

NO. 39667-0-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

SPENCER DICK and MARY DICK, husband and wife and their
marital community; 88th STREET, LLC,

Appellants,

vs.

FRANCIS CHENETTE and JANE DOE CHENETTE,

Respondents,

APPEAL FROM THE SUPERIOR COURT

HONORABLE JOHN P. WULLE

APPELLANTS' BRIEF

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APPELLANTS' BRIEF
STATE OF WASHINGTON
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ASSIGNMENT OF ERROR AND ISSUES PRESENTED

The trial court erred in its rulings in the Order on Motions for Summary Judgment.

1. In the Dicks' action brought under RCW 64.12.030, must their damages be computed on the basis of restoration value when they acquired and used the property from which the trees were taken for recreational purposes and the trees that were cut served as a visual buffer?

2. Can a ditch serve as a boundary under the doctrine of mutual recognition and acquiescence?

3. Did the defendants present sufficient competent evidence to make out all of the elements of mutual recognition and acquiescence?

4. Does RCW 5.60.030 preclude Mr. Chenette's testimony concerning matters that the Dicks' deceased predecessors could deny to include their use of the property; their alleged recognition and acquiescence in any boundary; and his beliefs and impressions concerning the alleged boundary?

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STATEMENT OF THE CASE

I. Facts That Are Substantially Agreed.

a. Description of the Properties.

By 2005, the parties owned adjoining parcels of property several hundred yards south of Lucia Falls Road in rural Clark County. Both are established in Township 4 North, Range 2 East of the Willamette Meridian. The land owned by Francis Chenette was located primarily in the southwest quarter of Section 13. Spencer Dick and Mary Dick owned property across the section line and mostly in the southeast quarter of Section 14. (CP 18-19, 60) The appendix to this brief includes a map of the two properties denoting ownership together with an aerial photograph. Both are part of the record. (CP 18-19, 60)

Both the Dick property and the Chenette property include a narrow graveled strip running north and south to provide access to Lucia Falls Road. Each strip is approximately twenty (20) feet wide. There is a wooded area between the two graveled roadways. There is a ditch in this wooded area of varying depths and widths. (CP 155)

The section line between Section 13 and Section 14 is east of the ditch between the two graveled roadways. (CP 155-58)

b. Location of the Trees in Question.

The trees in question are Douglas fir and western red cedar. Before Mr. Chenette removed them, they were located in the wooded area that is between each parcel's gravel access strip. They were either partially or totally on the Dicks' property, in Section 14. (CP 155, 158)

c. Historical Use and Conveyances of the Properties.

Mr. Chenette acquired his property in 1963. His parcel was surveyed at that time. He located all of the property corners. (CP 117-18; 122; 181-85)

At the time Mr. Chenette acquired his property, the Dicks' property was owned by a group known as Play Haven. At one time, a corporation known as Play Haven, Inc. may have existed. (CP 59) The Play Haven group was comprised of at least ten (10) families. (CP 125-53) They used the property for recreational purposes. The Play Haven members cleared brush on the west side of the ditch in the wooded area while Mr. Chenette cleared brush east of the ditch. (CP 63-64)

Lloyd Aspaas, Lyle French, Albin Hanning, and William Shefchek were members of the Play Haven Group. Each is now deceased. In 1989, these gentlemen, along with all the other living individual Play Haven members, conveyed their interests in the property to Julia

Hennessee. (CP 77-80; 125-53)¹ The Dicks entered into a Real Estate Contract with Ms. Hennessee in 2004 and obtained a Fulfillment Deed from her in 2005. (CP 160)

d. The Dicks' Acquisition and Use of Their Property.

Mr. and Mrs. Dick and their limited liability company acquired the property from Ms. Hennessee through a real estate contract executed in September of 2004. (CP 187-88) They purchased the property to use it as a weekend getaway. (CP 31) The trees between the two roadways created a visual buffer that insured privacy. This was important to Mr. Dick. As he stated:

I put a high personal value because it was part of the allure of this property the first time I went down there, walking down there with the realtor on this beautiful sunny day, walking through this tunnel of trees that filtered the light down onto the road and the sense of moving away from the world and a sense of going to place that was special and exclusive, in a place that you could have privacy there.

It was -- I put a very -- personally, I put a very high value on that sense of privacy and that sense of beauty, and they were just really beautiful trees and they did something special for the piece of property to have that long beautiful tunnel of shaded and private entry.

¹ Other Play Haven members may also be deceased. Mr. and Mrs. Dick were not able to document that status, however. Any person wishing to obtain a death certificate must provide the name and date of death of the deceased person. Mr. and Mrs. Dick were able to learn that specific information only as to these four gentlemen.

(CP 33) Mr. Chenette's attorneys engaged Gaston Porterie, an arborist, to render an opinion on damages. Mr. Porterie acknowledged that people living in the area would value privacy. He also believed that the trees between the two roadways would function as a visual buffer between the properties. (CP 124)

The Dicks placed a portion of their property in the current use classification for real estate property taxes as they were allowed to do by RCW 84.34. The area where Mr. Chenette removed the trees in question was not, however, in current use. (CP 160)

e. Removal of the Trees.

