

No. 37303-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SCOTT MERRIMAN and KIM MERRIMAN, husband and wife,

Appellants/Cross-Respondents,

v.

PAUL COKELEY and DIANNE COKELEY, husband and wife,

Respondents/Cross-Appellants

BRIEF OF APPELLANTS MERRIMAN

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
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I. INTRODUCTION

This boundary dispute case concerns the well-settled doctrine of mutual recognition and acquiescence. The doctrine, cited by Washington courts since at least 1925, supplements the doctrine of adverse possession. Rather than focusing on historic use (the common question in adverse possession), the doctrine of mutual recognition and acquiescence concerns the adjoining neighbors' knowledge and acceptance of a boundary line (the "recognition and acquiescence").

The Assignments of Error focus on whether the Merrimans established a well-defined boundary line in their proof at trial. The trial court failed to acknowledge the well-defined line formed by the surveyor's boundary monuments and prior owner's fence in line with the boundary monuments.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred when it failed to find that the facts, as found, established a "well-defined" line sufficient to meet the burden of proof of mutual acquiescence to the true boundary line between Merriman's Lot 10 and Cokeley's Lot 11 (Findings of Fact Nos. 10, 11, 21, 26, 27 and 28 (including several conclusions of law mis-

labeled as findings of fact); Finding of Fact No. 21; Conclusion of Law No. 3).

Assignment of Error No. 2: The trial court erred when it held, based on the facts as found, that Merriman failed to meet their overall burden of proof establishing that they acquired title to the disputed property by mutual acquiescence to the true boundary line (Conclusion of Law No. 3).

Assignment of Error No. 3: The trial court erred when it failed to find, as an alternative remedy, that Merriman met their burden of proof based on the facts presented establishing that they acquired title to the disputed property by adverse possession (Conclusion of Law No. 3).

Assignment of Error No. 4: The trial court erred when it found that Cokeley's predecessor placed a fence inside the property line in 2002, where the undisputed testimony was that for this particular fence he had followed what he believed to be the boundary established by the 1993 survey markers (Finding of Fact Nos. 8, 11).

Assignment of Error No. 5: The trial court made a clerical error when it found that the Swift survey monuments were placed in 1994, when the actual date was 1993 (Finding of Fact No. 7).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it found that there was no well-defined line between the properties at issue, as required for establishing a boundary through operation of mutual recognition and acquiescence, when the unambiguous and undisputed evidence at trial established the following:

(a) There were boundary line survey markers (monuments) set by a licensed surveyor in 1993; and

(b) Cokeley's predecessor, Mr. Willits, further memorialized the acknowledged boundary line in 1994 with two four-inch wood posts set in concrete at each lot corner and with a metal post midway between the two wood posts, all in line with the 1993 survey markers; and

(c) Mr. Willits later erected a fence that followed the boundary line designated by the 1993 survey markers, thus further affirming his long-standing recognition of that line as the true boundary; and

(d) The 1993 survey markers and 1994 posts were on a line that all neighbors continually understood and recognized as the boundary line since 1993.

Another element of this error is the trial court's statement that "[p]rior to 2002, there had been no boundary line markers [or] structure" between Lots 10 and 11, in direct contradiction to the court's various findings and acceptance of the fact that Mr. Swift had "clearly" placed survey markers along the asserted boundary in 1993. **(Assignment of Error No. 1).**

2. Whether the trial court erred when it did not find that Merrimans met their burden of proof in establishing a new boundary line through mutual recognition and acquiescence as a matter of law, where the facts at trial established not only a well-defined line, but also manifestation of a mutual recognition and acceptance of the designated line as the true boundary line by both neighbors for the requisite period of ten years. **(Assignment of Error No. 2).**

3. Whether the trial court erred when it did not find, as a matter of law, that in the alternative, the Merrimans established their claim to quiet title through adverse possession. **(Assignment of Error No. 3).**

4. Whether the trial court erred when it found that Mr. Willits had placed a fence in 2002 within the boundary line established by the survey markers, when the actual testimony unambiguously established that while placing a fence within a boundary might be his *usual* practice, in this case, Mr. Willits had followed what he believed to be the boundary, using the stakes previously placed at the 1993 survey markers as part of the fence support. **(Assignment of Error No. 4).**

5. Whether the trial court misstated when it found that surveyors had “placed three bar and cap survey markers along what they believed was the line between Lots 10 and 11” in 1994, when the actual testimony repeatedly affirms that the survey markers were actually placed in 1993. **(Assignment of Error No. 5).**

IV. STATEMENT OF THE CASE

A. Substantive Factual History.

The facts of this case are relatively straightforward. The parties own adjoining, narrow waterfront view lots. CP 71 ¶ 1. The Appellants (“the Merrimans”) have owned Lot 10 since 1996. CP 72 ¶ 2. Respondents Cokeley (“the Cokeleys”) purchased Lot 11 in 2004 from Ms. Rita Willits. CP 72 ¶ 3. While this section will lay out the relevant facts of this case as established through the testimony and evidence presented at trial, in reviewing these facts, it may be helpful for the Court to first understand the legal context of this appeal.

The Merrimans brought this quiet title action to affirm the boundary between Lots 10 and 11 that the neighbors had established over the years. CP 4-9 (Complaint); RP 181 ll. 9-12. The primary issue on appeal is whether the Merrimans established the new boundary under the mutual recognition and acquiescence doctrine as a matter of law, where the undisputed evidence at trial affirms that survey markers established this line in 1993, with continuing use and recognition of that line as the boundary ever since. In the alternative, there was sufficient evidence at trial to establish the Merrimans’ right to the contested property through adverse possession.

One of the required elements of establishing right to a new boundary through mutual recognition and acquiescence is the presence of

a “well-defined” line at the boundary. The key legal issue is a simple one: the Merrimans believe that there is such a well-defined line in this case as a matter of law, based on the facts as found by the trial court – namely, 1993 survey markers demarcating the common boundary, and neighbors who have uniformly affirmed their continual recognition of this line through the years up until a 2006 survey raised new questions. Even should the Court determine that this is a question of fact rather than a matter of law, no evidence supports the trial court’s findings.

1. 1993 Survey and Survey Monuments.

This boundary dispute stems from a 1993 survey of Lot 11 ordered by Mr. Willits, husband to Ms. Rita Willits, the Cokeleys’ predecessor. CP 72 ¶ 6; RP 84-85. Robert Swift, a licensed surveyor, conducted this survey. *Id.* Swift set three standard surveyor’s (re)bars and caps: one at the road on the landward end of the property; one at the top of the bank on the seaward end of the property; and one midway in-between. RP 86-87; *see also* CP 73 ¶ 7. All three survey markers run along Lot 11 where it borders Lot 10, the Merrimans’ property. *Id.* Bars and caps are commonly accepted markers for identifying surveyed boundaries, and the surveyor’s license number is on the cap. RP 14, ll. 1-10.

Mr. Willits testified at trial that he always believed that Swift’s bars and caps marked the common boundary line between Lots 10 and 11:

Q (by Mr. Miller): It’s my understanding from the surveyor that there was three bar and caps placed, and I’m going to place one at

the top of the road, one almost midway and then one other bar and cap pretty close to the bluff or the bank. You recall that there were caps–bar caps out there?

A: That's right.

Q: They're the ones with the yellow cap on it?

A. Yeah, they are.

RP 86, ll. 9-18; and

Q: Right, but you understand those bar and caps were the boundary line between this lot number ten and lot number 11; is that correct?

A. Correct.

RP 87, ll. 12-15. There is no contradicting testimony on this point.

2. Willits' posts on surveyed boundary line.

In order to further mark and make more obvious the location of the property boundary, Mr. Willits set two, four-inch round wood posts in concrete in line with the bars and caps at either end of the property a few months after the survey (e.g., one at the road and one at the top of the bank). RP 88-89; CP 73 ¶ 8. He also erected a metal T-post at the midway bar and cap. *Id.*

Mr. Willits testified that these posts also demarcated the property line between Lots 10 and 11:

Q (by Mr. Miller). Now, it's my understanding that you also placed some bar or stake near those bar and caps; is that correct?

