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

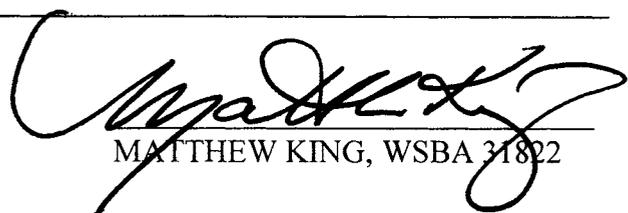
MARK S. HORN,
APPELLANT,

v.

BERNARD EISENBARTH,
RESPONDENT.

APPEAL FROM THE SUPERIOR COURT OF COWLITZ COUNTY
COWLITZ COUNTY CAUSE NO. 05-2-01969-8

BRIEF OF RESPONDENT



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I. INTRODUCTION

This appeal is taken from a bench trial quieting title of property in Cowlitz County. Appellant Horn claims the trial court's Findings of Fact regarding the accuracy of the Hampstur survey are not supported by substantial evidence. But, the trial court's Findings of Fact and Conclusions of Law are supported by substantial facts regarding the reliability of the Hampstur survey. The trial court's Findings of Fact and Conclusions of Law should be affirmed.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is Finding of Fact Number 9 supported by substantial evidence where the trial court found prior surveys had errors wrongfully moving the Common Boundary twenty-five feet west of its true location?
2. Is Finding of Fact Number 10 supported by substantial evidence when the trial court found the Hampstur survey to be accurate, reliable, and it correctly located the boundary between the Horn and Eisenbarth properties?
3. Is Finding of Fact Number 12 supported by substantial evidence where the trial court found Horn erected a wire and steel fence

upon Eisenbarth's property and Horn testified that the fence was his?

4. As Finding of Fact Number 12 is also a Conclusion of Law, the Court reviews the application of law to facts *de novo*. Is the Conclusion of Law, that Horn's fence was located upon Eisenbarth property, correct as the trial court, in accepting the Hampstur survey, established the property line at a certain location. Horn's fence was found to be upon Eisenbarth property.
5. Is Finding of Fact Number 13 supported by substantial evidence as Horn testified that the fence was his?
6. Finding of Fact Number 13 is also a Conclusion of Law. Was the Court's conclusion that the fence could be removed correct, as the Court found the Hampstur survey to be accurate, the Court located the property line at the old wood and barbed wire fence? As a result, Horn's wire and steel fence was not on Horn's property. Under Washington law, the placement of a structure on another's property constitutes trespass.

III. STATEMENT OF THE CASE

The Horn and Eisenbarth properties share a common boundary.

The original plat establishing the property lines was recorded in 1929. (RP

10-29-2007, P. 47, li. 7-14). Since then several surveys have been made. These surveys included the Donnelly survey, (Exhibit 11) the Germunson survey (which was subsequently amended) in 1996, (RP 10-29-2007, P. 20, li. 25, P. 21, li. 1-2, Exhibit 12 & 13) and the Oleson survey (Exhibit 14). The Hampstur survey is the most recent survey to have been undertaken. (Exhibits 8 & 9). Hampstur was able to use highway 99 as the semi-permanent monument as the widening of the road did not change the centerline.

The Donnelly survey had errors in it. (RP 10-29-2007, P. 78-79). Donnelly failed to use Highway 99's centerline as a monument (RP 10-29-2007, P. 78, li. 19-23). Donnelly also used the purported monument that was in a different location as part of the survey even though it appeared to be out of place. (RP 10-29-2007, P. 79, li. 1-9). As a result, his entire survey appeared to be thirty feet out of position. (RP 10-29-2007, P. 79, li.19-23). On the basis of these mistakes, Hampton disregarded the Donnelly survey. (RP 10-29-2007, P. 79, li.19-23). In reviewing the Donnelly survey, Donald Day, the Cowlitz County Public Works Surveyor found property lines "well west of where the original subdivision would have put it." (RP 10-29-2007, P. 93, li. 17-19).

During cross-examination, Hampton explained that there must be a basis for accepting a monument before you can accept it as a corner. (RP 10-29-2007, P. 128, li. 1-5). Hampton opined that a purported monument, thirty-feet from where the corner should have been located, was not a monument set by a surveyor. (RP 10-29-2007, P. 137, li. 16-18).

