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Court of Appeals
DIVISION II
STATE OF WASHINGTON

GARY T. RENNE and ELEANOR F. RENNE, husband and wife,

APPELLANTS,

v.

FLOYD F. RINEHOLD and CLARISSA E. RINEHOLD, husband and wife,

RESPONDENTS.

FLOYD F. RINEHOLD and CLARISSA E. RINEHOLD'S OPENING BRIEF

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I. INTRODUCTION

The Rennes and the Rineholds own adjoining parcels of real property in Mason County, Washington. CP 1-7, 21-54.

In 2015, the Rineholds discovered, by way of survey, that the Rennes were encroaching on their property. Suit to quiet title was thereafter filed in Mason County Superior Court by the Rineholds in 2016. CP 1-7, 21-54.

The Rennes answered and counterclaimed. They dispute the survey and claimed title by way of adverse possession, mutual recognition and acquisition, and estoppel (the answer and counterclaim are not a part of the record on appeal but see RP 8, 24, 74-75), which the Rineholds denied.

In May of 2018, the Rineholds moved for partial summary judgment for the limited purpose of determining:

> "The survey of Daniel F. Holman attached hereto as Exhibit A is a true, correct, and accurate survey and representation of the record title to Plaintiffs' property set forth in paragraph 2.1 of the Second Amended Complaint, and which survey correctly represents the record title for the easterly line of the Renne property which is identified in Exhibit B attached hereto." CP 8-14.

While the Rennes contested the motion questioning various aspects of the Holman survey (CP 65-83), the survey was consistent

with prior surveys. CP 21-54. Despite having consulted with three surveyors (CP 24, RP 35, 104), the Rennes never submitted an opinion by a qualified surveyor that the common line between the Rinehold property and the Renne property was anything other than as surveyed by Holman.

The trial court granted the Motion for Partial Summary Judgement and denied a subsequent Motion for Reconsideration. CP 193-195, 409-412.

Rennes' counterclaims were not before the trial court and await further determination. RP 8, 24, 74-75.

Respondents Rinehold ask that the Court of Appeals affirm the trial court.

II. RESPONSE TO ASSIGNMENT OF ERROR

The trial court properly granted the Rinehold Motion for Partial Summary Judgment and properly denied the Renne Motion for Reconsideration.

III. FACTS

Floyd and Clarissa Rinehold, and Gary and Eleanor Renne, own adjoining parcels of real property south of the south shore of Hood Canal in Mason County, Washington. CP 1-7, 21-54.

Defendants Donald and Caron DeNotta and D.D. DeNotta LLC., were originally parties, but their issues with the Rineholds were settled prior to the proceedings which are herein appealed.

The third-party defendants represent security interests that are not actively participating in this matter and will abide the result. CP 404-408.

The Rineholds own an oddly shaped parcel of real property, which was originally two parcels, Lots 1 and 3 of Short Plat 2459. CP 27. They acquired Lot 1 in 2004 and Lot 3 in 2005. CP 51-54. The lots were combined in 2005. CP 27(See note on upper right corner).

The Rennes acquired their property in 2006. CP 48-49.

The northerly portion of the Rinehold property is a long, narrow strip of land of varying width that connects the southerly portion of their property, where their home exists, to SR 106, also known as the Old Navy Yard Highway. CP 27. This is the road that runs from Belfair, southwesterly, along the South Shore of Hood Canal, past Union. The properties abut this road to the south, about midway between Belfair and Twanoh State Park.

The parties' properties are a part of the unrecorded plat of Sunset Beach, created by W. O. Watson in 1952, an old time Mason

County surveyor. CP 29-32. He surveyed and monumented the parcels he created but left a portion undivided. CP 29-32.

In 1979, his son, Glen Watson, had a retracement survey done by Roger Lovitt, a licensed surveyor who maintained his business in Mason County for many years. CP 22, 34. Lovitt's survey recovered monumentation set by W. O. Watson. CP 22, 34. His 1979 survey is labeled "Watson's Sunset Beach Survey". CP 34.

At the time of the W. O. Watson work, plats were not required to be recorded (nor did copy machines exist), but he provided copies to both Mason County Title and Land Title of Mason County to create a record of his work. CP 22-23, 206.

The Renne property is what is noted as Lot 5 on both surveys. The Rinehold property is east and south of the Renne property. CP 29-34.

The Watson plat/survey, in the area east of the Renne property, contains the notation "street." CP 29-32. This is in Watson's handwriting. CP 22, RP 58. This was never disputed. This area has been used for driveway purposes by the Rineholds, Rennes, and several other lots, including predecessors. CP 85. The Rineholds have title to the area of "the street" identified on the Watson plat. CP 51-54.

The other properties, including the Rennes, have easements for access. CP 85.

