

No. 39567-3-II

COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

STEPHEN CHANDLER and KIM O'NEILL,
Plaintiffs,

and

JOHN KUHLMAN and JANE DOE KUHLMAN, husband and wife; TIM SELFRIDGE and JANE DOE SELFRIDGE, husband and wife; and WINDERMERE REAL ESTATE/STELLAR GROUP, MORTGAGE ELECTRONIC REGISTRATION SYSTEM, INC., FIRST AMERICAN TITLE COMPANY, AND CHASE MANHATTAN BANK USA, Defendants.

JOHN KUHLMAN and JULIE KUHLMAN, husband and wife,
Appellant/Third-Party Plaintiffs,

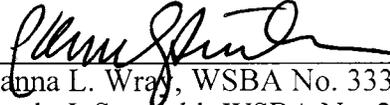
v.

DAN I. CARLSON and PATRICIA J. CARLSON, husband and wife,
Respondent/Third-Party Defendants.

On Appeal from the Cowlitz County Superior Court

APPELLANTS' REPLY BRIEF

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STATEMENT OF THE CASE

Chandlers' brief takes the liberty of inserting "facts" that are not in evidence. *See* Respondents' brief, p. 4 (first full paragraph). Stephen Chandler's declaration contains no such facts. CP 31-32. The court should disregard any facts that are not grounded in admissible evidence in the record.

Later in the brief, Chandlers again insert facts that are nowhere in the record. *See* Respondents' brief, p. 22 (first full paragraph). There is no citation to the record in this paragraph because there is no evidence to support it.

ARGUMENT

A. STANDARD

Summary judgment is appropriate if the pleadings, depositions and admissions on file together with the affidavits show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Del Guzzi Constr. Co. v. Global Northwest Ltd.*, 105 Wn.2d 878, 882, 719 P.2d 120 (1986). An appellate court reviewing an order of summary judgment places itself in the position of the trial court and considers the facts in a light most favorable to the nonmoving party. *Del Guzzi*, 105 Wn.2d at 882. The burden is on the moving party to prove no genuine issue of fact exists which could influence the outcome at trial. *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). Summary judgment is appropriate only when there is no

genuine issue of material fact, reasonable persons could reach only one conclusion, and the moving party is entitled to judgment as a matter of law. *Tanner Elec. Coop. v. Puget Sound Power & Light*, 128 Wn.2d 656, 668, 911 P.2d 1301 (1996).

For this court to uphold the trial court's judgment, Chandlers must establish that there is no dispute as to any genuine issue of material fact, that reasonable persons could only find in favor of Chandlers, and that Chandlers are entitled to judgment as a matter of law. In other words, even if no facts were in dispute, Chandlers still have to prove that it would be impossible for a jury to find in favor of Kuhlman's. Chandlers fail to carry this burden.

B. THE COMMON GRANTOR DOCTRINE FAILS.

Chandlers only present half of a quote from *Strom v. Arcorace*, 27 Wn.2d 478, 481, 178 P.2d 959 (1947) (quoting 11 C.J.S., Boundaries, § 77, p. 651) in support of their argument. The full quotation states:

A practical location made by the common grantor of the division line between the tracts granted is binding on the grantees who take with reference to that boundary. The line established in that manner is presumably the line mentioned in the deed, and no lapse of time is necessary to establish such location, which does not rest on acquiescence in an erroneous boundary, but on the fact that the true location was made, and the conveyance in reference to it. *However, for a boundary line established by a common grantor to become binding and conclusive on grantees it must plainly appear that the land was sold and purchased with reference to such line, and that there was a meeting of minds as to the identical tract of land to be transferred by the sale; * * ** (Emphasis on portion of quote omitted from Chandlers' brief).

Here, Chandlers admit that there is a question of fact as to notice of the “new” boundary to Kuhlman’s.¹ As such, under the *Strom* case, Chandlers cannot readjust the written boundary line under the common grantor doctrine because the land was not sold or purchased with reference to such a line, and there was no meeting of the minds as to the identical tract of land to be transferred by the sale. *Strom*, 27 Wn.2d at 481.

