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# 67747-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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THOMAS EGGLESTON and SHERRY EGGLESTON, husband and  
wife,

Respondents,

v.

LEE WRIGHT and NINA WRIGHT, husband and wife,

Appellants.

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BRIEF OF RESPONDENTS

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Appeal from Island County Superior Court  
Case No: 09-2-00972-9  
The Honorable Judge Vickie I. Churchill

Jason Anderson  
Law Office of Jason E. Anderson  
8015 – 15<sup>th</sup> Ave NW Ste 5  
Seattle, WA 98117  
(206) 706-2882  
Attorney for Plaintiffs/  
Respondents.

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TABLE OF CONTENTS

**A. REPLY TO ASSIGNMENTS OF ERROR: ..... 1**  
**C. REPLY TO STATEMENT OF THE CASE.....3**  
**D. ARGUMENT OF RESPONDENT.....4**  
    SUMMARY: ..... 4  
    STANDARD OF REVIEW.....4  
    TACKING OF PRIOR OWNER’S USE ..... 5  
    FINDINGS OF THE TRIAL COURT ..... 6  
    ISSUE 1. USE OF PROPERTY BY CLEVISH..... 7  
    ISSUE 2. NATURE OF THE FENCE..... 10  
    ISSUE 3. DENIAL OF APPELLANT’S CROSS-MOTION FOR SUMMARY  
    JUDGMENT..... 14  
**E. CONCLUSION, RELIEF SOUGHT. .... 14**

**APPENDIX**

**ORAL FINDINGS OF THE TRIAL COURT, RP 28, 29.....A-1**

TABLE OF AUTHORITIES

CASES

*Alexander v. County of Walla Walla*, 84 Wash.App. 687, 692, 929 P.2d 1182 (1997) ..... 5

*Anderson v. Hudak*, 80 Wash.App. 398, 403, 907 P.2d 305 (1995) ..... 8

*Bryant v. Palmer Coking Coal Co.*, 86 Wn.App. 204, 936 P.2d 1163 (1997) ..... 9

*Cent. Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wash.2d 346, 354, 779 P.2d 697 (1989). ..... 5

*Drumheller v Nasburg*, 3 Wn.App. 519, 475 P.2d 908, (1970) ..... 10

*El Cerrito, Inc. v. Ryndak*, 60 Wash.2d 847, 855, 376 P.2d 528 (1962) 8

*Frolund v. Frankland*, 71 Wash.2d 812, 817, 431 P.2d 188 (1967),  
overruled on other grounds by *Chaplin v. Sanders*, 100 Wash.2d 853,  
676 P.2d 431 (1984)). ..... 8

*Houplin v. Stoen*, 72 Wn.2d 131, 431 P.2d 998 (1967)..... 11, 12

*Hudson v. United Parcel Service, Inc.*, 163 Wn.App. 254, 258 P.3d 87 (2011) ..... 14

*Margola Assocs. v. City of Seattle*, 121 Wash.2d 625, 634, 854 P.2d 23 (1993). ..... 4

*McGovern v. Smith*, 59 Wash.App. 721, 734-35 & n. 3, 801 P.2d 250 (1990) ..... 14