In 1994, Daniel F. Holman, a licensed surveyor of many years' experience in Mason County, who was, and is, intimately familiar with the work of Watson and Lovitt, surveyed the, now, Rinehold property. CP 36. The Holman survey was a retracement survey. The survey did not discover any encroachments on the now Rinehold property, which he would have been required by law to note had he observed any. Former WAC 332-130-060, amended 1-13-19. See also RCW 58.09.090 and 58.17.255.

After the Rennes acquired their property in April 2006 (CP 48), they eventually constructed a new home on their property. It should be noted that Eleanor Renne is an experienced, licensed, managing real estate broker in Kitsap County. CP 71, 85.

Several years later, the Rineholds began to wonder if there were encroachments on their property and they hired Holman to survey their property again in 2015. CP 22. They discovered that the Rennes had constructed improvements which encroached onto their property. CP 27. While the new house was a few feet inside the line, the Rennes had constructed a rock wall and landscaping nine feet

onto their property, as well as creating a parking area 6.3 feet onto their property. CP 27.

Communication was then had with the Rennes to see if some resolution would be possible. The Rennes refused and, in January 2016, this lawsuit was initiated to quiet title, among other relief, to the Rineholds' property.

The Rennes have asserted adverse possession, mutual recognition and acquiescence, and estoppel to the encroaching area. RP 8, 24, 74-75.

The parties participated in some discovery.

During the course of this discovery, the Rennes indicated two surveyors as potential witnesses. They were asked to produce any surveys, expert opinions, or other information they were required to produce consistent with CR 26(b)(5). RP 35, 104.

They did not produce anything. They did provide a "sketch" by one surveyor, but that was all. The "sketch" showed the common line where Holman placed it. CP 24. Rennes acknowledged it was not a survey. RP 64-65.

IV. PROCEDURAL AND EVIDENTIARY HISTORY

In anticipation of trial, the Rineholds filed a Motion for Partial Summary Judgement on May 2, 2018. CP 8-14. The motion was straight forward and asked the court to rule on the singular issue that:

> "The survey of Daniel F. Holman attached hereto as Exhibit A is a true, correct, and accurate survey and representation of the record title to Plaintiffs' property set forth in paragraph 2.1 or 2.0 of the Second Amended Complaint, and which survey correctly represents the record title for the easterly line of the Renne property which is identified in Exhibit B attached hereto." CP 8-14.

The purpose of the motion was to narrow the issues for trial and to create a baseline for the testimony at trial.

The motion was supported by a declaration from the Rineholds' surveyor, Daniel Holman. CP 21-54. His declaration indicates he conducted significant historical research (CP 22-23), found original monumentation of Watson (CP 22) and determined, in conducting his retracement survey, the Rinehold boundaries which located the common line with the Rennes. CP 23-27. He was aware that the survey conducted by Lovitt was for Glenn Watson, who was W.O. Watson's son. CP 22. He also indicated that if the reference to the "roadway" was to the physical roadway, that would have the Renne north line extending twelve feet further east of his surveyed line

which would mean their description would not close. (this would give the Rennes' 114 foot of frontage on SR106, while every version of the unrecorded plat and every relevant description gives them 102 feet). CP 24-25, 45, 49, 206.

The lines run by Watson, Lovitt, and Holman (1994), were all done at a time when there were no boundary issues. The lines were consistent, and no one ever questioned them. That status existed for some 55 years. CP 24.

Holman indicated that a pipe that the Rennes "found" in the area of their northeast corner is not only not at the physical roadway, but it does match up with their northerly line. Also, it was a ½ inch pipe which was not typical of Watson. He concluded it was not set by Watson. CP 24-25.

Within the entire record, there is not one opinion by an expert which contradicts the foregoing.

It should also be noted that prior to the Rineholds' motion being brought and after years of litigation and discovery requests requiring the Rennes to disclose their experts and opinions, no opinion had been provided to contradict Holman's conclusion as to the common line.

The Rennes indicate in their opening brief (at page 14), that Holman's survey was "based upon Lovitt's plat and monument's set". That is not an accurate statement. What is accurate is that Holman based his retracement survey consistent with the historical record which included a review of Lovitt's survey. In other words, while Holman was mindful of Lovitt's work, he made his own independent evaluation from the entire historical record. CP 21-54.

The Rennes response to the motion asserted Holman's survey is not correct because:

1. The language of the Renee deed and its predecessors controls.
2. The physical roadway is a monument that controls.
3. Ms. Renne's interpretation of the deed language as a real estate professional concludes the line should go to the current roadway.
4. That the recent use of the disputed area shows there is a genuine as to adverse possession.
5. That during the Renne improvements from 2006 forward, the Rineholds never said anything. CP 65-83.

The response by Rineholds as to the fourth and fifth assertions was that those issues were not before the court, and therefore, as to the Rineholds' motion, those assertions were irrelevant. CP 158-166.