Disregarding the purported monument was proper according to Kenneth Chamberlain as it was an iron pipe, and not an iron rod, as identified by Donnelly's field notes. (RP 10-30-2007, Vol. 1, P. 97, li. 12-15). The difference between the two evidences that the located monument is different than Donnelly's monument. (RP 10-30-2007, Vol. 1, P. 97, li. 17-25, P. 98, li.1). Chamberlain further opined the Donnelly field notes evidenced the improper placement of the purported monument thirty feet too far west. (RP 10-30-2008, Vol. 1, P. 100, li. 6-24). Based on all the other surveys, Chamberlain opined that this monument was placed in error and he would "absolutely" reject it. (RP 10-30-2008, Vol. 1, P. 104, li. 24-25, P. 105, li. 1).

The Germunson original survey was also in error (RP 10-29-2007, P. 80, li 24-25, P. 81, li. 1-3.) in one main way; the common line between Carrollton Crest and Mt. Pleasant Acreage was incorrectly placed. (RP 10-29-2007, P. 80, li 24-25, P. 81, li. 1-3). The amended Germunson

survey substantially agreed with the Hampstur survey. (RP 10-29-2007, P. 81, li. 25, P. 82, li. 1-3). The amended Germunson survey also showed that Horn did not own any property to the west of the old post and barbed wire fence. (RP 10-29-2007, P. 82, li. 21-25, P. 83, li. 1-9). Chamberlain agreed with the amended survey to a point, however, it did not do any subdivision sections and did not go over to Carrollton Crest. (RP 10-30-2007, Vol. 1., P. 109, li. 12-15), making its usefulness limited.

Finally, the Oleson-Dunn survey's errors also warranted reconsideration of their findings. (RP 10-29-2007, P. 113, li. 10-13). The methodology used by the surveyor was "against the book." (RP 10-29-2007, P. 113, li. 10-13). There was too much information missing from the survey to allow Hampton to determine whether the Oleson survey was accurate. (RP 10-29-2007, P. 115, li. 8-10). Day opined that the Oleson survey made the same mistakes as the Donnelly survey. (RP 10-29-2007, P. 94, li. 21-25). Day further opined the Oleson survey projected this error across the westerly lots and this caused a fifty-foot problem with the survey. (RP 10-29-2007, P. 94, li. 24-25, P. 95, li. 1).

Chamberlain also finds problems with the Oleson survey, stating that the surveyor "ignores a lot of what he finds." (RP 10-30-2007, Vol. 1, P. 111, li. 19-25, P. 112, li. 1-12). Similarly, the Oleson surveyor failed to

provide all the bearings and distance necessary to understand his survey. (RP 10-30-2007, Vol. 1, P. 112, li. 9-12). Chamberlain further opined the Oleson survey discounted the County's location of the monument, which is improper. (RP 10-30-2007, Vol. 1, P. 112, li. 20-25). Finally, Chamberlain states Oleson had enough information to put him on notice that he "possibly had the wrong monument, and almost every piece of evidence on this plat, other than the physical monument there, tells you to question it." (RP 10-30-2007, Vol. 1, P. 116, li. 9-14).

The Hampstur survey, which was accepted by the Court, was "the most logical location for a common boundary." (RP 10-29-2007, P. 118, li. 20-24). In completing their survey, Hampton reviewed all prior surveys of the property. (RP 10-29-2007, P. 120, li. 10-14). In creating the survey, Hampton also obtained CADD files of the area created by Cowlitz County (RP 10-29-2007, P. 90, li. 18-25, P. 91, li. 1-3). Day reviewed the Hampstur survey and opined the Hampstur survey "matched precisely" to the County's attempts at determining the proper property lines. (RP 10-29-2007, P. 91, li 12-18). The Hampstur survey was consistent with the historical uses of the properties; the location of the Carrollton Crest plat was consistent with both the Mt. Pleasant plat and Kingsbury Road, which is the easterly boundary of the Mt. Pleasant plat.

Further, the Hampstur survey's ultimate goal was "to find a the (sic) common boundary as it was established in 1929." (RP 10-30-2007, Vol. 1, P. 83, li. 11-12). Chamberlain reviewed the Hampstur survey and concluded that it was correct. (RP 10-30-2007, Vol. 1, P. 128, li. 18).

