sloughs off, and that's – you know, when he says that I went over his area, it was just a –  
RP 98, lines 20-25; RP 99, lines 1-14.

Regarding improvements, the Respondent, Tom Harper, testified at trial in part as follows:

Q: What improvements did you work on yourself?

A: Before I moved in, or –

Q: Before and after.

A: None before. After, I built the deck; the extension to the deck; I had someone bring the hot tub in, and we paid an electrician to wire it up for us; I put in the - the picket fence; and –

Q: Let's talk about the picket fence.

A: Yep.

Q: Can you show that?

A: The picket fence, there.

Q: When was the picket fence put in?

A: I think 2000.

Q: The deck and the hot tub, when – or, the extension to the deck and the hot tub, when were they put in?

A: 2001. The patio, I did not have anything to do with.

Q: Okay. Can you [inaudible]?

A: Well, Jody wanted – that was her project, she wanted to do that. She did it about four times, actually.

Q: And when was the patio completed?

A: The year after the deck, 2002.

Q: And when was the garden put in?

A: She started on it almost immediately after the lawn went in, in '98, just slowly pecking away at it.

RP 131, line 25; RP 132, lines 1-23.

Q: Do you know what the approximate costs of the patio, the deck, the extension, and the hot tub were?

A: The hot tub was – well, the hot tub costs us about three thousand dollars, I think, and I know it costs us seven hundred to put the wiring in. The materials and everything for the deck and the patio and everything, five thousand dollars would probably cover that.

Q: Do you agree with your wife that if you had to move things, there would be some significant labor involved?

A: Yeah, yep.

RP 133, lines 15-24.

According to the unchallenged testimony of the Respondents, the improvements cost approximately \$5,000.00. In addition, there would be significant labor costs in removing the patio, deck, hot tub and fence. The trial court was correct in finding injury to the Respondents if the Appellant is allowed to repudiate his previous statements and actions regarding the location of the boundary.

### **3. Express Agreement**

#### **3.1 Boundary by Agreement was Pled as an Affirmative Defense.**

The affirmative defenses pled by the defendants are as follows:

1. The disputed property, now claimed by Plaintiff, is owned in fee simply by the Defendants based upon a boundary agreement and recognition and acquiescence.
2. The Plaintiff should be estopped from claiming the disputed property because of the boundary agreement between the parties. As a result of this said boundary agreement, the Defendants have changed their position and made improvements to the disputed property.

CP 5, Answer and Affirmative Defenses

A copy of the Defendant's Answer and Affirmative Defenses to Complaint to Quiet Title is attached as appendix "A".

The defendants clearly pled the boundary agreement theory. The defendants' claim of establishing ownership to the disputed property by boundary agreement was no surprise to the Plaintiff. In addition to the affirmative defenses raised, the Plaintiff's attorney acknowledged in argument that he found a letter in which the defendants' attorney referenced the boundary agreement theory. RP 146, lines 23-25.

Virtually the same evidence relied upon by the Defendants to establish the boundary by estoppel in pais was considered by the court in establishing the boundary by agreement. The Plaintiff's counsel failed to object to evidence coming in for the purpose of establishing boundary by agreement. Therefore, the pleadings should be deemed amended to conform to the evidence. CR15(b); *State, Dept' of Revenue v.*

*Puget Sound Power & Light Co.*, 103 Wn.2d 501, 694 P2d 7 (1985). (An affirmative defense may be raised and tried with the consent of the parties under the provisions of CR15(b) without formally amending the pleadings.)

### **3.2 Elements of Boundary by Agreement**

The following elements must be proved to establish a binding express agreement to resolve a boundary dispute entered into orally by adjoining land owners:

1. a bona fide dispute between the adjoining owners as to where their common boundary lies on the ground, or mutual uncertainty as to the true location of such boundary;
2. an express meeting of the minds arrived at by the owners to resolve permanently the dispute or uncertainty by recognizing a definite and specific line as the true and unconditional location of the boundary;

3. physical designation of that permanent boundary determination on the ground; and
4. possession of their respective property by such occupancy or improvements as would reasonably give constructive notice of the location of such boundary to their successors in interest, or alternatively,
  - a) bona fide purchasers for value taking with reference to such boundary.

Mutual recognition and acquiescence for the full statutory period to acquire property by adverse possession is not necessary when establishing boundaries by parol agreement. Inherent in the doctrine, however, is some aspect of acquiescence as evidenced by the requirement that sufficient possession of the property must be taken to provide constructive notice to a successor.

*Johnston v. Monahan* 2 Wn. App. 452, 496, P.2d 930 (1970).

### **3.3 Uncertainty of Boundary**

The evidence clearly establishes that nobody knew where the boundary line was located between the Appellant's and the Respondents' respective properties.

### **3.4 The Appellant and the Respondent Reached a Meeting of the Minds to Resolve the Boundary Dispute to a Specific Location on the Ground.**

The Appellant specifically marked the boundary on the ground with a strand of barbed wire. Mrs. Harper agreed to the location of the boundary as pointed out by the Appellant. According to the testimony of Mr. Vitous, the barbed wire had been on the ground for a long time. Although the barbed wire was no longer there at the time of trial, the location of the boundary was established by testimony and other markers including a tree, the Respondents' garden, and a concrete post placed by the Appellant to mark the boundary. The agreed boundary line was approximately 20 feet north of the 2004 survey line.