A. Correct.

RP 87, ll. 16-19; and

Q. Okay. So you put in a green, I'll call it a T-bar metal post near or adjacent to the bar and caps that the surveyor set in 1993?

A. What I did was I put a – as I remember, because I didn't keep a diary during this whole fiasco, I put a metal T-post on or adjacent to the one that was a midway point, and I put the round wooden post at the tops and bottoms of the lot.

RP 88, ll. 14-22; and

Q. Okay. And the purpose of these posts was to make it obvious where the boundaries or the corners of your property were?

A. Correct.

Q. Did the Merrimans or their predecessors ever object to the location of those posts or those markers?

A. No.

RP 89, ll. 12-19. There was no testimony contradicting the fact that these posts lay on the boundary line established by the 1993 survey markers.

3. **Willits' 2002 fence on surveyed boundary line.**

At trial, the Cokeleys made much ado about a fence erected by Mr. Willits in 2002, arguing that this was the first time that there was a "well-defined line." The trial court erroneously adopted the argument that only once there was a fence could there be a "well-defined line". RP 191, ll. 9-17. The legal effect of survey markers versus a fence with respect to what constitutes a "well-defined line" is a legal argument addressed further

below. It is important, however, as a foundation to that argument to make one critical point regarding the facts of this case.

In its decision, the trial court concluded that Mr. Willits constructed this fence *inside* the 1993 survey line:

Now, we know, in 1994, there was installation of a post at the top and at the bottom near those two markers. A couple of things about that: Number one, Mr. Willits indicated that he believed that that was the line, but he set those posts inside the line, and the ultimate metal posts that he used for the fence in 2002 were also set inside the actual line.

RP 192, ll. 10-19 (trial court's oral decision); *see also* CP 73 ¶ 11 ("As was his usual way of fencing, Willits placed the "T" posts on the inside of the property line or further into Lot 11"). However, this is *not* what Mr. Willits actually testified, nor is there any evidence in the record to support the trial court's conclusion.

Willits installed this fence in 2002 to more obviously mark the boundary line set by the 1993 survey markers. CP 73 ¶ 11. What Mr. Willits actually testified to, and what the trial court likely relied on, was the following:

Q (by Cokeleys' counsel Mr. Valz on recross examination). Mr. Willits, just one final question: As I recall in deposition, you testified it was your **normal practice** to put the fence line and the posts inside your own property line?

A. That's correct, sir.

Q. And so would that – to you, would that be three or four inches inside your own property line?

A. Yes sir.

RP 114, ll. 14-22 (emphasis added).

While counsel's question reflects a careful use of words, upon careful examination, all Mr. Willits testified to here was his "*normal*" practice. Critically, this testimony does not address how Mr. Willits erected the *particular fence at issue in this case*.

In contrast, with respect to the *particular fence at issue in this case*, Mr. Willits testified as follows:

Q. (by Mr. Miller). So you had a real straight well-defined line with that wire fence?

A. Yeah.

Q. **And was that consistent with the wood posts and the metal posts that you had previously put up years ago?**

A. **They were part of the line, yes.**

Q. So they were right in the middle of that line?

A. No, the wood posts were on either end, the metal T-post was in the center where the other cap was, and I used other supports [for the fence].

Q. **Okay. So when you got done with that wire fence, it was consistent with the previous two wood posts and metal posts that you had previously put up in 1993; is that correct?**

A. **Yes.**

RP 111, l. 15 – 112, l. 6.

When building *this* fence, Mr. Willits actually incorporated the two wood posts and metal T post marking the boundary that he himself had placed at the 1993 survey markers, simply adding additional supports for the barbed wire. *Id.* The Cokeleys' own attorney asked Mr. Willits extensive questions almost exclusively focused on the use on either side of the fence line, with the clear implication that the fence indicated the boundary – e.g., the line drawn by the 1993 survey markers. *See* RP 93, l. 6 – 104, l. 15.

In addition to Mr. Willits' testimony, Kim Merriman affirmed that *in this case* (as compared to whatever Mr. Willits' "usual" practice might be), Mr. Willits erected the barbed wire fence along the line demarcated by the 1993 survey markers:

Q. Okay. Did you have any communication with the Willits regarding the common boundary between your properties?

A. Yes, at least one time, we contacted them. We came home, and there was a barbed-wire fence, and we were somewhat surprised that it had been erected and, you know, wrote them a letter, and essentially told them that we understood that – you know, to mark the boundary line, and that we wished that we would have had a chance to chat with them about a different way of marking the boundary line, because that just seemed aggressive to us.

Q. Did the barbed-wire fence that was installed, was that consistent with the metal stakes that were there in 1996?

A. Yes.

Q. So you weren't concerned about where it was located but what it was; is that correct?

A. That's correct.

RP 42, l. 23 – 43, l. 17.

In other words, the *undisputed* testimony at trial by both Mr. Willits and Mrs. Merriman, is that Mr. Willits erected the 2002 fence along the 1993 survey line. Critically, there is *no* testimony or evidence on record contradicting the testimony that the markers were in line with what Mr. Willits, the Merrimans, and the Cokeleys' believed from 1993 to 2006 was the true boundary; and that the fence built by Mr. Willits in 2002 was in line with those markers. There are no facts in the record supporting the trial court's finding that Mr. Willits erected the 2002 fence *within* the boundary line defined by the 1993 survey markers.

4. **Cokeley 2006 survey and resulting dispute.**

In August 2006, Cokeleys ordered another survey of Lot 11. CP 75-76 ¶¶ 17-19. They retained the licensed survey firm Bracy & Thomas. RP 12-13; CP 75 ¶ 17. Mr. Bruce Studeman, a licensed surveyor with Bracy & Thomas, testified that his survey crew easily found the three Swift bars and caps set in 1993:

Q. Okay. And can you tell me, did they [the Bracy & Thomas crew] discover any previous surveying marks or monuments?

A. Yes, they did.

Q. And what did they discover?

A. They discovered some rebars and caps that were set along the property line. The surveyor was Mr. Swift.

Q. Okay. And how would they have been able to identify it was Mr. Swift?

A. By the license number on the cap.

RP 14, ll. 1-10; and

Q. Between the properties, I guess, of lot 10 and lot 11, how many of the bar and caps did your surveyors discover that was put in by Mr. Swift?

A. Three.

Q. Generally, where were they located along that line?

A. There was one at the property where the right-of-way – at the road.

Q. Okay.

A. There was one approximately in the middle between there and the top of the bank, and one was located at the approximate top of the slope.

RP 15, ll. 8-21; and

Q. Okay. Was there any indication from your surveyors they had difficulty finding the bar and caps by Mr. Swift?

A. No.

RP 21, ll. 8-11.

The Cokeleys did not assert their claim to the disputed land until after the 2006 survey. RP 138, ll. 17-23.

Mr. Studeman testified that Swift had made a small error when he turned an incorrect angle at the roadway. RP 17, ll. 10-23. Mr. Studeman testified that the bar and cap at the road (the starting point) was correct, but that the error resulted in the incorrect location of the Swift bar and cap at the midpoint between Lot 10 and 11 and at the far end at the top of the bank. *Id.*; RP 23, l. 11 – 24, l. 4; *see also generally* CP 75 ¶¶ 18-19. The difference between the 1993 and 2006 surveys constitutes a long and narrow wedge-shaped strip of property at the common boundary between Lots 10 and 11. *Id.*

Mr. Studeman testified that a bar and cap is the common practice by which surveyors mark a property boundary.

Q. [after discussing the crew's discovery of Mr. Swift's 1993 survey markers] Okay. And is that typical for a surveyor to mark their boundaries or corners with that kind of a bar and cap?

A. Yes.

Q. And is a bar and cap a fairly common practice in the surveying business to mark or identify boundaries?

A. Yes.

RP 14, ll. 18-25; and

Q. Is a bar and cap typically the way most homeowners mark and identified their corners when you've been asked to do so?

A. A surveyor would typically put a bar and cap in for marking on a property line, yes.

RP 17, l. 24 – 18, l. 3; and

Q. Okay. And is that the typical condition you would find typically of property, with a bar and cap that close to the ground?

