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

DENNIS WALKER and SANDRA WALKER, Appellants,

v.

JEFFREY PLUMMER and KELLI PLUMMER, Respondents.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This matter arises from a dispute over the boundary between two parcels of property. Relying on an old fence line, Plaintiffs allege they are entitled to have title to approximately ½ acre of property between the fence and the deed line (hereinafter the "Disputed Property") quieted in their name through the doctrines of adverse possession, mutual recognition and acquiescence, and location by a common grantor.

II. RESPONSE TO ASSIGNMENTS OF ERROR

ASSIGNMENTS OF ERROR

1. THE COURT DID NOT ERR IN STRIKING DEPOSITION TESTIMONY RECITING AN OUT OF COURT DECLARATION DRAFTED BY COUNSEL THAT ALLEGEDLY DESCRIBED CONVERSATIONS WITH THE ORIGINAL OWNER OF BOTH PARCELS REGARDING THE LOCATION OF SURVEY MARKERS.

2. THE COURT DID NOT ERR IN ENTERING ITS JUDGMENT AND DECREE OF QUIET TITLE, FINDINGS OF FACT NOS. 4, 5, 7, 8, 9, 12, 18-22, OR CONCLUSIONS OF LAW 3-10.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue No. 1. Did the trial court err in striking deposition testimony when counsel agreed said testimony should be stricken (Assignment of Error No. 1)?

Issue No. 2. Was the deposition testimony of Lorri Tipton admissible where said testimony consisted of reciting a declaration that was drafted

by counsel for Lorri Tipton's signature and was not offered as evidence (Assignment of Error No. 1)?

Issue No. 3. Were statements allegedly made to Lorri Tipton by Jack Januska describing where Lorri Tipton could find survey markers admissible when Jack Januska is not a party and did not testify (Assignment of Error No. 1)?

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Issue No. 8. Is there substantial evidence to support Findings of Fact No. 18-22 (Assignment of Error No. 2)?

Issue No. 9. Did the trial court err in reaching Conclusions of Law No. 3 through 10 that Plaintiffs failed to prove the elements of adverse possession, mutual recognition and acquiescence, and location by a common grantor?

III. STATEMENT OF THE CASE

On August 25, 1989, Jack and Gail Januska bought a 10 acre parcel of real property (Ex. 57). They already owned 5 acres immediately south of the west half of the parcel (RP pg 26, ln 14). The eastern portion of the parcel slopes steeply downward (Ex. 53). They constructed a fence across the top of the slope to keep livestock from going down the slope. It

was not intended as a boundary (Ex. 27).

On December 23, 1992, Jack and Gail Januska conveyed the eastern portion (the "Plummer Parcel") to John and Lorri Tipton by Real Estate Contract (Ex. 59) and on February 19, 1997, recorded a Statutory Warranty Deed (Ex. 65).

The Tiptons erected a fence (the "Tipton Fence") when they first purchased the property (Tipton Dep pg 13, ln 20). They erected the Tipton Fence for the purpose of containing llamas (Tipton Dep pg 26, ln 23). They located the fence in line with some "survey markers" they found (Tipton Dep pg 19, ln 17). They found the survey markers by reviewing the legal descriptions in the property records (Tipton Dep pg 15, ln 13). They found the northern survey marker through a discussion with a Mrs. Anderson, a neighbor to the north (Tipton Dep pg 16, ln 23). Mr. Davis, a neighbor to the south, showed them a survey marker on their southern boundary (Tipton Dep pg 84, ln 12).

Except when a well in the Disputed Area was tested in 1997, Lorri Tipton never saw water being used on the Disputed Property (Tipton Dep pg 45, ln 14), never saw the Januskas maintain the fence, never saw the Januskas use or maintain the Disputed Property (Tipton Dep pg 84, ln 23), and never saw Januska do anything at all on the Walker Parcel at any time (Tipton Dep pg 46, ln 3).

On November 18, 1997, Jack and Gail Januska conveyed the remaining west 660 feet of the property (hereinafter the "Walker Parcel") to Plaintiffs by Statutory Warranty Deed (Ex. 66). Lorri Tipton conveyed the Plummer Parcel to Defendants by Real Estate Contract (Ex. 68), and by Statutory Warranty Deed dated June 15, 1999 (Ex. 69).