Proof of a legal boundary need not be exact. The boundary may be defined by use of the property, by a natural feature, or by some building or structure such as a fence. *Bryant v. Palmer Coking Coal.*, 86 Wn. App. 204, 212, 936 P.2b 1163, *review denied*, 133 Wn.2d 1022, 950 P.2d 476 (1997). The line need not be straight so long as it is ascertainable. *Frolund v. Frankland*, 71 Wn.2d 812, 819-20, 431 P.2d 188 (1967) (finding a cleared area was sufficient to establish a clear boundary), *overruled on other grounds by Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984). A road is a sufficient legal boundary. *Bryant*, 86 Wn. App. at 213-14 (indicating that a dirt road was a sufficient boundary). Similarly, the edge of cultivation can be a boundary if well marked. *Skoog v. Seymour*, 29 Wn. 2d 355, 365, 187 P.2d 304 (1947), *overruled on other grounds by Chaplin*, 100 Wn.2d 853, 676 P.2d 431 (1984).

Therefore, there is substantial evidence in the record to establish the physical location of the boundary as agreed by the parties.

**3.5 The Appellant and the Respondents have Recognized the Agreed Boundary.**

There is an abundance of evidence in the record to show that the parties recognized and observed the boundary as agreed by the Appellant and the Respondents. The Respondents made significant improvements respecting the agreed boundary line, including the patio, the deck, the hot tub, the garden and the fence. Admittedly, years later the garden encroached on the agreed boundary line by approximately one foot. Nonetheless, the agreed boundary location is ascertainable.

Further, the Appellant admitted that when he mowed and graded, he did not cross the agreed boundary.

Therefore, all of the elements of establishing the boundary line by express agreement were satisfied by substantial evidence.

## C. CONCLUSION

Substantial evidence supports the trial court's determination that the boundary between the Appellant's and the Respondents' properties was established by estoppel in pais and by express agreement. Therefore, this court should affirm the trial court's ruling.

Dated: June 29, 2007

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'D. Ammons', written over a horizontal line.

Darrel S. Ammons  
WSBA #18223  
Attorney for Respondents

# **Appendix “A”**

SERVICE ACKNOWLEDGED  
19<sup>th</sup> day of Nov. 2004  
Frey - DSC  
OF ATTORNEYS FOR Plaintiff

FILED ENDORSED  
SUPERIOR COURT  
NOV 19 2004  
COWLITZ COUNTY  
TERI A. NIELSEN, CLERK

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

ROBERT VITOUS,  
  
Plaintiff,  
  
v.  
  
THOMAS W. HARPER and JODY C.  
HARPER, husband and wife; and  
COWLITZ BANK, dba BAY  
MORTGAGE,  
  
Defendants.

No. 04-2-01917-7

ANSWER AND AFFIRMATIVE  
DEFENSES TO COMPLAINT TO  
QUIET TITLE

COMES NOW the Defendants, Thomas Harper and Jody Harper, and answer  
Plaintiff's complaint as follows:

1. Paragraph No. 1 is admitted.
2. Paragraph No. 2 is denied.
3. Paragraph No. 3 is admitted.
4. Paragraph No. 4 is admitted.
5. Regarding Paragraph No. 5, it is admitted that there is a recorded survey that shows landscaping done by the Defendants. However, the landscaping is not an encroachment, as the landscaping is located on property owned by the Defendants.
6. Paragraph No. 6 is denied.

1 7. Paragraph No. 7 is denied.

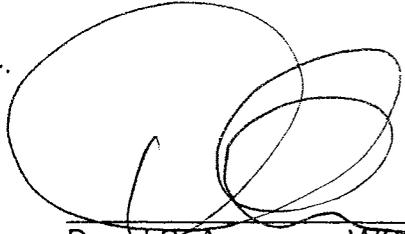
2 FOR AFFIRMATIVE DEFENSES, the Defendants, Tom Harper and Jody Harper,  
3 allege as follows:

- 4 1. The disputed property, now claimed by Plaintiff, is owned in fee simple by the  
5 Defendants based upon a boundary agreement and recognition and  
6 acquiescence.
- 7 2. The Plaintiff should be estopped from claiming the disputed property  
8 because of the boundary agreement between the parties. As a result of this  
9 said boundary agreement, the Defendants have changed their position and  
10 made improvements to the disputed property.

11 THEREFORE, the Defendants pray for relief as follows:

- 12 1. Plaintiff's complaint should be dismissed.
- 13 2. The disputed property should be quieted in fee simple in favor of the  
14 Defendants, Tom Harper and Jody Harper.

15  
16 DATED: November 18, 2004.

17   
18 \_\_\_\_\_  
19 Darrel S. Ammons, WSB#18223  
20 Of Attorneys for Defendants  
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COURT OF APPEALS  
DIVISION II  
07 JUL -2 AM 10:03  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

NO. 35881-6-II

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

ROBERT VITOUS,  
  
Appellant,  
  
vs.  
  
THOMAS W. AND JODY C.  
HARPER,  
  
Respondents.

**DECLARATION OF SERVICE**

I, Terri L. Specht, declare as follows:

On June 29, 2007, I personally served a true and correct copy of the Respondents' Brief, to the address listed below:

Michael W. Frey  
Donald W. Frey, P.S.  
600 Royal St, Suite B  
Kelso, WA 98626

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

DATED June 29, 2007, at Longview, Washington.

  
Terri L. Specht

ORIGINAL