*McInnis v. Day Lumber Co.*, 102 Wash. 38, 172 P. 844 (1918)). ..... 8

*Merriman v. Cokeley*, 152 Wn.App. 115, 215 P.3d 241 (2009)..... 10

*Mugaas v. Smith*, 33 Wash.2d 429, 206 P.2d 332, 9 A.L.R.2d 846 (1949) ..... 8

*Robel v. Roundup Corp.*, 148 Wn.2d 35, 42-43, 59 P.3d 611 (2002) 2, 6

*Roy v. Cunningham*, 46 Wn.App. 409, 413, 731 P.2d 526 (1986)..... 5

*Selby v. Knudson*, 77 Wash.App. 189, 196, 890 P.2d 514 (1995)..... 8

*Shelton v. Strickland*, 106 Wn.App. 45, 53, 21 P.3d 1179 (2001) ..... 5

*State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). ..... 2, 6

<i>State v. Stenson</i> , 132 Wn.2d 668, 697, 940 P.2d 1239 (1997);	1, 6
<i>Thomas v. Harlan</i> , 27 Wn.2d 512, 178 P.2d 965 (1947)	12, 13
<i>Timberlane Homeowners Ass'n v. Brame</i> , 79 Wash.App. 303, 309-10, 901 P.2d 1074 (1995), <i>review denied</i> , 129 Wash.2d 1004, 914 P.2d 65 (1996)	8
<i>Tyree v. Gosa</i> , 11 Wash.2d 572, 578, 119 P.2d 926 (1941)	11
<i>Waldorf v. Cole</i> , 61 Wn.2d 251, 377 P.2d 862 (1963)	11
<i>Wood v. Nelson</i> , 57 Wash.2d 539, 540, 358 P.2d 312 (1961)	8
<i>Wood v. Nelson</i> , 57 Wn.2d 539, 358 P.2d 312 (1961)	9
<i>Young v. Key Pharms., Inc.</i> , 112 Wash.2d 216, 225, 770 P.2d 182 (1989).	5

RULES

CR 56(c)	4
RAP 10.3(g)	1
RAP 10.3(g);	1

**A. Reply to Assignments of Error:**

Appellants, Defendants Wrights, fail to assign error to any specific factual findings made by the trial judge.

Appellants set forth two apparent assignments of error; (1) whether the Wrights acquiesced to *repair* of a preexisting fence as a boundary, or merely a barrier for “animals” (dogs), and (2) did the Egglestons, and their predecessor, Clevish, establish sufficient use and possession of the disputed area to quiet title by adverse possession.

Appellant fails to provide citations to the record, where each error is alleged to have occurred.

RAP 10.3(g); Special Provision for Assignments of Error. . . . A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

No error has been assigned to the following oral findings of the Trial Judge, as set forth in the Report of Proceedings on summary judgment, which are therefore verities on appeal<sup>1</sup>;

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<sup>1</sup> Unchallenged findings are verities on appeal. State v. Stenson, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997); State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). Robel v. Roundup Corp., 148 Wn.2d 35, 42-43, 59 P.3d 611 (2002).

- Mr. Clevish repaired a pre-existing fence, in order to “enclose his property.” (RP 29).
- The fence was a physical demarcation on the ground, which established a boundary (RP 27, 28).
- There is no express boundary line agreement, other than the fence line (RP 28).
- There was a mutual recognition of the fence as being a boundary, as in “This is my side and that’s your side.” (RP 28, 29).
- Mr. Wright declined putting in a gate, as he did not need to get to the other side of the mutual fence. (RP 28).
- The old fence had “zigzagged” where it was nailed up to trees, and the new fence was straight, but in the same area, in that “there was a little give here and a little take there. So it all worked out in the end.” (RP 29).

- The “other side” of the fence did not belong to Mr. Wright (RP 28).
- The use of the property was appropriate for the type of property that it was, uncultivated land, used to let dogs be outside. (RP 28).
- The use of the property had occurred for ten years (RP 29).

**C. Reply to Statement of the Case.**

Since this case was decided on summary judgment, and Respondents Egglestons’ position is that there is no dispute on any material issue of fact, the Egglestons will adopt the facts, as contained in Appellants’ statement of the case (Pages 9 – 15, Brief of Appellant) for purposes of this appeal. However, the Egglestons object to the argument contained in the Statement of the Case, and further object to the discussion of settlement discussions, at page 16.

**D. Argument of Respondent.**

***Summary:***

Even taking all of the Appellant's factual assertions at face value, the Respondents are entitled to summary judgment. The use of the property by Mr. Clevish (Predecessor in interest to the Respondents) was sufficient and appropriate for the densely overgrown land, and the use of the fence by both neighbors was as a boundary, which neither neighbor had sought to cross, and which demarked the extent of each neighbor's property. "This is my side and that's your side." (RP 28. 29)

***Standard of Review.***

This court reviews an order of summary judgment by applying the same standard as the trial court. *Margola Assocs. v. City of Seattle*, 121 Wash.2d 625, 634, 854 P.2d 23 (1993). Summary judgment must be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); *Margola*, 121 Wash.2d at 634, 854 P.2d 23.