In 2000, Defendants moved a house onto the Plummer Parcel, just east of the Tipton Fence. Photographs and video taken by Defendants show the Disputed Property was overgrown and not maintained before Plaintiffs built their home (Ex.s 71, 74, and 78).

Plaintiffs began building a home on the Walker Parcel in early 2002. Aerial photographs were taken by Clark County in 1996 (Ex. 61), 1998 (Ex. 67), and early 2002 (Ex. 72). The USGS took an aerial photograph when the Plaintiffs' home was under construction in May of 2002 (Ex. 73). This series of aerial photographs shows that Plaintiffs made no improvements to the Walker Parcel until they began construction of their home, and first connected to a well located on the Disputed Property when they built their home (Ex. 73).

The testimony was undisputed that there were no discussions between the parties regarding the Disputed Property before the summer of 2007, when a disagreement over the boundary began (RP pg 91, ln 15 and RP pg 378, ln 6). Defendants began removing the Tipton Fence during the

last weekend of July of 2007 (RP pg 379, ln 3).

On August 2, 2007, counsel for Plaintiffs sent Defendants a letter demanding they cease removing the fence (Ex. 77) and filed this lawsuit on September 13, 2007 CP 3). A surveyor determined that the Tipton Fence is 86 feet east of the deed line at its northern end and 65 feet east of the deed line at its southern end (Ex. 1 and Ex. 52).

During trial, Plaintiffs admitted a letter from Jack and Gail Januska stating the fence was constructed to contain livestock and was never intended as a boundary (Ex. 27). Plaintiffs also offered the Deposition of Lorri Tipton into evidence (Ex. 49). Defendant objected to those portions that consisted of Lorri Tipton reciting from a declaration (CP 56 at pg 2) prepared by for her signature counsel for Plaintiff (RP pg 313, ln 4, and Tipton Dep. Pg 69, ln 5). Plaintiff did not offer the declaration into evidence (RP pg 311, ln 5). Counsel for Plaintiffs stated that the deposition testimony should be stricken when Defendants' objections were reviewed in open court during trial (RP pg 314, ln 21).

IV. ARGUMENT

The Washington courts recognize 5 methods of resolving disputed boundaries, *Lamm v. McTighe*, 72 Wn.2d 587, 434 P.2d 565 (1957):

> Boundaries between adjoining properties, at odds with the true boundary as revealed by sub-sequent survey, may be established, under appropriate circumstances, through the following doc-trines, all of which have been recognized in this state: (1) Adverse possession, *Scott v. Slater*, 42 Wn.2d 366, 255 P.2d 377 (1953); (2) parol agreement of the adjoining landowners, *Rose v. Fletcher*, 83 Wash. 623, 145 P. 989 (1915); (3) estoppel in pais, *Thomas v. Harlan*, 27 Wn.2d 512, 178 P.2d 965, 170 A.L.R. 1138 (1947); (4) location by a common grantor, *Strom v. Ar-corace*, 27 Wn.2d 478, 178 P.2d 959 (1947); and/or (5) mutual recognition and acquiescence in a definite line by the interested parties for a long period of time, *Farrow v. Plancich*, 134 Wash. 690, 236 P. 288 (1925); T*homas v. Harlan, supra; Scott v. Slater, supra; Waldorf v. Cole*, 61 Wn.2d 251, 377 P.2d 862 (1963); *Houplin v. Stoen*, 72 Wn.2d 129, 431 P.2d 998 (1967).

Plaintiffs claim the Court should adjust the boundary to coincide with the Tipton Fence through the doctrines of adverse possession, mutual recognition and acquiescence, and location by a common grantor. The facts do not support any of the three claims.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR NO. 1

Issue No. 1. Did the trial court err in striking deposition testimony when counsel agreed said testimony should be stricken (Assignment of Error No. 1)?

Plaintiffs claim the trial court erred in striking the testimony on page 73 of the Deposition of Lorri Tipton. Defendants submitted written objections (CP 56). At trial, Plaintiffs agreed to strike the testimony (RP

pg 314, ln 21).

RAP 2.5(a) states:

> (a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court...