Horn appeals the trial court's Findings of Fact and Conclusions of Law accepting the Hampstur survey, arguing they are not supported by substantial evidence.

IV. SUMMARY OF ARGUMENT

The Findings of Fact are supported by substantial evidence. The evidence established sufficient bases for rejecting prior surveys. It further established the prior surveys were inaccurate and the purported monument, proffered by Horn, was located thirty feet from the actual corner. As a result, substantial evidence exists that the Hampstur survey is accurate and properly locates the property line.

V. ARGUMENT

Findings of Fact will not be overturned if they are supported by substantial evidence. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959) Substantial evidence exists "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *King County v. Washington*

State Boundary Review Board, 122 Wn.2d 648, 675, 860 P.2d 1024 (1993). *See also Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

Horn must assign error to specific findings and then show that the record does not support them. *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 243, 23 P.3d 520 (2001). Horn must point to the deficiencies he claims; bare conclusory allegations that evidence is insufficient is not enough. *Mavroudis v. Pittsburg Corning, Corp.*, 86 Wn.App. 22, 39, 935 P.2d 684, 693 (1997).

**A. The Law of Surveys and Monuments Supports the trial
Court's Rulings**

In determining a boundary, the fundamental question surrounds the grantor's intent. *Erickson v. Wick*, 22 Wn. App. 433, 436, 591 P.2d 804 (1979). That intent is taken from the language of the deed if possible, but when necessary by resort to the circumstances surrounding the entire transaction. *Hirt v. Entus*, 37 Wn.2d 418, 224 P.2d 620 (1950). Where a boundary is uncertain, it may be established by the best evidence available. *Ghione v. State*, 26 Wn.2d 635, 652, 175 P.2d 955 (1946). That evidence may include other deeds made as part of substantially one transaction, *Standring v. Mooney*, 14 Wn.2d 220, 227, 127 P.2d 401 (1942), or a

recorded plat referred to in a subsequent deed. *Cook v. Hensler*, 57 Wash. 392, 107 P. 178 (1910). Where the evidence conflicts as to the validity of a monument used to begin the original survey, the trial court, as finder of fact, may determine a boundary based on a modern survey. *Sparks v. Douglas County*, 39 Wn. App. 714, 722, 695 P.2d 588 (1985).

“The term ‘monument’ means a permanent natural or artificial object on the ground which helps establish the location of the boundary line called for.” *DD & L, Inc. v. Burgess*, 51 Wn. App. 329, 331 n. 3, 753 P.2d 561 (1988).

The doctrine that monuments prevail over courses and distances is never adhered to where it would lead to an absurdity or where it would defeat a grant when, by rejecting a call for one or more monuments, the deed may be upheld and the manifest intent of the parties made effectual. *White v Luning*, 93 US 514, 93 Otto 514, 23 L Ed 938 (1876); *Shipp v Miller's Heirs*, 15 US 316, 2 Wheat 316, 4 L Ed 248 (1817); *United States v 0.08246 Acres of Land*, 888 F Supp 693 (E.D. Pa. 1995).

Horn argues that one must always follow monuments, regardless of the outcome of such reliance. But this ignores United States Supreme Court precedent:

[a]s a general rule monuments, natural or artificial, referred to in a deed control its construction, rather than courses and

distances; but this rule is not inflexible; it yields whenever taking all the particulars of the deed together it would be absurd to apply it. If monuments are inconsistent with the calls for other monuments, and it is apparent from all the other particulars in the deed that they were inadvertently inserted, they will be rejected. *White v. Luning*, 93 U.S. 514, 524, 23 L.Ed. 938 (1876).

Here, if the purported monument were accepted, it would add thirty feet to certain parcels in the Mt. Pleasant plat, would decrease the lots in the Carrollton Crest plat, and would require a surveyor to ignore Highway 99 as a monument. This result is clearly contrary to the grantor's intent as Highway 99 was the monument originally relied upon to establish the property lines.

**B. Substantial Evidence Supports Finding of Fact Number
Nine**

The trial court relied upon the testimony of three experts in reaching its Findings of Fact. Not only is there substantial evidence supporting the trial court's finding, the Court's findings are in accordance with survey law which allows the disregard of a monument that would lead to absurd results. *White v. Luning*, 93 U. S. 514, 23 L.Ed. 938 (1876).