The moving party bears the initial burden to show the absence of any issue of material fact. *Young v. Key Pharms., Inc.*, 112 Wash.2d 216, 225, 770 P.2d 182 (1989). Uncontroverted, relevant facts offered in support of summary judgment are deemed established. *Cent. Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wash.2d 346, 354, 779 P.2d 697 (1989). Findings of fact by the trial court are appropriate on summary judgment where reasonable minds could reach but a single conclusion. *Alexander v. County of Walla Walla*, 84 Wash.App. 687, 692, 929 P.2d 1182 (1997).

In this case, taking the facts from the point of view of the Appellants, reasonable minds could reach but a single conclusion – making summary judgment in favor of the Respondents appropriate.

#### ***Tacking of Prior Owner's Use***

"Where there is privity between successive occupants holding continuously and adversely to the true title holder, the successive periods of occupation may be tacked to each other to compute the required 10-year period of adverse holding." *Roy v. Cunningham*, 46 Wn.App. 409, 413, 731 P.2d 526 (1986). Privity is established when the disputed property is transferred by deed and physically turned over. See *Shelton v. Strickland*, 106 Wn.App. 45, 53, 21 P.3d 1179 (2001).

It is undisputed that the Respondents Egglestons purchased their property from their predecessor, Mr. Clevish, that the property was transferred by deed and physically turned over to the Egglestons, and that therefore privity exists between Mr. Clevish and the Egglestons.

The trial court therefore appropriately referenced Mr. Clevish's undisputed use of the property, and fence, in order to determine adverse possession and/or mutual acquiescence over a ten-year period.

***Findings of the Trial Court***

The unchallenged findings are verities on appeal. State v. Stenson, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997); State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). Robel v. Roundup Corp., 148 Wn.2d 35, 42-43, 59 P.3d 611 (2002).

Specifically, the trial judge had made findings regarding the nature of the use of the property, and the discussions between the Appellants and their former neighbor, Mr. Clevish, as to the fence. These factual findings are not challenged in this appeal.

The only issues on appeal, therefore, are whether the nature of the Clevish's use of the property, and the nature of the discussions as to the fence, as found by the trial court, is sufficient to support the legal

conclusion that the ownership of the disputed property has been transferred by adverse possession and/or mutual acquiescence.

***Issue 1. Use of Property by Clevish.***

There is no allegation that the Appellants, Wrights, ever entered or used the disputed property at any time during the 10 years at issue. The only issue on appeal with respect to use of the property, therefore, is whether the Clevish's use of the property, admittedly exclusive, was sufficient to ripen to adverse possession and/or mutual acquiescence.

The trial court's findings as to the use of the disputed property, indicate that the disputed land was "uncultivated land". Therefore, the Appellant's argument that it was not used as intensely as a residential parcel, is not sufficient to defeat summary judgment.

The disputed land was fully enclosed by the Clevish' fence, and access was barred. The Trial Court found that Mr. Wright declined to have a gate put into the fence, as he did not need to cross the fence line, or enter the Clevish' yard. (RP 28). The use of the disputed land was as a yard for the Clevish' dogs – which is another indication that the use was exclusive to the Clevishes.

Use must be such as an owner of the type of property in question would make. *Timberlane Homeowners Ass'n v. Brame*, 79 Wash.App. 303, 309-10, 901 P.2d 1074 (1995), review denied, 129 Wash.2d 1004,

914 P.2d 65 (1996); *Selby v. Knudson*, 77 Wash.App. 189, 196, 890 P.2d 514 (1995).

What constitutes adverse possession of a particular tract of land depends on the nature, character and locality of that land, and the uses to which land of that type is ordinarily put. *Anderson v. Hudak*, 80 Wash.App. 398, 403, 907 P.2d 305 (1995) (citing *Frolund v. Frankland*, 71 Wash.2d 812, 817, 431 P.2d 188 (1967), overruled on other grounds by *Chaplin v. Sanders*, 100 Wash.2d 853, 676 P.2d 431 (1984)).