A. Yes.

RP 21, ll. 20-23.

The Merrimans do not dispute that the survey by Swift in 1993 was in error. This does not change the fact, however, that the neighbors had established a new boundary line based on the 1993 survey in the intervening years.

5. *Survey monuments, posts and subsequent fence marked a straight and well defined line recognized by all as the boundary since 1993.*

Mr. Willits testified several times over that the survey monuments and the posts he erected formed a straight, well-defined line:

Q. [when you put up this fence line] You had a straight shot down the hill, it was taut, you could see down that line to where that fence post is at the bottom of the hill that's been located as one point, so let's call it fence post 1.7. So that barbed-wire fence was taut?

A. Yes sir.

RP 99, ll. 5-11; and

Q: Okay. So when you got done with the wire fence, could you stand at one end, say, up at the road, and could you see straight down that wire fence line?

A. Yeah.

Q: So you had a real straight well-defined line with that wire fence?

A. Yes.

Q: And was that consistent with the wood posts and the metal posts that you had previously put up years ago?

A. They were part of the line, yes.

Q. So they were right in the middle of that line?

A. No, the wood posts were on either end, the metal T-post was in the center where the other cap was, and I used other supports.

RP 111, l. 10 - 112, l. 6.

Scott Merriman's testimony is in accord:

A. Correct. It was easy to see the line, because, right up there, there was a corner post.

Q. Okay. Could you ever at any time actually stand at the top and look down the entire line, the straight line?

A. Yes.

Q. I think Mr. Willits agreed that the barbed wire was taut and in a straight line. Would you agree with that?

A. Yes.

Q. Was there any doubt in your mind where the property line was at any time until this lawsuit started ...?

A. No.

RP 125, ll. 5-18.

Mr. Willits testified that he always believed and treated the line marked by the survey monuments to be the true boundary line:

Q. Okay. So that's what I'm getting at. From 1993 on, you always felt that was the proper line?

A. Yes.

RP 90, ll. 13-16.

To complete the circle, Mr. Cokeley affirmed that they, too, had considered the 1993 survey markers indicated the boundary:

Q. Now, do you recall inspecting the property and the boundaries that you ultimately ended up purchasing?

A. Yes.

Q. Okay. And did you notice the stakes that were there set up on the bank and at the roadway?

A. Of course.

Q: And was it your understanding that those were the boundaries that were aligned between you and the Merrimans?

A. At that time, yes.

Q. When did you first learn that that wasn't, in fact, the real boundary line based on the plat?

A. We were notified by Bracy & Thomas.

Q. Okay. So when Bracy & Thomas contacted you, that was the first time you were aware that the line wasn't as you understood it to be?

A. That's correct.

RP 138, ll. 6-23.

There is no contradicting evidence on this point, that the line marked by the 1993 survey markers was the line recognized by all neighbors as the boundary up until 2006.

Furthermore, the parties all testified that they manifested a mutual recognition and acceptance of the line designated by the 1993 survey markers by their acts with respect to their respective properties. RP 39, ll.9-16; 82, 2-6 (Kim Merriman's testimony regarding Merrimans' maintenance of property); 44, l. 22 – 45, l. 10 (Kim Merriman's testimony regarding Mr. Willits' maintenance of property line); RP 122-126 (Scott Merriman's testimony regarding maintenance and improvements to property).

B. Procedural History.

The Merrimans filed their complaint to quiet title on November 14, 2006, based on the historical boundary line marked by the 1993 survey monuments and the neighbors' respective recognition of that line as the boundary since that time. CP 4-9. The Cokeleys answered with claims of set-off against the Merrimans for alleged interference with prospective sales of Lot 11 based on the Merrimans' efforts to assert rights to the disputed triangle of property. CP 29-32 (original answer filed December

5, 2006); CP 33-36 (amended counterclaim filed September 18, 2007). A bench trial was held on November 20, 2007.

After trial, Cokeley presented and the trial court entered various findings of fact, including the following relevant to this appeal:

- There was a survey conducted in 1993 at the behest of Mr. Ward Willits, “to determine the boundary line between Lots 10 and 11.” (CP 72 ¶ 6)
- In 1994 [sic-should be 1993], the surveyors “placed three bar and cap survey markers along what they believed was the line between Lots 10 and 11.” (CP 73 ¶ 7).
- “After the placement of these survey markers by Hansen & Swift, Ward Willits placed two four inch round treated wooden posts adjacent to the corner survey buttons. These wooden posts were placed in concrete and located on the inside of the survey buttons. Willits placed one additional stake approximately halfway along the north property line. At that location, Ward Willits placed a metal “T” post to mark the location.” (CP 73 ¶ 8)
- In 2002, out of concern about yard waste placed on Lot 11 along the boundary with Lot 10, Mr. Willits erected a two-strand barb wire fence “from the Hansen and Swift buttons between Lots 10 and 11.”
- “As was his usual way of fencing, Willits placed the “T” posts on the inside of the property or further into Lot 11.” (CP 73-74, ¶ 8)
- The Cokeleys bought Lot 11 in 2004. (CP 74 ¶ 14)
- As part of developing the property, the Cokeleys retained Bracy Thomas for a survey to complete and certify the boundary line between the two lots. (CP 75 ¶ 17). Bracy Thomas located the three Swift survey markers when surveying the property. (CP 75 ¶ 18). Bracy Thomas determined that two of the Swift survey markers were in error. (CP 75-76 ¶ 19).

- There had been no regular use by either neighbor of the disputed area between Lots 10 and 11. (CP 76 ¶ 21).
- “Prior to 2002, there had been no boundary line markers, structure, fence, trail or any other designation of use in the disputed area between Lots 10 and 11.” (CP 76 ¶ 21).
- “A review of photographic exhibits ... make clear that the area between the Merriman lot and the Cokeley lot does not have a clear nor well defined line or boundary.” (CP 77 ¶ 26)
- There was no fence line between the two parcels before 2002, and no established trail in the disputed area. (CP 77 ¶ 27)
- “A review of photographic exhibits and testimony make clear that there is no clearly nor well defined line between the two parcels.”¹ (CP 77 ¶ 28).

CP 71-79.

Cokeley presented and the trial court entered conclusions of law, including the following relevant to this appeal:

- “The plaintiffs have failed to present proof by clear and convincing evidence that they acquired title to any other disputed portion of the defendants’ real property by adverse possession or mutual acquiescence.” (CP ¶ 3)

Id.

Several of the “findings of fact” are actually conclusions of law. The court signed and filed the findings of fact and conclusions of law on January 4, 2008. The Merrimans timely filed this appeal.

¹ There are two hand-written words added above this line on the order, but they are illegible and not initialed. The words appears to be “grooming or vegetation.” Merrimans do not believe that the additional language makes any material difference to the argument herein.

V. ARGUMENT

A. Summary of Argument.

Since 1993, the three survey markers set by licensed surveyor Robert Swift, along with the Willits wooden and metal posts set in 1994, have demarcated a certain and well-defined line between Lots 10 and 11. These markers constitute a “well defined line” under Washington law, thus satisfying this element of establishing a boundary through mutual recognition and acquiescence.

The trial court erred when it found that the survey markers are not clear evidence of a certain and well-defined line, legally sufficient to meet this element of proof in a claim for boundary change under the doctrine of mutual recognition and acquiescence.

The trial court further erred when it did not find, as a matter of law, that the Merrimans otherwise met their burden of proof by demonstrating that the neighbors had manifested through their acts a recognition of the 1993 survey line as the boundary line for the requisite period of time, thus establishing the new boundary line by mutual recognition and acquiescence.

In the alternative, the Merrimans established sufficient evidence to support their claim of acquiring the disputed triangle of land through adverse possession.

