

No. 64595-1-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE

GARY F. KARLBERG and SHARON KARLBERG,
a married couple,

Respondents,

v.

STEVEN L. OTTEN,
a single man,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT
FOR WHATCOM COUNTY
THE HONORABLE IRA UHRIG

BRIEF OF RESPONDENTS KARLBERG

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INTRODUCTION

This is a boundary dispute. In 1975, Gary Karlberg bought a 5+ acre parcel of land north of the Y Road. Karlberg was told by his seller that the eastern boundary was a cedar post fence (“Fence”). The Fence had been treated as the boundary by the owners on both sides for decades. The neighbors to the east were the Penns, who owned a 20+ acre parcel.

In 1976, Karlberg built a large shop on the property some 75 feet west of the Fence, as well as a driveway and concrete retaining wall. In 1978, Gary married Sharon. They built a home on the property in 1983, where they have lived ever since. During the 70s and early 80s, the Karlbergs planted trees and landscaped around their home, shop and driveway. The improved part of the Karlbergs’ property ended about 45 feet west of the Fence, and the rest was left as a hayfield. The Karlbergs hayed up to the Fence in the 70s, 80s and 90s.

In 1994, the Penns had a survey performed and discovered that the surveyed line was some 82 feet west of the Fence—right down the middle of the Karlbergs’ shop. Steven Otten, who lived with the Penns at the time, learned of the survey and began interfering with the Karlbergs’ use of the land between the surveyed line and the Fence (“Disputed Area”).

Otten inherited the Penns’ property in 1996. The Karlbergs sued Otten in 1996 to quiet title to the Disputed Area, and Otten counterclaimed

to quiet title and to eject the Karlbergs from the Disputed Area. Neither party pursued the suit—in fact it was dismissed for want of prosecution in 2000—but things did calm down for a while.

In 2003, Otten again began interfering with the Karlbergs' use of the Disputed Area. In 2004, Otten ran a barbed wire fence down the surveyed line to the north of the Karlbergs' shop. In 2008, Otten cut down a tree next to the Karlbergs' driveway, and the Karlbergs again sued Otten. The Karlbergs' 2008 suit prayed to quiet title to the 45-foot wide improved portion of the Disputed Area. Otten again counterclaimed to quiet title and eject the Karlbergs from the Disputed Area.

After a 3-day bench trial in 2009, the trial court found that the Karlbergs owned all the property up to the Fence. The trial court quieted title to the 45-foot strip in the Karlbergs and awarded damages.

Both Otten and the Karlbergs filed suits in 2009. Following cross-motions for summary judgment, the trial court ruled in favor of the Karlbergs and quieted title in them to the remaining portion of the Disputed Area. Otten has appealed from the judgments entered in all three suits, and this Court has consolidated these appeals.

ISSUES

1. Does substantial evidence support the trial court's findings of fact challenged by Otten?

2. Did the trial court abuse its discretion in denying Otten's motion to amend his answer to add a counterclaim for adverse possession less than one month prior to trial?
3. Did the trial court abuse its discretion in rejecting Otten's attempt to interject his claim of adverse possession into the trial?
4. Did the Karlbergs waive the right to the remaining portion of the Disputed Area by suing for only the 45-foot improved part?
5. Is the Karlbergs' claim to the remaining portion of the Disputed Area barred by *res judicata*?

STATEMENT OF THE CASE

Findings & Conclusions. Please refer to the attached findings of fact and conclusions of law entered by the trial court on November 20, 2009, some of which have been challenged by defendant.¹ The undisputed findings and conclusions are quoted below.

FINDINGS OF FACT

1. Plaintiffs Gary and Sharon Karlberg are a married couple, residing at 4444 Y Road, Bellingham, Washington ("Karlberg Property").
2. Defendant Steven Otten is a single man, residing at 4418 Y Road, Bellingham, Washington ("Otten Property").
3. From at least the early 1940s, a fence¹ has been treated and recognized as the boundary between the Karlberg Property and the Otten Property. The line of the Fence was clearly visible to the parties' predecessors-in-

¹ CP 19-24, copies in Appendix. The disputed findings are discussed under Issue No. 1.

title from at least the early 1940s to at least the late 1990s.² The parties' predecessors-in-title maintained the Fence and occupied the area up to, but no farther than, the Fence. The parties' predecessors-in-title in good faith accepted the Fence as the boundary and treated the Fence as the true boundary line between their properties.

4. In addition, plaintiffs' predecessors-in-title occupied the Karlberg Property up to the Fence beginning no later than the early 1940s. Plaintiffs' predecessors-in-title cleared the field west of the Fence in the 1940s, ran cattle in the field, leased the field and cut hay in the field up to the Fence. This occupancy was open and obvious to defendant's predecessors-in-title. Plaintiffs' predecessors-in-title used the land in this manner up to the Fence exclusively and continuously, without any interruption, from the 1940s until plaintiffs purchased the Karlberg Property.

5. On May 19, 1975, plaintiffs purchased the Karlberg Property by assuming a purchaser's interest in a real estate contract with Walter Lunde and Margaret Lunde as sellers.³ Plaintiffs paid off this real estate contract and received a statutory warranty fulfillment deed from the Lundes, which was recorded on June 16, 1983.⁴

...

7. In 1994, the defendant's predecessors-in-title had a survey performed of the west part of the Otten Property. The survey showed that the boundary with plaintiffs was some 82 feet west of the Fence.⁶ Thereafter, defendant attempted to interfere with plaintiffs' occupancy of the land immediately west of the Fence, resulting in friction between the parties, including incidents reported to the Whatcom County Sheriff's Department

8. On June 17, 1996, defendant Steven Otten received a deed to the Otten Property.⁷

¹ This fence is referred to as the "Existing Fence" on Ex. 19. Ex. 19 was filed for record on May 20, 1994, under Whatcom County Auditor's File No. 940520171. This fence will be referred to throughout the Findings of Fact, Conclusions of Law and Judgment as "the Fence."

² Ex. 1-8.

³ Ex. 23.

⁴ Ex. 53.

⁶ Ex. 19. The Fence is not parallel to the surveyed line. The survey shows that the Fence is some 82' east of the surveyed line at a point 92.33' north of the Y Road and some 49.4' east of the surveyed line at the far (north) end of the Fence.

⁷ Ex. 46.

...

From the foregoing findings of fact, the court makes the following:

CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and of the property in dispute.

2. Plaintiffs' predecessors-in-title acquired the land up to the Fence through mutual recognition and acquiescence. The Fence was a well defined line on the ground that both parties' predecessors-in-title in good faith recognized as the true boundary line by their acts, occupancy and improvements with respect to their respective properties for more than the ten years required for adverse possession. Lamm v. McTige, 72 Wn.2d 587, 593 (1967).

3. In the alternative, plaintiffs' predecessors-in-title acquired title to the land up to the Fence by adverse possession. Plaintiffs' predecessors-in-title had open, notorious, uninterrupted, exclusive, hostile and continuous use of the land up to the Fence from at least the early 1940s until plaintiffs' purchase in 1975. Plaintiffs' predecessors-in-title exercised dominion over this land in a manner consistent with the actions which a true owner would take. ITT Rayonier v. Bell, 112 Wn. 2d 754, 759 (1989).

4. When the plaintiffs purchased the Karlberg Property in 1975, they acquired all the land up to the Fence from their predecessors-in-title. El Cerrito v. Ryndak, 60 Wn. 2d 847 (1962).²

Otten's Answer & Counterclaim. The Karlbergs filed their

² CP 20-23.

complaint on February 25, 2008,³ and Otten answered on April 7, 2008, alleging that: the Karlbergs' possession was permissive;⁴ Otten had hayed the Disputed Area, thus interrupting any continuous and/or exclusive use of the property by Karlberg;⁵ and the Fence was merely a cattle fence rather than a boundary fence.⁶ Otten counterclaimed to quiet title and eject the Karlbergs from the Disputed Area (including removing the driveway, shop, trees, and lawn) and for an award of damages.⁷

Otten's Adverse Possession Claim. On October 1, 2009—less than one month prior to trial—Otten moved to amend his answer to allege a counterclaim to quiet title to the Disputed Area on the basis of his own adverse possession.⁸ This will be discussed further under Issue No. 2, but suffice it to say at this point that the motion to amend was denied. Otten then filed a complaint to quiet title to the Disputed Area based on his own adverse possession on October 23, 2009—four days prior to trial.⁹

Subsequent Karlberg Suit. The case was tried to the bench on October 27-29 and November 2, 2009, the Honorable Ira J. Uhrig presiding,¹⁰ and resulted in a 11/20/09 judgment quieting title in the

³ CP 318-330.

⁴ CP 175, Paragraph 1.

⁵ CP 175, Paragraph 2.

⁶ CP 176, Paragraph 3.

⁷ CP 176-177.

⁸ CP 159-168.

⁹ CP 344-347.

¹⁰ CP 19 & 24.

Karlbergs to the improved portion of the Disputed Area.¹¹ A couple of months following trial, the Karlbergs filed suit to quiet title to the remaining portion of the Disputed Area.¹² The Karlbergs moved for summary judgment and Otten cross-moved for summary judgment on his adverse possession claim. This will be discussed further under Issue No. 5, but the outcome was that title was quieted in the Karlbergs to the rest of the Disputed Area.¹³

Appeal. Otten appeals from all three judgments entered against him, the net effect of which was to award the Karlbergs the Disputed Area. Otten is not challenging the amount of damages awarded.

STANDARD OF REVIEW

Findings. A finding of fact erroneously described as a conclusion of law is reviewed as a finding. Willener v. Sweeting, 107 Wn.2d 388, 393-4, 730 P.2d 45 (1986). Individual findings of fact must be read in the context of other findings of fact and of the conclusions of law. In re Hews, 108 Wn.2d 579, 595, 741 P.2d 983 (1987). Unchallenged findings are verities on appeal. Nearing v. Golden State Foods Corp., 114 Wn.2d 817, 792 P.2d 500 (1990).

Conclusions. An unchallenged conclusion of law becomes the law

¹¹ CP 17-18.

¹² CP 363-369.

