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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29799-3-III

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION III

LANCE G. PIERCE and JANETTE PIERCE, husband and wife,

Plaintiffs/Respondents,

v.

ALBERT L. BELCHER and LOUISE M. BELCHER, husband and wife,

Defendants/Appellants.

APPEALED FROM STEVENS COUNTY SUPERIOR COURT CAUSE
NO. 09-2-00552-2

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

This rural property boundary dispute involves a Trial court that committed reversible error when it misapplied and misconstrued facts and Washington boundary law to arbitrarily rewrite the legal description of the real property at issue.

Superior Court Judge Allen Nielson erroneously concluded after a 2-day bench trial that the legal boundary at issue had been re-established by a “*certain, well defined, physically designated line.*” CP 864-872. In his holding, Judge Nielson inexplicably ruled that a boundary purportedly consisting of two t-posts periodically obscured from view by overgrown grass and weeds; a seasonal “mow” line that actually changed year to year based upon harvest patterns and “*years of different use*”; and the western edge of a driveway curve serving the Pierce’s property that permissively encroached in part upon Appellant Belcher’s acreage by a few feet, was as a matter of law, *mutually recognized*. CP 864-872. The Trial court did so despite the fact that the so called boundary indicators neither touch nor line up to form a certain, well-defined line, physically designated upon the ground; the long accepted legal standard in Washington which this Court specifically had reminded Judge Allen of in Green v. Hooper, 149 Wn. App. 627, 642 (Div. III, 2009).

Respondents at trial failed to meet their initial, fundamental burden of proof, both factually and legally. There was no well-defined, physically designated line and the neighboring owners never manifested a *mutual recognition and acceptance* of a boundary line different from that legally described and recorded in both property deeds. Further, there was no evidence that the requisite *mutual recognition and acquiescence*, if any, continued for any discernible, uninterrupted 10-year period.

Appellants request that this Court reverse and vacate the Trial court's Judgment, along with the corresponding Findings of Fact and Conclusions of Law which do not and cannot support the Court's arbitrary ruling. Additionally, Appellants request that this Court quiet title in the disputed portion of land to them as bona fide purchases and legal owners. Finally, Appellants respectfully request that the Trial court's Conclusion of Law **D**, with respect to the Respondents trespass, be reversed.

II. ARGUMENT

A. Argumentative And Unsupported Assertions Of Purported Fact Must Be Stricken.

RAP 10.3(a)(5) requires a Statement of the Case to be "*A fair statement of the facts... without argument.*" The rule mandates that "[r]eference to the record **must** be included for each factual statement." (emphasis added). Respondents' Statement of the Case violates RAP 10.3 as it is replete with unsupported, argumentative assertions of fact.

In Sherry v. Financial Indem. Co., 160 Wn.2d 611, 615 (2007), the Court refused to consider “*facts recited in the briefs but not supported by the record.*” Id. at fn.1. Accordingly, under RAP 10.3, the following argumentative and/or unsupported statements of fact cannot be considered and must be stricken from Respondents’ Brief.¹

- “...*the common boundary is the line, visibly marked by “T” posts, that has been in place and acquiesced in and recognized by all property owners from the time the parcels were severed to the date of this dispute, a period of approximately 26 years.*” Respondents’ Brief, p.1

This assertion is not only false, but it is argumentative and not supported by any evidence in the record. In fact, not all owners testified in this case. Only Michael Trimble, Kelly Davis (in the form of two Declarations), Lance Pierce, Ronald Miller (in the form of a Declaration), and Louise Belcher provided testimony, and none testified as Respondents assert. The full first paragraph on page one of Respondents’ Brief is in fact argumentative and unsupported, and fails to cite to the record.

- “*The evidence is undisputed that during his ownership, Miller kept his property neatly mowed, and that he never mowed beyond the boundary markers or “T” posts.*” Respondents’ Brief, p.3.

This assertion is also argumentative and unsupported by the record. Kenneth Anderson, the Pierces’ real estate agent, testified the first time he saw the subject property was July 2007 when prior owner Davis put

¹ For ease of reference, Appellants attach hereto as Appendix 1, a diagram of the adjoining property parcels at issue and a summary of past ownership interests for each parcel.

Respondents' property on the market. RP 114, ll.16-25. Anderson testified he just couldn't remember the exact area mowed, as his "*memory is not that good.*" RP 103, ll. 16-18.

Respondent Pierce testified he first visited the subject property, twice on July 3, 2007. RP 119, ll.23-24; 160, ll.11-14. During his first pre-purchase visit he did not see "T" posts "*because they were in the hay*" and the hay was as tall as his belly button. RP 119, ll.23-24; 159, ll.16-18. Respondent Pierce later contradicted this testimony claiming "T" posts were visible "*that night of July 3rd*" when he purportedly went to verify the location of the western boundary by himself. RP 121, ll.5-14; 160, ll.11-14. After July 3, Respondent Pierce did not see the property again until November 2007, and then not again until twice in 2008. RP 160, ll. 19-20; 166, ll.22-23. Based upon this trial testimony, Respondent Pierce cannot now on appeal introduce new speculative and baseless evidence regarding Miller's historic mowing activities.