In 2005, Mr. Chenette sold his property to Lyndon Fisher. The parties' purchase and sale agreement allowed Mr. Chenette to remove all merchantable timber from the property. According to Mr. Chenette, he insisted on being allowed to remove the timber because Mr. Fisher wanted the timber but he did not want to pay for it. Mr. Chenette also believed that the sale price was too low and "sure wasn't going to give (Mr. Fisher) all of the timber." (CP 121)

In June of 2005, Mr. Chenette engaged Doug Somero, a logger, to remove timber from the property. He directed Mr. Somero to remove twenty-six (26) trees in the area between the two roadways. (DEP

Chenette, pps. 67-68) Mr. Chenette took the trees to a mill. After paying Mr. Somero and applicable tax, he received \$3,797.96. (CP 47)

II. Facts Concerning the Boundary between the Two Parcels.

Ron Aspaas is the son of Lloyd Aspaas. He recalls the ditch running between the two parcels and a barbed wire fence “running most of the length of this ditch.” As he stated, “it seems to me the fence ran along the east bank of the ditch.” (CP 64)

When Mr. Dick viewed the property prior to purchase, there was no sign of any fence in the vicinity of the ditch. In the brief interactions that Mr. Dick and Mr. Chenette had prior to the removal of the trees, Mr. Chenette did not point out or refer to any fence in that area. (CP 160)

Clark County survey records confirm the existence of a fence in the area east of the ditch. There is a quarter section monument at the corner of the northwest and southwest quarters of Section 13 and the northeast and southeast quarters of Section 14. That monument is east of the ditch. Wayne Ritter of the Clark County Engineer’s Office located that monument in March of 1974. He stated that the monument was on a north-south fence line. Charles Whitten is a professional surveyor. He prepared a Land Corner Record on May 10, 1994, and filed it with the Clark County Auditor. In that document, he stated that he visited the quarter section monument on May 4, 1994, and found it in “an old north-

south fence line.” He noted the presence of gravel roads both east and west of the quarter section monument. (CP 159)

David Simes is also a professional land surveyor. He used a metal detector to locate remnants of the barbed wire fence in August of 2009. These remnants were on or near the section line between Section 13 and Section 14. Two of these remnants were immediately to the east of trees that Mr. Chenette had removed. In other words, if the fence line was the boundary, the trees were clearly on the Dicks’ side of the boundary. (CP 154-58)

III. Course of Proceedings.

Mr. and Mrs. Dick filed suit in November of 2006 and filed their Amended Complaint on March 27, 2007. (CP 1-2) Mr. Chenette subsequently answered. (CP 3-5) Based on Mr. Chenette’s demand, the matter was set for trial by jury.

On July 23, 2009, Mr. and Mrs. Dick moved for partial summary judgment. They sought a ruling requiring assessment of damages on restoration value and exclusion of evidence of any other measure. By this time, Mr. Chenette had asserted that the ditch was the boundary line between the two properties. Mr. and Mrs. Dick also argued that he could not bring forward sufficient competent evidence to support that claim. They asked the trial court to rule that the section line between Section 13

and Section 14 be established as the boundary line between the two parcels. In connection with boundary question, they moved in limine to preclude Mr. Chenette from testifying concerning transactions with Play Haven members based on RCW 5.60.030. (CP 7)

Mr. Chenette responded by seeking summary judgment to the effect that the Dicks' damages could only be based on stumpage. (CP 39-40) He also sought a ruling that the ditch established the boundary line between the parcels. (CP 37-38) Mr. Chenette also submitted a declaration. In that declaration, he discussed events that had occurred while the Play Haven members owned and possessed their property. (CP 65-67)

Mr. and Mrs. Dick moved to strike certain portions of the Déclaration of Ron Aspaas. They also moved to strike Mr. Chenette's declaration to the extent that his statements were inadmissible under the terms of RCW 5.60.030. (CP 68-74)

On August 24, 2009, the trial court entered the Order on Motions for Summary Judgment. It ruled that there was a genuine issue of material fact on Mr. Chenette's claim that the boundary between the two parcels was the ditch based upon the doctrine of mutual recognition and acquiescence. It also decided that Mr. Chenette could testify regarding the conduct of the Play Haven members and their use of the land but not his

impressions as to their beliefs regarding the boundary. Finally, it concluded that the Dicks' damages would be based on stumpage value and not restoration value. (CP 163)

The Dicks then sought discretionary review. (CP 165-68) Mr. Chenette also sought discretion review. (CP 169-175) The Commissioner then allowed discretionary review to proceed. He based his decision on the trial court's certification of the issues presented in the motion based on RAP 2.3(b)(4). (CP 164)

ARGUMENT

Assignment of Error No. 1: The trial court erred in its Order on Motions for Summary Judgment.

I. Standard of Review.

The trial court's Order on Motions for Summary Judgment is at issue here. An appellate court reviews a summary judgment order *de novo* engaging in the same inquiry as did the trial court. Summary judgment is appropriate only if the pleadings, depositions and affidavits on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. All facts are viewed in the light most favorable to the nonmoving party. Summary judgment can be granted on if reasonable persons could reach one conclusion from all the

evidence. *Hisle v. Todd Pacific Shipyards Corp*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004); *Vallandigham v. Clover Park School District No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005); *Activate, Inc. v. Washington State Department of Revenue*, 150 Wn.App. 807, 812, 209 P.3d 524 (2009).