Rineholds moved to strike the lay declarations submitted by Renne on the basis of:

1. ER 701 (they were not experts);
2. The relevant time frame relating to the survey and deed interpretation was circa 1952-1955;
3. Hearsay. CP 146-148.

The Rineholds moved to strike Ms. Renne's opinion as to her interpretation of the deeds, and comments made to witnesses by others as hearsay. (CP 146-148, 154-155). This motion was granted. CP 194.

The reply of the Rineholds is summarized as follows (see argument for more specific details):

1. Bare assertions are not sufficient to defend a Motion for Summary Judgement.
2. Expert testimony as to the common line's location was required to defend the motion and the Rennes offered none.

3. The lay testimony of the Rennes did not relate to the time of the transaction or proximate thereto, and therefore had no bearing on the correctness of the Holman survey.
4. Any discussion regarding the Rennes' equitable claims (adverse possession, etc.) were not relevant to the motion.
5. The intent of the original grantor and lines run by him control.
6. The Rennes provided no expert opinion or evidence relating to the totality of the circumstances in 1952-1955 that contradict Holman. CP 158-166.

As to the first issue, the Rineholds indicated that in a retracement survey, the purpose is to follow in the steps of the prior surveyor viewed from all the surrounding circumstances at the time of the original survey. CP 104. Holman did that and provided his expert opinion. CP 21-54. The Rennes sought to argue the application of the term roadway in its deed created an ambiguity preventing summary judgment. They produced no competent testimony to support this assertion. The plat identified the entire area of the Rinehold property east of Renne as a "street". CP 32.

The Rennes presented no evidence which examined all of the circumstances existing at the time of the Watson plat and presented no expert opinion which examined that or disagreed with the actual location of the common line as later surveyed at three different times. They never, throughout this proceeding, submitted a survey of the common line. RP 64-65.

The trial court granted the Motion for Partial Summary Judgment. CP 193-195. It rendered its oral decision on July 16, 2018, in a thorough recitation of the evidence and the law. RP 1-21. While the present review is de novo, the court's reasoning is instructive. While the Rennes now assert the basis for the court's decision was the lack of proof of a physical roadway in the 1950's, a close reading of the transcript of the court's ruling indicates the court's determination was far broader than the narrow assertion of the Rennes.

The decision of the court was based upon the evidence of the Holman survey, the prior surveys, and the fact that the Rennes produced no "counter opinion" by any of the three surveyors they had consulted (RP 4, 6-8). The court noted they "chose" not to present such an opinion. RP 18. They never related any roadway to any lines run in the field. RP 17

The final order was entered on July 30, 2018. CP 193. A timely Motion for Reconsideration was filed August 9, 2018. CP 196-200.

The Motion for Reconsideration was based upon:

1. Holman did not note a "stake" at the Renne's northeast corner (Holman did actually note this in his declaration, but indicated it did not come from Watson nor was it consistent with anything).
2. The court relied on Holman's view that the platted street was 52 feet wide but then appeared other evidence indicated it was not 52 feet wide. CP 196-200.

The Rennes later submitted evidence beyond what was asserted in the original proceeding (CP 198-198), and Motion for Reconsideration (see below).

The motion asserted this newly discovered evidence was not discoverable with reasonable diligence without saying why this was so after two and a half years. CP 197-198.

However, the Rineholds, again, both in the original Motion for Reconsideration, and in later submittals, never provided an expert opinion that located the common line different than Holman and Lovitt, and Watson, despite the fact that through their submissions

and discovery responses, they consulted with three different surveyors, two during discovery and one, a previously undisclosed surveyor. CP 24, RP 35, 104.

Eleanor Renne submitted a declaration that there was a newly discovered stake east of the northeast monument corner of their property as surveyed by Holman, but they presented no testimony that was a survey monument. CP 202-203. Holman indicated he was intimately familiar with Watson's work and what Eleanor Renne identified was not anything placed by Watson. CP 24-25. During the times of the Lovitt and earlier Holman survey, any monumentation placed by them would have been a rebar and plastic (yellowish orange) cap with the surveyors identifying information. The point identified by Renne had none of that. CP 24.

Lovitt and Holman never identified that stake. CP 27, 34, 36. It is not consistent with any point on any map or plat. CP 24. Most importantly, all surveys are consistent with the plat that shows the north line of the Renne lot to be 102 feet. CP 23, 34, 30. This stake, which never appeared until a significant time into these proceedings, would give to Rennes 114 along their north line. CP 95. That is inconsistent with every document relating to their property. CP 24-25,

45, 49, 206. In addition, while Rennes assert to the physical roadway, this stake is several feet west of the roadway and south of the Renne north line. CP 24, 27, 29-32, 34, 36, 95. It is not consistent with anything.