- "*The exception to the clear boundary line cut pattern was when the adjoining landowners, either Miller and Trimble or Miller and Pierce in 2008 jointly allowed a third party to cut and keep the hay on both parcels.*" Respondents' Brief, p.3.
- "*The boundary posts were set a sufficient distance apart so as to easily allow the farm machinery to pass between.*" Respondents' Brief, p.3

These assertions are likewise unsupported by the record. Respondents misrepresent Respondent Pierce's trial testimony to support

these assertions. Respondent Pierce lacks any personal knowledge of the property at issue prior to July 2007 – the first time he viewed the property. RP 119, II.23-24. Further, Respondent Pierce testified he had no first had knowledge as to who put the “T” posts into the ground, or when, or why. RP 171, II. 10-26. Accordingly, any self-serving testimony now by Respondent Pierce regarding what the 2000 aerial photo might represent is pure speculation and must be stricken.

- *“Miller never expressed any concern regarding the location of the driveway or the boundary line ... from 1992 until right before he sold his property in 2008.”* Respondents’ Brief, p.3-4.

This argumentative assertion misstates the trial testimony and is again unsupported by the record. Prior owner Trimble testified he never had any discussions of road ownership with Miller. RP 59, II.19-21. Miller in fact testified he advised Davis that the boundary *“was not what he thought”* prior to Davis selling to Pierce. CP 193, ¶4. Miller further testified he informed Pierce that *“his belief as to where the boundary existed was a mistake...”* Id. at ¶5.

- *“Belcher began ... constructing a fence along a line that was different from the common boundary line located on the ground by the PVC posts and “T” posts as they existed in 1982.”* Respondents’ Brief, p.6

This argumentative assertion is unsupported by the record. There is no evidence establishing anything existed as a boundary on the ground in 1982 or that the boundary differed from what was legally recorded.

- “The fence posts were set in a manner so as to obstruct the Pierce driveway, completely cutting off Pierces’ ability to reach their building site with their heavy equipment.” Respondents’ Brief, p.6

This argumentative assertion is unsupported by the record. There is no evidence to support the assertion that the posts were “*set in a manner so as to obstruct the Pierce driveway*” or to cut off their “*ability to reach their building site...*” See RP 130. Indeed, Respondent Pierce acknowledged the fence was built to the “*edges*” of the driveway. RP 131, l. 17. Further, Appellants stopped fencing on either side of the driveway because they “*didn’t want to block Respondents off*”. RP 266, ll.13-18.

- “[T]he open hayfields between the Pierce and Belcher parcels were not overgrown nor were the boundaries marked by survey markers that were hidden.” Respondents’ Brief, p.10

This assertion is unsupported by the record. In fact, the evidence and testimony at trial clearly establish the falsity of this assertion. Douglas Noyes, a licensed surveyor of the property, testified he never even saw the well-witching posts while doing his survey, because they were obscured from view. “*When I was there, the grass was quite tall ... I did not see them from any position....*” RP 218, ll. 13-15; 219, l.23. Even Respondent Pierce testified that on the first day he saw the property he did not see the “T” posts as “*they were in the hay. The hay was up this high (to his belly button)*”. RP 119, 23-24; 150, ll.19-23; 159, ll.16-18.

- *“Fence posts, spaced 50 – 75 yards apart, ran the length of the boundary.”* Respondents’ Brief, p.11

This assertion misrepresents the record. The evidence and testimony establishes the existence of only three “T” posts between the Belchers’ home and the disputed ingress/egress driveway. RP 32, ll.23-25. Furthermore, the testimony was that an approximate distance of 50 to 75 yards existed between the three posts. RP 173, 24-25. Even ignoring testimony that the three posts were not even in a line, that accounts for only a portion of the 1349 foot property line. Thus, these three “T” posts did not run *“the length of the boundary”* as now alleged by Respondents. Finally, there is no evidence in the record establishing the “T” posts were ever part of a fence. The only evidence at trial was that they were markers left by a well-witcher. RP 82, ll.5-10; 248, ll. 13-23.

- *“Numerous witnesses and photographic evidence clearly showed that these fence posts were readily visible, formed a straight line, and remained in the same location for a period of 25 years.”* Respondents’ Brief, p.11

This assertion is patently false and unsupported by the record. Not one witness established the “T” posts as fence posts. Not one witness established the “T” posts had existed for 25 years. To the contrary, Greg Olson, a Century 21 Kelly Davis Real Estate Agent for prior owner Miller (1992-2008), and Appellant Belcher both testified the “T” posts were put in by Miller for *“well sites ... when Mr. Miller had it water witched or for*

a dowsers.” RP 82, ll.5-10; RP 248, ll. 17-23. Thus, at best the “T” posts were in place for a period of 16 years and were never “fence line” posts.

- *“There was also a clear line of cultivation, as well as Miller’s mowing line, that followed the common boundary between the Pierce and Belcher parcels.”* Respondents’ Brief, p.11

This assertion is also unsupported by the record. The trial testimony and photographic evidence established that the annual mow patterns changed depending upon who was doing the farming and the nature of the haying operations. RP 15, ll.2-13; 119, ll.14-24; 130, ll.3-13; 144, ll.5-145, ll.14; 205, ll.2-207, ll.16. Additionally, it was established that at times, no mow line existed at all as the fields were left overgrown. RP 218, ll. 13-15; 219, l.23; 119, 23-24; 150, ll.19-23; 159, ll.16-18.