Supporting affidavits and other materials must be based on personal knowledge and shall set forth such facts as would be admissible in evidence and show affirmatively that the affiant is competent to testify to the matters stated. CR 56(e). Therefore, the Appellate Court can only consider admissible evidence in reaching its decision. *Dunlap v. Wayne*, 105 Wn.2d 592, 535-36, 716 P.2d 842 (1986); *Lynn v. Labor Ready, Inc.*, 136 Wn.App. 295, 306, 151 P.3d 201 (2006).

II. The Trial Court Erred by Ruling that the Dicks' Damages Would Be Determined on the Basis of Stumpage.

a. Restoration Value Is the Proper Measure of Damages Because the Property Was Purchased and Used for Recreational Purposes and the Trees Provided a Visual Buffer.

The Dicks sued under Washington's Timber Trespass Statute, RCW 64.12.030. Several standards have been set out for computing damages under that statute. Each is based on the use of trees that are removed. Trees that are grown for timber are valued on the basis of stumpage. *Henriksen v. Lyons*, 33 Wn.App. 123, 652 P.2d 18 (1982). For fruit or Christmas trees, damages are equal to the revenue those trees

would have produced less costs of production. *Pearce v. G.R. Kirk Co.*, 92 Wn.2d 869, 873-74, 602 P.2d 357 (1979); *Sparks v. Douglas County*, 39 Wn.App. 714, 695 P.2d 588 (1985). Damages for trees cut from recreational and residential property — trees that have a non-commercial use — are based on restoration value rather than stumpage, production value, or lost profits. Trees that function as a visual buffer are also valued based on restoration. *Sherrell v. Selfors*, 73 Wn.App. 596, 871 P.2d 168 (1994), cited with approval in *Birchler v. Castello Land Company, Inc.*, 133 Wn.2d 106, 111-112, 942 P.2d 968 (1997).

When there is no genuine issue of material fact as to the use of trees, summary judgment is proper to determine the method of computation of damages. The Court reached that conclusion in *Hill v. Cox*, 110 Wn.App. 394, 41 P.3d 495 (2002). The plaintiff in that case purchased twenty (20) acres of remote forested property in Okanogan County with a cabin and a spring. The trial court found that reasonable minds could not differ as to the proposition that the plaintiff “purchased the property for recreational purposes, and that the trees. . . preserved a visual buffer enhancing privacy and aesthetic value.” 110 Wn.App. at 404-5. On that basis, it granted summary judgment to the effect that damages would be determined on the basis of replacement and restoration costs as opposed to stumpage. The Court of Appeals affirmed.

In our case, just as in *Hill v. Cox, supra*, reasonable minds cannot differ. The trees that were removed functioned as a visual buffer. Even Mr. Chenette's arborist agrees with that conclusion. It is also unquestioned that the Dicks purchased the property for recreational and residential purposes. From Mr. Dick's perspective, the trees had clear and unmistakable aesthetic value. For that reason, damages must be computed on the basis of restoration.

b. The Rural Character of the Property Does Not Require the Use of Any Other Measure of Damages.

Mr. Chenette is expected to contend that the rural or undeveloped character of the property where the trees were located requires them to be valued as stumpage. The urban, suburban, or rural character of the property has no bearing on the question. Obviously, the property in *Hill v. Cox, supra*, was rural. Restoration value was also used to determine damages in *Allyn v. Boe*, 87 Wn.App. 722, 93 P.2d 364 (1997). In that case, the property in question consisted ten (10) acres of wooded and undeveloped property in Thurston County. The damages were computed based on what the Court called "the basic formula method." 87 Wn.App. at 727. This is a generally accepted methodology for computing damages under the restoration method when actual replanting of the trees is not feasible.

c. The Trees' Distance from the Cabin on the Property Does Not Matter.

Next, Mr. Chenette is expected to argue that the trees are at some distance from the cabin on the Dicks' property. He apparently believes that restoration value is only appropriate when the trees that are removed are within some distance from a residence. This argument has no basis in law. In fact, it is not necessary that there even be a residence on the property to use restoration value to compute damages as opposed to stumpage. For example, in *Allyn v. Boe, supra*, restoration value in the form of the basic formula method formed the basis of the damage computation although there was no residence on the property. 87 Wn.App. at 727.

In any event, the trees are on the access road to the cabin. The Dicks would see the trees whenever they came to the property and whenever they would walk along the roadway. Finally, all agree that the absence of the trees eliminates the visual buffer the trees provided.

For these reasons, it is clear that the rural nature of the property is of no importance in determining the proper measure of damages.

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d. Mr. Chenette Cannot Rely on the Fact That Other Portions of the Dicks' Property Is in Current Use.

Finally, Mr. Chenette claims that the trees must be valued as stumpage because a portion of Dicks' property is in "current use" under RCW 84.34. Mr. Chenette cannot rely on that argument for a number of reasons. Each of these is discussed below.