The purpose of this rule is to promote judicial efficiency by allowing the trial court the opportunity to consider all issues and arguments and correct any errors, *Smith v. Shannon*, 100 Wn. 2d 26, 666 P.2d 351 (1983); *Postema v. Postema Enterprises, Inc.,* 118 Wash. App. 185, 72 P.3d 1122 (2003); *Demelash v. Ross Stores, Inc.*, 105 Wash. App. 508, 20 P.3d 447 (2001). When a party's own action during trial creates the error, that party cannot complain of the error on appeal, *Shanlian v. Faulk*, 68 Wash. App. 320, 843 P.2d 535 (1992); *City of Bellevue v. Kravik*, 69 Wash. App. 735, 850 P.2d 559 (1993).

Because Plaintiffs agreed during trial that the testimony should be stricken, they are precluded from arguing on appeal that the trial court erred in striking the testimony.

<u>Issue No. 2.</u> Was the deposition testimony of Lorri Tipton admissible where said testimony consisted of reciting a declaration that was drafted by counsel for her signature but was not offered as evidence (Assignment of Error No. 1)?

ER 801 contains the following definitions:

> (a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
>
> c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

The deposition testimony of Lorri Tipton was hearsay on several levels. The question on page 73 of the deposition of Lorri Tipton, beginning at line 7, consists of counsel for Plaintiff reading a portion of Lorri Tipton's declaration describing an interaction Lorri Tipton allegedly had with Jack Januska about the location of some survey markers, then asking her about the meaning of her statement in the declaration.

The declaration of Lorri Tipton is clearly hearsay within the meaning of ER 801(c). It is clearly a statement other than one made while testifying that was made for the purpose of attempting to prove that Jack Januska represented the survey markers as the boundary. Her declaration is inadmissible unless it falls within one of the exceptions to ER 802

<u>Issue No. 3.</u> Were statements allegedly made to Lorri Tipton by Jack Januska regarding the location of survey markers admissible when Jack Januska is not a party and did not testify (Assignment of Error No. 1)?

If Jack Januska had in fact represented some survey markers as the

boundary, his words or acts in making such representation would also be hearsay, and would be inadmissible unless they fall within one of the exceptions to ER 802.

Appellant argues that Januska's representations are admissible even though hearsay under ER 804(b)(3), which states:

> (3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true.

The rule requires that the statement be contrary to the declarant's pecuniary or proprietary interest at the time of its making. The question of whether the statement is against interest at the time of trial is of no consequence in determining whether the exception applies, 5C Wash. Prac., *Evidence Law and Practice*, §804.31 (5th Ed.). Plaintiffs argue that pointing out boundaries that short Tipton would subject Januska to civil liability and was therefore against his interest. The question is whether the representations were against Januska's interest at the time they were made. If Januska had pointed out boundaries that shorted Tipton before the sale to Tipton closed, he would not be subject to civil liability, but would be entitled to reform the legal description in the deed to conform to the boundaries that he had pointed out.

Furthermore, the rules require that the statement be so contrary to the declarant's interest that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. It may have been against Tipton's interest for Januska to point out boundaries that shorted Tipton, but it would not have been against Januska's interest at the time since he would retain more land.

This exception is intended to apply only to statements that are likely to be trustworthy, considering the surrounding circumstances and the context in which they are made, 5C Wash. Prac., *Evidence Law and Practice*, §804.29 (5th Ed.). These alleged statements and conduct are not trustworthy. They are contrary to Exhibit 27, produced by Plaintiffs, and to the immediately following deposition testimony where Lorri Tipton states she found the survey markers on her own.

Appellant also argues that the statement is admissible as a present sense impression under ER 803(a)(1), which states:

> (1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

The rule includes only statements made under circumstances ruling out reflection or premeditation, 5C Wash. Prac., *Evidence Law and Practice*, §803.4 (5th Ed.). The rule is based on the assumption that under circumstances defined by the rule, there is very little chance of

misrepresentation or conscious fabrication by the declarant, 5C Wash. Prac., *Evidence Law and Practice*, §803.3 (5th Ed.).

Statements that qualify as present sense impressions must grow out of the event reported and in some way characterize that event. They must be a "spontaneous or instinctive utterance of thought," evoked by the occurrence itself, unembellished by premeditation, reflection, or design, and not be statements of memory or belief, *State v. Martinez*, 105 Wash.App. 775, 20 P.3d 1062 (2001). An answer to a question is not a present sense impression, *State v. Martinez*, citing *State v. Hieb,* 39 Wash.App. 273, 693 P.2d 145 (1984), *rev'd on other grounds,* 107 Wash.2d 97, 727 P.2d 239 (1986).