¹³ CP 353-356.

of the case. King Aircraft v Lane, 68 Wn.App. 706, 716, 846 P.2d 550 (1993). Appellate review of a conclusion of law, based upon findings of fact, is limited to determining whether the findings are supported by substantial evidence, and if so, whether those findings support the conclusion. American Nursery Prods., Inc. v. Indian Wells Orchards, 115 Wn.2d 217, 222, 797 P.2d 477 (1990).

ARGUMENT

Issue No. 1. Does substantial evidence support the trial court's findings of fact challenged by Otten?

Error Alleged. Otten has assigned error to Findings of Fact Nos. 6 and 9 through 13. Otten does not discuss why each finding is unsupported by substantial evidence. Rather, Otten makes the general claim that he contested the Karlbergs' possession of the Disputed Area from 1981 on.¹⁴

Standard of Review. Review of a trial court's findings of fact is limited to determining whether substantial evidence supports the findings. Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the declared premise. A reviewing court may not disturb findings of fact supported by substantial evidence even if there is conflicting evidence. Merriman v Cokeley, 168 Wn.2d 627, 631, 230 P.3d 162 (2010).

¹⁴ Brief of Appellant Steven L. Otten at 12.

Discussion. Finding No. 6 concerns the Karlbergs' use of the Disputed Area between 1975 and 1994. Finding No. 9 concerns the Karlbergs' use of the Disputed Area from 1996 to approximately 2003. Finding No. 10 concerns the Karlbergs' use of the Disputed Area from approximately 2003 to 2008. Findings Nos. 11, 12 & 13 concern the damages resulting from Otten's destruction of property in the Disputed Area. The evidence supporting the findings will be discussed within these groupings.

1975 to 1994. Finding of Fact No. 6 reads:

6. Between 1975 and 1994, plaintiffs continuously occupied the Karlberg Property up to the Fence. They built a shop, put in a driveway and gate, built a concrete retaining wall, planted a lawn and trees, landscaped the area and hayed the field up to the Fence. In addition, plaintiffs' children played on the Karlberg Property up to the Fence. This occupancy was open and obvious to defendant's predecessors-in-title and continued uninterrupted for some nineteen years. Plaintiffs' occupancy was under a claim of right and without the permission of defendant's predecessors-in-title.

Defendant's predecessors-in-title made occasional, transitory use of some of the land west of the Fence by haying part of the area on a couple of occasions. However, this was with the tacit permission of the plaintiffs, who allowed the haying as a matter of neighborly accommodation. Plaintiffs wanted the field hayed so that it would not present a fire hazard and had little interest in selling the hay. In fact, plaintiffs had the field hayed themselves right up to the Fence for most of this period and did not receive any money for the hay after the early 1980s.⁵

⁵ Dick Gilda paid the plaintiffs to hay the field up to the Fence in the mid and late '70s, as did Mr. Gilda's son in the early '80s. Thereafter, Don Florence hayed for the plaintiffs and paid nothing for the hay.¹⁵

Some of the evidence supporting Finding No. 6 will be discussed below.

Gene Aarstol. Gene Aarstol, a retired school principal, testified that he used to hunt on what later became the Karlberg Property in the 1940s.¹⁶ A cedar post fence ("Fence") existed at that time and was treated as the boundary between what would become the Karlberg Property and the Otten Property.¹⁷ The same Fence was still in place when plaintiff Gary Karlberg purchased the property in 1976 and was still treated as the boundary.¹⁸ The line of the Fence remained visible until at least 1998.¹⁹

Mr. Aarstol helped Karlberg build a shop on his property in the 1970s.²⁰ In siting the shop, Karlberg told Aarstol that the eastern boundary was the Fence, and Aarstol agreed since Aarstol "knew it was

¹⁵ CP 20-21

¹⁶ RP 18-19; 23-25.

¹⁷ RP 20-23; 25-26 & 27; Exs 1&1.

¹⁸ RP 28-31; Exs 3, 4 & 5; RP 32.

¹⁹ RP 32-33; Ex 8.

²⁰ RP 34.

the property line also.”²¹ They sited the shop about 82 feet west of the Fence.²²

Karlberg planted trees in the Disputed Area in the 70s,²³ as well as a cement bulkhead.²⁴ Karlberg also put in a driveway with cedar posts on both sides of it in the Disputed Area and put his address—“4444”—on one of the posts.²⁵ Karlberg also put in a big rock retaining wall and fruit trees (sic) in the Disputed Area.²⁶ Karlberg also put in a lawn and ornamental trees in the Disputed Area.²⁷

All these improvements remained in place through the 1990s.²⁸ The Fence continued to be treated as the boundary line between the Karlberg Property and the Otten Property into the 1990s.²⁹

Ed Sofie. Starting around 1973, Ed Sofie boarded horses on what later became the Karlberg Property by leasing from Karlberg’s predecessor-in-title, Walt Lunde.³⁰ Carl Post also leased what became the Karlberg Property from Lunde and ran Holsteins on it.³¹ Lunde told Sofie

²¹ RP 35.

²² RP 35-36; Ex 4; Finding of Fact No. 7.

²³ RP 41; Ex 10.

²⁴ RP 44; Ex 15A.

²⁵ RP 45-47; Ex 15B.

²⁶ RP 47-48; Ex 15B & 15C.

²⁷ RP 51-52; Ex 9.

²⁸ RP 42-43, 50-52; Ex 9.

²⁹ RP 37; Ex 8.

³⁰ RP 55-57.

³¹ RP 56.

that his east boundary was the Fence,³² and Sofie ran his horses all the way to the Fence.³³

Sofie bought the property immediately north of both the Karlberg Property and what was later to become the Otten Property in 1976.³⁴ The Fence remained in place through the 1970s, the 1980s, and the 1990s,³⁵ and was not removed until around 2003.³⁶ The Fence is not only the eastern boundary for the Karlberg Property, but also for Sofie's property.³⁷

Karlberg purchased his property from Lunde in 1975.³⁸ At the time of purchase, Sofie heard Lunde tell Karlberg that the Fence was the east property line.³⁹ After purchasing the property, the Karlbergs made various improvements, including a shop,⁴⁰ ornamental trees,⁴¹ and a driveway with gateposts.⁴² In addition, Karlberg had his property hayed up to the Fence by Don Florence in the 1980s and 1990s.⁴³ Karlberg continued haying up to the Fence into the 2000s, but Otten flail-chopped

³² RP 57-58.

³³ RP 57.

³⁴ RP 54-56; Ex 3.

³⁵ RP 58-59; Ex 8.

³⁶ RP 60-61.

³⁷ RP 71-72; Ex 3.

³⁸ RP 59.

³⁹ RP 57-58.

⁴⁰ RP 60; Ex 4.

⁴¹ RP 64-65, Exs 13 & 14.

⁴² RP 66-67; Ex 17B.

⁴³ RP 61-63.

the hay (i.e. without baling it) in the Disputed Area during one of these years.⁴⁴

Lee Compton. Lee Compton was a retired log truck and long-haul driver.⁴⁵ In 1942, Mr. Compton's family purchased a 13-acre parcel running from the Mount Baker Highway to the Y Road.⁴⁶ The Compton property was later sold to Gary Karlberg and Ed Sofie.⁴⁷ Mr. Compton, his three brothers and his parents lived in a house off the Mount Baker Highway on what would become Sofie's property.⁴⁸

At the time of purchase, Mr. Compton's father walked the boundaries with his seller, Gene Rodenberger, and Rodenberger said that the Fence was the east boundary.⁴⁹ Mr. Compton and his father cleared the 13 acres up to the Fence, which was always treated as the boundary by the Comptons and their neighbors across the Fence to the east.⁵⁰ The Fence was treated as the boundary from the 1940s through the 1990s.⁵¹ The Fence remained in place until at least the 1990s.⁵²

⁴⁴ RP 61-63.

⁴⁵ CP 111. Mr. Compton's videotaped deposition was published and treated as substantive evidence by the trial court. RP 268-271. Mr. Compton was suffering from cancer at the time of trial (CP 126) and has since died.

⁴⁶ CP 111-113; Exs 1 & 2.

⁴⁷ CP 111-113; Exs 1 & 2.

⁴⁸ CP 112-113; Exs 1 & 2.

⁴⁹ CP 125; 132-133; 137.

⁵⁰ CP 114-116.

⁵¹ CP 124 & 126.

⁵² CP 131; Exs 1, 4 & 5.

Mr. Compton's father died in 1959. Mr. Compton's mother later married Walt Lunde.⁵³ Lunde later sold five acres of the family property fronting on the Y Road to Gary Karlberg and his wife.⁵⁴

Don Florence. Don Florence hayed what later became the Karlberg Property all the way up to the Fence beginning around 1974.⁵⁵ Florence hayed the Karlberg Property up to the Fence through the 1980s and into the 1990s.⁵⁶ Florence paid for the hay the first time he mowed it (1974), but did not pay for the hay thereafter.⁵⁷

Sometime in the 1990s, Florence began haying only to the center of Karlbergs' shop building⁵⁸ and has continued doing so up to the present.⁵⁹ Otten has cut the hay in the Disputed Area a couple of times.⁶⁰ During some years, no one hayed the Disputed Area.⁶¹

Bryn Karlberg. Bryn Karlberg is Gary Karlberg's daughter.⁶² Bryn helped her father plant trees on the Karlberg Property

⁵³ CP 120-121.

⁵⁴ CP 121.

⁵⁵ RP 76-77, Exs 3, 4 & 5.

⁵⁶ RP 78.

⁵⁷ RP 90-91.

⁵⁸ RP 79; Ex 4.

⁵⁹ RP 79-80.

⁶⁰ RP 80.

⁶¹ RP 80-82; Ex 12.

⁶² RP 95.

beginning around 1976.⁶³ Her father built a shop on the property around 1976, as well as a driveway and gateposts.⁶⁴

Her parents told Bryn not to go beyond the Fence, and Bryn's understanding was that the Fence was the property line.⁶⁵ Bryn's parents kept the property hayed in the 1970s and 1980s all the way up to the Fence.⁶⁶

Scott Murdzia. Scott Murdzia is the son of Sharon Karlberg.⁶⁷ Scott mowed the lawn in the Disputed Area beginning around the late 1970s.⁶⁸ The lawn extended 20-25 feet east of the shop (not all the way up to the Fence.)⁶⁹

Around 2003, Otten pushed derelict cars into the Disputed Area in front of the Karlbergs' shop.⁷⁰ At about this time—2003—Gary Karlberg told his stepson Scott not to mow the lawn anymore.⁷¹

Carl Post. Carl Post is a dairy farmer who ran heifers on Walt Lunde's place for about two years starting around 1977 (sic).⁷²

⁶³ RP 95-96; 99-100; Exs 4, 5 & 15.