- *“A ridge line formed in the earth along the boundary, created when the hay was cut on either side.”* Respondents’ Brief, p.11

This assertion is wholly unsupported by the record. Respondent Pierce never resided on the property, never witnessed the land being hayed, rarely visited the land since purchasing it, never hayed it himself, and in fact testified he only once had the land jointly cultivated –when he agreed to allow Miller to contact “Les” and have the hay cut. RP 117, ll.17-18; 144, ll.13-14; 160, ll.23-24; 166, ll. 22-23; 169, ll.10-18; 170, ll.10-15. There is no record to establish the existence of an alleged “ridge

line” either prior to the Pierce ownership in July 2007 or after. RP 119, ll. 23-24; 206, ll.16-19; 144, ll.13-14.

B. Respondents’ Failed To Meet Their Burden Of Proving An Altered Boundary By Mutual Recognition And Acquiescence.

The trial court committed reversible error as a matter of fact and law in quieting title to Respondents by failing to apply the correct evidentiary standard. The record illustrates Respondents failed to prove, by clear, cogent, and convincing evidence, any of the three requisite factors necessary to establish an altered boundary by mutual recognition and acquiescence; (1) a certain, well defined, physically designated boundary; (2) that the predecessors in interest to both properties mutually recognized and acquiesced to an altered boundary; and (3) that the mutual recognition and acquiescence existed for ten consecutive years. Merriman v. Cokeley, 168 Wn.2d 627, 630 (2010).

Appellants’ property was owned from 1982 to 1992 by Voile, Sr. See App. A. Respondents’ property was owned from 1982 to 1991 by Voile, Jr. Id. There was no trial evidence or testimony by either Voile, Jr. or Voile, Sr. In 1991, Voile, Jr. sold Respondents’ property to Marilyn Trimble. Id. In 1997 Michael Trimble became the sole owner of Respondents’ property after a series of random ownership transfers

between him and his mother, Marylin Trimble. Id. There was no evidence or testimony provided at trial by Marylin Trimble.

Respondents only provided limited trial testimony from two prior owners of their property. Davis by Declaration and Michael Trimble. Of those two, only Trimble ever lived on the property. However, his testimony failed to support any mutual recognition in or acquiescence to an altered boundary. In fact, Trimble never resided on the property until 1998 when he relocated from Seattle. He testified that during his ownership he never walked the west boundary. Id.; 58, ll.11-14.

In 2005, Trimble sold to Davis, a Century 21 Real Estate Broker. During trial, Davis' testimony was given via two previously drafted Declarations.² Contrary to the contents of the Declarations, Davis, as a real estate Broker, had previously disclaimed all knowledge of the property when selling it to Pierce. See Ex. 123. Further, Trimble's testimony contradicts Davis' written assertion that he was familiar with the corner markers on his property. Trimble testified at trial that he had never physically shown Davis any boundary as he "*only spoke to him by telephone.*" RP 28, 1.20-29, 1.11. Trimble further testified that in selling the property to Davis he could not recall describing to Davis the well-witching posts as a boundary. Id.

² The parties stipulated only to the admission of these Declarations, not to their veracity.

Tellingly, no prior owner of 1801 Hutchison Rd. (Appellant Belcher's property) testified to an express agreement, recognition or acquiescence of any mutually changed boundary between the parcels. Thus, Respondents have failed to prove by clear, cogent, and convincing evidence that Appellants' predecessors in interest, the Millers, ever recognized the well-witching posts, the ever-changing "mow line", or the driveway, as a new boundary line.

1. **Substantial Evidence Does Not Exist Which Would Prove The Common Boundary Line Was Certain, Well Defined, And In Some Fashion Physically Designated Upon The Ground.**

"In order to establish the first element of mutual acquiescence, the purported boundary line 'must be certain, well defined, and in some fashion physically designated upon the ground.'" Green, supra at 642, citing Lamm v. McTighe, 72 Wn.2d 587, 593 (1967).

a. **The Moving "Mow" Line Did Not Indicate A Legally Recognized Common Boundary.**

Respondents cannot and have not shown that an annually adjusted alfalfa "mow line" constitutes a well-defined line that physically designates a certain boundary upon the ground.

A **June 2000** WSDOT aerial photo shows both parcels as having been harvested up to and against the driveway. (Ex. 101) The 2000 aerial photo also illustrates that the southern portion of the 1801 Hutchison Road

property was harvested as well. Id. However, a **July 2005** WSDOT aerial photo clearly shows that the 1801 Hutchison Road property was harvested in a completely different pattern. (Ex. 102). These aerial photos provide irrefutable evidence that no well-defined boundary existed based on agricultural practices that acted to alter the boundary descriptions contained in the parties' legal chains of title.

Additionally, the mow lines here varied during each year depending upon the alfalfa growing season, rainfall and personal harvest decisions of the owners. In no way can changing seasonal crop lines, as evidenced here, provide clear, cogent and convincing evidence of a well-defined altered boundary line being established differently from the deeded boundary. This fact is underscored by the holding in Skov v. MacKenzie-Richardson, Inc., 48 Wn.2d 710, 715 (1956) that “*occasional grazing*” is insufficient to establish boundary by acquiescence. If occasional grazing is insufficient, surely periodic and varying harvest patterns are unable to do so as well.

b. The Well-Witching Posts Here Did Not Indicate Or Serve As A Common Boundary.