The evidence the trial court declined to admit was deposition testimony of Lorri Tipton regarding the declaration prepared for her signature by counsel for Plaintiffs. The language of the declaration that is at issue is a statement that Jack Januska showed Lorri Tipton some survey markers.

The deposition testimony of Lorri Tipton regarding the statements in the declaration was in response to a question, was not a spontaneous or instinctive utterance of thought, and was not evoked by the occurrence itself. The testimony was a statement of memory or belief. The deposition testimony is not admissible under ER 803(a)(1).

Furthermore, had Lorri Tipton made the same statement during testimony at trial that she made in her declaration, the testimony would still not be admissible under ER 803(a)(1). Pointing out survey markers is not a "spontaneous or instinctive utterance of thought," evoked by the occurrence itself, unembellished by premeditation, reflection, or design.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR NO. 2

In a civil case, the trial court's findings of fact will not be disturbed on appeal if they are supported by substantial evidence. Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise, *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise, *Bering v. Share*, 106 Wn.2d 212, 721 P.2d 918 (1986).

Substantial evidence is sometimes defined as the quantum of evidence needed to satisfy the burden of production (as opposed to the higher burden of proof), *In re Dependency of C.B.*, 61 Wn.App. 280, 810 P.2d 518 (1991), footnote 2. Once a party produces enough evidence to satisfy the burden of production, the trial court alone determines the facts

of the case, and an appellate court will not substitute its judgment, 2A Wash. Prac., *Rules Practice* RAP 2.5 (6th Ed.).

It is not role of appellate court to weigh and evaluate conflicting evidence, *Burnside v. Simpson Paper Co.*, 66 Wn.App. 510, 832 P.2d 537 (1992).

Furthermore, Plaintiffs have the burden of proving the facts necessary to support their various claims. Defendants do not have a burden of disproving the facts necessary to support Plaintiffs' claims.

Issue No. 4. Is there substantial evidence to support Findings of Fact No. 4 and 5 (Assignment of Error No. 2)?

Findings of Fact No. 4 and 5 state that neither Jack nor Gail Januska pointed the old fence out as the boundary or made any express or implied representation to John or Lorri Tipton that the old fence was the boundary, that John and Lorri Tipton built the fence to contain their livestock, that John and Lorri Tipton located the fence between what Lorri Tipton described as "survey markers", and that there is no evidence that any survey was ever made that would have encompassed any monument at either the northern or southern terminus of the Tipton Fence or to determine the boundary.

Plaintiffs have the burden of proving the facts necessary to support

their various claims. Plaintiffs have failed to produce any evidence that Januska pointed the old fence out as the boundary or made any express or implied representation that the old fence was the boundary between the Walker Parcel and the Plummer Parcel.

Lorri Tipton testified at deposition that she and her former husband located the survey markers on their own after reviewing property records and speaking to neighbors.

Plaintiff has not produced any evidence of a survey and there is no evidence that any survey of the boundary between the two parcels had ever been made prior to trial. There is no reference to survey records on the Hagedorn sketch (Ex. 1 and Ex. 52). It is clear from the Hagedorn sketch that whatever "survey markers" Lorri Tipton found, they did not represent the boundary described in the deeds.

Not only is there substantial evidence to support Findings of Fact No. 4 and 5, there is no evidence to dispute them.

Issue No. 5. Is there substantial evidence to support Finding of Fact No. 7 (Assignment of Error No. 2)

Finding of Fact No. 7 states that Jack Januska did not construct a fence for the purpose of establishing a boundary, that Jack Januska did not consider either the old dilapidated fence or the Tipton Fence the boundary,

and that Jack Januska did not acquiesce in or accept the Tipton Fence as the true boundary between the Walker Parcel and the Plummer Parcel.

Exhibit 27, offered as evidence by Plaintiffs, is a letter from the Januskas stating that they built the fence to contain livestock and they never considered the fence to be the boundary. It is the only statement made by the Januskas directly regarding the fence. There is no evidence to the contrary. Lorri Tipton testified at deposition that Jack Januska never approached her about the Tipton fence (Tipton Dep pg 56, ln 2).