⁶⁴ RP 96-97; Ex 12-13.

⁶⁵ RP 99-100.

⁶⁶ RP 100.

⁶⁷ RP 102.

⁶⁸ RP 103-104; Ex 8.

⁶⁹ RP 104 & 111; Exs 4 & 18.

⁷⁰ RP 105; Ex 10.

⁷¹ RP 105.

⁷² RP 114-116.

Post's cattle grazed all the way up to the Fence, which Post understood to be the boundary line.⁷³

Gary Karlberg. Gary Karlberg is a retired school principal.⁷⁴ Karlberg purchased his property from Walt Lunde in 1975.⁷⁵ Karlberg walked the boundaries with Lunde, and Lunde pointed out the Fence as the east boundary.⁷⁶

In the 1970s, Karlberg put in a driveway,⁷⁷ a shop,⁷⁸ gateposts,⁷⁹ and a retaining wall.⁸⁰ Karlberg also planted ornamental trees with his daughter Bryn in the 70s,⁸¹ and an ornamental *Cedrus deodora* in 1982.⁸² All these improvements are in the Disputed Area.⁸³

In 1977, Karlberg had his property surveyed and learned that the surveyed line ran down the middle of his shop.⁸⁴ After consulting a lawyer, Karlberg continued to use the land all the way up to the Fence as his own.⁸⁵ Karlberg has continued to do so and has continued to claim all

⁷³ RP 115; Exs 4 & 5.

⁷⁴ RP 137.

⁷⁵ RP 139.

⁷⁶ RP 139-140; Exs 4-5.

⁷⁷ RP 140.

⁷⁸ RP 141-143.

⁷⁹ RP 147.

⁸⁰ RP 150-151.

⁸¹ RP 146.

⁸² RP 147.

⁸³ Exs 8, 18 & 27.

⁸⁴ RP 143.

⁸⁵ RP 143.

the land up to the Fence as his own.⁸⁶ Otten's claim that Karlberg sought Otten's permission to use part of the Disputed Area is untrue.⁸⁷

Prior to purchasing the property, it was hayed all the way to the Fence.⁸⁸ From 1976 until 1983, Karlberg had Dick Gilda hay his property all the way to the Fence.⁸⁹ Don Florence hayed thereafter beginning around 1983.⁹⁰ Gilda paid for the hay, but Florence did not.⁹¹ Florence has hayed for Karlberg ever since.⁹² Florence hayed all the way to the fence until 1994, when he began haying only west of the survey line.⁹³ Otten cut hay in the Disputed Area for a couple of years between 1988 and 1993.⁹⁴ Karlberg was not concerned since he viewed the hay as a fire hazard and wanted it removed.⁹⁵

The Karlbergs lived in a mobile home on the property until they built their permanent home in 1983.⁹⁶ From 1975 until 1994, the Karlbergs were able to enjoy their property without any interference from Otten.⁹⁷

⁸⁶ RP 144 & 161.

⁸⁷ RP 177.

⁸⁸ RP 153.

⁸⁹ RP 153-154.

⁹⁰ RP 153-154.

⁹¹ RP 155.

⁹² RP 155.

⁹³ RP 144-145;155-156.

⁹⁴ RP 145.

⁹⁵ RP 146.

⁹⁶ RP 257.

⁹⁷ RP 257-258.

Sharon Karlberg. Sharon Karlberg is a retired secretary for the school district.⁹⁸ She married Gary Karlberg in 1978 and began going out to the property with Gary in 1977.⁹⁹ Gary and Sharon put a mobile home on the property in about 1982.¹⁰⁰ They built a house in 1983 and have lived on the property ever since.¹⁰¹

Sharon's understanding was that the Fence was their east boundary.¹⁰² Sharon and Gary were able to use their property up to the Fence without interference until around 1994.¹⁰³

Aerial Photographs. An aerial photograph taken in 1955 shows the line of the Fence and shows that the vegetation on the two sides of the Fence is different in color.¹⁰⁴ The area to the west of the Fence is darker and has no trees. The area east of the Fence is lighter and is bordered by trees.¹⁰⁵

An aerial photograph taken in 1966 shows much the same thing, with the different coloration on the two sides of the Fence being even more obvious.¹⁰⁶

⁹⁸ RP 273.

⁹⁹ RP 272.

¹⁰⁰ RP 272-273.

¹⁰¹ RP 274.

¹⁰² RP 274.

¹⁰³ RP 274-275.

¹⁰⁴ Exs 1 & 2.

¹⁰⁵ Ex 2.

¹⁰⁶ Ex 3.

Photographs. Photographs taken in 1976 show the shop and the Fence, consistent with the aerial photographs.¹⁰⁷ A photograph taken in 1991 shows the Karlbergs' lawn, ornamental trees, and mown hay in the Disputed Area up to the line of the trees and Fence.¹⁰⁸

Detailed Discussion. Ample evidence in the record supports Finding of Fact No. 6. To the extent contrary evidence exists, it consists mainly of Otten's own testimony.

However, even if Finding No. 6 is erroneous in some respect, it would make little difference. Finding No. 6 supports Conclusion of Law No. 5, which holds that the Karlbergs' use of the Disputed Area during 1975-1994 satisfies the elements of adverse possession. But it is undisputed that Karlberg owned the Disputed Area anyway. The unchallenged findings and conclusions quoted above on pages 3-5 hold that Karlberg acquired all the land up to the Fence when he purchased from Lunde in 1975. Whether the Karlbergs' use of the Disputed Area from 1975 to 1994 is sufficient to establish adverse possession makes no difference to the outcome of this case, and any error with regard to Finding No. 6 and Conclusion No. 5 is therefore harmless. In Re Bailey's Estate, 178 Wash 173, 176, 34 P.2d 448 (1934) ("An erroneous finding of fact by the court which does not materially affect the merits of the

¹⁰⁷ Exs 4 & 5.

¹⁰⁸ Ex 9.

controversy does not constitute prejudicial error and is not ground for reversal.”)

1996 to 2003. Finding of Fact No. 9 reads:

9. On December 18, 1996, plaintiff Gary Karlberg filed a complaint to quiet title against defendant Steven Otten under Whatcom County Superior Court Cause No. 96-2-02348. This suit was dismissed without prejudice for want of prosecution on March 27, 2000.⁸ The plaintiffs were unaware that the suit had been dismissed for want of prosecution for several years. After suit was filed and until the parties realized that the suit had been dismissed, there was relatively little friction between the parties, and the plaintiffs had the quiet enjoyment of the Karlberg Property up to the Fence.

⁸ Ex 51.¹⁰⁹

Some of the evidence supporting Finding No. 9 will be discussed below.

Gary Karlberg. Gary Karlberg filed suit against Otten in 1996, which quieted things down for a few years.¹¹⁰ In 2003, Otten put junk cars among the trees in front of the Karlbergs’ shop building.¹¹¹ Gary’s stepson Scott and Scott’s son Nick mowed the lawn east of the shop until 2003.¹¹² Gary did not know that the suit had been dismissed for want of prosecution until 2004.¹¹³

¹⁰⁹ CP 21.

¹¹⁰ RP 259. The parties stipulated that the complaint was filed on 12/18/96. RP 492.

¹¹¹ RP 260; Ex 10.

¹¹² RP 261.

¹¹³ RP 162.

Sharon Karlberg. Gary filed suit against Otten in 1996, which calmed things down for four to six years.¹¹⁴ The Karlbergs were unaware that the case was dismissed in 2000 for want of prosecution.¹¹⁵ After 2000, little things happened, and then in 2004, Otten put up a barbed-wire fence in the lower field.¹¹⁶

Aerial Photographs. An aerial photograph taken in 1998 shows the line of the Fence overgrown with vegetation, different shades of vegetation on the two sides of the Fence (lighter to the west) and the Karlbergs' home, shop and ornamental trees in the Disputed Area.¹¹⁷

Photographs. Photographs from 2003 and 2004 show the shop, driveway and gatepost (with the Karlbergs' address—"4444") in the Disputed Area.¹¹⁸

Detailed Discussion. Ample evidence supports Finding No. 9, but again the finding makes no difference to the outcome of the case. Any error with regard to the finding is therefore harmless.

2003 to 2008. Finding of Fact No. 10 reads:

10. Beginning around 2003, defendant renewed his challenge to plaintiffs' occupancy of the Karlberg Property up to the Fence. Defendant moved junk cars onto the area in question (including onto the Y Road right-of-

¹¹⁴ RP 275-276.

¹¹⁵ RP 275.

¹¹⁶ RP 275-276.

¹¹⁷ Ex 8.

¹¹⁸ Exs 10 & 12.

way abutting the Karlberg Property) and painted rings around trees. In 2004, defendant built a barbed wire fence running along the surveyed line north of plaintiffs' shop building. This again created friction and resulted in complaints to the sheriff's department.¹¹⁹

Some of the evidence supporting Finding No. 10 will be discussed below.

Ed Sofie. Otten removed the Fence around 2003.¹²⁰ Otten moved junk cars onto the Karlbergs' property in front of the shop some time prior to 2006.¹²¹ Otten painted a red stripe around a tree in front of the Karlbergs' shop in this same time frame.¹²²

Gary Karlberg. Otten moved junk cars in front of the Karlbergs' shop in 2003.¹²³ In 2004, Otten put up a barbed-wire fence, which kept the Karlbergs from using the area east of the middle of their shop.¹²⁴ In 2007, Otten removed one of the gateposts around the Karlbergs' driveway, and Gary called the sheriff.¹²⁵

¹¹⁹ CP 21.

¹²⁰ RP 60-61.

¹²¹ RP 63-63; Ex 13.

¹²² RP 65; Ex 14.

¹²³ RP 260; Ex 10.