Respondents cannot and have not shown that the well-witching posts constituted a certain, well-defined line physically designating a common boundary. Even if the evidence was ignored and a conclusion

was reached that these “T” posts were “survey” markers of some kind, more is needed beyond isolated survey markers when an area is overgrown. Merriman, supra. Respondents’ surveyor Doug Noyes testified that while he was surveying the parcels he never saw the well-itching posts, because they were obscured from view by grass that was overgrown and “*close to head height.*” RP 218, ll. 13-15; 219, ll.22-23. Even Respondent Pierce testified that on the first day he ever saw the property, the very day he made the offer to buy, he did not actually notice the overgrown “T” posts. RP p. 119, 23-24; p. 150, ll.19-23; p. 159, ll.16-18.

Respondents’ baseless assertion that “*evidence as to the location and physical evidence of the common boundary line is voluminous*” is unsupported by the record. Respondents’ Brief, p.12. Respondents reliance upon purported testimony from prior owner Trimble, prior owner Davis, Kenneth Anderson (Respondents’ real estate agent), and Respondent Pierce does not assist them and is in fact grossly misplaced. Nothing in the proffered testimony rises to the requisite standard of proving the existence of a common boundary by clear, cogent, and convincing evidence.

Indeed, prior owner Trimble consistently failed to identify the location of the southwestern boundary marker. He only changed his

testimony after Respondents' counsel engaged in a series of leading questions after schooling Trimble during recess with the use of Appellants' aerial photos. RP 30, 11.3-9; 37, 11.12-24; 40, 11.20-42, 11.10. On cross examination, Trimble even admitted to being schooled as to the location of the boundary! RP 49, 11.20-50, 11.18. (*"During the break, plaintiff's attorney, Chris Montgomery, assisted you with defense exhibit 102. Correct? A. Yes. ... A. He was asking me if I was sure where the property lines were. Q. And what did he indicate to you using defense exhibit 102 as to where those lines were? A. Here, here, then further down is another fence line."*). Trimble failed to provide any clear, cogent, and convincing evidence regarding an altered boundary.

Respondents' reliance on Davis' self-serving Declaration testimony wherein he claims to have become *"very familiar with the corner markers of his property"* fails to provide clear, cogent, and convincing evidence of an altered boundary. This "testimony" is contrary to Davis rejection of any familiarity with the parcel contained in the Davis/Pierce real estate transaction documents. (Ex. 123); RP 189, 11.17-194, 11.6

Testimony from Kenneth Anderson, the Pierces' realtor, regarding the location of the "T" posts and the formation of an alleged new boundary line, is equally misguided. Anderson's testimony established

that the first time he saw the purported new boundary was when he visited the property in 2009 to photograph it. RP 102, ll. 12-23. This was two years after assisting Respondents with their real estate purchase. RP 105, ll. 16-18. Additionally, Respondent Pierce testified that Anderson did not return to the property with him to view the boundary once it had been allegedly identified by Davis over the phone. RP 121, ll.5-7. Based upon this testimony, and Anderson's admission that his "*memory is not that good*", Anderson has no basis within which to compare the status of the purported new boundary line from 2007 to 2009. RP 103, ll.12-18. Testimony by Anderson that "*there were no changes in the location of any of the posts observed*" is unfounded and meaningless.

Finally, Respondents' attempt to rely upon testimony of Respondent Pierce as clear, cogent, and convincing evidence of a common boundary is grossly misplaced. Respondent Pierce had no knowledge of the property prior to July 2007. RP 119, ll.23-24; 160, ll.11-14. According to his testimony, Respondent Pierce only saw the property twice on July 3, 2007; once during the day and once during the night. RP 119, ll.23-24; 121, ll.5-14; 159, ll.16-18;160, ll.11-14. Pierce testified he could not see the posts during the day as they were overgrown by hay. RP 119; 121; RP 160; 119; 159. Based upon this trial testimony, Respondent Pierce did not and cannot provide clear, cogent, and

convincing evidence regarding the location of a mutually recognized and acquiesced to common boundary.

The Trial court committed error when it arbitrarily and erroneously ignored the only evidence presented as to the placement and purpose of the “T” posts. The “T” posts were previously set by a well-witcher to designate sources of underlying witched water. RP 82, ll.5-10; 248, ll. 13-23. Otherwise there is simply no testimony or evidence to support the Trial court’s conclusion, as a matter of law, that the well-witching posts established a clear, well-defined boundary line.

2. **There Is No Requisite Substantial Evidence To Prove Mutual Recognition And Acquiescence.**

In the absence of an express agreement, Washington law mandates that “... *acquiescence must consist in recognition of the fence as a true boundary line, and not mere acquiescence in the existence of a fence as a barrier.*” Green v. Hooper, supra at 641-642, (emphasis added). Here, Respondents admit “*there is no evidence of an express agreement between the parties creating the boundary.*” Respondents’ Brief, p.21.

Respondents’ reliance upon Trimble’s trial testimony to provide clear, cogent, and convincing evidence of mutual recognition and acquiescence to a common boundary is misplaced. At trial, Trimble consistently misidentified the southwestern corner of the Pierce property

as being at the very southern corner of the “mow” line, and the northwestern corner of the Pierce property as being the very northern corner of the “mow” line. RP p. 16, ll. 2-4; p. 37, l. 24 - p. 38, l. 11; see Ex. 18; RP p. 39, ll. 8-17, see Ex. 25. The photo evidence clearly reflects that to be not even remotely true. Exs. 101 and 102.