Ms. Renne submitted her opinion that some of this newly discovered evidence had not been taken into account by Holman. A review of Holman's declaration indicates he reviewed this information and determined this evidence was not competent. CP 24-25.

She also submitted unauthenticated aerial photographs, for which there was no foundation, and which showed nothing but that the entirety of the Rinehold property adjacent to Renne had been cleared. CP 121, 210-212. Please note the width of the clearing compared to the width of the clearing for SR106. The widths are similar. CP 121, 210-212. Photos of the presently existing roadway show it is significantly narrower. CP 292.

On the same day, Ms. Renne signed a declaration with an aerial photograph purporting to be dated August 19, 1951, which she concludes "shows the clearing for the roadway at issue". CP 217. She did not assert it showed a roadway. CP 214. Finally, she attested,

falsely, that the photograph was one on file with the Department of Natural Resources. CP 214.

The Rineholds filed a Motion to Strike and for terms. CP 221-222, as amended. CP 274-276. The Rineholds asserted as to the new evidence:

1. This evidence was not timely disclosed, that after over two and a half years of litigation, this evidence was reasonably discoverable with due diligence;
2. Lacked foundation; and
3. Ms. Renne was, again, trying to testify as an expert. CP 112.

The Rineholds further responded that:

1. There was no witness attesting to the location of the roadway or that one even existed in 1952-1955;
2. There was no evidence that the physical roadway which now exists was created by the common grantor or any party to the original grant;
3. Defendants presented no expert testimony;
4. The current survey by Holman is consistent with his prior survey, the Lovitt survey, and the original Watson plat;

5. Both the Lovitt survey and the Holman surveys located an original Watson monument at the southeast corner of the Renne property;
6. The Lovitt and Holman bearings running south to that monument are substantially the same and are consistent with the bearing in the deed description; and
7. The lack of any counter-expert opinion required the court to accept the Holman survey as a proper conclusion representing the intent of Watson from the deeds, monuments found, and the unrecorded plat. CP 196-200.

The Defendants' Motion for Reconsideration questioned none of the forgoing.

The Rineholds also asked the court, if it did not strike Ms. Renne's declarations, that the matter be continued so they could produce records that the community well was not drilled until 1971, and the assessor's records show none of the properties now served by the roadway were developed until well after the 1950s, all showing that there was no need for a roadway until well past the 1950s. CP 225.

The Rineholds counsel then learned that Ms. Renne had improperly contacted Terry Curtis, a previously disclosed expert for the Rineholds, to obtain aerial photos and to have him interpret them. CP 278. Mr. Curtis submitted a declaration as to this improper contact. He pointed out that the purported 1951 aerial was not on file with DNR as she has attested to but was an image he saw online. CP 279-281. Ms. Renne subsequently did not dispute this. CP 311-315.

This hearing was originally scheduled for hearing August 27, 2018, when the parties appeared. RP 77. After hearing arguments, the court continued the matter four weeks for the sole purpose of allowing the Rennes time to authenticate the 1951 aerial image, not for an opportunity to submit additional evidence. RP 90, 102, 118.

The hearing on the Motion for Reconsideration was eventually heard Monday, October 1, 2018. CP 273.

Contrary to the court's specific direction, significant additional, previously undisclosed materials were submitted.

The Rennes submitted, two working days before the hearing, a declaration from a Pete Kauhanen (another previously undisclosed "expert"), a self-described GIS specialist with the San Francisco Estuary Institute, only indicating, as to his qualifications, he had a GIS

certification from San Francisco State University. CP 289-304. He indicated he had experience looking at aerial photographs. CP 290. He specifically referred to two images he asserted were from 1951, without foundation, and opined he saw a roadway in existence. CP 291.

He submitted a list of his qualifications. It contained no evidence of training in interpreting aerial photographs, but only, perhaps, suggesting his GIS training qualified him. CP 300-302.

He professed to interpret what was described as the 1951 USGS photo which the court had yet to admit over objection. CP 292. A simple review of the photo indicates that interpretation is not reasonable. CP 291. A cleared area is shown. CP 292. It compares in width to SR106. CP 292. The width of the Rinehold property in this area is 40-50 feet which would be consistent with a state highway. CP 292.

A declaration of James Dempsy, (submitted two days before the hearing) a previously nondisclosed licensed surveyor, was submitted. He indicated he had some issues with the Lovitt and Holman surveys. CP 305-310. He did not conduct a survey, or at least he failed to say he did. CP 305-308. He never stated the common line

surveyed by Holman was not properly located. CP 305-308. He also did not view any deeds other than the Renne deed. CP 305-308.