¹²⁴ RP 259. NB: The barbed wire fence Otten ran down the field north of the shop in 2004 is not to be confused with the strand of barbed wire Otten ran between the trees south of the shop in 1994. The former excluded the Karlbergs from using part of the Disputed Area from 2004 on. The latter was a "fantasy fence," which was partially removed by the Karlbergs, did not enclose anything and did not interfere with the Karlbergs' use of the property (RP 318-319; 369-371) until late 2007, when Otten rebuilt and added to it. (RP 371-372)

¹²⁵ RP 262; Ex 14.

Scott Murdzia. Around 2003, Otten pushed derelict cars into the Disputed Area in front of the Karlbergs' shop.¹²⁶ At about this time—2003—Gary Karlberg told his stepson Scott not to mow the lawn anymore.¹²⁷

Sharon Karlberg. In approximately 2003, Otten put red spray paint around the trunks of the Karlbergs' trees.¹²⁸ Around 2004, Otten put up a barbed-wire fence in the lower field.¹²⁹ Once Otten put the barbed wire up, the Karlbergs could not use their lawn next to the shop.¹³⁰ In 2007, Otten strung a rope across the Karlbergs' driveway, and Sharon called the sheriff.¹³¹

Detailed Discussion. Again, ample evidence supports Finding No. 10, but the finding makes no difference to the outcome of the case.

Damages. Findings of Fact Nos. 11, 12 & 13 read:

11. In January 2008, defendant cut down an ornamental tree (*Cedrus deodara*) located a few feet east of plaintiffs' paved driveway. This tree added to the beauty of the Karlberg Property and also acted as a buffer providing privacy to plaintiffs' home. The reasonable value of this tree was \$6,500.

¹²⁶ RP 105; Exs 10 & 11.

¹²⁷ RP 105.

¹²⁸ RP 278; Ex 14.

¹²⁹ RP 275-276.

¹³⁰ RP 259.

¹³¹ RP 278

Shortly thereafter, defendant removed the stump of this ornamental tree and a nearby gatepost just east of the driveway. In the process, defendant damaged the driveway. The total value of the damage to the driveway and gatepost was \$1,500.

12. The defendant's damage to the Karlberg Property discussed in paragraph 11 above amounted to self-help. The defendant knew, or should have known, that plaintiffs claimed ownership of the area damaged and nevertheless intentionally and unreasonably entered onto this area and injured the land.

13. Plaintiffs' attorney's fees with regard to injury to the gatepost and driveway amount to \$750.⁹

⁹ 3 hours x \$250/hour.¹³²

Although Otten has assigned error to these findings, he has not attempted to show how they are wrong. This Court should therefore refuse to review Findings Nos. 11-13. Baumgardner v American Motors, 83 Wn.2d 751, 759, 522 P.2d 829 (1974) ("Assignments of error not argued will not be considered.")

In any event, there is ample evidence to support the findings. Otten admitted cutting down the *Cedrus deodara* in 2008.¹³³ Otten also admitted tearing out the gatepost and moving the numbering ("4444") on it to a telephone pole west of the driveway in 2008.¹³⁴ The arborist

¹³² CP 21-22.

¹³³ RP 130; Exs 14 & 15B.

¹³⁴ RP 132-133; Ex 16.

testified that the value of the Cedrus deodara was \$6,600.¹³⁵ Gary Karlberg testified that the damage to his driveway amounted to \$1,500.¹³⁶

Issue No. 2. Did the trial court abuse its discretion in denying Otten's motion to amend his answer to add a counterclaim for adverse possession less than one month prior to trial?

Error Alleged. Otten argues that CR 15(a) requires trial courts to grant motions to amend pleadings unless the opposing party can show prejudice. Otten claims that no such showing was made here and that the case must be reversed as a result.¹³⁷

Standard of Review. A trial court's denial of a motion to amend is reviewed under an abuse of discretion standard. The trial court's decision will be reversed only when it is manifestly unreasonable, exercised on untenable grounds or for untenable reasons. Tex Enters. v Brockway Standard, 110 Wn.App. 197, 203-204, 39 P.3d 362, modified on other grounds 149 Wn.2d 204, 66 P.3d 625 (2003).

Facts. After pleadings were joined, a discovery order was entered on June 2, 2008, setting discovery deadlines. Fact witnesses were to be designated 90 days prior to trial, experts 60 days prior to trial, and the

¹³⁵ RP 210.

¹³⁶ RP 166-167.

¹³⁷ Brief of Appellant Steven L. Otten at 20-27 & 29-36.

discovery cutoff date was 30 days prior to trial.¹³⁸ The discovery order also stated that:

Should the trial date be continued, the deadlines specified in this order remain unchanged (i.e. the deadlines relate to the original trial date, rather than the continued date).¹³⁹

Trial was set for November 4, 2008, so the discovery cutoff was October 5, 2008. The 11/4/08 setting was bumped by another case,¹⁴⁰ and trial was re-scheduled for February 17, 2009. This setting was also bumped,¹⁴¹ and trial was re-scheduled for October 27, 2009.

The trial court heard a number of pre-trial motions and was thoroughly familiar with the case well prior to trial. For example, the trial court: granted the Karlbergs' motion for a temporary injunction in March 2008;¹⁴² denied Otten's motion for reconsideration of the temporary injunction in March 2008;¹⁴³ granted the Karlbergs motion to limit Otten's deposition of Sharon Karlberg in October 2008;¹⁴⁴ denied Otten's motion to continue the November 4, 2008 trial date;¹⁴⁵ and denied Otten's motion

¹³⁸ CP 499-501.

¹³⁹ CP 502.

¹⁴⁰ CP 483, ls 4-5.

¹⁴¹ CP 377, ls 21-22.

¹⁴² CP 517-520. Voluminous declarations were filed with this motion. CP 505-516; 521-533.

¹⁴³ CP 503-504.

¹⁴⁴ CP 489-490; 493-497.

¹⁴⁵ CP 480-481; 482-486. Note that the Karlbergs showed that several of their witnesses were elderly and in poor health. RP 478-479.

for partial summary judgment in September 2009.¹⁴⁶ Thus, the trial court knew by October 2009 that this litigation was contentious, that Otten had attempted to continue the trial date once before, that two previous trial dates had been pre-empted by criminal cases and that several of the Karlbergs' witnesses were of advanced years and in poor health.

On October 1, 2009, Otten moved to amend his answer and counterclaim to allege: new facts—that Otten exclusively occupied the Disputed Area from 1994 to the present;¹⁴⁷ a new defense—that the 10-year or 7-year statute of limitations for ejectment had run;¹⁴⁸ and a new counterclaim—that Otten acquired title to the Disputed Area by adverse possession, mutual recognition/acquiescence and color of title.¹⁴⁹

Otten's motion to amend was heard on October 16, 2009.¹⁵⁰ At the hearing, the Karlbergs argued that Otten's motion contained only the conclusory assertion that the amended pleading would not add anything new to the case,¹⁵¹ as Otten had not said what evidence he intended to offer.¹⁵² Moreover, discovery had focused on whether Otten's use of the Disputed Area was sufficient to defeat the Karlbergs' claim of exclusive

¹⁴⁶ CP 432-439. Again, voluminous declarations and memoranda were filed in connection with the motion. CP 430-431; 432-439; 458-477; 440-457

¹⁴⁷ CP 307-308.

¹⁴⁸ CP 305, paras 5 & 6.

¹⁴⁹ CP 307-308.

¹⁵⁰ 10/16/09 RP 1-2.

¹⁵¹ 10/16/09 RP 7.

¹⁵² 10/16/09 RP 7-8.

possession (particularly prior to 1994), not on whether Otten could establish his own adverse possession from 1994 to the present.¹⁵³ Since the discovery cutoff had long since passed and trial was to start in less than two weeks, the prejudice to the Karlbergs was obvious.

The trial court denied the motion, finding that the Karlbergs would be prejudiced by the Otten's proposed amended pleading:

I certainly share the concern that the defense mentions about the promotion of judicial efficiency and the avoidance of multiplicity of suits, but I think weighing that against the potential for prejudice and the plaintiff having been substantially prepared for trial for quite some time for a trial that has already been bumped twice suggests that it is appropriate to respectfully deny the motion to amend the answer.¹⁵⁴

Discussion. “Undue delay is a proper ground for denial of a motion for leave to amend.” Tex Enters. v Brockway Standard, supra, 110 Wn.App. at 204. There, Tex initially filed an eight-count amended complaint in May 1999. Discovery closed on July 12, 2000, but Tex did not move to add a claim for equitable estoppel until July 20, 2000, less than two weeks before trial. The trial court denied the motion to amend in part because it was untimely, and this Court affirmed. *Accord*, Donald B. Murphy Constr. v King Cty, 112 Wn.App. 192, 199-200, 49 P.3d 912

¹⁵³ 10/16/09 RP at 9-12.

¹⁵⁴ 10/16/09 RP at 14.

(2002).¹⁵⁵

Here, the trial court had tenable reasons for ruling that the Karlbergs would be prejudiced by Otten's last minute amendment. Adding a counterclaim for adverse possession/mutual acquiescence more than one year after the discovery cutoff and less than one month prior to trial speaks for itself. The trial court did not abuse its discretion in denying Otten's motion to amend.

Otten also argues that his original answer generally alleging ownership of the Disputed Area encompassed his adverse possession claim, so he did not need to amend his pleadings.¹⁵⁶ Otten did not make this argument to the trial court, and this Court should refuse to consider the argument. Bellevue School Dist. v Lee, 70 Wn.2d 947, 950, 425 P.2d 902 (1967).¹⁵⁷ In fact, by moving to amend his answer, Otten invited the alleged error and should not now be heard to complain. In any event, while a plaintiff in a quiet title action can generally allege ownership,¹⁵⁸

¹⁵⁵“Murphy contends it is not clear why the trial court denied the motion to amend and argues that the record does not support a finding that the County would have suffered prejudice... The County opposed the amendment and argued that Murphy had waited too long; that its witnesses were already determined and disclosed; that its defenses were based on Murphy's original claims; and that it would have to retain new experts to support defenses to the new claims. Such factors will support a trial court's decision to deny a motion to amend.”

¹⁵⁶ Brief of Appellant Steven L. Otten at 27-29.