The *Strom* case is factually distinguishable as well. In *Strom*, one neighbor sued to quiet title over a narrow strip of land between their homes, and the court held that the common grantor doctrine applied because the appellants purchased their property seeing and knowing the conditions as they existed (a fence was erected), and although they raised a question with their grantor as to the location of the dividing line, they were assured by their grantor that the fence was the correct line. They did nothing to protest - in fact, they rebuilt a part of the fence in the same location as the former fence. *Strom*, 27 Wn.2d at 481-482. This is in stark contrast to when the Kuhlman’s purchased their property in 2001, and there was no fence, indeed, no visible line at all distinguishing the boundary between the two properties.

The common grantor doctrine cannot apply because Chandlers acknowledge and concede that there is a question of fact as to notice to Kuhlman’s; and because the undisputed testimony of Kuhlman’s reveals that at the time the Kuhlman’s bought their property, a visual examination did not reveal a physical demarcation sufficient to make subsequent

¹ Respondents’ brief, p. 7.

parties aware of the changed boundary. *Fralick v. Clark County*, 22 Wn.App. 156, 589 P.2d 273 (1978).

C. NOTICE TO KUHLMANS IS NOT ONLY RELEVANT,
IT IS DECISIVE.

Chandlers argue that notice to Kuhlman is not relevant because their predecessors in interest had already established the new boundary under the common grantor doctrine. This is not the case, as illustrated in *Fralick v. Clark County*, 22 Wn.App. 156, 589 P.2d 273 (1978). The facts in *Fralick* are extremely similar to the facts presented here.

In *Fralick*, the dispute as to title of a strip of land was between the Fralicks and Clark County. The history of ownership of the property was traced by the court. Just as in the case at bench, Clark County was two steps removed from the original common grantor. Fralicks also had several predecessors in interest. The original common grantors, Cole and Witter sold the southern tract (later owned by Clark County) to Mr. Smale. Cole and Smale examined the property together and Cole, contrary to the written legal description, pointed out the lower falls as the northern boundary. Smale then sold the property to Harrison. Again, Smale told Harrison the lower falls were the northern boundary. When Harrison sold the property to Clark County some years later, he did NOT tell the County that the falls were the boundary. In all, Smale and Harrison together owned the property from 1940 until 1974 – some 34 years – with notice that the lower falls were the northern boundary. *Fralick*, 22 Wn. App.

at 159. Using Chandlers’ reasoning, this alone was enough to change the boundary from then on, regardless of notice to subsequent purchasers.

However, in *Fralick*, the court specifically looked at *the County’s* notice (or lack thereof) and determined that the trial court was correct that “the County is not bound by prior boundary-line agreements” because there was nothing in the record that indicated that *the County* had any knowledge of the “lower falls” boundaries. *Fralick*, at 160. The court’s decision in *Fralick* eviscerates Chandlers’ argument that the Kuhlman’s notice is irrelevant. Chandlers may not like the court’s holding in *Fralick*, but *Fralick* has been the law in this jurisdiction since 1978 – well before either the Chandlers or Kuhlman’s owned any of the property at issue. Chandlers call this “a case of first impression” in Washington.² Even if one completely ignores the facts and holding in *Fralick*, it is not a case of first impression. Indeed, there are many cases addressing this issue, not the least of which is *Fralick*, which is directly on point.

Chandlers go to great length to talk about public policy considerations, but they fail to provide a single citation that supports any of these ideas as established public policy. To the contrary, public policy considerations run in favor of Kuhlman’s. Public policy – which was strong enough to pass into law – requires that real estate be conveyed by written deed, and that legal boundaries are contained in written legal documents and recorded with the County. RCW 64.04.010, RCW 64.04.020, RCW 65.08.070. As a general rule, a person purchasing

² Respondents’ brief, p. 13, l. 1.

real property may rely on record title to that property in the absence of actual knowledge of another's title or facts sufficient to put him on notice of it. *Gold Creek North Ltd. Partnership v. Gold Creek Umbrella Ass'n*, 143 Wn.App. 191, 201, 177 P.3d 201 (2008) (citing *Olson v. Trippel*, 77 Wn.App. 545, 550-51, 893 P.2d 634 (1995) (quoting *Lind v. Bellingham*, 139 Wn. 143, 147, 245 P.925 (1926))).