Once title by adverse possession is acquired, it cannot be divested by acts other than those required when title is acquired by deed. *El Cerrito, Inc. v. Ryndak*, 60 Wash.2d 847, 855, 376 P.2d 528 (1962) (citing *Mugaas v. Smith*, 33 Wash.2d 429, 206 P.2d 332, 9 A.L.R.2d 846 (1949); *McInnis v. Day Lumber Co.*, 102 Wash. 38, 172 P. 844 (1918)).

A key element in determining whether use is sufficient to ripen to adverse possession, is whether the property at issue is enclosed.

“An adverse possessor need not enclose the claimed parcel. [] Moreover, the trial court need not “find a blazed or manicured trail along the path of the disputed boundary; it is reasonable and logical to project a line between objects when the extent of the adverse possessor's claim is open and notorious as the character of the land and its use requires and permits.” [] A boundary may be defined by the use of the property itself, [] by a natural feature, [] or by a fence. [*Wood v. Nelson*, 57 Wash.2d 539, 540, 358 P.2d 312 (1961).” (internal citations omitted).

*Bryant v. Palmer Coking Coal Co.*, 86 Wn.App. 204, 936 P.2d 1163 (1997).

In this case, there is no dispute, that the property at issue was fully enclosed by the Clevish' fence, and that use of the property was exclusively by the Clevishes.

Where a fence purports to be a line fence, rather than a random one, and when it is effective in excluding an abutting owner from the unused part of a tract otherwise generally in use, it constitutes prima facie evidence of hostile possession up to the fence. We know of no requirement that a particular degree or kind of use be established as to every part of a fenced tract of land as a prerequisite to finding possession thereof."

*Wood v. Nelson*, 57 Wn.2d 539, 358 P.2d 312 (1961)

The fence was effective in excluding the Wrights, as abutting owners, from the disputed portion of land. Even if the disputed portion is considered "unused", as in *Wood v. Nelson*, fencing the area in a manner that excludes the neighbor is sufficient use to establish adverse possession.

"Exclusive dominion over land is the essence of possession, and it can exist in unused land if others have been excluded therefrom. A fence is the usual means relied upon to exclude strangers and establish the dominion and control characteristic of ownership."

*Wood v. Nelson*, 57 Wn.2d 539, 358 P.2d 312 (1961)

[W]hat constitutes possession or occupancy of property for purposes of adverse possession necessarily depends to a great extent upon the nature, character, and locality of the property involved and the uses to which it is ordinarily adapted or

applied. In this vein, we have accepted the view that the necessary occupancy and use of the property involved need only be of the character that a true owner would assert in view of its nature and location. *Skoog v. Seymour*, 29 Wash.2d 355, 187 P.2d 304; \* \* \*

In the instant case the trial court carefully considered the unique nature and location of the disputed area, and the fact that it was an integral part of defendants' fish hatchery operation. Under these circumstances the trial court held that defendants 'unfurled the flag' of hostile ownership when they erected the fence, thus enclosing the area. . ." *Drumheller v Nasburg*, 3 Wn.App. 519, 475 P.2d 908, (1970).

### ***Issue 2. Nature of the Fence.***

Appellants appear to argue, that the fence at issue was in the nature of a cattle enclosure, and not intended as a property boundary line.

The fact that the fence was intended to keep the Clevishes' dogs inside their property, does not convert the fence into an animal pen, not intended as a property boundary.

A person may erect a fence for some other purpose than to mark a boundary line; thus, where the parties have not expressly agreed that the fence is the boundary line, there must be some evidence that they have acquiesced in it as the boundary line. *Merriman v. Cokeley*, 152 Wn.App. 115, 215 P.3d 241 (2009).

In this case, however, there was no other purpose for the fence, other than a boundary to the property.

In *Waldorf v. Cole*, 61 Wn.2d 251, 377 P.2d 862 (1963), the court found that a rockery, built by Waldorf on his (Waldorf's) own property, was not intended as any indication of a property line, where the disputed area was unimproved and unused. The rockery was built against a dirt bank. There is no indication that anyone was excluded from any portion of property by Waldorf's rockery.