¹⁵⁷ “The trial court must have an opportunity to consider and rule upon a litigant's theory of the case before this court can consider it on appeal.”

¹⁵⁸ As in the cases relied on by Otten, Rogers v Miller, 13 Wash. 82, 42 Pac 525 (1895) and Metropolitan Bldg. Co. v Fitzgerald, 122 Wash. 514, 210 Pac 770 (1922).

RCW 7.28.130 requires a defendant to state particularly the nature of his estate or right to possession. RCW 7.28.130 has been construed to prevent a defendant from offering evidence of adverse possession where the defendant's answer generally denies plaintiff's allegation of ownership. Brown v Haley, 56 Wash. 218, 105 P. 478 (1909). In other words, adverse possession by statute is an affirmative defense for purposes of CR 8(c), which Otten was required to plead.

Moreover, a week after his motion was denied, Otten filed another lawsuit claiming title to the Disputed Area by adverse possession/mutual acquiescence and under color of title.¹⁵⁹ Otten lost that claim on summary judgment,¹⁶⁰ but the point is that Otten's adverse possession claim was heard on the merits in the companion suit. Otten was therefore not prejudiced by the denial of his motion to amend, and any alleged error is therefore harmless. Crippen v Pulliam, 61 Wn.2d 725, 380 P.2d 475 (1963).

Issue No. 3. Did the trial court abuse its discretion in rejecting Otten's attempt to interject his claim of adverse possession into the trial?

Error Alleged. Otten claims that his adverse possession claim was tried by implication.¹⁶¹ The facts necessary to support Otten's adverse

¹⁵⁹ CP 344-347.

¹⁶⁰ See discussion under Issue No. 5.

¹⁶¹ Brief of Appellant Steven L. Otten at 36-38.

possession claim came into evidence at trial without objection from the Karlbergs.¹⁶² The trial court's failure to consider Otten's claim of adverse possession therefore constitutes reversible error.¹⁶³

Standard of Review. A trial court's CR 15(b) ruling should be reversed only on a showing of manifest abuse of discretion. A trial court abuses its discretion if its decision is manifestly unreasonable, exercised on untenable grounds or for untenable reasons. A decision is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. Green v Hooper, 149 Wn.App 627, 636, 205 P.3d 134 rev den 166 Wn.2d 1034 (2009).

Facts. On Friday, October 23, 2009, in addition to filing a new complaint, Otten filed a pleading entitled "Defendant's Additional Affirmative Defenses." This pleading alleged that the Karlbergs' claim for ejectment was barred by the 10-year or 7-year statute of limitations.¹⁶⁴ Recall that the trial court denied Otten's motion to add this defense one week earlier.¹⁶⁵

Trial started on Tuesday, October 27, 2009. Otten's entire opening statement (other than identifying his witnesses) consisted of:

¹⁶² Brief of Appellant Steven L. Otten at 21-27 & 37-38.

¹⁶³ Brief of Appellant Steven L. Otten at 38.

¹⁶⁴ CP 288-289.

¹⁶⁵ CP 156-157.

The facts will be that they [the Karlbergs] have never possessed the property in an uninterrupted fashion 45 feet west of the 1994 survey line and there will be witnesses that will testify that this property was used not by the Karlbergs alone.¹⁶⁶

During trial, Otten put on evidence that he used the Disputed Area. However, there was no indication that Otten intended to use the evidence for any purpose other than the ostensible one—disputing the Karlbergs’ claim of adverse possession.¹⁶⁷ In fact, Otten failed to indicate that he was trying to prove up adverse possession in his own right even when it would have been appropriate to do so. Otten offered his tax records into evidence through two exhibits,¹⁶⁸ and plaintiffs objected on the ground of relevancy.¹⁶⁹ Even after the trial court questioned the relevancy of Otten’s having paid property taxes,¹⁷⁰ Otten offered no explanation of how payment of taxes was germane to the issues in the case. If Otten was trying to prove that he paid property taxes on the Disputed Area in order to establish his own adverse possession under the 7-year statute, this would have been a good time to say so.

¹⁶⁶ RP 12.

¹⁶⁷ Two elements of which are uninterrupted and exclusive possession. Chaplin v Sanders, 100 Wn.2d 853, 857, 676 P.2d 431 (1984).

¹⁶⁸ Exs 47 & 38.

¹⁶⁹ RP 419; 437-438; 491-492.

¹⁷⁰ “Q. Who has been paying the taxes on this property?

Mr. Belcher: Again, I don’t see the relevance

The Court: I don’t either. In an adverse possession case of this nature, I don’t see the relevance, but go ahead.”

RP 419-420

Be that as it may, Otten said nothing about his own adverse possession claim until final argument.¹⁷¹ In rebuttal argument, the Karlbergs objected to Otten’s attempt to interject this claim into the case.¹⁷² In its oral ruling in favor of the Karlbergs, the trial court made no mention of any claim of adverse possession on the part of Otten.¹⁷³

At the November 20, 2009 hearing on entry of judgment, Otten again tried to interject his adverse possession claim into the case.¹⁷⁴ The Karlbergs objected, and the court sustained the objection since “it goes beyond the scope of the pleadings.”¹⁷⁵

Discussion. In Dewey v Tacoma Sch. Dist. No. 10, 95 Wn.App. 18, 974 P.2d 847 (1999), this Court said:

When issues that are not raised by pleadings are tried by express or implied consent of parties, they will be treated in all respects as if they had been raised in the pleadings. In determining whether parties impliedly tried an issue, an appellate court will consider the record as whole, including whether the issue was mentioned before trial and in opening arguments, the evidence on the issue admitted at trial, and the legal and factual support for the trial court's conclusions regarding the issue.¹⁷⁶

In Dewey, a former employee of Tacoma School District, plaintiff

¹⁷¹ RP 567-568.

¹⁷² “...[T]hey are going into adverse possession by them, which is not in this case. This court has ruled that this is not to be allowed...” RP 572-573

¹⁷³ RP 575-581.

¹⁷⁴ 11/20/09 RP 9-10.

¹⁷⁵ 11/20/09 RP 12, ls 15-16.

¹⁷⁶ 95 Wn.App. at 26, citations omitted, emphasis supplied.

William Dewey, sued for wrongful discharge. After the plaintiff rested his case, the school district moved to dismiss, whereupon the plaintiff moved to amend his complaint to allege a First Amendment theory. The trial court denied the motion to amend and dismissed plaintiff's suit.

On appeal, Dewey argued that the parties "tried the First Amendment claim by implication" by addressing it in oral argument.¹⁷⁷ This Court noted that, although plaintiff addressed the First Amendment claim in his trial brief, the district's reply brief made no mention of such a claim. Neither did the trial court mention the First Amendment claim in ruling on the motion to dismiss. In affirming, this Court said:

A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in case all along... The trial court did not err in ruling that the First Amendment claim was not tried by implication.¹⁷⁸

Here, after the trial court denied his motion to add a counterclaim for his own adverse possession, Otten (like Dewey) attempted to finesse the issue. Otten never mentioned his adverse possession claim until final argument, and the Karlbergs then objected. The trial court made no mention of the issue in its oral ruling. Under these circumstances, as in

¹⁷⁷ 95 Wn.App. at 25.

¹⁷⁸ 95 Wn.App. at 26, citations omitted, emphasis supplied. *Accord*, Green v Hooper, *supra*.

Dewey, the trial court did not err in ruling that Otten's adverse possession claim was not tried by agreement.

Moreover, even if the trial court erred in failing to hear Otten's adverse possession claim, such error would be harmless for two reasons. First, as already discussed, Otten's adverse possession claim was heard and denied in the companion case.

Second, Otten's claim is not supported by the record. Otten's alleged use of the Disputed Area is based almost entirely on his own testimony, which was disputed.¹⁷⁹ Even if Otten's testimony is taken at face value, it does not show open, notorious, uninterrupted, exclusive use for ten (or even seven) years.¹⁸⁰

¹⁷⁹ Otten testified that he hayed three years during the 80s (RP 424-427), six or seven years during the 90s (RP 427-428) and then not until 2007. (RP 429-430 & 459-460) Sofie testified that Otten hayed once prior to 2000. (RP 62-63) Don Florence testified that Otten hayed no "more than a couple of times." (RP 80) Gary Karlberg testified that Otten hayed "once or twice." (RP 353) Sharon Karlberg testified that Otten hayed only a couple of times. (RP 353; 537) Similarly, Otten's testimony about weeding, pruning, storing fence posts and using the driveway were disputed by Gary Karlberg (RP 522-524; 529; 173) and Sharon Karlberg. (RP 537-538)

¹⁸⁰ It was undisputed that the Karlbergs used part of the Disputed Area—for example, their shop and driveway—from the mid-1970s to the present (RP 259; 565) and other parts—for example, the lawn east of the shop—from the mid-70s to 2003 or 2004. (RP 105; 260) Some of Otten's uses were, by his own admission, either *de minimis*—such as nicking the corner of the driveway (rather than driving down it) (RP 507-509)—or done in secret (when the Karlbergs were away). (RP 528-530; 564) Finally, an undisputed finding—Finding No. 7—indicates that Otten's interference with the Karlbergs' use of the Disputed Area began in 1994 and caused complaints to the sheriff. This, together with the undisputed fact that Karlberg sued to eject Otten in 1996, would indicate that neither party's possession of the unimproved portion of the Disputed Area was exclusive from 1994 until Otten put up the barbed wire fence in 2004.

Issue No. 4. Did the Karlbergs waive the right to the remaining portion of the Disputed Area by suing for only the 45-foot improved part?

Error Alleged. Otten claims that the Karlbergs waived any right to the rest of the Disputed Area by asking the trial court to quiet title only to the improved portion.¹⁸¹ Otten does not explain his legal theory or cite any authority in support of this argument, but the Karlbergs will assume Otten is claiming judicial estoppel.

Standard of Review. A trial court's decision to apply judicial estoppel is reviewed for abuse of discretion. Ashmore v Estate of Duff, 165 Wn.2d 948, 952, 205 P.3d 111 (2009).