Chandlers unnecessarily stray from the present issue by rhetorically asking this court to consider who had title to the strip of land between 1974 and 2001.³ This issue is not before the court, just as it was not before the court in *Fralick*. The *Fralick* court did not need to make any determination about who owned the strip there between 1940 and 1974 because it was properly focused on the two relevant issues: (1) whether there was an agreed boundary established between the common-grantor and the original grantee, and if so, (2) whether a visual examination of the property indicated to subsequent purchasers that the deed line was no longer functioning as the true boundary. *Fralick*, at 160.

Fralick also puts to rest Chandlers' hypothetical bouncing boundary line. Chandlers suggest that very possibly, if and when Kuhlman's ever sell their property, they could somehow cause a reversion of the title to the strip back to *Bishops*.⁴ This theory is nonsense and is exactly why every conveyance of real estate in this State is required to be by written deed. RCW 64.04.010-020. It is why legal boundaries are

³ Respondents' brief, p. 10, l. 1-2; p. 12.

⁴ Respondents' brief, p. 12.

contained in *written* legal documents and recorded with the County. RCW 65.08.070. This is also why RCW 64.06.020 requires that sellers make certain disclosures in writing – just as Bishop and Carlson did here – confirming that there are no encroachments, boundary agreements, or boundary disputes. Imagine Kuhlman's dismay when their purchase (to their knowledge) was pursuant to all of these laws – laws meant to safeguard the sacred property rights of individuals – only to have their neighbors claim that the land for which they paid money, described in the deed, recorded with the County, and confirmed in the sellers' disclosure, was not theirs, but their neighbor's land based upon a verbal agreement some 30 years earlier. This is precisely why the common grantor doctrine requires either actual notice or a visual examination of the property indicating to subsequent purchasers that the deed line is no longer the true boundary. *Winans v. Ross*, 35 Wn.App. 238, 242, 666 P.2d 908 (1983).

Here, summary judgment was not appropriate because there are genuine issues of material fact, reasonable persons could reach more than one conclusion, and Chandlers are not entitled to judgment as a matter of law. *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 668, 911 P.2d 1301 (1996).

D. CHANDLERS IGNORE THE OTHER FACTUAL DISPUTES.

Chandlers completely ignore the list of six separate disputed factual contentions raised in Kuhlman's opening brief at pp. 8-11, with the exception of the two Carlson affidavits. There is no explanation from

Chandlers why the first five disputed areas (in addition to the concession on notice to Kuhlman), do not independently, not to mention collectively, require the reversal of the trial court's judgment.

The disputed facts are material to the outcome of this litigation. For example, Chandlers rely upon an "express agreement" between Bishop and Carlson to support their acquiescence argument.⁵ However, both Bishop and Carlson separately denied in writing any such boundary agreement in their seller's disclosure statements. CP 73, 82-86, App. pp. 2, 11-15, John Kuhlman Dec, ¶ 4, Ex. 2; CP 62-28, App. pp. 34, 35-40, Selfridge Dec, ¶ 6, Ex. 1. Chandlers fail to address why these completely contradictory factual statements on a crucial issue do not create a jury question and therefore defeat summary judgment.

With regard to the two Carlson affidavits, the primary case relied upon by Chandlers, *Marshall v. AC & S Inc.*, 56 Wn.App. 181, 185, 782 P.2d 1107 (1989), for the proposition that a party cannot create an issue of fact by contradicting earlier deposition testimony, is distinguishable. There, plaintiff testified unequivocally in his deposition as to a certain date, which was further objectively verifiable by medical records. Defendants moved for summary judgment on the statute of limitations. In response, plaintiff submitted a clearly self-serving affidavit changing his previous testimony. The court held that the contradictory affidavit did not raise a genuine issue of material fact. *Marshall*, at 185. In this case, Carlson submitted two affidavits – albeit slightly different – the first

⁵ See Respondents' brief, p. 15.

affidavit drafted by Chandlers' counsel and the second by Kuhlman's counsel. Allowing Kuhlman's counsel to give Carlson a chance to clarify some of the statements he signed in the affidavit prepared by Chandlers' counsel is no different than conducting cross-examination in a deposition. If Carlson's clarifying testimony had occurred during the course of a deposition, would Chandlers be successful in only presenting the testimony elicited in response to their own attorney's questions to the exclusion of the remainder of the transcript? The answer is no. Kuhlman would be able to present the clarifying testimony elicited later on in the deposition. The only unfairness that would arise from this situation is for Chandlers to maintain exclusive control over a witness who has more to say than they want to hear.