First of all, the "current use" classification system relates to the property's assessed value. Assessed value is not relevant in determining property value. *In Re Northlake Avenue*, 96 Wash. 344, 165 P. 113 (1917); *American State Bank v. Butts*, 111 Wash. 612, 191 P. 754 (1920); *McClure v. Delguzzi*, 53 Wn.App. 404, 767 P.2d 146 (1989). This rule is based on the fact that assessed value is a matter between the taxing agency and the property owner and that assessed values are relative and not actual. *American State Bank v. Butts*, *supra*; *McClure v. Delguzzi*, *supra*.

Secondly, a property's "current use" status has little bearing on whether and when trees will actually be cut. Mr. Chenette's property was not in current use. Nonetheless, he chose to log it. By contrast, there is no evidence of any recent or extensive logging on the Dicks' property.

The most salient reason to reject any consideration regarding the "current use" status of the Dicks' property is simple and

straightforward. The trees that were removed were not in “current use.” If the trees were not put into “current use” classification, Mr. Chenette can hardly argue that they should be treated as stumpage because they were in that classification.

e. Conclusion.

In this case, reasonable minds could only conclude that Mr. and Mrs. Dick sought to use their property for residential and recreational purposes and that the trees that were removed formed a visual buffer. With those facts, clear and undisputed authority requires that damages be computed on the basis of restoration value. Furthermore, the question is subject to determination on summary judgment. *Hill v. Cox, supra*. Nonetheless, the trial court ruled that damages would be based on stumpage. Its decision therefore amounted to error. The matter should be remanded to the Court for trial with damages to be computed on restoration value and with an order precluding any mention of any of other damages.

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III. Mr. Chenette Has Not Produced Sufficient Evidence to Support a Claim of a Boundary by Mutual Recognition and Acquiescence.

a. Requirements of the Doctrine and Particularized Standard of Review.

In order to create a boundary by mutual recognition and acquiescence, Mr. Chenette must prove each of the following each of the following elements by clear, cogent, and convincing evidence:

1. The line must be certain, well defined, and in some fashion physically designated upon the ground, e.g., by monuments, roadways, or fence lines;
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 the respective properties, mutual recognition and acceptance of the designated line as the true boundary line; and
3. The mutual recognition and acquiescence of the line must have continued for that period of time required to secure the property by adverse possession.

Lamm v. McTighe, 72 Wn.2d 587, 592-93, 434 P.2d 565 (1967); *Muench v. Oxley*, 90 Wn.2d 637, 641, 584 P.2d 939 (1978).

Since Mr. Chenette bears the burden of proof, he must adduce sufficient competence evidence showing the existence of every element necessary for him to prevail on his claim. *Young v. Key*

Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Since his burden of proof on this issue is clear, cogent, and convincing evidence, he must submit evidence that makes each element of the claim highly probable. *In re LaBelle*, 107 Wn.2d 196, 209, 728 P.2d 138 (1986). Mr. Chenette did not meet his burden. Each of the elements will be discussed in turn.

b. There Is No Showing of a Certain and Well Defined Line.

i. The Ditch Does Not Meet the Requirement.

To show a boundary by mutual recognition and acquiescence, there must be a certain and well defined line such as a monument, roadway, or fence line. A fence has often been held to be sufficient because it is a feature that often denotes a boundary. *Turner v. Creech*, 58 Wash. 439, 108 P. 1084 (1910); *Rose v. Fletcher*, 83 Wash. 623, 145 P. 989 (1915); *Egleski v. Strozyk*, 121 Wash. 398, 209 P. 708 (1922); *Farrow v. Plancich*, 134 Wash. 690, 236 P. 288 (1925); *Lamm v. McTighe*, *supra*; *Draszt v. Naccarato*, 146 Wn.App. 536, 192 P.3d 921 (2008). Fence lines together with survey stakes have also been held to satisfy this element in *Mullally v. Parks*, 29 Wn.2d 899, 190 P.2d 107 (1948), and *Campbell v. Reed*, 134 Wn.App. 349, 139 P.3d 419 (2006).

By contrast, a number of items have been found to be insufficient. These include a row of pear trees in *Scott v. Slater*, 42

Wn.2d 366, 255 P.2d 377 (1953); a rockery built against a dirt bank in *Waldorf v. Cole*, 61 Wn.2d 251, 377 P.2d 862 (1963); and the combination of errant concrete blocks, intermittent moorage, and the seeding of oysters and clams in *Lloyd v. Montecucco*, 83 Wn.App. 846, 855-56, 924 P.2d 927 (1996).

The ditch Mr. Chenette claims to serve as the boundary between the parties does not meet the first element of the doctrine of mutual recognition and acquiescence—a certain and well defined line, such as a monument, roadway, or fence line. The ditch is clearly not a “monument, roadway, or fence line.” It is not a line at all, much less a “certain, well defined line” because it varies in width. Mr. Chenette has yet to point to a decision where a ditch satisfied the requirement of a certain and well defined line. That is not surprising. A ditch is more like the row of pear trees in *Scott v. Slater, supra*, or the rockery and dirt bank in *Waldorf v. Cole, supra*, items the Court held to be insufficient.