Facts. In opening statement, the Karlbergs argued that they owned all the property up to the Fence, but were seeking to quiet title only to the 45-foot portion containing their shop, yard, and ornamental trees.¹⁸² During trial, Gary Karlberg testified that his east boundary was the Fence, but that he was only asking to quiet title to the part of the Disputed Area which contained his improvements.¹⁸³ In final argument, the Karlbergs asked the trial court to enter a finding that the Karlbergs owned up to the Fence, but to enter judgment quieting title only to the 45-foot strip.¹⁸⁴

In its oral ruling, the trial court said:

¹⁸¹ Brief of Appellant Steven L. Otten at 47-50.

¹⁸² RP 6-12.

¹⁸³ RP 167-168.

¹⁸⁴ RP 555.

The evidence is overwhelming that the [F]ence was recognized as the boundary¹⁸⁵... And even if this were not so... the plaintiffs also would, under the facts of this case as presented, have acquired title through their own actions since they began ownership of the parcel in question¹⁸⁶... I believe that, under the facts presented, the law requires that title be quieted to the plaintiffs as per I believe it was Exhibit No. 27 [survey of 45-foot strip]. But the findings, as [the Karlbergs] point out, I think the findings... should reflect that title passed to, up to the fence line, but we are only quieting title, for reasons I do not yet understand, maybe never will, but the request is to quiet title up to that which is set forth in Exhibit No. 27.¹⁸⁷

In accordance with its oral ruling, the trial court entered findings and conclusions that the Karlbergs owned all the way to the Fence.¹⁸⁸ The court then ruled that:

Plaintiffs' east boundary is the Fence. However, since plaintiffs' complaint prays only to quiet title to the 45-foot strip east of the surveyed line, title should be quieted to only this area.¹⁸⁹

In the two companion cases—Otten's suit filed 10/23/09 and the Karlbergs' suit filed 12/27/09¹⁹⁰—the same trial court granted judgment to the Karlbergs to the remaining portion of the Disputed Area. In opposition, Otten argued that the Karlbergs' claim was barred by *res*

¹⁸⁵ RP 576.

¹⁸⁶ RP 577.

¹⁸⁷ RP 579-580.

¹⁸⁸ Findings Nos. 3 & 4 and Conclusion No. 4; CP 19-20 & 23.

¹⁸⁹ Conclusion No. 6; CP 23. NB: Otten assigns error to the conclusion, but does not argue the point.

¹⁹⁰ CP 363-369.

judicata, but did not argue waiver.¹⁹¹

Discussion. Otten's waiver argument was not made to the trial court, and this Court should not reach the argument for that reason.

Bellevue School Dist. v Lee, *supra*. In addition, Otten does not explain the legal basis for his waiver argument, and this Court need not consider arguments unsupported by authority. Milligan v Thompson, 110 Wn.App 628, 635, 42 P.3d 418 (2002).

That aside, Otten does not dispute that Karlberg acquired title up to the Fence when he purchased his property based on adverse possession by Karlberg's predecessors-in-title. Once title is acquired by adverse possession, it cannot be relinquished by parole abandonment or verbal declarations or any other act short of what would extinguish title acquired by deed. Mugaas v Smith, 33 Wn.2d 429, 431, 206 P.2d 332 (1949). As the Mugaas court said, "Title to real property is a most valuable right and will not be disturbed by estoppel unless the evidence is clear and convincing."¹⁹² Since promissory and equitable estoppel obviously do not apply,¹⁹³ perhaps Otten's waiver theory is judicial estoppel.

¹⁹¹ CP 234-237; 238-239; 240-244.

¹⁹² 33 Wn.2d at 434, citation omitted. *Accord*, Birkeland v Corbett, 51 Wn.2d 554, 565-566, 320 P.2d 635 (1958) ("To constitute waiver other than by express agreement, there must be unequivocal acts or conduct of the vendor evincing an intent to waive.")

¹⁹³ Promissory estoppel is a contract theory, and equitable estoppel requires reliance. Carillo v City of Ocean Shores, 122 Wn.App 592, 610-611, 94 P.3rd 961 (2004).

Assuming Otten is arguing judicial estoppel, the doctrine was discussed in Ashmore v Estate of Duff, supra:

Judicial estoppel prevents a party from asserting one position in a judicial proceeding and later taking an inconsistent position to gain an advantage. The core factors are whether the later position is clearly inconsistent with the earlier position, whether judicial acceptance of the second position would create a perception that either the first or second court was misled by the party's position, and whether the party asserting the inconsistent position would obtain an unfair advantage or imposes an unfair detriment on the opposing party if not estopped.¹⁹⁴

None of the Ashmore factors is present here. First, the Karlbergs' suit to quiet title and eject Otten from the 45-foot improved portion of the Disputed Area is not inconsistent with later suing to quiet title and eject Otten from the remaining portion, particularly when the Karlbergs made it clear in the first suit that they owned it all. Second, there can be no perception that any court was misled since the same trial court presided over all three lawsuits. Third, Otten filed a lawsuit just days before trial to claim the entire Disputed Area based on his own adverse possession. Thus, Otten was willing to re-litigate title to the Disputed Area and incurred no detriment as a result of the Karlbergs' subsequent suit. Under these circumstances, judicial estoppel does not apply.

¹⁹⁴ 165 Wn.2d at 950-952, citations omitted.

Issue No. 5. Is the Karlbergs' claim to the remaining portion of the Disputed Area barred by *res judicata*?

Error Alleged. Otten argues that the 11/20/09 judgment entitles him to the rest of the Disputed Area as a matter of *res judicata*.¹⁹⁵

Standard of Review. A question of law is reviewed *de novo*. Lascheld v City of Kennewick, 137 Wn.App 633, 154 P.3d 307 (2007).

Facts. After trial, in response to the trial court's judgment ejecting him from the 45-foot strip,¹⁹⁶ Otten did not move his junk cars in front of the Karlbergs' shop onto his own property. Instead, he moved them to an area between the 45-foot strip and the Fence,¹⁹⁷ even though the court had just found that this property belonged to the Karlbergs. The Karlbergs then filed suit to quiet title and eject Otten from this portion of the Disputed Area.¹⁹⁸

The Karlbergs moved for summary judgment on the basis that: the 11/20/09 findings collaterally estopped Otten from re-litigating many of the operative facts; Otten's claim of adverse possession failed under those facts; and Otten pointed to no additional facts not already considered during trial.¹⁹⁹ Otten made a cross-motion for summary judgment in his

¹⁹⁵ Brief of Appellant Steven L. Otten at 38-47.

¹⁹⁶ CP 18.

¹⁹⁷ CP 368, para 14; CP 257, para 3.

¹⁹⁸ CP 363-369.

¹⁹⁹ CP 336-337; CP 334-335.

own suit, claiming that the 11/20/09 judgment entitled him to the rest of the Disputed Area as a matter of *res judicata*.²⁰⁰ The trial court granted the Karlbergs' motion for summary judgment and denied Otten's motion in both suits.²⁰¹

Discussion. As a preliminary matter, Otten assigned error to the summary judgments entered against him,²⁰² but did not furnish this Court with the record considered by the trial court in making its rulings.²⁰³ Otten has therefore not complied with RAP 9.12, and this Court would ordinarily be unable to review the summary judgments. LeBeuf v Adkins, 93 Wn.2d 34, 605 P.2d 1287 (1980). However, Otten's only basis for challenging the summary judgments is his *res judicata* argument, and this Court may decide that the record on this issue is sufficiently developed to permit review.

Anyway, Otten's *res judicata* theory fails for three reasons: (1) the essential elements of *res judicata* are not present here; (2) even if they were, Otten split the cause of action himself and waived the defense; and (3) the issue of quieting title and ejecting Otten from the remaining portion

²⁰⁰ CP 234-237; 238-239; 240-244.

²⁰¹ CP 334-335; CP 336-337.

²⁰² Brief of Appellant Steven L. Otten at 4-5.

²⁰³ The orders granting summary judgment list the documents considered by the trial court (CP 334-335 & 336-337), a number of which Otten has not made a part of the record before this Court.

of the Disputed Area was reserved by the trial court. Each of these will be discussed below.

Elements Absent. As this Court said in Mead v Park Place Properties, 37 WnApp 403, 682 P.2d 256 rev den 102 Wn.2d 1010 (1984):

For *res judicata* to apply, there must be identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made.²⁰⁴

Here, there is no identity of subject matter or cause of action among the three suits. The Karlbergs' first suit sought to quiet title and eject Otten from the 45-foot improved portion of the Disputed Area based on adverse possession. Otten's suit sought title to the entire Disputed Area by his own adverse possession. The Karlbergs' second suit sought to quiet title and eject Otten from the remaining portion of the Disputed Area based on, not only adverse possession, but also collateral estoppel. Thus, the subject matter and causes of action were not identical.

Nevertheless, Otten argues that *res judicata* prevents "the award of additional relief based on the same facts and circumstances litigated to final judgment in a prior action,"²⁰⁵ relying on Kinsey v Duteau, 126 Wash. 330, 218 P. 230 (1923) and Kimmer v Keiski, 116 Wn.App. 924, 68 P.3d 1138 (2003). Otten's reliance on these cases is misplaced.

²⁰⁴ 37 Wn.App at 405, citations omitted.

²⁰⁵ Brief of Appellant Steven L. Otten at 40.

In Kinsey, Joseph Duteau assigned all of his property to his brother-in-law, H.M. Kinsey, in 1902 to be cared for while Duteau was in South Africa. Duteau's property included an executory contract to purchase some Snohomish County property, and Duteau left the funds necessary to pay off the contract with Kinsey. Duteau agreed to give Kinsey a one-half interest in the property for his services. Kinsey paid off the contract and took a deed to the property in his own name in 1903. In 1920, Duteau sued Kinsey to recover a one-half interest in the property, but his complaint was dismissed on demurrer.²⁰⁶ In 1921, Kinsey sued Duteau to quiet title to the property, and Duteau cross-complained for title to the property as equitable and beneficial owner. The trial court ruled for Kinsey on the ground of *res judicata*, and Duteau appealed.

On appeal, the supreme court affirmed, saying:

Certainly, if the facts set forth in the first complaint did not entitle the appellant to recover even a one-half interest in the property, the same facts would not justify a recovery of the entire interest. More than this, there can be no splitting of causes of action. A party cannot in one action sue for a part of that which he is entitled to recover, and in a subsequent action sue for the remainder, when the right of recovery rests upon the same state of facts.²⁰⁷

²⁰⁶ The opinion does not explain the basis for the demurrer. One can only speculate that Duteau's suit was barred by the statute of limitations or *laches*.