E. ACQUIESCENCE FAILS.

Chandlers have the burden of proving each of the elements of mutual recognition and acquiescence by clear, cogent, and convincing evidence. *Green v. Hooper*, 149 Wn.App. 627, 641, 205 P.3d 134 (2009). Evidence is clear, cogent, and convincing "when the ultimate fact in issue is shown by the evidence to be 'highly probable.'" *In re Dependency of K.R.*, 128 Wn.2d 129, 141, 904 P.2d 1132 (1995). Chandlers have failed to meet this burden.

The first element is for the line to be "certain, well-defined, and in some fashion physically designated upon the ground." *Green*, 149 Wn.App. at 641 (citing *Lamm v. McTighe*, 72 Wn.2d 587, 434 P.2d 565

(1967)). Chandlers' attempt at proving acquiescence fails because it is not "highly probable" that a well-defined and physically designated line existed. Chandlers argue that a "well-defined" line was marked by an iron pipe, a blaze in a tree, and a second iron pipe that was washed away by the river and replaced by a rock set in concrete. An examination of the facts supporting this argument reveals that there is not clear, cogent, or convincing evidence.

1. The iron pipe in the northeast corner

- Bishop says an iron pipe marked the northeast corner, CP 27, Bishop Dec, ¶ 5;
- Carlson says there was a monument near the roadway, CP 43, Carlson Dec (first), ¶ 4;
- Chandler's declaration is devoid of any facts regarding an iron pipe;
- Kuhlman's declaration says he was never shown a pipe, CP 74, Kuhlman Dec, ¶ 5.

Of the four residents who lived in the neighboring properties, there is evidence of an iron stake marking the northeast corner near the road (there is no dispute as to this point).

2. The blaze in the cedar tree

- Bishop says a cedar tree in the middle of the north line was marked with an ax, CP 27, Bishop Dec, ¶ 5;
- Carlson's declarations are silent as to the tree;

- Kuhlman says the cedar tree was covered with ivy, CP 74, Kuhlman Dec, ¶ 5;
- Kuhlman has searched for a blaze mark on the ivy-covered tree, even after the ivy was removed, and couldn't find it, CP 74, Kuhlman Dec, ¶ 6;
- Chandler's declaration is devoid of any facts regarding a cedar tree.

Of the four residents who lived in the neighboring properties, the only evidence of the blaze in the tree, is that Bishop alone saw it, and then it was covered by ivy. There is no evidence of whether the blaze was visible, or how long the blaze remained. Tellingly, Chandler does not submit evidence that he ever saw a blaze in a tree. Presumably, if the blaze was still present and visible, Chandler would have said so. This is not clear, cogent, or convincing evidence either as to the existence of the blaze, the visibility of the blaze, or the longevity of the blaze.

3. The northwesterly iron pipe replaced by concrete rock

- Bishop says an iron pipe marked the northwesterly upland portion of the north line in 1974, CP 27, Bishop Dec, ¶ 5;
- Bishop says the original iron pipe would wash away from time to time, CP 28, Bishop, ¶ 1;
- Carlson says the iron stake described by Bishop was gone by 1980 when he purchased the property, CP 125, Carlson Dec (second), ¶ 5;

- Bishop says he and Carlson set a large rock in concrete to replace the iron pipe marking the northwest boundary, CP 28, Bishop Dec, ¶ 13;
- Carlson (in his first affidavit drafted by Chandlers' lawyer) denied that the large rock in concrete was set to memorialize the corner, CP 43, Carlson Dec (first), ¶ 6;
- Carlson (in his second affidavit) stated that the rock was used as an end form for a curved concrete mow strip after he rip-rapped the river bank in 1996, and he never meant for this to be a legal boundary, CP 125, Carlson Dec (second), ¶ 6;
- Bishop says the rock endured "multiple floods" (meaning it was under water for portions of time), CP 28, Bishop Dec, ¶ 13;
- Kuhlman's declaration says he was never shown a rock set in concrete or told that such a rock marked the boundary, CP 73, Kuhlman Dec, ¶ 5;
- Chandler's declaration says Bishop showed him a stone monument by the river, CP 32, Chandler, ¶ 4.