Mr. Curtis added further information regarding his contact with Ms. Renne. CP 320-324. He indicated GIS qualifications do not qualify one as an expert in photogrammetry. CP 323-324. He explained what is required to interpret an aerial photograph by a photo expert, which, he indicated Mr. Kauhanen is not. CP 323-324. In particular, he indicated that a photogrammetry expert, in rendering an expert opinion, requires the use of overlapping images (stereopairs) which create a three-dimensional image to be able to view both horizontal and vertical relationships of objects and terrain. CP 324.

He concluded that from the 1951 aerial photograph, the interpretation of Mr. Kauhanen that a roadway was shown, could not been made. CP 323-324.

It was curious that Ms. Renne would hire someone such as Mr. Kauhanen with no adequate training from as far away as San Francisco to provide an opinion favorable to her that was lacking in foundation in several respects. It appears he used to live near the

Rennes which raises the possibility of a personal connection. When this issue was raised, it was never denied. CP 325-399.

The lack of use of stereopairs was, in this writer's experience, a telling sign, and prompted further investigation. The declaration from Mr. Curtis and articles submitted from professional organizations submitted indicate Mr. Kauhanen's failure to use stereopairs was fatal to his opinion. CP 324, 338-342.

In addition, a review of the curriculum for San Francisco State University showed his GIS training included no training in photo interpretation(CP 326, 330-335), that his employment shows he is an environmental expert who works with unmanned aircraft systems, and who works with GIS systems (of which looking at photo images is only a small part). His job is to locate trash in the waters and estuaries around San Francisco Bay. CP 326, 330-397.

The Motion for Reconsideration was originally scheduled to be heard on August 27, 2018. At that time, Rineholds' counsel challenged Mr. Kauhanen's qualifications as an expert, that he failed to conduct a proper examination, that the 1951 aerial lacked foundation and was not admissible. CP 235-399.

The Rineholds continued to assert arguments previously made.

The Court continued the matter until October 1, 2018, to allow the Rennes time to procure a foundation for the 1951 aerial photograph. They never did. RP 90.

All three declarations by Ms. Renne, Mr. Kauhanen and Mr. Dempsy were submitted on September 27, 2018, two working days before the hearing on this matter on October 1, 2018. CP 289-311. Kauhanen and Dempsy had never been disclosed as experts. RP 35, 104.

At the hearing on October 1, 2018, the declarations of Mr. Kauhanen and Mr. Dempsy were objected to as being incompetent and lacking foundation. RP 100, 102, 106-107, 113-117.

The court indicated that in continuing the previous hearing to October 1, 2018, it had not intended to allow the Rennes to submit additional evidence, but only for an opportunity to authenticate the 1951 photo. RP 118. The court ruled that the photograph was not properly authenticated as a result of Mr. Renee's declaration but indicated Mr. Kauhanen's declaration did create an issue of material fact (RP 119-125, 128) as to the photographs admissibility.

So at that point in time, after the matter had been pending for five weeks, Rennes submissions:

1. Violated CR 26 (b)(5);
2. Violated CR 56(c);
3. Has not been disclosed in discovery;
4. Never showed Kauhanen had any training in photogrammetry;
5. Never showed Kauhanen used materials or procedures relied on by experts. See State v. Ecklund, 30 Wash. App. 313, 633 P.2d 933 (1981), State vs. Nation, 110 Wash. App. 651, 41 P.3d 1204 (2002). RP 105.;
6. Never showed how this new evidence was not discoverable (understanding the court has discretion, Martini v. Post, 128 Wash.App. 153, 313 P.3d 47 (2013) RP 106, 117; and
7. The submissions conflicted with the court's reason for the prior continuance. RP 90.

The point of the forgoing is to show that the trial court gave the Rennes every conceivable opportunity to rebut the motion, and determined they had failed to do so.

On October 17, 2018, the trial court ruled on the Motion for Reconsideration. RP 14-18. The Court decided to not rule on the Rineholds' Motion to Strike and the foundational issues because the court determined that evidence was not relevant to its determination. RP 20. The essence of the court's ruling was that while the Rennes raised what it called "critiques" of the surveys, the Rennes had "chosen" not to do their own retracement survey and therefore had presented no conclusion that the common line was "contrary" to Holman. RP 17-18. Even more telling the court determined even if there was a roadway shown in the 1951 aerial, there was no

testimony to show where it was at that time in relationship to the Holman line. RP 121. The court had previously put them on notice that even if they could determine there was a roadway, they had to relate it to the line run in the filed. RP 17. The Motion for Reconsideration was denied. RP 18.

The Rennes thereafter sought a determination that there was no just reason for delay to allow an interlocutory appeal, to which the Rineholds agreed, and which the court independently reviewed and concurred. CP 409-412.

V. ARGUMENT

A. STANDARD OF REVIEW

The standard of review set forth in the Rennes' opening brief is correct but incomplete.