Trimble’s testimony regarding the location of the southern and northern boundary markers was inconsistent. RP p.30, ll.3-9; p.37, ll.12-24; p. 40, ll.20-p.42, ll.10. Ultimately though Trimble admitted that the apparent “mow” line depicted in the 2005 aerial photo which he relied upon to testify about the Pierce’s theory of an allegedly certain, well-defined, and physically designated boundary line, was completely different than the “mow” line depicted in the 2000 aerial photo. RP p. 60, ll. 11-24; Exs. 13 and 25.

As for Respondents’ reliance upon a map allegedly drawn by Trimble, Trimble never testified regarding the map! Denise Rogers, an employee of Kelly Davis, testified she drew the map pursuant to Trimble’s oral instructions, Trimble was fuzzy about one of the boundaries, Trimble did not walk the boundaries with her, and simply pointed out approximately where “*the back two boundaries*” were. RP 65, ll.16-66, ll.1; 70, ll.7-16. This testimony refutes any assertion that Ex. 5 establishes

Trimble's alleged "*continued belief*" as to mutual recognition and acquiescence to a common boundary. Respondents' Brief, p. 23; Ex. 5.

Finally, as Respondents only became aware of the subject property in July 2007, any reliance upon Respondent Pierce's testimony is unhelpful in establishing the mutual recognition and acquiescence to a common boundary by clear, cogent, and convincing evidence. Respondent Pierce testified he never met Davis, his direct predecessor in title, and never spoke to him before purchasing the property. RP 180-181, ll.17 - 10. Additionally, Respondent Pierce testified he had rarely visited the property since purchasing it, and only two of those visits occurred prior to Miller selling to Appellant in 2008. RP 160, ll.23-24; 166, ll. 22-23; 169, ll.10-18; 170, ll.10-15. Respondent Pierce cannot now recreate the record claiming personal knowledge of Miller's alleged recognition and acquiescence to a common boundary.

In Waldorf v. Cole, 61 Wn.2d 251, 255-56 (1963), the Supreme Court held there was a "*complete lack of proof*" of mutual recognition and acquiescence because the disputed area "*was apparently not used and was essentially in its original condition.*" The same complete lack of proof exists here. Indeed, the facts here closely mirror those in Waldorf. Here, the evidence concerning occupation or improvements illustrate that although the predecessors in interest did periodically grow hay and harvest

over **parts** of the disputed area by themselves or others, the property owners never made any improvements, never planted any ornamental trees, flowers, or shrubs, never fenced, and never put the area to any other uses. RP 15, ll.2-13; 39, ll. 18-40, ll.15; 119, ll.14-24; 130, ll.3-13; 144, ll.5-145, ll.14; 205, ll.2-207, ll.16.

Evidence, if any, of mutual occupation and improvement is required to be clear, cogent, and convincing. Here no such evidence was presented. Thus, the requisite burden was not even remotely met by Respondents Pierce. The Trial court committed error in concluding as a matter of law that the property owners preceding Appellants Belcher and Respondents Pierce, demonstrated mutual recognition of and acquiescence to periodic and changing mow lines, well-witching posts, or a driveway curve becoming a new boundary line 1,349.28 feet in length.

3. Respondents Failed To Prove An Altered Boundary Was Recognized And Acquiesced To For 10 Years.

Respondents could not and did not produce any evidence supporting their allegation that an altered boundary was acquiesced to for any discernable, uninterrupted 10-year period. Trimble owned and occupied 1799 Hutchison Road from 1998 to 2005 (7 years) before he sold the property to Davis. **See Appendix A** (CP 571,572,595). Davis in turn only owned the property for two years (2005 – 2007) when he sold to

Respondents Pierce. Id. Davis never lived on the property and in fact disclaimed any knowledge of the property. Ex. 123. Even if Trimble had been able to positively identify any altered boundary based either on well-witching posts or a mow line, he could only do so for seven years, not ten. Davis in turn could not and did not identify any altered boundary, thus preventing a discernable 10-year period of time from existing.

Miller, the prior owner of 1801 Hutchison road, testified he put Davis on notice that the boundary did not exist as he thought prior to selling in 2007. CP 193, ¶ 4. This too disrupted any purported 10-year period. (*“Prior to Mr. Davis selling the 1799 Hutchison Road property to the Pierces in 2007, I notified him the boundary between 1801 and 1799 was not what he thought it was....”* CP 193. ¶ 4.

Here, even if the Trial court was able to cobble “facts” as support for an altered boundary line in a certain, well-defined, physically demarked fashion, the Pierces’ claim of boundary line adjustment fails, as a matter of fact and law since they did not and could not prove the alleged new boundary line had been acquiesced to for the requisite, discernable 10-year period of time.

C. **The Trial Court's Ruling Is Not Supported By Its Findings Of Fact And Conclusion Of Law.**

Here, the Trial court abused its discretion in establishing the new boundary line between the Belchers' and Pierces' property. A trial court abuses its discretion when its ruling is based upon untenable grounds or reasons. Wilcox v. Lexington Eye Inst., 130 Wn.App. 234, (2005).