B. Standard of Review.

This case addresses acquisition of title through mutual recognition and acquiescence, or alternatively, the related doctrine of adverse possession. A trial court's findings on whether a party meets the elements of such doctrines are mixed questions of law and fact. *See, e.g., Miller v. Anderson*, 91 Wn. App. 822, 828, 964 P.2d 365 (1998) (adverse possession); *810 Properties v. Jump*, 141 Wn. App. 688, 700, 170 P.3d 1209 (2007)(prescriptive easement); *see also Lilly v. Lynch*, 88 Wn. App. 306, 316, 945 P.2d 727 (1997)(mutual recognition and acquiescence doctrine supplements adverse possession). In such a case, the trier of fact determines the essential facts, while the question of whether the facts as found constitute adverse possession or mutual acquiescence is a determination made as a matter of law. *Id.*; *see also Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984).

The appropriate review of a trial court's findings of fact following a bench trial is a determination as to whether substantial evidence supports the findings, and whether those findings support the conclusions of law. *Harris v. Urell*, 133 Wn. App. 130, 137, 135 P.3d 530 (2006). Substantial evidence exists when there is a sufficient quantity of evidence to persuade

a fair-minded, rational person of the truth of the finding. *Id.* Factual issues tend to be those focused on the “who-what-when-where-and-how” questions, a determination of damage awards, and issues such as reasonableness of an action under a specific set of circumstances. *See, e.g.,* Teglund, 14A Wash. Prac., Civil Procedure § 33.18. The legal import of established facts, however, is a question of law that the appellate court reviews de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-880, 73 P.3d 369 (2003). That is the case here.

Several of the trial court’s findings at issue in this appeal are couched in the findings of fact, but are actually questions of law. The Appellate Court is not bound by the trial court’s designation of factual findings versus legal conclusions, and thus a finding of fact that is really a legal conclusion will be treated as such, subject to de novo review. *Woodruff v. McClellan*, 95 Wn.2d 394, 396, 622 P.2d 1268 (1980).

There are several such instances in this case. The primary focus of this appeal is the conclusions of law drawn by the court based on the facts as presented and found by the court. For example:

- Finding of Fact ¶ 10: “During 1993 to 2002, there was no clear establishment of a boundary line between lots 10 and 11.” CP 73.

Whether there was a sufficiently “clear” line established for purposes of applying the doctrine of mutual recognition and acquiescence is a question of law in applying the legal elements of proof to the evidence.

Here, the trial court's *application of the law* to the facts as found was in error as the court utilized an incorrect legal standard of proof.

- Finding of Fact ¶ 26: "A review of photographic exhibits ... make clear that the area between the Merriman lot and the Cokeley lot does not have a clear nor well defined line or boundary." (CP 77)
- Finding of Fact ¶ 28: "A review of photographic exhibits and testimony make clear that there is no clearly nor well defined line between the two parcels." (CP 77)

Here, the trial court erroneously concluded that lack of a fence or some other object visible in the photographs meant that there was no "clear or well defined boundary," as that term is used with respect to the required proof in establishing mutual recognition and acquiescence. Washington law, however, provides a different standard, and the trial court made a *legal error* in applying the incorrect standard of proof to the evidence.

Indeed, there were instances where the trial court's finding of fact was not actually supported by the testimony. For example, the trial court found that Mr. Willits placed the 2002 fence inches within the boundary line, "as per his usual way of fencing" (CP 73-74 ¶ 11). The actual uncontradicted testimony was that (1) Mr. Willits *usually* placed a fence somewhere within a boundary line, but also, that (2) *in this case*, Mr. Willits used the survey markers to erect the fence *on that line*, using as support for that fence some of the very same posts he testifies he placed *on the line* shortly after the survey. This appears to have simply been an error

in the court's memory of the actual testimony. There are a few other factual errors, as discussed in more detail herein.

For the most part, however, the issues herein are questions of law: whether the trial court applied the correct *legal* elements of proof to the facts as presented and found. Therefore, this Court's review of the trial court's errors on appeal is primarily *de novo*. Even if some of the questions herein are deemed factual in nature, the Merrimans respectfully argue that there is no evidence supporting the key conclusions of the trial court, much less substantive evidence.

C. Findings of Fact in Error.

The legal arguments below utilize the actual evidence as entered at trial. In some cases, the trial court unfortunately mischaracterized or misstated that evidence in its findings of fact. Below is a brief summary of those errors, with the actual testimony provided to demonstrate the trial court's error. In most cases, if not all, these facts should not be critical to the determination of the conclusions of law addressed above. To the extent these facts affect the correct application of the law to the actual facts in evidence, however, these factual errors need to be corrected.

1. Trial court erred in finding that Willits' 2002 fence was constructed inside the 1993 boundary survey markers.

The trial court found that Mr. Willits placed the 2002 fence inches within the boundary line, "as per his usual way of fencing." CP 73-74 ¶

11. The actual uncontradicted testimony was that while perhaps Mr.

Willits *usually* placed a fence somewhere within a boundary line, *in this case*, Mr. Willits used the survey markers to erect the fence *on that line*, using as support for that fence some of the very same posts he testified he placed *on the line* shortly after the survey. RP 111, l. 15 – 112, l. 6.

This is not a case of the trial court making a factual determination after weighing conflicting testimony – the trial court was simply wrong about what was actually testified to. This appears to have simply been an error in the court’s memory of the actual testimony. In a trial with as much detail back and forth as typical for boundary disputes, it is not surprising that this error was made. But this error is a material one, because it proves something quite different than what the court used it for.

2. *Trial court erred when it stated that there had been no boundary line markers placed before 2002.*

As part of the Assignment of Error No. 1, relating to the trial court’s general failure to find that survey markers failed to establish a “well-defined line,” the trial court stated in one of its findings that “[p]rior to 2002, there had been no boundary line markers [or] structure” in the disputed area between Lots 10 and 11. CP 76 ¶ 21. However, this finding conflicts with the actual testimony and other of the trial court’s findings of fact (CP 72 ¶ 6; CP 73 ¶ 7), wherein the evidence establishes and the court recognized that the 1993 survey “clearly placed some markers,” the 1993 Swift survey markers discussed at length herein. *See, e.g.*, RP 187, ll. 16-17; RP 84-87. Therefore, to the extent that this finding fails to recognize

the 1993 Swift survey markers along the asserted boundary between Lots 10 and 11, it is in error and unsupported by the evidence.

3. *Trial court erred when it stated that the Swift survey markers were placed in 1994.*

In what appears to be a simple misstatement, the trial court found that the original surveyor placed bar and cap survey markers between Lots 10 and 11 in 1994. CP 73 ¶ 7. The actual date was 1993. *See generally* RP 84-87; *see also* RP 112, ll. 7-9 (survey was in 1993; Mr. Willits put up his own stakes at the survey markers in 1994).

D. Mutual Recognition and Acquiescence: An Overview.

Mutual recognition and acquiescence is a fundamental boundary dispute doctrine developed over almost a century of case law in Washington. *Farrow v. Plancich*, 134 Wash. 690, 236 P. 288 (1925). Mutual recognition and acquiescence supplements the doctrine of adverse possession; rather than focusing on historic use (the common question in adverse possession), the doctrine of mutual recognition and acquiescence concerns the adjoining neighbors' knowledge and acceptance of a boundary line (the "recognition and acquiescence"):

In the settlement of boundaries, the mutual recognition and acquiescence doctrine supplements adverse possession. *Lloyd v. Montecucco*, 83 Wn. App. 846, 855, 924 P.2d 927 (1996)(citing Stoebuck § 8.21 at 519), *rev. den'd*, 131 Wn.2d 1025, 937 P.2d 1101 (1997). In *Mullally v. Parks*, 29 Wn.2d 899, 906, 190 P.2d 107 (1948), the court noted:

[T]hat where boundaries have been defined in good faith by the interested parties, and thereafter for a long period of time acquiesced in, acted upon, and improvements made with reference thereto, such boundaries will be considered the true dividing line and will govern, and whether the lines as so established are correct or not becomes immaterial.

Lilly v. Lynch, 88 Wn. App. 306, 316, 945 P.2d 727 (1997) (emphasis added).