There must be no genuine issue of a material fact. Speculation or conjecture do not create a genuine issue of material fact. Moore v. Hagge, 158 Wash. App. 137, 241 P.3d 787 (2010), which also held that a trial court has wide discretion in ruling on the admissibility of expert testimony and a Court of Appeals will not disturb the trial court's ruling if the reasons therefore are fairly debatable

Conclusory or speculation in expert opinions lacking an adequate foundation are not to be considered. Moore, infra at 155.

> "The very object of a motion for summary judgment is to separate what tis formal or pretended in denial or averment from what is genuine and substantial, so that only they latter may subject to suit or the burden of trial."

Hill v. Cox, 110 Wash. App. 394, 41 P.3d 495 (2002), citing Preston v. Duncan, 55 Wash.2d 678, 349 P.2d 605 (1960), quoting Judge (later Justice) Cardoza in Richard v. Credit Suisse, 242 N.Y. 346, 152 N.E. 110, 45 A.L.R. 1041 (1926).

The purpose of a summary judgment is to avoid useless trials on issues that cannot be factually supported or could not, as a matter of law, lead to an outcome favorable to the non-moving party. Burris v. General Ins. Co of America, 16 Wash. App. 73, 75, 533 F.2d 125 (1976).

Speculation or argumentative assertions do not defeat a summary judgment motion. Ranger Insurance Company v. Pierce County, 164 Wash. 2d 545, 192 P. 3d 886 (2008). Supposition and unsupported opinion evidence will not suffice. Snohomish County v. Rugg, 115 Wash. App. 218 61 P. 2d 1184 (2002). Bare assertions, or unauthenticated or hearsay evidence does not suffice. SentialeC3 v. Hunt, 181 Wash. 2d 127, 331 P. 3d 10 (2014). A scintilla of evidence,

evidence that is "merely colorable" or evidence that is not "significantly probative" will not defeat a summary judgment motion. Seiber v. Poulsbo Marine Center, Inc., 136 Wash. App. 731, 150 P. 3d 633 (2007).

B. THE RENNES NEVER SUBMITTED ANY COMPETENT PROOF TO DISPUTE HOLMAN'S CONCLUSION AS TO THE LOCATION OF THE COMMON LINE

This appeal addresses one question: Is Holman's conclusion as to where the Renne and Rinehold common property line is located, sustained by the record? Nothing in the record supports reversal of the trial court's decision.

The Rennes assert that the record title of their easterly line is to a presently existing roadway on the Rinehold property serving multiple properties which is located easterly of the common line surveyed by Holman. The legal interpretation of the deeds is viewed in light of the exhibits which indicate that the suggested interpretation by Renne of their deed as going to the westerly line of the roadway is incorrect as a matter of law.

While the Rennes suggest to the court that a call in a deed to a monument controls over courses and distances, other rules supersede that rule of construction.

First and foremost, in interpreting any deed, the intent of the original grantor is paramount. The map created by Watson himself and by Lovitt, for Watson's son, are clear evidence of the intent that the physical roadway has no application. Wohl v. City of Missoula, 369 Mont. 108, 300 P3d 1119 (2013). If the intention of the original grantor can be determined from the historical record, it controls. *17 William B. Stoebuck and John W. Weaver, Washington Practice: Real Estate: Property Law, Sec. 7.9 at p. 486.*

Second, and determinatively, lines run on the ground by the original grantor control over monuments referenced in a deed. The role of the surveyor is to locate the lines where the original surveyor placed them. DD&L, Inc. v. Burgess, 51 Wash. App. 329, 753 P.2d 561 (1988). In surveyor parlance, it is retracement survey.

The position of the Rineholds in the present case is consistent with Thompson v. Schlittenhart, 47 Wash. App. 209, 734 P. 2d 48 (1987).

That case involves an unrecorded plat in the City of Auburn. There is one difference in that in that case the common grantor/platter created two inconsistent deeds, whereas in the present case,

interpreting the word "street" as being the platted area in Exhibit B to Holman's declaration renders all deeds fully consistent.

In the Thompson case, *infra*, two surveyors, one for each of the parties, testified to inconsistent results. The surveyor for Thompson examined deeds for the surrounding properties, conveyances by Thompsons' predecessor's on interest, the unrecorded plat and monuments on the ground, and then established a common line based upon what he considered was the intent of the original grantor. *Infra*, p211.

The surveyor for Schlittenhart literally followed the language in the deeds.

The court held that its overriding purpose was to follow the intent of the original common grantor and held to the Thompson line. Thompson v. Schlittenhart, supra, not only supports the trial court's decision, but the facts before the trial court are even stronger than in that case.