Horn also argues the trial court erred in Finding No. 9 when it failed to accept the purported monument offered by Horn. But this ignores the assumptions that would have to be made to accept the monument as

accurate, including, (1) error existing in the Carrollton Crest subdivision plat, (2) error existing in the Mt. Pleasant plat, (3) three property owners were occupying less than their full parcel. (RP 10-30-2007, Vol. 1, P. 130, li. 18-25, P. 131, li. 1-10).

Further, a higher evidenciary standard of monument exists – Highway 99. (RP 10-30-2007, Vol. 1, P. 138, li. 13-25). Standard practice for surveyors is to accept semi-permanent monuments, such as roads, over artificial monuments. (RP 10-30-2007, Vol. 1, P. 138, li. 13-25). The purported monument “throws a bearing off; it throws the distances off; and it’s not on the section subdivision line by almost seventy feet;...it is clearly questionable.” (RP 10-30-2007, Vol. 1, P. 150, li. 22-25, P. 151, li. 1-2).

The trial court found that Hampton was a licensed surveyor and properly concluded that the Donnelly, Germunson, and Oleson-Dunn surveys each contained errors. *Finding of Fact No. 9*. The finding further states that the surveying errors moved the Common Boundary west of its true location. *Finding of Fact No. 9*.

C. Substantial Evidence Supports Finding of Fact Number

Ten

The trial court found the Hampstur survey to be the “most comprehensive recorded survey” and it was accurate and reliable as it preserved the integrity of the lots. *Finding of Fact 10*.

The Hampstur survey’s ultimate goal was “to find a the (sic) common boundary as it was established in 1929.” (RP 10-30-2007, Vol. 1, P. 83, li. 11-12). The Hampstur survey was “the most logical location for a common boundary.” (RP 10-29-2007, P. 118, li. 20-24). Hampton reviewed all prior surveys of the property before beginning their survey. (RP 10-29-2007, P. 120, li. 10-14). Hampton also obtained Cowlitz County CADD files showing the monument locations established in Highway 99. (RP 10-29-2007, P. 90, li. 18-25, P. 91, li. 1-3). Day reviewed the Hampstur survey and opined it “matched precisely” to the County’s attempts at determining the proper locations of property lines. (RP 10-29-2007, P. 91, li 12-18). Chamberlain reviewed the Hampstur survey and concluded that it was correct as well. (RP 10-30-2007, Vol. 1, P. 128, li. 18).

Substantial evidence supports this finding of fact; the trial court had evaluated the prior surveys, found them to have errors, and determined the Hampstur survey was the most likely to reflect the original intent of the plat.

Finding of Fact 10 also finds the survey “correctly monuments the forty-two year old fence as the boundary between” the Horn and Eisenbarth properties. Horn testified that the old fence was installed as a “fence of convenience” when he was fifteen years old. (RP 10-30-2008, Vol. 2, P. 204, li. 18-25). The old fence was within one or two feet of where the Hampstur survey established the property line. (RP 10-29-2008, P. 65, li. 3-6). Hampton further opined that Horn did not own any property west of the old fence, based on his survey. (RP 10-29-2008, P. 82, li. 21-25, P. 83, li. 1-9).

Substantial evidence supports the Court’s finding of fact number 10. The fence was established 42 years ago along the accurate property line.

D. Substantial Evidence Supports Finding of Fact Number Twelve

The trial court’s finding of fact number 12 is that Horn “erected a wire and steel fence on [Eisenbarth’s] property.” As discussed above, the Hampstur survey established Horn’s property line was the old wire fence. Horn testified that he installed a wire and steel fence along what he believed to be his property line, which was thirty feet west of the old fence. (RP 10-29-2008, Vol. 2, P. 204, li. 3-16). The court’s Finding of

Fact 12 is supported by substantial evidence, specifically Horn's own testimony regarding construction of the fence.

However, it appears Finding of Fact 12 is also a Conclusion of Law as it applies the facts to the parties' property interests. Conclusions of Law are reviewed *de novo* by the Court of Appeals. *Dumas v. Gagner*, 137 Wn.2d 268, 280, 971 P.2d 17 (1999). Once the trial court concluded the Hampstur survey was correct and Horn's property line was the old wood and barbed wire fence, the Court could only conclude the wire and steel fence was located on Eisenbarth's property.