It was established that Respondents Pierce, prior to trial, arbitrarily and capriciously chose a post located on the northern edge of the Belchers' property and then hired surveyor Noyes directing him to arbitrarily "tie" that post in with the southeastern boundary post on the Belchers' property in order to create a new shared boundary. RP 185, ll:1-2; 214-15, ll.17-16; 217, ll.10-12. Respondents do not refute this is what they did.

Yet, inexplicably, when entering its Findings of Fact and Conclusions of Law, the Trial court entered a Ruling quieting title in the portion of the Belchers' property as described and depicted in the Noyes' survey. CP 878; Exs. 73, 75. The Court's quiet title was to the very same strip of property Respondents arbitrarily identified and then commissioned and directed surveyor Noyes to define, describe, and depict. This description had absolutely no connection to the Court's underlying Findings of Fact or Conclusion of Law A.

Thus, the Trial court's Ruling, CP 872, was an abuse of discretion in adopting Respondents Pierces' arbitrarily commissioned and directed a legal description of the strip of land to which they sought quiet title.

D. Appellants Are Bona Fide Purchasers.

Where a successor-in-interest does not receive actual notice of the location of a claimed boundary, the occupancy or improvements must be reasonably sufficient to give the successor constructive notice of the location. See Johnston v. Monahan, 2 Wn. App. 452, 457 (1970).

Appellant Belcher testified that the "T" posts randomly staked throughout the property were placed by a "well-witcher" as a means of identifying an underlying water source. RP 248, 11.13-23. Further, Appellant Belcher was told that the neighboring land owners had "permission" to use the adjacent roadway in question for ingress/egress purposes. RP 251, 11.1-10.

Respondents' argument that Miller's placement of the boundary marker the day prior to Appellants' visit somehow placed Appellants on notice of a changed boundary is senseless. Appellants and Appellants' real estate agent, Merritt, both testified that Appellants specifically requested the boundaries be clearly marked prior to their second visit so they would have full knowledge of their location. RP 244, 12-14; 308, 11.2-10. The fact that prior owner Miller complied with this request does nothing to

indicate Appellants were on notice that the boundaries might not be what they were purported to be.

Finally, Respondents' attempt to use an irrelevant "blackmail" joke as an indication of notice regarding a changed boundary, is ludicrous. Merritt, Appellants' real estate agent, testified she was joking with Ms. Belcher while touring the property and commented that Ms. Belcher might be able to arrange a land swap – the driveway curve in question for some pasture land. RP 282, ll.8-283, ll.23; 305, ll5-14; 308, ll.24-309, ll.2. It was Merritt who used the word blackmail as a joke. Id.

The record is clear that Appellants lacked any notice they were receiving less than the parcel described in their Statutory Warranty Deed. The Miller-Belcher real estate contract specified the correct physical description of the property. Ex. 108. The Seller's Disclosure Statement affirmatively represented that 1801 Hutchison Road was not encumbered by any encroachments, boundary agreements or boundary disputes and that there were no rights-of-way, easements or access limitations that would affect the Buyer's use of the property. Ex. 107. The Millers' real estate agent, Greg Olson of Kelly Davis Century 21, personally confirmed the location of the property boundary when touring the property with Appellant. RP 244, ll.12-248, ll.7. All the documentation Appellants received and relied upon in contemplating the purchase of 1801 Hutchison

Road confirmed that the boundary line comported with the visual tour given to Appellant Belcher. RP 243, ll. 9-13; Exs. 104 - 111. Lastly, Respondent Pierce himself testified Appellant Belcher was not aware that the legal boundary was allegedly not operating as the true boundary when Appellants purchased the real property at 1801 Hutchison Road. RP 184, ll.1-25.

Thus, Appellants as a matter of fact and law are bona fide purchasers of 1801 Hutchison Road as described in their Statutory Warranty Deed. Appellants bought the real property at issue for value in good faith and without notice of the Pierces' claimed interest. The trial court committed reversible error in declining to find Appellants as bona fide purchasers.

E. Trespass Was Proven By Appellants.

Respondents' assertion that Appellants failed to challenge the Court's Finding that Respondents' did not commit trespass is baseless. Respondents' Brief, p.31. On page 47 of Appellants' Brief, Appellants specifically contend that Finding of Fact and Conclusion of Law D (finding that the Pierces did not trespass upon the Belcher's property), is not supported by substantial evidence.

Indeed, Respondents failed to refute that they entered onto the Belcher's property and began removing posts with a backhoe, prior to

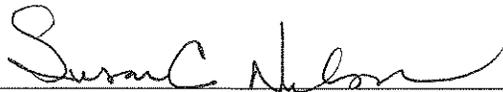
serving the Appellants with the 10/27/09 Order. Further, Respondents failed to present any evidence that the use of a backhoe to physically remove the wooden fence posts caused no damage. RP p.269, ll.9-22; 273, ll.15-18; 270, ll.18-24. The evidence presented at trial clearly supported the claim that Respondents exceeded the Court's order by committing trespass. The Trial court erred in failing to find trespass and Respondents liable for the damage inflicted by such trespass.

III. CONCLUSION

This Court is requested to reverse and vacate the Trial court's Judgment in its entirety, along with the Trial court's corresponding Findings of Fact and Conclusions of Law which do not and cannot support the Trial court's arbitrary ruling. Additionally, this Court should quiet title in the disputed portion of land to Appellants as bona fide purchasers and legal owners. Finally, the Trial court's Conclusion of Law **D**, with respect to the Respondents' trespass, must be reversed.