That case holds, as applied to the present case, that even if one were to assume the deed of the Rennes' predecessor was referring to a physical roadway, Holman's determination as to W. O. Watson's intent controls. Based upon this holding, the only evidence which could defeat

the Motion for Partial Summary Judgement would have been the production of a survey by the Rennes which considered all of the surrounding tracts and circumstances in the 1950's and expressed a conclusion different than Holman based upon that surveyor's opinion of W. O. Watson's intent. That did not happen. In fact, what little they did present was not competent.

When the Rennes bought their property, the Lovitt survey and earlier Holman survey were recorded and they were on notice thereof. CP 34, 36. Strong vs. Clark, 56 Wash. 2d 230, 352 P.2 183 (1960).

The deed from Glenn Watson and Frances Watson to Joan Addington (as trustees) is very telling. CP 136. Glenn Watson had the common line surveyed. CP 34. Joan Addington had the common line surveyed. CP 30. They both put the common line where Holman put it. CP 30, 34. The intent of that deed is interpreted in light of these surveys. It is the same as the Rinehold deed.

Rennes presented no competent expert testimony to dispute the recent Holman survey or the consistent historical surveys by Lovitt and Holman. Expert testimony is required "when an essential element of the case is best established by an opinion which is beyond the expertise of a layperson...". Testimony in such a case is required to

defeat a motion for summary judgment. Young v. Key Pharmaceuticals, Inc., 112 Wash. 2d 216, 770 P. 2d 182 (1989) (relating to medical malpractice). Smith v. Shannon, 100 Wash 2d. 26, 666 P. 2d 351 (1983) (informed consent). Wagner v. Flightcraft, Inc., 31 Wash App. 558, 643 P. 2d 906 (1982). (airplane crash) Randolph v. Collectromatic, Inc., 590 F. 2d 844 (10fw Cir. 1979) (product defects). Ambin v. Barton, 123 Wash. App. 592, 98 P. 3d 125 (2004) (legal malpractice). Raff v. County of King, 125 Wash. 2d 697, 887 P. 2d 886 (1995) (defective roadway). Farm Corp Energy, Inc. v. Old Nat. Bank of Washington, 109 Wash. 2d 923, 750 P. 2d 231 (1988) (lost profits). Mattson v. Carlisle Packing Co., 123 Wash. 243, 212 P. 2d 179 (1923) (safe use of a ladder). See also ER 701.

In Rue v Oregon & W.R. Co., 109 Wash. 436, 186 P. 1074 (1920), a person qualified with sufficient expertise to testify as a surveyor, but did not actually conduct a survey, was not competent to testify to prove acts relating to a survey.

In the surveying context, two Washington cases have held that the testimony of a person with insufficient expertise (engineers) was not competent evidence. Rue v. Oregon & W.R. Co., supra, Batchlor v.

Madison Park Corporation, 25 Wash. 2d 907, 172 P. 268 (1946). See also Murray v. Bousquet, 154 Wash. 42, 280 P. 935 (1929).

RCW 18.43.020(9) provides that the establishment of lines is the practice of land surveying. RCW 18.43.010 requires that in order to practice land surveying, one must be qualified and licensed to do so.

The Rennes consulted with three surveyors CP 24, RP 35, 104., yet presented no evidence that the common line was not correctly located. Therefore, this court must conclude that those surveyors agreed with the conclusion as to the location o the common line.

Where a party has under its control evidence which might pertain to a subject matter and fails to present it, the presumption is created that that evidence is not favorable to that party. Wright v. Safeway Stores, Inc., 7 Wash. 2d 341, 109 P. 2d 542 (1941). State v. Baker, 56 Wash. 2d 846, 355 P. 2d 806 (1960).

C. THE CALL IN THE DEED DOES NOT CREATE AN AMBIGUITY IN THE CONTEXT OF THE SUMMARY JUDGMENT MOTION

The Rennes claim the term roadway in the deed in and of itself, creates an ambiguity. They are asking this court to assume that but they point to no opinion of an expert that supported that or would question

Holman's ultimate conclusions of where the common line is. In fact, there is none.

However, the only evidence they submitted as to the interpretation of the deed, as it related to the totality of the circumstances in the 1950's, and the ultimate conclusion, is the opinion of Ms. Renne, which was stricken by the trial court and that ruling is not challenged in this appeal. CP 194.

The issue of there being a physical roadway in the 1950's needs to be put in context. In the priority of considerations expressed above:

1. Intent of the grantor.
2. Lines run on the ground.
3. Reference to monuments in a deed.

This only issue the street issue addresses is the third priority. In other words, while the lack of a physical road would eliminate any argument the Rennes have as to the third priority, if a court can reach a determination based upon either of the first two priorities, the third priority becomes irrelevant. However, they never show that any roadway, circa 1952-1955, if existing, was inconsistent with Holman. RP 17, 121.

As to this third issue, the trial court initially found there was no proof a that the reference in the deed was to a physical roadway since there was no proof one had been created at that time or somewhat prominent to the events in the 1950's. RP 5-6.