Not only is there substantial evidence to support Finding of Fact No. 7, there is no evidence to dispute it.

Issue No. 6. Is there substantial evidence to support Finding of Fact No. 8 (Assignment of Error No. 2)?

Finding of Fact No. 8 states that the Plummer Parcel was not sold by the Januskas with reference to the Tipton Fence as the boundary, was not purchased by John and Lorri Tipton with reference to the Tipton Fence as the boundary, and that there was no meeting of the minds between Jack Januska and John and Lorri Tipton that the Tipton Fence was the boundary.

Plaintiffs have the burden of proving the facts necessary to support their causes of action. The burden is not on Defendants to disprove such

facts. There is no evidence that the Plummer parcel was either sold by Januska or purchased by Tipton with reference to any fence as the boundary. There is no evidence that a fence was discussed or even considered by Januska during that transaction. Accordingly, there can be no meeting of the minds.

Issue No. 7. Is there substantial evidence to support Findings of Fact No. 9 and 12 (Assignment of Error No. 2)

Findings of Fact No. 9 and 12 state that Jack and Gail Januska never lived on the Walker Parcel, made no use of the Disputed Parcel after they conveyed the Plummer Parcel to John and Lorri Tipton, that on November 3, 1997, Jack Januska had the well in the Disputed Property tested pursuant to the pending sale to Plaintiffs, and that Jack and Gail Januska made no other use of the Disputed Property after the sale of the Plummer Parcel to John and Lorri Tipton in 1992.

Dennis Walker testified that Jack Januska lived on the parcel immediately south of the West end of the Walker parcel when he sold the property to Plaintiffs and that he continued to live there after the sale (RP pg 41, ln 14). It is clear that Januska did not purchase the parcel he lived on in the same transaction as the Walker parcel (Ex. 57). It is clear from the aerial photographs that there were no improvements on the Walker

parcel before Plaintiffs built their home in 2002. Januska could not have lived on the Walker parcel at any time before he sold it in 1997.

Lorri Tipton testified at deposition that, with the exception of having the well tested in 1997, she never saw Januska do anything at all in the disputed Property (Tipton Dep pg 84, ln 23).

There is substantial evidence to support Findings of Fact No. 9 and 12.

Issue No. 8. Is there substantial evidence to support Findings of Fact No. 18-22 (Assignment of Error No. 2)?

Findings of Fact No. 18-22 state that Defendants made no admissions, statements, or acts inconsistent with their claim of title to the Disputed Property that were relied on at any time by Plaintiffs, that Defendants did not at any time acquiesce in or accept the Tipton Fence as the true boundary, that Plaintiffs and their predecessors did not use the Disputed Property exclusively for a period of 10 continuous years, that Plaintiffs' and their predecessors' use of the Disputed Property was not open and notorious for a period of 10 continuous years, and was not hostile for a period of 10 continuous years.

In fact, Plaintiffs have proven the contrary. Jack Januska owned the Walker Parcel from the day he built his fence until November 18,

1997, the day he sold to the Walkers. The only statement from Jack Januska regarding the fence was that he did not ever consider the fence a boundary.

Furthermore, Lorri Tipton testified at deposition that she built the existing fence in a location they believed to be the correct boundary. She testified they determined the location of the boundary on their own and never spoke to Januska about the fence. They never saw Januska use the Disputed Property, never saw his livestock on the Disputed Property, and he never mowed or maintained the Disputed Property. She testified that with the exception of a single day the well was tested in November of 1997, she never saw him on the Disputed Property at all. There is no evidence that Januska considered the fence a boundary.

Issue No. 9. Did the trial court err in reaching Conclusions of Law No. 3 through 10 that Plaintiffs failed to prove the elements of adverse possession, mutual recognition and acquiescence, and location by a common grantor?

Adverse Possession

To establish title by adverse possession, the claimant must prove his possession was: (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile, *Chaplin v. Sanders*, 100 Wn.2d 853, 676

P.2d 431 (1984), *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 774 P.2d 6 (1989).

The Washington Supreme Court, in *Chaplin v Sanders*, *supra*, clarified the hostile element of adverse possession:

> The "hostility/claim of right" element of adverse possession requires only that the claimant treat the land as his own as against the world throughout the statutory period. *The nature of his possession will be determined solely on the basis of the manner in which he treats the property.* His subjective belief regarding his true interest in the land and his intent to dispossess or not dispossess another is irrelevant to this determination.