The only evidence of the original iron stake is that it would wash away from time to time and was gone by 1980. The only evidence of the rock as a boundary marker is completely contradictory. Bishop says it was supposed to be a boundary, and Carlson, twice, says it was not. Additionally, Bishop says it was under water (and therefore not visible) when it endured multiple floods. Again, this is insufficient evidence to meet the clear, cogent, and convincing standard. It is not highly probable

that the iron pipe, the cedar tree, and the rock established a boundary that was “certain, well-defined, and in some fashion physically designated upon the ground.”

Perhaps more telling than all of the absent or contradictory testimony is the purely objective, photographic evidence. It is noteworthy that the only photographs submitted by Chandlers are those from after 2005 when the Kuhlman fence was already erected. With all the support that Bishop gave Chandlers, one would think at least one pre-2005 photograph would surface to objectively support Chandlers’ allegation of a certain, well-defined line, that in some fashion is physically designated upon the ground. Chandlers submitted nothing of the sort. Instead, the photographs submitted by Kuhlman, one as early as 1998, show absolutely no physical demarcation of a certain, well-defined line, and, as discussed below, contradict such a line. Chandlers have failed to carry their burden of proving by clear, cogent, and convincing evidence the required certain, well-defined boundary which is physically designated upon the ground.

One piece of evidence that Chandlers ignore, and which flies in the face of the visible, well-defined boundary, is the retaining wall built by Carlson. Carlson built a retaining wall with railroad ties on property he believed to be entirely his own. CP 126, Carlson Dec (second), ¶ 7. The retaining wall extends well to the south of what Chandlers claim to be the boundary line. CP 76, 95, Kuhlman Dec, ¶ 14 (and Ex. 10). The retaining

wall is parallel to the river and perpendicular to the boundary line, yet it does not stop where the supposed boundary line ends. If Carlson had believed the boundary to be what Chandlers claim, then he would not have built the retaining wall where he did. Additionally, any theoretical visual line created by the northeastern iron rod, through the cedar tree down to the rock, is offset by the retaining wall which extends well to the south of the cedar tree. Anyone looking at that “line” would be confused as to whether the end of the retaining wall marked the boundary.

Without clear, cogent, and convincing evidence of a certain, well-defined boundary which is physically designated on the ground, Chandlers’ claim for acquiescence fails.

Summary judgment is appropriate only when there is no genuine issue of material fact, reasonable persons could reach only one conclusion, and the moving party is entitled to judgment as a matter of law. *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 668, 911 P.2d 1301 (1996). Chandlers have failed to establish that there is no genuine issue of material fact. They have failed to establish that reasonable persons could only reach one conclusion. They have failed to establish that they are entitled to judgment as a matter of law.

CONCLUSION

The trial court erred in granting summary judgment in the Chandlers’ favor. A disputed issue of material fact prevented the entry of summary judgment in their favor. Reasonable persons could find in favor

of Kuhlman. The law, as applied to the facts in this case, supports the conclusion that title to the disputed strip is as described in the written warranty deeds. This court should reverse the trial court's judgment and remand for entry of judgment in favor of the Kuhlman.

Dated this 26th day of February, 2010.

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PROOF OF FILING AND SERVICE

I certify that on this 26th day of February, 2010, I filed the original and one copy of **APPELLANTS' REPLY BRIEF** with the Court of Appeals, Division II by United States Postal Service certified mail at the following address:

Court of Appeals : Division II
950 Broadway, Suite 300
Tacoma, WA 98402

I further certify that on this 26th day of February, 2010, I served a copy of the **APPELLANTS' REPLY BRIEF** by United States Postal Service first-class mail on the following parties at these addresses:

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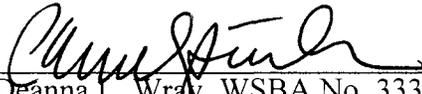
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Dated this 26th day of February, 2010.

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