Mr. Chenette called the trial court’s attention to *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984), to suggest that a ditch in fact could be a boundary. In that case, the defendants claimed title to land by adverse possession, not mutual recognition and acquiescence. Defendants’ predecessors had cleared the land up to a deep drainage ditch

and opened a trailer park. The park's residents used the cleared area for parking, storage, garbage removal, and picnicking. They also mowed up to the ditch and planted flowers in the area. The ditch did not operate as a boundary. It simply defined the limit of the claim of adverse possession.

It is also hard to see how a ditch of varying widths could provide clear, cogent, and convincing evidence of any sort of a boundary. Mutual recognition and acquiescence requires a certain and well defined line. The boundaries of a ditch will vary — if only slightly — from season to season. This fact, coupled with the variance precludes any conclusion — much less one based on clear, cogent, and convincing evidence — that the boundaries of the ditch amount to a line that is “certain” and “well defined.”

ii. Other Features in the Area Do Meet the Requirement.

The ditch can also not amount to a “certain, well defined line” because there were other features in the area that would clearly meet the requirement. These are the barbed wire fence described by Ron Aspaas and the corner monuments of Mr. Chenette's parcel.

In his declaration, Mr. Aspaas described a barbed wire fence running the length of the ditch and on its east side. The Supreme Court has repeatedly stated that a fence can meet the requirement

of a “certain, well defined line.” Other surveyors who visited the area confirmed the existence of this fence although it clearly was in disrepair by the time Mr. and Mrs. Dick bought their property. Most importantly, its remnants were located at or near the section line between Sections 13 and 14. The presence of this “certain, well defined line” on the boundary between the two properties as described by their deeds eliminates any claim of a different boundary based on mutual recognition and acquiescence when the fence was clearly evident.

The fence was not the only feature that would qualify as a “certain, well defined line.” There were also corner monuments that set out the boundaries of Mr. Chenette’s property. Mr. Chenette had located all these. They were obviously apparent to anyone who cared to look. The Supreme Court has also told us that monuments can form a sufficient boundary for the purposes of the doctrine of mutual recognition and acquiescence. Once again, the presence of clear monuments precludes application of the doctrine of mutual recognition and acquiescence.

iii. The Ditch Does Not Impart Notice of a Boundary.

The necessity of a specifically and clearly defined monument stems from the need to identify precisely what the boundary line is. *Farrow v. Plancich, supra*, 134 Wash. at 691. Furthermore, any

line not fixed by a written agreement must be sufficient to impart notice to a subsequent purchaser of the property — such as Mr. and Mrs. Dick — in order to bind them to that boundary. *Fralick v. Clark County*, 22 Wn.App. 156, 160, 589 P.2d 273 (1978) — boundary line established by parol agreement; *Winans v. Ross*, 35 Wn.App. 238, 666 P.2d 908 (1983) — boundary line established by common grantor. A ditch between two gravel roads simply cannot impart sufficient notice of anything. There is no reason why any subsequent purchaser, upon inspecting the property, would conclude that the ditch amounted to a boundary. It is therefore insufficient.

c. There Are No Improvements.

A party claiming mutual recognition and acquiescence must show that the parties manifested their acquiescence to the alleged boundary line by their acts, occupancy, and improvements. *Campbell v. Reed, supra*, 134 Wn.App. at 363-64. This requirement was met by the placement of berry bushes in *Lamm v. McTighe, supra*; by placing a house on the area in question in *Turner v. Creech, supra*; by planting a garden in *Egleski v. Strozyk, supra*; by constructing trails and planting trees in *Mullally v. Parks, supra*; by building a road in *Campbell v. Reed, supra*; and by the wall of a building in *Draszt v. Naccarato, supra*.

There is no showing that the parties made any improvement based upon the alleged boundary line. The most that can be said is that the Play Haven members cleared brush on the west side of the ditch and Mr. Chenette cleared the brush on the east side of the ditch. In the absence of improvements, there can be no showing of the creation of a boundary by mutual recognition and acquiescence.

d. There Is No Showing That the Parties Acquiesced in the Ditch Being a Boundary Line.

In order to establish a boundary by mutual recognition and acquiescence, the parties must acquiesce in a feature being a boundary line and not merely a barrier. *Thomas v. Harlan*, 27 Wn.2d 512, 178 P.2d 965 (1947). In this case, there is evidence from any of the Dicks' predecessors that the ditch was considered a boundary. Mr. Chenette has produced nothing from any Play Haven member and also no statement from Julia Hennessee, the person who owned the property from 1989 to 2004.

Mr. Chenette has also produced no evidence concerning any discussions between adjoining owners that the ditch was to serve as a boundary line. Without such evidence of such discussions or indications, no finding of acquiescence can be made. *Houplin v. Stoen*, 72 Wn.2d 131, 431 P.2d 998 (1967); *Muench v. Oxley*, *supra*.