A claim under the doctrine of mutual recognition and acquiescence is not adverse, and therefore the proof is different than for adverse possession. Mutual recognition and acquiescence requires proof of the following elements:

(1)The line must be certain, well-defined, and in some fashion physically designated upon the ground, e.g., by monuments, roadways, fence lines, etc.;

(2) in the absence of an express agreement establishing the designated line as the boundary line, the adjoining landowners, or their predecessors in interest, must have in good faith manifested, by their acts, occupancy, and improvements with respect to their respective properties, a mutual recognition and acceptance of the designated line as the true boundary line; and

(3) the requisite mutual recognition and acquiescence in the line must have continued for that period of time required to secure property by adverse possession.

Lamm, 72 Wn. 2d at 593 (emphasis added).

A major role of the doctrine of recognition and acquiescence is to fulfill equity's anti-lulling policy in certain cases where estoppel and adverse possession fall short. Powell on Real Property, Boundaries § 68.05[c] at 68-23 (1998). The doctrine of mutual recognition and

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acquiescence does not require that the misrepresentation be fraudulent or intentional; it is sufficient that the party against whom the doctrine is applied had actual notice of the truth. *Id.*

The crux of the current appeal comes down to one key legal issue: what facts are required to establish a “well-defined” line for purposes of establishing a claim under the doctrine of mutual recognition and acquiescence? The trial court’s mistaken answer to this question, that boundary line survey markers known and recognized by all neighbors fail to satisfy this burden, is the basis from which all other legal conclusions at issue flow.

The following section will focus on the fact that the uncontroverted testimony at trial established facts that, under Washington law, established a “certain, well-defined” line that is “in some fashion designated on the ground” – thus meeting the first element. The next sections will in turn outline how the uncontroverted testimony at trial also established that the parties manifested a mutual recognition and acceptance of the line established by the survey markers as the true boundary line (thus meeting the second element); and demonstrate that the uncontroverted testimony and evidence at trial establishes as a matter of law the requisite mutual and acquiescence since 1993, well over the required ten years (and thus meeting the third and final element).

E. The trial court erred when it failed to find a “well-defined” line based on the facts established at trial and the trial court’s own findings of fact.

The trial court’s fundamental error was in concluding that established survey markers were not sufficient to create a “certain, well-defined” line, the first element in proving mutual recognition and acquiescence. The unambiguous and undisputed evidence at trial established the following facts:

- (a) There were survey markers (monuments) set by a licensed surveyor in 1993, at the request of the Respondent Cokeleys’ predecessor, which purported to represent the boundary line. RP 84-87; CP 73.
- (b) The survey markers were on a line which both neighbors continually understood and recognized as the boundary line since 1993. RP 89-89; 90, ll. 13-16 (Willits’ testimony); RP 125, ll. 5-18 (Scott Merriman’s testimony); RP 138, ll. 6-33 (Mr. Cokeley’s testimony).
- (c) Mr. Willits, the Cokeleys’ predecessor, further memorialized the acknowledged boundary line with two four-inch wood posts set in concrete at each lot corner and with a metal post mid-way between the two wood posts, all in line with the survey markers. RP 87-89.
- (d) Mr. Willits later erected a fence following the boundary line set by the 1993 survey markers, thus further affirming his long-standing recognition of that line as the true boundary. RP 11-112.
- (e) The trial court recognized the survey markers as “clearly” placed. RP 187, ll. 16-17.

Both the Cokeleys and the trial court implemented an incorrect standard of proof by requiring a fence to demarcate the boundary, ignoring

the survey monuments placed in 1993 and claiming that the overgrowth of blackberries obscured the line. The undisputed testimony establishes, however, that the survey markers were in place, those monuments were readily ascertainable, and that all neighbors knew just where the line was as designated by those survey markers. When Washington law is applied to the facts as found by the trial court, the Merrimans established a “well defined” line as required in their claim for a boundary adjustment per mutual recognition and acquiescence.

a. Survey markers are traditional monuments used to designate a boundary – a fence is not required.

Under Washington case law, any line designated by monuments – such as survey markers – constitutes a “well-defined line” for purposes of proving that element of mutual recognition and acquiescence. There is no basis in law for the trial court’s conclusion that there must be a fence or other “major” type of improvement for there to be a “well-defined” line. A fence (or any other more obvious improvement) is not required under the law:

(1)The line must be certain, well-defined, and in some fashion physically designated upon the ground, e.g., by monuments, roadways, fence lines, etc.;

Lamm, 72 Wn. 2d at 593; *see also* Am.Jur. 2d, Boundaries, §65 (the term monuments and objects are used interchangeably).

Notably, use of “monuments” is the first example used in the legal standard of what constitutes a line that is “certain, well-defined, and in some fashion physically designated upon the ground.”

Nothing is more accepted as marking the division of real property than a survey marker (i.e. monument) such as the bar and caps set by Mr. Swift in the 1993 survey. Survey stakes, like bars and caps, are also “monuments”:

A stake once placed, however, fixes the corner as conclusively as if it were marked by a natural object or a more permanent monument. Owing to the fact that it may be removed or obliterated, its location is frequently more difficult to prove, but **if proved, it fixes the corner with the same certainty as where the mark is a permanent object.** (Emphasis added).

Am. Jur. 2d, Boundaries, §68 Stakes.

Survey bars and stakes would be considered artificial monuments as would roads and fences. Am. Jur. 2d §65. Bruce Studeman, the surveyor employed by the Cokeleys in 2006, testified at trial that a survey bar and cap such as those present in this case is the common method to identify property boundaries. RP 14, ll. 18-25; RP 17, l. 24 – 18, l. 3; RP 21, ll. 20-23. Mr. Studeman’s expert testimony was neither objected to nor contradicted.

Long-standing case law on the doctrine of mutual recognition and acquiescence consistently holds that the legal burden of proof does not require *both* a fence and monuments, as the trial court demanded in this case. As long ago as 1925, the Washington Supreme Court has specifically held that survey markers are sufficient to mark a line without an accompanying fence:

We hold that the dividing line, as originally established by Engineer Fraser [the surveyor], is the true dividing line at this time between the lots, however that may affect either appellant or respondent. **Though the old fence is gone, one of the original [surveyor] line stakes still exists, and there ought to be no trouble in actually locating that line on the ground.**

Farrow, 134 Wash. at 691 (emphasis added).

In other words, a fence, landscape plantings, mowing or other means is not required to lead one between the survey markers, which in and of themselves constitute a “well defined line” for purposes of establishing a claim of mutual recognition and acquiescence.

In this instance, the 1993 boundary line included a straight line of *both* survey monuments and additional wood-in-concrete and metal posts. A licensed surveyor set three bars and caps in 1993 (RP 84-87); in 2006 a second surveyor readily located the monuments from 1993. RP 21, ll. 8-11. At trial Mr. Willits testified that he set two, four-inch wood posts in

concrete in line with the 1993 survey corner markers and a metal T post at the 1993 survey center marker, all of which are reasonably considered monuments as well. RP 87-89. Willits, Cokeleys, and the Merrimans all testified that they knew where the survey markers were, and believed they were the common boundary line for the two lots. RP 87-89; 90, ll. 13-16 (Willits' testimony); RP 125, ll. 5-18 (Scott Merriman's testimony); RP 138, ll. 6-23 (Mr. Cokeley's testimony).

Critical to the legal issues in this case is the fact that through this action of erecting the fence – whether on or a few inches off the line demarcated by the 1993 survey markers – Mr. Willits simply affirmed his recognition of the boundary line demarcated by those survey markers. In other words: it was not the fence that established a well-defined line, but rather that Mr. Willits erected the fence along a line that had already been established back in 1993.

The trial judge incorrectly reasoned that he could not see a clear well-defined line through the trees in the exhibit photographs, and therefore denied the claim. RP 191, ll. 8-17 (“it does not appear to me that there was a well-defined line.”). If the trial court's reasoning correctly stated the proof required under mutual recognition and acquiescence, it would no longer matter whether the neighboring parties mutually agreed

to a line, and survey monuments would be irrelevant. Such a result disregards almost a century of well-settled law.