**E. Substantial Evidence Supports Finding of Fact Number
Thirteen**

The final finding of fact that Horn challenges is that Eisenbarth is entitled to have Horn's fence removed from Eisenbarth's property. *Findings of Fact 13*. This finding of fact is based on the trial court's prior rulings regarding where the property line is located as well as Horn's installation of the fence along the purported property line. As discussed above, these findings are supported by substantial evidence.

Finding of Fact 13 is also a Conclusion of Law as it applies the facts to the quiet title claim. Conclusions of Law are reviewed *de novo* by the Court of Appeals. *Dumas v. Gagner*, 137 Wn.2d 268, 280, 971 P.2d

17 (1999). Once the trial court concluded the Hampstur survey was correct and Horn's property line was the old wood and barbed wire fence, the Court could only conclude the wire and steel fence was located on Eisenbarth's property. When a person places a structure on another person's land, the tort of trespass arises. *Bosteder v. City of Renton*, 155 Wn.2d 18, 117 P.3d 316 (2005), quoting *Phillips v. King County*, 136 Wn.2d 946, 957 n.4, 968 P.2d 871, 876 (1998). Therefore, the Court of Appeals should find this Conclusion of Law appropriate under the facts found by the trial court.

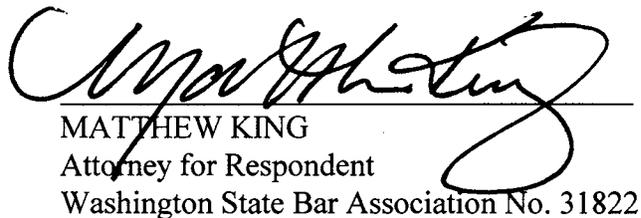
V. CONCLUSION

In *Staaf v. Bilder*, 68 Wn.2d 800, 802-803, 415 P.2d 650, 652 (1966) the Court held:

The learned trial judge made his findings not only from substantial evidence but from evidence entitled to great weight, presented by both plaintiffs and defendants based on disputed facts and the conflicting conclusions of professional experts. The court received evidence from both parties describing old fences and fence lines, abandoned fences and fence lines, remnants of old and dilapidated fences, and remnants of chicken wire and barbed wire left from fallen and dilapidated fences, and heard testimony describing the history and ownership of the two adjacent tracts. It heard not only the detailed facts but the conclusions of fact derived therefrom by professional surveyors. The record shows that the court considered and weighed all of this evidence in reaching its Findings of Fact. Therefore, noting that substantial evidence supports the Findings of Fact, we accept them as verities.

As in *StAAF*, this trial court had substantial evidence from experts addressing the prior surveys. These experts all provided logical, rational, and well-reasoned opinions regarding the unreliable nature of the prior surveys. Horn presented no expert testimony supporting his contention that the Oleson survey was accurate. The trial court considered all evidence before it in reaching its Findings of Fact and Conclusions of Law. The Court of appeal should find the trial court's Findings of Fact were supported by substantial evidence. This Court should also find the trial court's Conclusions of Law correct and should affirm the trial court's decision.

RESPECTFULLY SUBMITTED,


MATTHEW KING
Attorney for Respondent
Washington State Bar Association No. 31822

COURT OF APPEALS
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IN THE COURT OF APPEALS
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Mark S. Horn)
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)
) DECLARATION OF SERVICE
v.)
)
Bernard Eisenbarth.,)
Respondent.)

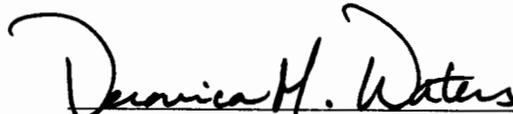
I, Veronica M. Waters, hereby declare under penalties of perjury of the Laws of the State of Washington that the following is true and correct:

On the 6th day of August, 2008, I enclosed copies of the following documents: Brief of Respondent and this Declaration, postage prepaid, addressed to:

Suzan Clark
1101 Broadway St Ste 250
Vancouver, WA 98660

And placed them in a USPS mailbox in Seattle, Washington.

DATED this 6th day of August, 2008.


Veronica M. Waters