Mr. Chenette has stated he regarded the ditch as the boundary. By not excluding this testimony, the trial court appears to have considered it and to have ruled that a jury could consider it. (CP 163) He cannot give any evidence in that regard due to RCW 5.60.030 as will be discussed below. In any event, his belief is not sufficient because acquiescence cannot be unilateral. *Houplin v. Stoen, supra*. Furthermore, his “acquiescence” in the ditch as the boundary line is not meaningful. The section line between Section 13 and Section 14 — the boundary between the two properties — is east of the ditch. Mr. Chenette would gain property if the boundary was established at the ditch. Whatever he might say is the sort of self-serving statement that is insufficient to establish acquiescence. *Houplin v. Stoen, supra*, 72 Wn.2d at 137.

In his declaration, Ron Aspaas stated that “from (his) observation, the ditch was considered to be the boundary line between the two properties.” (CP 64) This statement is not admissible. By its terms, it is a conclusion that Mr. Aspaas may have drawn from his observations. Ultimate facts or conclusory statements of fact are not sufficient to raise a genuine issue of material fact in a motion for summary judgment. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988); *Coleman v. Hoffman*, 115 Wn.App. 853, 858, 64 P.3d 65

(2003); *Segaline v. Department of Labor and Industries*, 144 Wn.App. 312, 182 P.3d 480 (2008).

e. Mr. Chenette Cannot Give Testimony Concerning Actions of Play Haven Members.

i. Introduction.

In paragraphs 6 and 7 of his declaration, Mr. Chenette discussed acts of the Play Haven members concerning their property and his beliefs concerning their alleged recognition of and acquiescence in the ditch as the property line. The trial court ruled that Mr. Chenette could testify “regarding the Play Haven owners’ conduct on and use of the land but not his impressions as to their beliefs regarding the boundary.” (CP 163) It is not clear to what extent it considered his declaration in connection with the summary judgment motions. The trial court erred by allowing consideration of the acts of the Play Haven members but correctly ruled that Mr. Chenette could not testify to his beliefs concerning the alleged boundary.

ii. Mr. Chenette Cannot Testify about Anyone’s Acts in Connection with the Property.

At least four of the Play Haven members have passed away. These are Lloyd Aspaas, Lyle French, Albin Hanning, and William Shefchek. For that reason, RCW 5.60.030, Washington’s Dead Man’s Statute, renders incompetent any testimony that Mr. Chenette might

give concerning matters that any of them could contradict. It provides as follows in pertinent part:

(I)n an action or proceeding where the adverse party sues or defends . . . as deriving right or title by, through or from any deceased person . . . then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased . . . person . . .

This statute applies here.

Mr. and Mrs. Dick derive their title to their property from the Play Haven members in general and from Mr. Aspaas, Mr. French, Mr. Hanning, and Mr. Shefchek in particular. The Dicks therefore qualify as “adverse parties” for the purposes of RCW 5.60.030. Mr. Chenette is obviously a party in interest under the terms of that statute since the Dicks are suing him. He is therefore precluded from testifying about any transaction with Play Haven members.

The term “transaction” is broadly defined under the terms of RCW 5.60.030. It means “dealing or performing some business or the management of any affair.” The test is whether the deceased *could* have contradicted the interested person’s testimony; whether the deceased *would* have contradicted the interested person’s testimony does not matter.

Estate of Wind, 27 Wn.2d 421, 426, 178 P.2d 431 (1947); *In re Shaughnessy's Estate*, 97 Wn.2d 652, 656, 648 P.2d 427 (1992); *Laue v. Estate of Elder*, 106 Wn.App. 699, 25 P.3d 1032 (2001).

Mr. Chenette states in his declaration that the Play Haven members dug the ditch and then maintained the area on the west side of the ditch while he maintained the area on the east side of the ditch. CP (66) Mr. Aspaas, Mr. French, Mr. Hanning, and Mr. Shefchek could refute these statements in his declaration. Therefore, he cannot testify concerning these issues.

Mr. Chenette is expected to claim an interested party's observations of another person's conduct or use of land is not a "transaction" for the purposes of RCW 5.60.030. He is incorrect. If the deceased party could contradict the testimony of the interested party, a transaction is present. The deceased Play Haven members could deny that they dug the ditch. They could also refute Mr. Chenette's statements concerning maintenance. Specifically, they could assert that Mr. Chenette did not do maintenance on either side of the ditch. Or they could say that no one did any maintenance on either side of the ditch. Since they could contradict both what maintenance he claims that they did and also what maintenance he claims that he did during the relevant time period, his testimony is barred by RCW 5.60.030. This is especially true because the

conduct in question appears to be critical to his establishment of a claim for a boundary by mutual recognition and acquiescence.

For the same reason, Mr. Chenette justifies consideration of his testimony as to what maintenance he did on the basis that he is simply discussing his own actions. He cannot testify that he maintained the property on the east side of the ditch because Mr. Aspaas, Mr. French, Mr. Hanning, and Mr. Shefchek could all claim that they cleared the brush and he did not.

iii. The Dead Man's Statute Applies Here.

Mr. Chenette is expected to claim that RCW 5.60.030 does not apply because an entity known as "Play Haven, Inc." may have at one time existed and held title to the property the Dicks now own. He may also allege that the statute has no applicability because some Play Haven members may be alive. These arguments must be rejected.