Even if this were a question of fact, the undisputed testimony shows that everyone involved in this case recognized the disputed line as the boundary for well over ten years – with or without a fence – and the undisputed testimony confirms that each of those neighbors knew exactly where it was because of the monuments placed in the 1993 survey. There is no evidence that the lack of a fence hindered the neighbors’ awareness of the line clearly defined by the 1993 survey markers and the stakes Mr. Willits erected in 1994. That is all the law requires to meet the first element of mutual recognition and acquiescence. There is *no* evidence to support the trial court’s conclusion, much less substantive evidence.

In summary, the surveyed line by Swift in 1993, as designated by the bar and caps (i.e. monuments) is, as a matter of law, a clear and well-defined line designated physically on the ground, and therefore meets the first element of mutual recognition.

b. Overgrowth does not negate an ascertainable line that is “well-defined” by survey monuments set in the ground.

Both the Cokeleys and the trial court made much of the fact that the line had become overgrown over the years, and used that as the reason

there was no longer a “well-defined” line – despite the testimony that everyone knew where that line was. But this is not the law.

The Washington Supreme Court has rejected an argument very similar to the Cokeleys’ argument here. *Frolund v. Frankland*, 71 Wn.2d 812, 816-20, 431 P.2d 188 (1967), *overruled on other grounds*, *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984). In *Frolund*, the Court held that the existence of ascertainable survey markers are sufficient to establish a “clear and definitive line,” notwithstanding vegetation overgrowth over the years that otherwise blurred any other visible indication of a line:

And, it is unquestioned that the area lying to the east of defendants’ homesite and through which the remnants of the old fence run is, with the exception of the pathway between the parties’ properties, **covered with heavy brush and timber** and has been, on both sides of the fence, **allowed to so remain over the years**. Likewise, the evidence indicates without cavil that no one has in any fashion or for any purpose endeavored to preserve, repair, or maintain any portion of the old fence, with the result that as of the time of this action only a few fence posts and strands of wire in varying postures and stages of decay remained.

* * *

Plaintiff further argues that defendants’ actions did not establish or reveal a clear and definitive line, nor otherwise indicate a claim to any property east of the cleared area [e.g., the wooded area]. Again, the nature and use of the properties involved, and the fact that any boundary line between them necessarily followed a straight course **negates plaintiff’s argument. A survey stake stood at the northwesterly corner of**

defendants' cleared area and the common easterly corner was ascertainable.

Id. at 816-17; 819-20.

The *Frolund* case also demonstrates that a party's use at one portion of the property may establish a line that must reasonably be drawn straight through undeveloped portions of the property, such as with the wooded area on the upper Cokeley property. In fact, the property and dispute at issue in the *Frolund* case appears to be strikingly similar to the case at bar in a number of respects:

At the outset, it is essential to bear in mind that what constitutes possession or occupancy of property for purposes of adverse possession necessarily depends to a great extent upon the nature, character, and locality of the property involved and the uses to which it is ordinarily adapted or applied. In this vein, we have accepted the view that **the necessary occupancy and use of the property involved need only be of the character that a true owner would assert in view of its nature and location.** *Skoog v. Seymour*, 29 Wn.2d 355, 187 P.2d 304 [1947]; *Bowden-Gazzam Co. v. Hogan*, [22 Wn.2d 27, 165 P.2d 285 (1944)].

In the instant case, we are concerned with a narrow, elongated wedge of property lying between two parcels of land which, over the years, have been primarily devoted to rural-water-front homesites and beach recreational areas with **their more landward portions being allowed to remain in their original or unimproved state.**

Furthermore, **it was never the conception of either of the parties that the boundary line between their respective parcels followed anything but a straight course.** ... Certainly, such

actions met the requirements of the law regarding occupancy and use of rural, semicleared water-front property, and were sufficient to place plaintiff, as a rural landowner of ordinary prudence, upon notice and inquiry that defendants ... were asserting ownership to that property lying south and east of a boundary line **in extension of the line defined by their survey stakes** and the cleared area.

* * *

71 Wn.2d at 816-18 (emphasis added).

The trial court in the case at bar concluded that overgrowth over the boundary line and lack of use in the wooded areas defeated the Merrimans' claims of a "well-defined" line for purposes of establishing mutual recognition and acquiescence. This conclusion is directly contrary to the legal standards developed under Washington law, and specifically *Frolund*. The trial court's conclusion that there was not a "well-defined line," as that term is used to meet the legal burden of proof in a mutual recognition and acquiescence case, was thus a legal error in misapplying Washington law to the facts of this case.

c. *Neighbors treated line marked by 1993 survey monuments as boundary for over ten years, further evidencing the fact that this line was sufficiently "well-defined."*

The primary purpose of the "well-defined line" element of mutual recognition is to insure that the parties have knowledge of the existence of the location of that line: "In general, the line must be marked in that manner that customarily marks a division of ownership." Powell on Real Property, Boundaries §68.05[5] [b] at 68-28 (1998).

The undisputed trial testimony establishes that the three 1993 Swift survey markers were long-accepted as marking the common boundary between Lots 10 and 11. RP 84-87; 90, ll. 13-16; 125, 5-18; 138, 6-23. Both Willits and Cokeleys, along with the Merrimans, testified at trial that until the second survey in 2006, they all believed in good faith and acted in a manner that the survey markers of 1993 marked the property boundary. *Id.* Only after the 2006 survey, well after the requisite ten years of mutual recognition and acceptance had run, the Cokeleys changed their mind, alleging the lack of a well-defined line. RP 86-90, 111, 125, 138.

The trial court accepted the testimony of Willits, Cokeleys, and Merriman, thus establishing that since 1993 they knew of and treated the survey markers as the boundary between Lot 10 and 11. Thus, when applying Washington law to the facts of this case, there is a mutually recognized and accepted “well-defined line” meeting the first and second elements of mutual recognition.

d. Common sense conclusion: there is no substantial evidence that the boundary at issue was anything other than a “well-defined” line.

Even if it were a question of fact, there is *no* evidence that anyone was unclear about where this line was. Even basic common sense dictates that a “well-defined” line must exist if several people were fully aware of where that line is at and relied on that line consistently over the years,

especially where there were physical markers on that line that everyone knew of. Even if this were a question of fact, rather than one of law, there was no substantial evidence – indeed, *no* evidence at all – that the line was unknown to the neighbors involved. Certainly, no fair-minded, rational person could be convinced of the truth of the court’s finding of no “well-defined” line under the facts presented. Thus, the facts do not support the court’s findings. *Harris v. Urell*, 133 Wn. App. at 137.

In short: how can this be anything *but* a “well-defined” line?

F. **The Trial Court erred in not concluding as a matter of law that the Merrimans met their burden of proof establishing that they acquired title to the disputed property by mutual acquiescence, based on the facts as found.**

The trial court further erred in not concluding that, based on the facts as found, the Merrimans also met the final two elements required to prove their claim.

1. *Second element: Mutual recognition and acceptance.*

The trial court appears to have required that there be some affirmative *use* of the disputed area in order to sustain a claim of mutual recognition and acquiescence. CP 76 ¶ 21 (regarding “regular use”). This is an incorrect application of the law to the facts. The second element for establishing a new boundary through the doctrine of mutual recognition and acquiescence is simply proof of the *recognition and acceptance* of the certain and well-defined line as the common boundary by the neighbors in question. *Lamm*, 72 Wn. 2d at 593. This proof can be either by express

agreement or implied by acts, occupancy and improvements. *Houplin v. Stoen*, 72 Wn.2d 131, 137, 431 P.2d 998 (1967) citing *Skov v. MacKenzie-Richardson, Inc.*, 48 Wn.2d 710, 296 P.2d 521 (1956).

Here, the defendants Cokeley and their predecessor Willits admitted at trial that they believed the survey markers were the common property boundary, and they acted accordingly. RP 138, ll. 6-2. They stayed on their side of the line and respected the Merriman side of the line. RP 90-91. The Merrimans did likewise. *See, e.g.*, RP 39; 44, l. 22-45; 78, ll. 6-15; 82, ll. 2-6; 122-126. This testimony under oath reflects an express (or, at a minimum, implied) agreement as to the recognition of the line defined by the 1993 survey markers, and acceptance of this line as the common boundary.