When a landowner fences "less land than he owned", the resulting fence is less likely to be considered a boundary between properties. Such was the case in *Houplin v. Stoen*, 72 Wn.2d 131, 431 P.2d 998 (1967), relied upon extensively by Respondents<sup>2</sup>. The Houplin court limited its review to issues of mutual acquiescence, and not adverse possession<sup>3</sup>. In declining to find mutual acquiescence, the Houplin court pointed out that the neighboring property owner did not rely upon the fence, as his (the neighbor's) land was "wild and unoccupied". In discussing mutual acquiescence, the Houplin court discussed the activities of both of the neighbors involved, with respect to the fence. The landowner who built

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<sup>2</sup> "[Houplin] the owner of the land in section 3 fenced less land than he owned."

<sup>3</sup> "[Houplin] It is important to keep in mind what this case does not involve. It does not involve adverse possession; it does not involve determination of a boundary line by parol agreement between adjoining landowners; it does not involve an estoppel in pais, for there is no evidence that defendant Myers acted to his detriment or injury by relying upon the mistake made by plaintiff's predecessor in interest when he placed the fence in its present position. Title to real property will not be disturbed by estoppel unless the evidence is clear and cogent. *Tyree v. Gosa*, 11 Wash.2d 572, 578, 119 P.2d 926 (1941)."

the fence, had testified that “his main purpose in building the fence was to keep in cattle, pigs and horses.” The other owner, to the South, made no use of the property, and thus did not rely upon the fenceline.

In this case, unlike *Houplin*, both neighbors used the fence as an indicator of the property line. The Appellant, Wright, used his property up to, and not beyond, the fence. The Respondent’s predecessor, used the fence to keep his dogs within his property, but, unlike the landowner in *Houplin*, Mr. Clevish did not fence *less* property than he owned, with a main purpose of keeping animals penned in. Clearly, the purpose of the fence was to enclose the property, and to the extent that Mr. Clevish enclosed *more* property than he owned, he gained ownership either by mutual acquiescence or adverse possession.

*Thomas v. Harlan*, 27 Wn.2d 512, 178 P.2d 965 (1947), relied upon by Appellants, is a case brought exclusively under a theory of mutual acquiescence, or estoppel, and not adverse possession.<sup>4</sup> The *Thomas v. Harlan* court rejected the theory of estoppel, because the respondent in that case, Thomas, “a surveyor and civil engineer,” had made inconsistent claims to property, some based upon his surveys, some based upon

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<sup>4</sup> “[*Thomas v Harlan*] Respondents in their brief do not press their right to the title by adverse possession, but follow the theory advanced by the trial court. The question, then, is narrowed to the proposition of whether respondents have acquired the strip of land by acquiescence and estoppel.” *Thomas v. Harlan*, 27 Wn.2d 512, 178 P.2d 965 (1947),

possession, and did not indicate that he had relied on the placement of a fence as a property line<sup>5</sup>. Mutual acquiescence was rejected, on the specific facts of the *Thomas v. Harlan* case, where “the entire property was unoccupied, unimproved, wild prairie land. The only improvement made by them was a one-room building which was used occasionally for recreational purposes. The location of the building is uncertain, though it is clear that it was not near the disputed property. . .” *Thomas, Supra*. A fenceline erected on unoccupied, unimproved, wild prairie land, is not subject to the same consideration as to mutual acquiescence, where the fence was not actually used by both neighbors as a boundary between properties.

In the instant case, the use of the fence was far more definite; the land was adjacent to the Wright’s residence and the Clevishes’ commercial property, and the fence was in actual use by both neighbors specifically as a boundary between their respective properties. As found by the trial court, the fence was intended by the Clevishes to keep their

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<sup>5</sup> “[Thomas v Harlan] There is no need to cite authorities to decide the question of estoppel for the simple reason that respondents did not rely upon the statement they attributed to Mrs. Cline, to the effect that the fence indicated the boundary line. This is evident from the fact that respondents, one a surveyor, made a survey of the property in order to find the true line. It is too impossible to believe that respondent Thomas found the boundary line to be within a foot or two of the fence.” *Thomas v. Harlan*, 27 Wn.2d 512, 178 P.2d 965 (1947),