Even if a corporation known as "Play Haven, Inc.," once existed and held title to the property Mr. and Mrs. Dick now own, the Dicks' predecessors also include Mr. Aspaas, Mr. French, Mr. Hanning, and Mr. Shefchek. Each of them executed a deed conveying their interest in the property to Ms. Hennessee. Therefore, Mr. and Mrs. Dick derive their title to the property from those four gentlemen, among others. Since

each was a Play Haven member, each would have been present during such times to observe what both they and Mr. Chenette had or had not done with respect to maintaining the property. Therefore, they could refute whatever testimony Mr. Chenette might give on those issues. Therefore, Mr. Chenette cannot testify on those matters.

It also does not matter that some Play Haven members may still be alive. If any Play Haven member has passed away, Mr. Chenette is precluded from giving testimony. This conclusion follows from the fact that the Dicks obtained a portion of their title through the deceased Play Haven member. The Court reached this conclusion in *Diel v. Beekman*, 7 Wn.App. 139, 499 P.2d 37 (1972). In that property dispute, the trial court prohibited the Diels from testifying concerning conversations they had with Mr. Beekman and from questioning Mrs. Beekman regarding any conversation with the Diels that took place in her presence and in the presence of Mr. Beekman. The Court of Appeals affirmed the trial court. It noted that the Diels were making claim against Mrs. Beekman based upon her own community interest in the property and against the community interest she had acquired through her late husband. A Texas statute similar to RCW 5.60.030, it stated:

The restriction of the Texas statute is like that in the Washington statute. The protection is unqualified in one who

derives a right from the deceased, be it partial, total, separate or community, will not have testimony by the party-in-interest forced into the record over his objection.

(Emphasis added) 7 Wn.App. at 154.

Since the Dicks derive their title in part through Mr. Aspaas, Mr. French, Mr. Hanning, and Mr. Shefchek, RCW 5.60.030 is applicable.

iv. The Trial Court Correctly Ruled That Mr. Chenette Could Not Testify Concerning His Impressions or Beliefs Regarding the Boundary but Should Also Have Precluded Mr. Chenette from Testifying to His Feelings Concerning Any Alleged Boundary.

In Paragraph 7 of his declaration, Mr. Chenette stated that, “I understood from my interactions with the Play Haven group that they regarded the ditch as the boundary between our properties. I also always regarded the ditch as the boundary between the two properties.” (CP 66) The trial court would not consider this testimony. That ruling was correct. It erred, however, by not precluding Mr. Chenette from testifying concerning his own feelings and impressions regarding the location of the boundary.

In the first sentence of the testimony set out above, Mr. Chenette is stating a conclusion based on certain interactions he had with Play Haven members. These may have been conversations or other types of interactions. Obviously, Mr. Aspaas, Mr. French, Mr. Hanning, or

Mr. Shefchek could deny that any “interactions” ever took place. They could also refute whatever Mr. Chenette might claim occurred or was said in those “interactions.” Therefore, RCW 5.60.030 bars Mr. Chenette’s testimony on those matters.

The second sentence of the testimony—how Mr. Chenette regarded the boundary — suffers from the same infirmity. The only way he could come to an understanding that the boundary was something other than what a survey of the property based on legal descriptions contained in deeds would be through interactions with Play Haven members. And, of course, Mr. Aspaas, Mr. French, Mr. Hanning, and Mr. Shefchek could deny that the interactions occurred and/or the content of the interactions.

Mr. Chenette may seek admission of his testimony, however, on the basis that it is merely his “feelings and impressions.” Generally, “feelings and impressions” testimony from an interested party should not be admitted because it would effectively allow an interested party to give testimony about a transaction with the deceased, a result not allowed by RCW 5.60.030. As the Court stated in *Martin v. Shaen*, 26 Wn.2d 346, 353, 173 P.2d 968 (1946):

The rule is well settled that under (RCW 5.60.030), an adversely interested party cannot testify indirectly to that to which he

is prohibited from testifying directly, and thereby create an inference as to what did or did not transpire between himself and the deceased person.

The Courts in *Lappin v. Lucurell*, 13 Wn.App. 277, 534 P.2d 1038 (1975), and in *Estate of Miller*, 134 Wn.App. 885, 143 P.3d 315 (2006), refused to allow “feelings and impressions” testimony on the same basis. In both cases, the Court precluded the interested party from testifying as to “feelings and impressions” as to whether an advance of money was a gift or a loan.

Mr. Chenette seeks to testify concerning his “feelings and impressions” as to what Play Haven members believed the boundary to be. It is hard to imagine a clearer example of “feelings and impressions” testimony that should not be admitted. The basis for the “feelings and impressions” must be Mr. Chenette’s interactions with Play Haven members to which he cannot testify. If he cannot testify to the interactions that lead to his conclusions, he cannot express the conclusion on the basis that it is “feelings and impressions.”

f. Conclusion.

Mr. Chenette has failed to produce sufficient and admissible evidence to support his claim of a boundary by mutual recognition and acquiescence. Furthermore, he cannot give testimony

concerning his interactions with Play Haven members to support this claim. Mr. and Mrs. Dick moved for summary judgment to eliminate this claim. The trial court erred by denying there motion.