Adverse possession requires proof of 10 years of continuous possession, *ITT Rayonier, Inc. v. Bell, supra.* Since Plaintiffs' have owned the Walker Parcel only since November 10, 1997, their adverse possession claim relies on Januska's exclusive dominion and control of the Disputed Property before November 18, 1997.

The evidence is clear that Jack Januska did not adversely possess the Disputed Property at any time after he sold it to Lorri Tipton. Because the holder of legal title is presumed to possess the property, the party claiming adverse possession bears the burden of proof on each element. *ITT Rayonier, supra, Miller v Anderson*, 91 Wn. App. 822, 964 P.2d 365 (1998). Until the Januskas sold the Plummer Parcel to John and Lorri Tipton, the Plummer and Walker parcels had never been owned

differently. Jack Januska did not build the fence as a boundary, and Lorri Tipton determined the location of the fence the subject of this dispute. She testified in her deposition that she never saw Januska do any possessory act on the Disputed Property.

Possession itself can be established by a fence only if the fence is of such a character as a true owner would make considering the nature and location of the land in question, *Young v. Newbro*, 32 Wn.2d 141, 144-45, 200 P.2d 975 (1948), overruled on other grounds, *Chaplin v. Sanders*, *supra*. The existence of a fence is not enough, standing alone, to establish title by adverse possession, *Hunt v. Matthews*, 8 Wn. App. 233, 505 P.2d 819 (1973). A fence existing as a convenience rather than as an assertion of ownership does not establish notice of a claim, *Hunt v. Matthews*, *supra*.

Lorri Tipton built the existing fence in a location she believed to be the boundary. She determined the location of the boundary on her own and never spoke to Januska about the fence. She never saw Januska use the Disputed Property, never saw his livestock on the Disputed Property, and Januska never mowed or maintained the Disputed Property. With the exception of a single day the well was tested in November of 1997, she never saw him on the Disputed Property at all. There is no evidence that Januska considered the fence a boundary.

Mutual Recognition and Acquiescence

The elements of mutual recognition and acquiescence were set forth in *Lamm v. McTighe,* 72 Wn.2d 587, 434 P.2d 565 (1957):

> From the foregoing cases, as well as others, in which we have dealt with the doctrine, it may be gleaned that the following basic elements must, at a minimum, be shown to establish a boundary line by recognition and acquiescence: (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.

The burden is on Plaintiffs to establish mutual recognition and acquiescence by "clear and convincing" evidence, *Lilly v Lynch*, 88 Wn. App. 306, 945 P.2d 727 (1997). Recognition and acquiescence requires that the parties demonstrate by their possessory actions their acquiescence to the line as the boundary for a period of time which satisfies the appropriate statute of limitations, *Piotrowski v. Parks*, 39 Wn. App. 37, 691 P.2d 591 (1984). To prevail, the party claiming a boundary through recognition and acquiescence must demonstrate agreement or acquiescence in the line by both parties for the period required to establish adverse possession, *Thomas v. Harlan, supra*; *Muench v. Oxley*, 90 Wn.2d

637, 584 P.2d 939 (1978).

Where there is a fence between neighboring properties, mere acquiescence in the fence's existence is not sufficient to establish a claim of title to a disputed strip of ground. There must be some action showing that the neighbors recognize the fence as a boundary line, *Waldorf v. Cole*, *supra* (quoting *Thomas v. Harlan*, *supra*. The theory behind the *Waldorf* holding is that a person may erect a fence for some other purpose than to mark a boundary line; thus, where the parties have not expressly agreed that the fence is the boundary line, there must be some evidence that they have acquiesced in it as the boundary line, *Merriman v. Cokeley,* Wn. App. Div II No. 37303-3-II, Sept. 3, 2009.