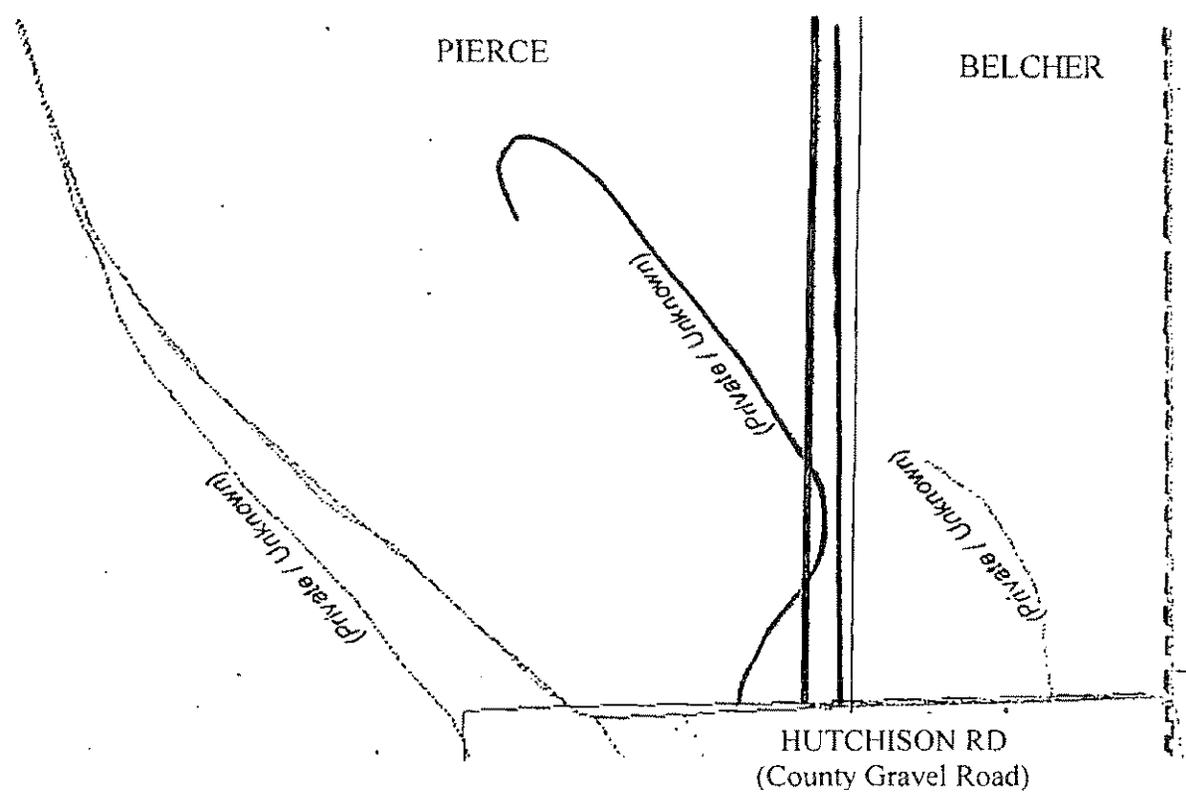
DATED this 28 day of November, 2011.

DUNN & BLACK, P.S.



ROBERT A. DUNN, WSBA #12089
SUSAN C. NELSON, WSBA #35637
Attorneys for Appellants

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(portion of Appendix A)

Since being divided, 1801 Hutchison Road has been transferred by Statutory Warranty Deed three separate times; 1799 Hutchison Road has been transferred by Statutory Warranty Deed and/or quit claim deed eight separate times. On May 27, 1982, Thomas Franco, after dividing his parcel into the two separate parcels at issue, conveyed both parcels at issue. The parcel currently owned by the Pierces was conveyed to George Jr. and Debra Voile by Statutory Warranty Deed dated May 27, 1982. The parcel currently owned by the Belchers was conveyed to George S. Voile, Sr. & Joanne C Voile by Statutory Warranty Deed dated May 27, 1982.

Thomas Franco

<u>1799 Hutchison Road</u>			<u>1801 Hutchison Road</u>		
Purchase Date	Recording Date	Grantee	Purchase Date	Recording Date	
5/27/1982	11/25/1992	George Voile, Jr. & Debra L.	5/27/1982	7/1/1988	George S. Voile, Sr. & Joanne C.
7/29/1991	7/22/1997	Marylin Trimble			
2/29/1992	4/20/1992	Michael Trimble	9/1/1992	9/3/1992	Ronald & Alene Miller
9/3/1994	9/19/1994	Michael Trimble & Marylin Trimble			
7/17/1997	7/17/1997	Michael Trimble			
3/26/2005	3/28/2005	Kelly Davis			
8/28/2007	8/30/2007	Lance & Janette Pierce	7/18/2008	7/22/2008	Louise & Albert Belcher

However, the Deed transferring the Pierces' property was not recorded until almost 10½ years later, on November 25, 1992 under Auditor's File No. 9215414. See **Ex. D** to Plaintiffs' Complaint. Notably, this recordation occurred 4½ years after George Sr. recorded his Statutory Warranty Deed for 1801 Hutchison Road, July 1, 1988. Neither Deed references the driveway in question or any purported "common boundary" being established by Thomas Franco on the ground.