CONCLUSION

The trial court erred by denying the summary judgment motion of Mr. and Mrs. Dick concerning Mr. Chenette's attempt to establish a boundary by mutual recognition and acquiescence. It also erred by ruling the damages Mr. and Mrs. Dick suffered would be limited to stumpage. For those reasons, the Court of Appeals should reverse the trial court and remand the matter for trial with directions to dismiss any claim Mr. Chenette might make to establish a boundary on the basis of mutual recognition and acquiescence; with directions to instruct the jury to the effect that damages will be computed on the basis of restoration value; and with directions to preclude any testimony concerning any method of damage computation other than restoration.

RESPECTFULLY SUBMITTED this 29 day of Dec,
2009.



BEN SHAFTON, WSB #6280
Of Attorneys for Mr. and Mrs. Dick

APPENDIX

Map 34
Aerial Photo 36

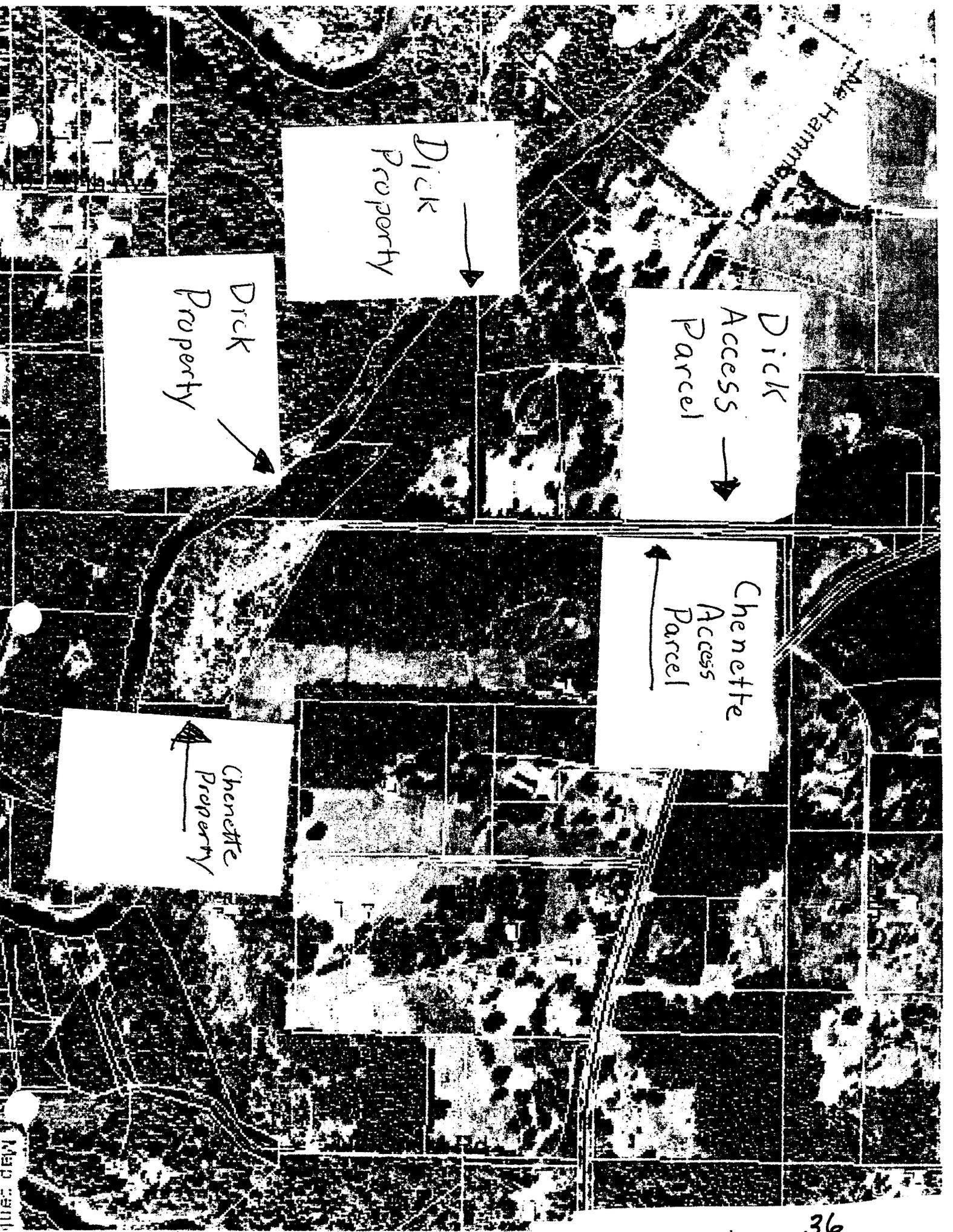


Printed: December 24, 2026
 Scale: 1:3600
 1" = 300'

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Clark County Department of Assessment and GIS

SW Qtr of Section 13 T4N R2E WM



NO. 39667-0-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

SPENCER DICK and MARY DICK, husband and wife and their
marital community; 88th STREET, LLC,

Appellants,

vs.

FRANCIS CHENETTE and JANE DOE CHENETTE,

Respondents,

APPEAL FROM THE SUPERIOR COURT

HONORABLE JOHN P. WULLE

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STATE OF WASHINGTON
COUNTY OF KING
JAN 11 2011
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