In fact, the 2002 fence that Mr. Willits erected and upon which the parties so heavily rely is simply a particularly overt example whereby Mr. Willits, through his acts, conveyed his knowledge and acceptance of the 1993 survey line as the boundary. No further proof should be necessary to prove by implication what Willits and Cokeleys admitted under oath. Both neighbors knew the location of the line from the three survey markers along with the in-line wooden and metal posts, and they accepted and treated it as the common boundary.

2. Third element: Ten year period was satisfied.

The third and final element for a claim of mutual recognition and acquiescence is that the parties recognized and accepted the line for the time frame required for adverse possession. This time frame is ten years. RCW 4.16.020(1). It is undisputed that the third element of mutual recognition and acquiescence ten year period was satisfied. The setting of the three survey marker “monuments” in 1993 by Cokeleys’ predecessor Willits began the statutory period. The Cokeleys did not dispute the location of the boundary established by the 1993 survey markers until their survey in August 2006, well beyond the necessary ten years. RP 138, ll. 6-23.

G. **The Trial Court erred when it failed to find, based on the facts as found, that as an alternative remedy, the Merrimans established that they acquired title to the disputed property by adverse possession.**

For the reasons set forth above, the trial court erred in its application of the legal standards of proof to this case; and thus, also failed to fully address or make findings sufficient to support its denial of the Merrimans’ claim under the alternative doctrine of adverse possession.

To establish a claim of adverse possession, the claimant's possession must be proved to be (1) exclusive, (2) actual and uninterrupted, (3) open and notorious, and (4) hostile. *ITT Rayonier, Inc. v. Bell*, 112 Wn. 2d 754, 757, 774 P.2d 6 (1989). The testimony and evidence discussed above relating to the neighbors’ exclusive use of the

respective sides of the 1993 boundary line also suffice to establish a claim for adverse possession. At a minimum, the trial court failed to properly evaluate this claim, and there are insufficient facts within the court's findings to support its rejection of the Merrimans' claim for adverse possession, when looking at the facts actually supported by the record.

VI. CONCLUSION

In conclusion, the trial court erred in finding that the fence built by Willits, Cokeley's predecessor, in 2002 was constructed inside the 1993 boundary survey markers. The trial court further erred when it stated that there had been no boundary line markers placed before 2002. The trial court also erred when it stated that the Swift survey markers were placed in 1994, when in fact the date was 1993.

In addition, the trial court erred when it failed to find a well-defined line based on the facts established at trial and the trial court's own findings of fact. In support, Merriman point out that survey markers are traditional monuments used to designate a boundary—a fence is not required. Moreover, overgrowth does not negate an ascertainable line that is well-defined by survey monuments set in the ground. And neighbors treated the line marked by the 1993 survey monuments as the boundary for

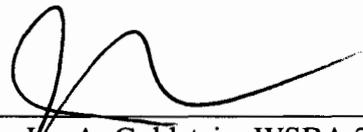
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over ten years, further evidencing the fact that this line was sufficiently well-defined.

Also, simply based on common sense, there is no substantial evidence that the boundary at issue was anything other than a well-defined line.

In summary, the trial court erred in not concluding as a matter of law that the Merrimans met their burden of proof establishing that they acquired title to the disputed property by mutual acquiescence and recognition based on the facts as found.

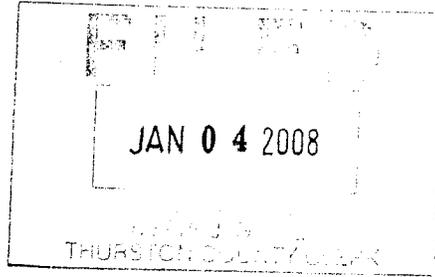
RESPECTFULLY SUBMITTED this 17 day of July, 2008.

By: 
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APPENDIX

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Date: _____
Time: _____
Judge/Calendar: _____



**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON**

**SCOTT and KIM MERRIMAN,
husband and wife,**

NO. 06-2-02110-7

Plaintiffs,

vs.

**FINDINGS OF FACT;
CONCLUSIONS OF LAW;
ORDER**

**PAUL and DIANNE COKELEY,
husband and wife,
Defendants.**

Attn: Ct. Clerk

THIS MATTER having come for trial before the court and the plaintiffs appearing in person and by and through their attorneys, **Jay A. Goldstein and Thomas F. Miller**, and the defendants appearing in person by and through their attorney, **Ken Valz**, and the court having heard the testimony of all parties, now makes the following:

FINDINGS OF FACT

1. Lots 10 and 11 of Block 1 of the Edgewater Beach plat of Thurston County lie adjacent to each other. Both parcels are quite narrow and are residential view lots of Puget Sound. These lots are located off the Steamboat Island Road in the Olympia area.

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4 2. The owners of Lot 10 are Scott and Kim Merriman. This lot has an address of
5 2321 Schirm Loop Road NW., Olympia, Washington. This lot contains a single family
6 residence and a detached ^{garage} studio. The Merrimans purchased this lot in 1996 from
7 Dan Kosenski.

8
9 3. The owners of Lot 11 are Paul and Dianne Cokeley. This lot has an address of
10 2221 Schirm Loop Road, NW., Olympia, Washington. This lot is undeveloped. The
11 Cokeleys purchased this lot on May 11, 2004 from Rita Willits.

12 4. Lot 10 has contained a residence since the early 1980's. In 1981, Dan
13 Kosenski built a concrete pad and a fire pit at the portion of Lot 10 that lies adjacent to
14 Puget Sound. This residence and the adjoining concrete pad and fire pit were used
15 uninterrupted by Kosenski and, later, the Merrimans since 1981.

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17 5. Lot 11 previously contained a cabin which was used by Rita Willets as her
18 primary residence. Rita Willits removed this home in the 1990's and the lot was then left
19 as undeveloped land.

20 6. During the 1990's, Lot 11 was maintained by Rita Willits' husband, Ward
21 Willits. During September 1993, Ward Willits retained a surveying firm, Hansen and
22 Swift Inc., to determine the boundary line between Lots 10 and 11.
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3 7. During 1994, Hansen and Swift placed three ^{barb cap} ^{MARKERS} survey buttons along what they 
4 believed was the line between Lots 10 and 11. This survey was not recorded by Hansen
5 and Swift.

6 8. After the placement of these survey ^{MARKERS} buttons by Hansen and Swift, Ward Willits 
7 placed two four inch round treated wooden posts adjacent to the corner survey buttons.
8 These wooden posts were placed in concrete and located on the inside of the survey
9 buttons. Willits placed one additional stake approximately halfway along the north,
10 property line. At that location, Ward Willits placed a metal "T" post to mark the location.

11
12 9. Neither adjacent property owner made contact with each other to discuss the
13 Hansen and Swift survey.

14 10. From September, 1993 until 2002, no further changes were made at the
15 location of the boundaries between Lots 10 and 11. During the intervening years, from
16 1993 to 2002, the area along the lot line became overgrown with blackberry bushes,
17 weeds and ivy. During 1993 to 2002, there was no clear establishment of a boundary line
18 between Lots 10 and 11.
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20 11. When Ward Willits returned to maintain Lot 11 in 2002, he became
21 concerned about yard refuse being placed on Lot 11 along the boundary with Lot 10. At
22 that time, Willits erected a two strand barb wire fence. Willits placed strands of barb wire
23 from the Hansen and Swift buttons between Lots 10 and 11. As was his usual way of
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1 fencing, Willits placed the "T" posts on the inside of the property line or further into
2 Lot 11.

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4 12. On September 24, 2002, Scott Merriman wrote a letter to Rita Willits in which
5 he expressed his gratitude for clearing the blackberries, weeds and ivy from the boundary
6 line and describing the boundary line as an "eye sore" and being extremely overgrown.
7 This letter was admitted as **Exhibit 4**. In addition, in this letter, Scott Merriman
8 expressed his desire to purchase Lot 11 from Willits but offered a lesser price than Willits
9 was asking for the lot. Merriman had desired to preserve Lot 11 as a vacant adjacent lot.