²⁰⁷ 126 Wash. at 334, citations omitted.

Otten cites Kinsey for the proposition that one splits his cause of action by first suing for one-half of something and then later suing for all of it. Not so. Kinsey holds that if one is not entitled to one-half of something, then *a fortiori* he is not entitled to all of it. In the case at bar, the Karlbergs were entitled to all of the property, but only sued to quiet title and eject Otten from half of it. Kinsey does not prevent the Karlbergs from filing a subsequent suit to quiet title and eject Otten from the rest of the property. In fact, that is more or less what Kinsey did—the 1920 suit established his right to the property and the 1921 suit quieted title to the property in him as against Duteau. Duteau argued that Kinsey’s filing of the second suit waived the *res judicata* defense and re-opened all issues, but the Kinsey court rejected the argument.²⁰⁸

Neither does Kimmer v Keiski support Otten’s position. There, a trial court entered judgment granting an easement “not to exceed 12 feet in width.” The judgment was not appealed. In a post-judgment proceeding, the trial court widened the easement to as much as 30 feet, and this Court reversed on the basis that *res judicata* prevented re-litigating the width of the easement. Here, the 11/20/09 judgment did not limit the Karlbergs to only half the Disputed Area—it quieted title and ejected Otten from the improved portion, but did not quiet title in either party to the remaining

²⁰⁸ 126 Wash. at 334-335.

portion. The summary judgments then quieted title in the Karlbergs to the remaining portion, which was not inconsistent with the 11/20/09 judgment. Kimmer is inapposite.

Where an issue is not addressed in a proceeding, *res judicata* does not prevent that issue from subsequently being litigated. As the supreme court said in Luisi Truck v Util. & Transp. Comm'n, 72 Wn.2d 887, 894, 435 P.2d. 654 (1967):

Neither the doctrine of *res judicata* nor collateral estoppel are intended to deny a litigant his day in court. The purpose of both doctrines is only to prevent relitigation of that which has previously been litigated. It is a rule of rest... The party asserting either doctrine has the burden of proof to show that the determinative issue was litigated in the former proceedings.²⁰⁹

Here, the issue of title to the remaining portion of the Disputed Area was not determined by the 11/20/09 judgment, so *res judicata* does not apply. Washington Nickel v Martin, 13 Wn.App. 180, 534 P.2d 59 rev den 86 Wn.2d 1002 (1975). There, plaintiff sued to quiet title to property occupied by defendants. Whether the defendants were occupying plaintiff's property depended on the location of the beginning point in a legal description. Plaintiff contended that the beginning point was a "lost corner" while defendants contended that it was an "obliterated corner."

²⁰⁹ 72 Wn.2d at 894, citations omitted, emphasis supplied.

The trial court held that it was an obliterated corner, but was nonetheless unable to determine the boundary. The trial court therefore dismissed the complaint, and plaintiff appealed.

This Court noted that neither party conducted a survey, thus making precise location of the boundary impossible, and held:

We hold that the trial court's dismissal of plaintiff's complaint was proper, but that the judgment of dismissal is *res judicata* only as to the trial court's finding that the east quarter corner of section 24 is an 'obliterated corner.' In the event a survey using the 'obliterated corner' as the point of beginning fails to resolve the dispute between the parties, then the parties may seek a determination of the location of the disputed boundary line in a future action.²¹⁰

In Washington Nickel, the plaintiff was free to go back to court, establish the boundary line and quiet title to the property since the prior suit did not decide the boundary line issue. Similarly, the Karlbergs were free to go back to court since the 11/20/09 judgment did not decide the issue of title to the remaining portion of the Disputed Area. As in Washington Nickel, *res judicata* does not apply.

Waiver. In the alternative, even if the elements of *res judicata* are present, Otten waived the defense by bringing another action over ownership of the Disputed Area. Brice v Starr, 93 Wash. 501, 161 P. 347 (1916). In Brice, plaintiff was defrauded in a land deal and filed two

²¹⁰ 13 Wash.App at 183.

suits—one to recover damages for the fraud and a second to cancel the deed fraudulently conveyed. The second suit was tried first, and the trial court entered findings that defendants had defrauded plaintiff and cancelled the deed. The defendants then plead *res judicata* as a defense to the damage suit, and the trial court rejected the defense and awarded plaintiff damages. On appeal, the Brice court said:

[H]aving submitted to a trial of the second action without moving therein for a consolidation with the first, and without raising the objection that, by it, [plaintiff] was splitting his cause of action, [defendants] waived the right to raise that objection here.²¹¹

...

Whatever the general rule, no court ought to permit the equitable doctrine of res judicata so to operate as to defeat a recovery to which the findings and decree in the second suit clearly show [plaintiff] entitled. The judgment in the second action here involved certainly is res judicata, but it must have the opposite effect from that contended for by [defendant]. It is only res judicata of the things actually decided. It proves that the deed was fraudulently obtained, and hence that the mortgage was fraudulently given and the proceeds wrongfully appropriated, and conclusively establishes [plaintiff's] right to recover a money judgment in the amount of the mortgage and interest, but it does not preclude that recovery in another suit which was the first instituted.²¹²

Here, the facts are even stronger than in Brice. Otten himself filed another suit concerning the Disputed Area prior to trial and thereby waived any objection to splitting the cause of action. And, as in Brice, the

²¹¹ 93 Wash. at 503.

²¹² 93 Wash. at 507, emphasis supplied.

trial court's findings show that the Karlbergs are entitled to the remaining portion of the Disputed Area. The equitable doctrine of *res judicata* should not be applied so as to award Otten land that the trial court found was owned by the Karlbergs.

Issue Reserved. As this Court said in Cummings v Guardianship Servs., 128 Wn.App. 742, 754, 110 P.3d 796 (2005):

Res judicata bars relitigation when an issue has been definitively adjudicated; it does not apply where a plaintiff's right to recover damages is "plainly reserved from adjudication."²¹³

Accord, Estate of Black, 153 Wn.2d 152, 102 P.3d 796 (2004).

Estate of Black is instructive. There, a will was admitted to probate, and a second, "lost" will was then submitted for admission to probate. The party submitting the lost will also contested the first will, and the beneficiaries of the first will contested the validity of the lost will, including whether the testator was incompetent or unduly influenced when she executed the lost will. On summary judgment, the trial court admitted the lost will to probate, but declined to rule on the incompetency and undue influence issues.

On appeal, this Court held that the *res judicata* effect of the summary judgment admitting the lost will to probate precluded any further

²¹³ 128 Wn.App. at 754, citation omitted.

challenge to the will based on incompetency or undue influence. Since this was not what the trial court intended, the summary judgment was reversed.²¹⁴ On review, the supreme court affirmed on different grounds and held that *res judicata* did not prevent further challenges to the lost will since the trial court's oral opinion and order reserved ruling on any issues concerning incompetency or undue influence:

The doctrine of *res judicata* prevents relitigation of the same claim where a subsequent claim involves the same subject matter, cause of action, persons and parties, and quality of persons for or against the claim made. *Res judicata* bars "every question which was properly a part of the matter in controversy, but it does not bar litigation of claims which were not in fact adjudicated."²¹⁵

...

However, it must be remembered that *res judicata* bars only claims actually adjudicated which were or should have been raised in the proceeding. Here, the trial court specifically stated it would not address claims regarding competency or undue influence and limited the summary judgment trial to whether the lost will should be admitted to probate ... Because the trial court order limited the issues, the grant of summary judgment admitting the 1993 will would not bar claims regarding competency or undue influence because these claims were not addressed, nor could they be addressed, in the summary judgment trial.²¹⁶

In the case at bar, the trial court held that the Karlbergs owned up to the Fence and quieted title as requested by the Karlbergs. Since the Karlbergs' complaint did not request quiet title or ejectment regarding the

²¹⁴ 116 Wn.App 476, 485-86, 66 P.3d 670 aff'd 153 Wn.2d 152, 102 P.3d 796 (2003).

²¹⁵ 153 Wn2d at 170, citations omitted.

²¹⁶ 153 Wn.2d at 171, emphasis supplied.

remaining portion of the Disputed Area, the trial court did not address that issue. Moreover, Otten's own suit was still pending when the trial court made its ruling. Under these circumstances, the issue of quieting title and ejecting Otten from the remaining portion of the Disputed Area was reserved, as in Estate of Black. *Res judicata* does not apply.

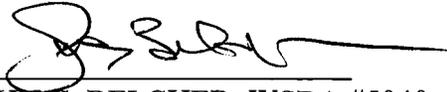
CONCLUSION

The trial court should be affirmed.

Respectfully submitted this 11TH day of March 2011.

BELCHER SWANSON LAW FIRM, P.L.L.C.

By



JOHN C. BELCHER, WSBA #5040
Lawyer for Respondents Karlberg

• • • •

APPENDIX

Findings of Fact and Conclusions of Law entered November 20, 2009.
CP 19-24.

SCANNED ✓

FILED IN OPEN COURT
11-20-2009
WHATCOM COUNTY CLERK

By _____ Deputy

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SUPERIOR COURT OF WASHINGTON, FOR WHATCOM COUNTY

GARY F. KARLBERG and SHARON
KARLBERG, a married couple,

Plaintiffs,

vs.

STEVEN L. OTTEN, a single man,

Defendant.

No. 08-2-00445-3
Judge Ira Uhrig

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

This case was tried to the bench on October 27-29, 2009 and November 2, 2009. Testimony was heard, exhibits were admitted, memoranda considered and argument of counsel taken. On the basis of this record, the court makes the following:

FINDINGS OF FACT

1. Plaintiffs Gary and Sharon Karlberg are a married couple, residing at 4444 Y Road, Bellingham, Washington ("Karlberg Property").