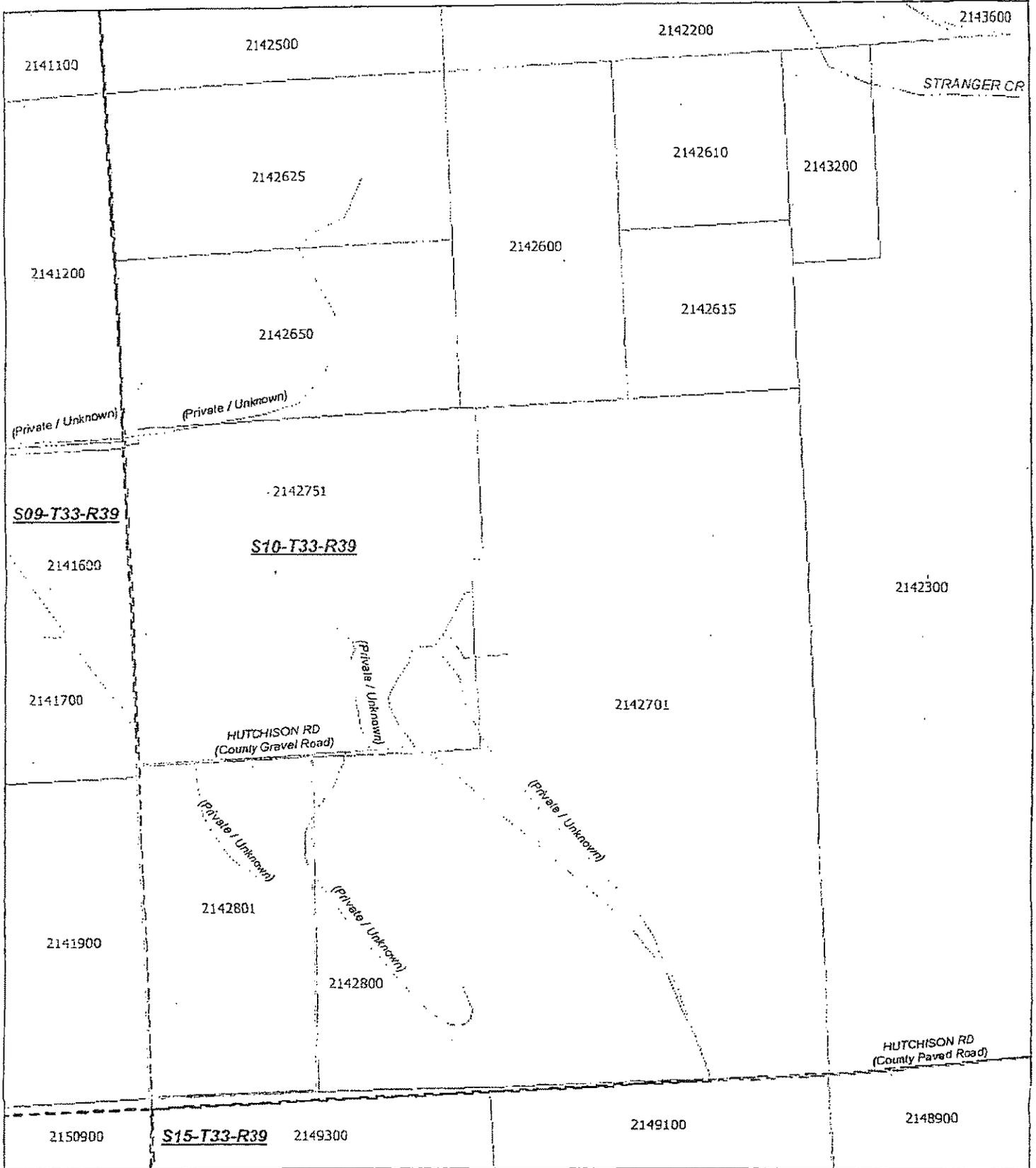
Instead the 1799 Hutchison Road Deed describes the parcel as:

"That portion of the E 1/2 of the SW 1/4 of the SW 1/4 and that portion of the SE 1/4 of the SW 1/4 of Section 10, Township 33 North, Range 39 East, W.M. Lying South and West of Kerr County Road No. 423."

(Hereinafter "Pierces' parcel"). Id.

Stevens County Title Company

280 S Oak - 100 E Birch, Colville, WA 99114
(Ph) 509-684-4589 - (Fx) 509-684-5448



1 inch equals 500 feet

0-000000595 This sketch is furnished for your information only. The Company has not surveyed the premises and assumes no liability for any inaccuracy therein.

APPENDIX A

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28 day of November, 2011,
I caused to be served a true and correct copy of the foregoing document to
the following:

- | | | |
|-------------------------------------|------------------|-------------------------|
| <input type="checkbox"/> | HAND DELIVERY | Chris A. Montgomery |
| <input checked="" type="checkbox"/> | U.S. MAIL | Montgomery Law Firm |
| <input type="checkbox"/> | OVERNIGHT MAIL | 344 East Birch Avenue |
| <input type="checkbox"/> | FAX TRANSMISSION | P.O. Box 269 |
| <input type="checkbox"/> | EMAIL | Colville, WA 99114-0269 |


SUSAN C. NELSON