Acquiescence in a property line cannot be a unilateral act. It must be bilateral. Both parties must agree or acquiesce, either expressly or by implication. In *Houplin v. Stoen*, *supra*, a former owner of plaintiff's property erected a fence along his southern boundary relying on an inaccurate survey. The owner had fenced less land than he owned. Defendants claimed the fence was the boundary through acquiescence over nearly 20 years. The Supreme Court described the land between the fence and the true boundary as wild and unoccupied. It had never been cultivated, although there was evidence that a few trees had been cut for personal use and a few cattle had been pastured occasionally. The

question before the Supreme Court was whether there was evidence of 'sufficient acquiescence in the fence line to constitute it as the true boundary line of the property'. The Court, quoting *Thomas v. Harlan*, 27 Wn. 2d 512, 178 P.2d 965 (1947) stated:

> *In the absence of an agreement to the effect that a fence between the properties shall be taken as a true boundary line, mere acquiescence in its existence is not sufficient to establish a claim of title to a disputed strip of ground, Dibirt v. Bopp*, 4 Cal. App.2d 541, 41 P.2d 174...
>
> In all cases, it is necessary that acquiescence must consist in recognition of the fence as a boundary line, and not mere acquiescence in the existence of a fence as a barrier. (Citations omitted.)

It is clear that Lorri Tipton mistakenly built the fence the subject of this matter between 65' and 85' east of the true boundary. There is no evidence whatsoever that Jack Januska ever recognized and accepted the fence as the true boundary between the two parcels. There is no evidence that Januska ever exercised dominion over the Disputed Property in a manner consistent with actions a true owner would take. That was not the testimony of Lorri Tipton and there is no such evidence.

Common Grantor

The common grantor doctrine was described in *Fralick v Clark County*, 22 Wn. App. 156, 589 P.2d 273 (1978):

> It is clear that a grantor who owns land on both sides of a line which he has established as the common boundary is bound by

> that line. *Clausing v. Kassner*, 60 Wn. 2d 12, 371 P.2d 633 (1962); *Turner v. Creech*, 58 Wash. 439, 108 P. 1084 (1910). However, for the boundary line to become binding and conclusive on grantees, it must plainly appear that the land was sold and purchased with reference to the line, and that there was a meeting of the minds as to the identical tract of land to be transferred by the sale, *Kronawetter v. Tamoshan*, Inc., 14 Wn. App. 820, 826, 545 P.2d 1230, 1234 (1976). Accord *Thompson v. Bain*, 28 Wn. 2d 590, 183 P.2d 785 (1947). See also 11 C.J.S. *Boundaries* s 77(b), p. 651 (1938); Browder, The *Practical Location of Boundaries*, 56 Mich.L.Rev. 487, 529 (1958).

For Plaintiffs to establish the boundary through the common grantor doctrine, they must prove that the land was sold and purchased with reference to the fence line, and that there was a meeting of the minds as to the identical tract of land to be transferred by the sale, *Kronawetter, v. Tamoshan*, 14 Wn. App. 820, 826, 545 P.2d 1230 (1976), citing *Thompson v. Bain*, 28 Wn.2d 590, 183 P.2d 785 (1947). That was not the testimony of Lorri Tipton and there is no such evidence.

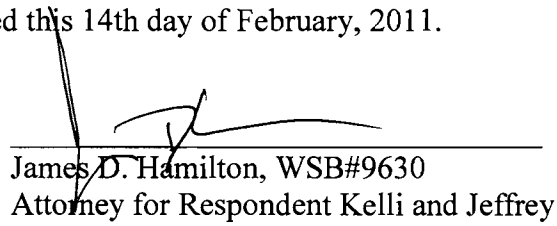
V. CONCLUSION

Plaintiffs have not proven that they or the Januskas used or occupied the Disputed Property for 10 continuous years in the manner required to establish the Tipton Fence as the boundary through either adverse possession or through recognition and acquiescence. Plaintiffs have not proven that the Plummer Parcel was sold by Januska and

purchased by Lorri and John Tipton with reference to the Tipton Fence as the boundary, or that there was a meeting of the minds as to the identical tract of land to be transferred by the sale as required by the common grantor doctrine.

The trial court should be affirmed.

Respectfully submitted this 14th day of February, 2011.



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CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing RESPONDENT'S BRIEF upon the following named person(s) by mailing a true copy thereof with postage prepaid, contained in a sealed envelope, at the following address(es):

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STATE OF WASHINGTON
BY
DEPUTY

Dated: February 14, 2011.

JAMES D. HAMILTON, WSBA #9630
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Kelli and Jeffrey Plummer.