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11 13. On November 20, 2003, without notice to Ward or Rita Willits, Scott and
12 Kim Merriman recorded a "Notice" at the Thurston County Recording Section and in the
13 chain of title for Lot 11. ~~The Willits believed that the intention of recording the Notice~~
14 ~~was to decrease the value of Lot 11.~~ 91

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16 14. On May 11, 2004, the Willits sold Lot 11 to Paul and Dianne Cokeley.

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18 15. After the Merrimans learned of the sale of Lot 11 to the Cokeleys, the
19 Merrimans began a course of regular communication with the Thurston County Building
20 and Development Department regarding the use of Lot 11. The Merrimans made ten to
21 fifteen communications with Thurston County. These communications included emails,
22 personal visits and appearances at public hearings. The Merrimans objected to the use of
23 Lot 11 by the Cokeleys for residential purposes and expressed concern regarding water
24 drainage, the size of the proposed Cokeley home, concern regarding existing vegetation

1 and concern regarding tree removal from Lot 11. After reviewing the numerous
2 objections to the use of Lot 11 made by the Merrimans, the Thurston County Building
3 and Development Department approved permits for the Cokeleys to erect a single family
4 residence on Lot 11.
5

6 16. As part of the permitting process, Thurston County approved the use of an
7 additional lot owned by the Cokeleys, on the other side of Schirm Loop Road, for
8 placement of a drain field for Lot 11. ~~The septic tank permit requires a minimum set~~
9 ~~back of ten (10) feet from the mutual boundary line with Lot 10. Thurston County has~~
10 ~~informed the Cokeleys and the Merrimans that should the boundary line between the two~~
11 ~~lots be moved closer to the septic tank area, then all permits would be cancelled and there~~
12 ~~would be a necessary re-application for all permits.~~ 

14 17. After approval for the home plans, the Cokeleys retained the survey firm of
15 Bracy Thomas to complete and certify the boundary lines between the two lots.
16

17 18. While undertaking the survey, Bracy Thomas located three survey ^{markers} buttons 
18 placed by Hansen and Swift. Bracy Thomas contacted Hansen and Swift and discovered
19 that the Swift survey was never recorded.

20 19. On August 9, 2006, Bracy Thomas completed a survey in which they
21 discovered that two of the survey ^{markers} buttons placed by Hansen and Swift were placed in
22 error. The first Swift button is misplaced by .9 feet or 11 inches inside the boundaries of
23 Lot 11 and is located in the middle of the boundary between Lot 10 and 11. The second
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1 erroneous Hansen and Swift survey button is at the top of a steep bank above Puget
2 Sound and is 1.7 feet or 20 inches inside the boundaries of Lot 11.

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4 19. Bracy Thomas also learned during the survey, that the Kosenski concrete pad,
5 and fire pit used by Lot 10 extended on to Lot 11 by 4.4 feet at the area next to the bank
6 and to 5.8 feet at the water boundary.

7 20. On August 10, 2006, after discovery of the error in the Swift markings, Paul
8 and Dianne Cokeley gave notice to the Merrimans that they have no objections to
9 continued use of the concrete pad and fire pit.

10
11 21. Prior to the August 9, 2006 survey by Bracy Thomas, there had been no
12 regular use by either party of the disputed area between Lot 10 and 11. This is the
13 triangular area between the Swift survey ~~buttons~~^{markings} and the actual boundary line. Prior to
14 2002, there had been no boundary ^{line} marker, structure, fence, trail or any other designation
15 of use in the disputed area between Lots 10 and 11.

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17 22. On November 14, 2006, the plaintiffs placed a Lis Pendens in the chain of
18 title of Lot 11. During August 2006, the Cokeleys had placed the lot for sale. The
19 plaintiffs were aware at the time of filing the Lis Pendens, that the Cokeleys intended to
20 sell the lot as a residential lot on the open market. The Cokeleys received an offer to
21 purchase the real estate for \$395,000.00 in early 2007 but after the placement of the Lis
22 Pendens, this offer was withdrawn.

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3 23. On September 15, 2007, the Cokeleys had a second offer to purchase. The
4 second buyer offered \$325,000.00 for the real property. After being informed of the Lis
5 Penders, the buyer withdrew his offer. Both purchase and sale agreements required the
6 Cokeleys to deliver a clear title to the new buyer. This was impossible due to the Lis
7 Penders filed on the real property by the Merrimans.

8 24. The Cokeleys have testified that they agree the Merrimans should be granted
9 title to the concrete pad and fire pit.

10
11 25. The Merrimans have testified that they have no claim to the tidelands
12 contained in the Cokeley lot boundaries.

13 26. A review of photographic exhibits, including Exhibit 3, No. 28; Exhibit 3,
14 No. 14; Exhibit 105, No. P, Exhibit 105, No. E, make clear that the area between the
15 Merriman lot and the Cokeley lot does not have a clear nor well defined line or boundary.

16
17 27. A review of photographic exhibits and testimony make clear that there was no
18 fence line between the two parcels before 2002. A review of photographic exhibits and
19 testimony make clear that there was no established trail in the disputed area.

20 28. A review of photographic exhibits and testimony make clear that there is no
21 clearly nor well defined ^{grading or vegetation} line between the two parcels.

22
23 Based upon the foregoing Findings of Fact the court makes the following:

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3 **CONCLUSIONS OF LAW**

4 1. The plaintiffs have agreed that they have no claim to the tidelands contained in
5 the Cokeley lot boundaries and the court affirms this ownership of tidelands by the
6 defendants.

7
8 2. The defendants have agreed that the plaintiffs should have the possession and
9 title to the concrete pad and fire pit and the court awards the possession and title to the
10 concrete pad and fire pit to the plaintiffs.

11 3. The plaintiffs have failed to present proof by clear and convincing evidence
12 that they acquired title to any other disputed portion of the defendants' real property by
13 adverse possession or mutual acquiescence.

14
15 4. The defendants have failed to present proof by a preponderance of the evidence
16 that there has been a slander of title to their real property nor an intentional interference
17 with business relationship by the plaintiffs. In addition, the evidence presented by the
18 defendants regarding damages is based upon mere speculation.

19 5. The defendants have failed to establish that the filing of a Lis Pendens by the
20 plaintiffs was not in good faith.

21
22 6. The Lis Pendens filed by the plaintiff should be removed.

23 7. Neither party is the prevailing party and neither party should be awarded
24 attorney fees.

1 8. ~~The court reserves the issue of fees, pursuant to CR 68, for a separate order.~~ *JS*

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3 Based upon the foregoing Conclusions of Law, the court hereby enters the
4 following orders:

5 1. The Lis Pendens filed by the plaintiff is released and the defendants may
6 present a separate order to be recorded with the Thurston County Auditor.

7 2. The plaintiffs are given title to the concrete pad and firepit and the plaintiffs
8 may present a separate order to be recorded with the Thurston County Auditor.

9 3. The clerk of the court shall enter a dismissal of all claims.
10

11 DONE IN OPEN COURT this 4 day of December, 2007.

12
13 
14 _____
15 Judge GARY R. TABOR

16 Presented by:

17 _____
18 Ken Valz, WSBA # 12068
19 Valz, Houser, Kogut and Barnes, P.S.
20 Attorney for Defendants Cokeley

21 Agreed as to Form and Order:

22 _____
23 Jay A. Goldstein, WSBA # 21492
24 Attorney for Plaintiffs Merriman

25 _____
 Thomas F. Miller, WSBA # 20264
 Attorneys for Plaintiffs Merriman

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Certificate of Service

I certify that on the 17 day of July, 2008, I served the party listed below with a true and correct copy of the foregoing Brief of Appellants in the above-entitled matter by ABC Legal Messenger:

Ken Valz
Valz, Houser, Kogut & Barnes, P.S.
1800 Cooper Point Road SW #15
Olympia, WA 98502

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

DATED at Olympia, Washington, this 17 day of July, 2008.



DONNA WAITE
Paralegal for attorney Goldstein

HELEN
COURT OF APPEALS
DIVISION II
08 JUL 17 PM 1:54
STATE OF WASHINGTON
BY _____
DEPUTY