2. Defendant Steven Otten is a single man, residing at 4418 Y Road, Bellingham, Washington ("Otten Property").

3. From at least the early 1940s, a fence¹ has been treated and recognized as the boundary between the Karlberg Property and the Otten Property. The line of the Fence was clearly visible to the parties' predecessors-in-title from at least the early 1940s to at least the late 1990s.² The parties' predecessors-in-title

¹ This fence is referred to as the "Existing Fence" on Ex. 19. Ex. 19 was filed for record on May 20, 1994, under Whatcom County Auditor's File No. 940520171. This fence will be referred to throughout the Findings of Fact, Conclusions of Law and Judgment as "the Fence."
² Ex. 1-8.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 1**

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maintained the Fence and occupied the area up to, but no farther than, the Fence. The parties' predecessors-in-title in good faith accepted the Fence as the boundary and treated the Fence as the true boundary line between their properties.

4. In addition, plaintiffs' predecessors-in-title occupied the Karlberg Property up to the Fence beginning no later than the early 1940s. Plaintiffs' predecessors-in-title cleared the field west of the Fence in the 1940s, ran cattle in the field, leased the field and cut hay in the field up to the Fence. This occupancy was open and obvious to defendant's predecessors-in-title. Plaintiffs' predecessors-in-title used the land in this manner up to the Fence exclusively and continuously, without any interruption, from the 1940s until plaintiffs purchased the Karlberg Property.

5. On May 19, 1975, plaintiffs purchased the Karlberg Property by assuming a purchaser's interest in a real estate contract with Walter Lunde and Margaret Lunde as sellers.³ Plaintiffs paid off this real estate contract and received a statutory warranty fulfillment deed from the Lundes, which was recorded on June 16, 1983.⁴

6. Between 1975 and 1994, plaintiffs continuously occupied the Karlberg Property up to the Fence. They built a shop, put in a driveway and gate, built a concrete retaining wall, planted a lawn and trees, landscaped the area and hayed the field up to the Fence. In addition, plaintiffs' children played on the Karlberg Property up to the Fence. This occupancy was open and obvious to defendant's predecessors-in-title and continued uninterrupted for some nineteen years. Plaintiffs' occupancy was under a claim of right and without the permission of defendant's predecessors-in-title.

Defendant's predecessors-in-title made occasional, transitory use of some of the land west of the Fence by haying part of the area on a couple of occasions. However, this was with the tacit permission of the plaintiffs, who allowed the haying as a matter of neighborly accommodation. Plaintiffs wanted the field hayed so that

³ Ex. 23.
⁴ Ex. 53.

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it would not present a fire hazard and had little interest in selling the hay. In fact, plaintiffs had the field hayed themselves right up to the Fence for most of this period and did not receive any money for the hay after the early 1980s.⁵

7. In 1994, the defendant's predecessors-in-title had a survey performed of the west part of the Otten Property. The survey showed that the boundary with plaintiffs was some 82 feet west of the Fence.⁶ Thereafter, defendant attempted to interfere with plaintiffs' occupancy of the land immediately west of the Fence, resulting in friction between the parties, including incidents reported to the Whatcom County Sheriff's Department.

8. On June 17, 1996, defendant Steven Otten received a deed to the Otten Property.⁷

9. On December 18, 1996, plaintiff Gary Karlberg filed a complaint to quiet title against defendant Steven Otten under Whatcom County Superior Court Cause No. 96-2-02348. This suit was dismissed without prejudice for want of prosecution on March 27, 2000.⁸ The ~~parties~~ ^{plaintiffs} were unaware that the suit had been dismissed for want of prosecution for several years. After suit was filed and until the parties realized that the suit had been dismissed, there was relatively little friction between the parties, and the plaintiffs had the quiet enjoyment of the Karlberg Property up to the Fence.

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10. Beginning around 2003, defendant renewed his challenge to plaintiffs' occupancy of the Karlberg Property up to the Fence. Defendant moved junk cars onto the area in question (including onto the Y Road right-of-way abutting the Karlberg Property) and painted rings around trees. In 2004, defendant built a

⁵ Dick Gilda paid the plaintiffs to hay the field up to the Fence in the mid and late '70s, as did Mr. Gilda's son in the early '80s. Thereafter, Don Florence hayed for the plaintiffs and paid nothing for the hay.

⁶ Ex. 19. The Fence is not parallel to the surveyed line. The survey shows that the Fence is some 82' east of the surveyed line at a point 92.33' north of the Y Road and some 49.4' east of the surveyed line at the far (north) end of the Fence.

⁷ Ex. 46.
⁸ Ex. 51.

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 3

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barbed wire fence running along the surveyed line north of plaintiffs' shop building. This again created friction and resulted in complaints to the sheriff's department.

11. In January 2008, defendant cut down an ornamental tree (Cedrus deodara) located a few feet east of plaintiffs' paved driveway. This tree added to the beauty of the Karlberg Property and also acted as a buffer providing privacy to plaintiffs' home. The reasonable value of this tree was \$6,500.

Shortly thereafter, defendant removed the stump of this ornamental tree and a nearby gatepost just east of the driveway. In the process, defendant damaged the driveway. The total value of the damage to the driveway and gatepost was \$1,500.

12. The defendant's damage to the Karlberg Property discussed in paragraph 11 above amounted to self-help. The defendant knew, or should have known, that plaintiffs claimed ownership of the area damaged and nevertheless intentionally and unreasonably entered onto this area and injured the land.

13. Plaintiffs' attorney's fees with regard to injury to the gatepost and driveway amount to \$750.⁹

From the foregoing findings of fact, the court makes the following:

CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and of the property in dispute.

2. Plaintiffs' predecessors-in-title acquired the land up to the Fence through mutual recognition and acquiescence. The Fence was a well defined line on the ground that both parties' predecessors-in-title in good faith recognized as the true boundary line by their acts, occupancy and improvements with respect to their respective properties for more than the ten years required for adverse possession. Lamm v. McTige, 72 Wn.2d 587, 593 (1967).

3. In the alternative, plaintiffs' predecessors-in-title acquired title to the land up to the Fence by adverse possession. Plaintiffs' predecessors-in-title had open, notorious, uninterrupted, exclusive, hostile and continuous use of the land up

⁹ 3 hours x \$250/hour.

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3 to the Fence from at least the early 1940s until plaintiffs' purchase in 1975.
4 Plaintiffs' predecessors-in-title exercised dominion over this land in a manner
5 consistent with the actions which a true owner would take. ITT Rayoiner v. Bell,
6 112 Wn. 2d 754, 759 (1989).

7 4. When the plaintiffs purchased the Karlberg Property in 1975, they
8 acquired all the land up to the Fence from their predecessors-in-title. El Cerrito v.
9 Ryndak, 60 Wn. 2d 847 (1962).

10 5. In the alternative, plaintiffs acquired title to the land up to the Fence
11 through their own adverse possession from 1975 until 1994. Plaintiffs' occupancy
12 up to the Fence was open, notorious, uninterrupted, exclusive, hostile and
13 continuous. In addition, plaintiffs' possession, while not absolutely exclusive, was
14 substantially exclusive since it amounted to the kind of exclusive possession
15 expected of an owner under the circumstances. Crites v. Koch, 49 Wn.App 171,
16 174 (1987). Some intermittent haying occurred on a couple of occasions by
17 defendant or defendant's predecessors-in-title. This was more a matter of
18 neighborly accommodation than any adverse use by defendant. In any event,
19 occasional, transitory use by the title owner does not prevent ownership by adverse
20 possession under these facts. Harris v. Urell, 133 Wn.App. 130, 138 (2006) rev den
21 160 Wn. 2d 1012 (2007).

22 6. Plaintiffs' east boundary is the Fence. However, since plaintiffs'
23 complaint prays only to quiet title to the 45' strip east of the surveyed line, title
24 should be quieted to only this area.¹⁰

25 7. Plaintiffs lack an adequate remedy at law with regard to the quiet
26 enjoyment of their property. Defendant should be ejected from the Karlberg
27 Property and a permanent injunction should issue ordering defendant to stay off the
Karlberg Property, including that portion of the Karlberg Property within the Y Road
right-of-way. Defendant may use the Y Road right-of-way in the same fashion as
any other member of the public. However, defendant may not store vehicles or

¹⁰ As shown on Ex. 27.

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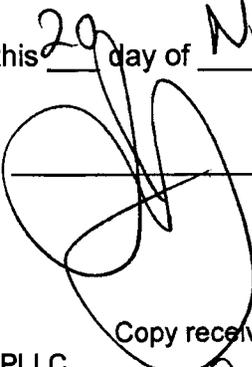
anything else on the Karlberg Property whether within or without the Y Road right-of-way.

8. Defendant's cutting of the ornamental tree was in violation of RCW 64.12.030. The ornamental tree acted as a buffer and was part of the landscaping, entitling plaintiffs to replacement and restoration costs rather than stumpage value. Hill v. Cox, 110 Wn.App. 394 (2002).

Defendant did not carry his burden of showing that cutting the tree was casual or involuntary for purposes of RCW 64.12.040. Defendant's cutting of the tree was deliberate and done at a time when he should have known there was a good faith dispute as to ownership. Hirt v. Entus, 37 Wn2d 418 (1950). Plaintiffs are therefore entitled to treble damages (\$6,500 x 3 = \$19,500).

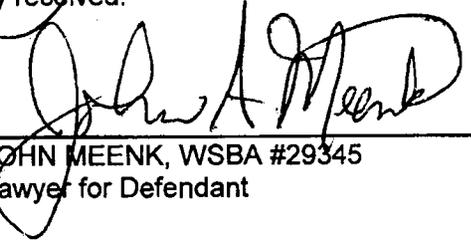
9. Defendant's injury to plaintiffs' gatepost and driveway was wrongful for purposes of RCW 4.24.630 since the defendant intentionally and unreasonably caused this damage. Defendant is therefore liable for treble damages (\$1,500 x 3 = \$4,500) plus reasonable attorney's fees in the amount of \$750.

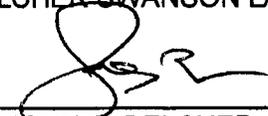
DONE IN OPEN COURT this 29 day of Nv., 2009.



JUDGE

Presented by:
BELCHER SWANSON LAW FIRM, PLLC

Copy received:

By: _____
JOHN MEENK, WSBA #29345
Lawyer for Defendant


By: _____
JOHN C. BELCHER, WSBA #5040
Lawyer for Plaintiffs

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