On the Motion for Reconsideration, the trial court hedged on this because of the declaration of Mr. Kauhanen. RP 15-16.

The Rineholds objected to his testimony because:

1. It was undisclosed during discovery and was not produced until two days before the Motion for Reconsideration;
2. It was never shown how this was not previously discoverable;
3. Mr. Kauhanen submitted no testimony he had any training in aerial photo interoperation. He only claimed some experience in reviewing aerial photos which complies with no legal standard; and
4. The photo relied on was never authenticated. CP 221-222, 274-376.

As an additional note, Mr. Kauhanen never attested that this road he perceived was in the same location as the present road. CP 289-310. In other words, even if a roadway did exist in the 1950's, and even if the

deed was calling to a physical roadway, there is no proof that Holman's survey is inconsistent with that. RP 121.

Despite this, the court decided there could be an ambiguity as to the existence of the roadway in the 1950's (RP 17), but the concluded:

> "... no effort has been made by the Defendant Renne to relate this purported roadway to the actual lines run in the field. Critiques of the action of other surveys are not surveys themselves." (RP 17).

In other words, as to the three priorities above, the trial court gave every benefit of the doubt to the Rennes as to the third priority and held that they still had submitted no proof as to the first two priorities, and insufficient proof as to the third.

D. THE CHALLENGE TO HOLMAN'S SURVEY AS A RETRACEMENT SURVEY HAS NO BASIS

Ms. Renne continues to seek to interpret the surveys. She is not competent to interpret surveys. See ER 701. She provides no proof that all three surveys are not correct. As the trial court pointed out "critiques" of surveys are not surveys. RP 17.

A number of points made by the Rennes before this court were either never made before the trial, have no bearing on the record, or are not correct.

Rennes assert Holman's 1994 survey did not disclose any encroachments (CP 36), nor did Lovitt. CP 34. The simple answer is, at that time there weren't any. There is no proof in the record there was any encroachments that should have been mapped.

This other answer is, regardless, this has no bearing on the issue before this court.

E. AS TO THE ISSUE OF THE THIRD PRIORITY, CALLS TO ARTIFICIAL MONUMENTS DO REQUIRE PROOF OF THE EXISTENCE OF THE MONUMENT

The Rennes rely on Ray v King County, 120 Wash. App. 564, 86 P.3d 183 (2004). In that case a rail line was not built until after the deed.

In Ray, the railroad was constructed eight to eleven months after the deed. Ray, infra at 570. The court held that this contemporaneous action reflected the intention of the parties to the deed. Ray, infra at 592. The case does not in any way suggest that proof of activities 50-65 years later should be considered in interpreting deeds and plats.

The proof must relate to the conduct of the parties "at the time the deed was executed" to determine their intention. Newport Yacht Basin Ass'n of Condo Owners v. Supreme NW, Inc., 168 Wash. App. 56, 237 P.3d 18 (2012)

F. LEGAL AND EQUITABLE PRINCIPLES HAVE NO RELEVANCE TO THE ISSUE PRESENTED

The Rennes argue that legal and equitable principals are relevant to the determining the "true" boundary line (Renne Brief, p. 20).

This is certainly is true. However, the issue of the "true" line was not before the court. Before the court was the issue of the properly surveyed line based upon the historical record title. The Rennes never filed a motion to ask the court to consider this issue.

At pages 6-10 of the Renne brief, reference is made to more recent activities regarding the use of the property and peoples impressions, this evidence was objected to before the trial court (CP 146-148, 154-155), which objection the court sustained, and struck. CP 193-195. The Rennes have not challenged that ruling. It is improperly referenced in the Renne brief.

Whether or not the line should be changed by way of the equitable theories asserted by the Rennes is to be determined by the trial court after this appeal.

The only relevance of facts on the ground as to a proper survey relates to the intention of the original parties to the transaction. Newport Yacht Basin, supra, and Hirt v. Entus, 37 Wash. 2d 418, 428, 224 P. 2d 620 (1950).

The sole issue for determination for the trial court was the intention of W. O. Watson in the 1950's, not subjective opinions of the parties 40-60 years later.

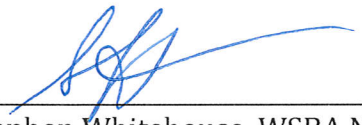
It might be noted that the Rennes' posture in this case presents a glaring inconsistency. They fully recognize that other parties have an access easement over the Rineholds property. They have not included any of these people as parties.

IX. CONCLUSION

The rulings of the Superior Court in granting the Motion for Summary Judgement and denying the Motion for Reconsideration should be affirmed, and the remaining issues left to the Superior Court for determination.

Respectfully submitted this 18th day of April, 2019.

WHITEHOUSE & NICHOLS, LLP



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