Jason Anderson, WSBA # 32232  
Attorney for Respondents

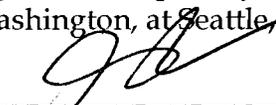
### Certificate of Mailing

I hereby certify that on this date I mailed, emailed, and/or faxed a copy of the document to which this is appended to the appellant, as follows;

Copies sent to:

Christon C. Skinner, Kathryn C. Loring Law Office of Skinner & Saar, P.S.	Fax No (360- 679-9131)
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Signed under penalty of perjury, under the laws of the State of Washington, at ~~Seattle~~ Washington, on the date set forth below;

  
\_\_\_\_\_ (signature)

3/15/12 (date)

Appendix

Oral Findings of the Trial Court RP 28, 29

A-1

1 know where the property line was. Mr. Clevish talked to  
2 him, said, "Let's build a fence right here." Mr. Clevish  
3 thought-- Mr. Wright thought it was on the boundary - it  
4 was in the general area. And he said, "Okay."

5 There was no express-- There was no conversation  
6 saying, "This is our new property line." But that's  
7 not req-- We're not required to prove that.

8 What we have is we have a fence that was built and  
9 has been used, and - and - and the land on the - on the  
10 Clevish side, Clevish and then Eggleston side has been  
11 used lightly, but it's been used since that time. And  
12 that boundary was recognized up until the time that this  
13 lawsuit was filed.

14 So we would contend that this Court can find by  
15 clear, cogent and convincing evidence that the event -  
16 that there is an acquiescence to the boundary line between  
17 these two properties being the current fence line.

18 THE COURT: Thank you.

19 All right. Thank you very much.

20 The - the issue that I am going to focus on right now  
21 is the Motion for Summary Judgment. I think that my  
22 decision will take care of the other issues, as well.

23 The doctrine of mutual acquiescence requires, as has  
24 been stated, a - a certain well-defined and physically  
25 designated boundary on the ground. A fence can't get

1 anymore physical than that, and the definition itself is a  
2 physical demarcation on the ground. So that fence has  
3 established a boundary.

4 The second element that it's a mutual recognition of  
5 the designated boundary line as the true line, that is in  
6 the absence of a express boundary line agreement. And  
7 there is no express boundary line agreement.

8 But there is a mutual recognition, in my mind, of the  
9 fence as being: "This is my side and that's your side."

10 The deposition that has been quoted here I think  
11 actually indicates that as well. Because Mr. Clevish said  
12 that, "I was going to replace the fence because I had a  
13 couple of dogs..." -- And it doesn't stop there "...and I  
14 wanted to keep them in my property."

15 I believe, also, that there was a discussion about  
16 whether or not there should be a gate. And Mr. Wright  
17 said, "No," he didn't need to get on the other side.

18 That doesn't seem to be an indication that that  
19 "other side" belongs to Mr. Wright. He didn't indicate  
20 that by saying that he didn't need to get on the other  
21 side.

22 The fact that there was very little use of the  
23 property other than, say, for the dogs being out there is  
24 the type of property that there was. The property was not  
25 cultivated. It was the type--

1 Well, in a - in a beach house area, for example,  
2 there might be a different type of use because of the  
3 nature of the beach house.

4 This is more of a wild area with trees allowed, that  
5 type of thing, where you would expect only dogs to be very  
6 interested in being out there. And it had - had occurred  
7 for ten years.

8 I find by clear, cogent and convincing evidence that  
9 there is mutual acquiescence in this case.

10 I know that Mr. Wright's declaration puts forth that  
11 he didn't mean that to be the true boundary line, but he'd  
12 recognized it as such. He also indicated, too -- And this  
13 is not disputed -- that that fence would zigzag, and the--  
14 The original fence was zigzag because it was nailed up to  
15 tree. But the new fence was straight. And that there was  
16 a little give here and a little take there. So it all  
17 worked out in the end.

18 So that, to me, says that they recognized that there  
19 was a boundary line about in that area. Now, they  
20 weren't-- Approximate where it was. But whether they  
21 agreed that that was the boundary line or not, they  
22 mutually agreed that "You stay on your side and you'll  
23 keep your dogs enclosed, and I'll stay on my side."

24 And, also, Mr. Clevish says that he wanted to enclose  
25 his property. "Enclose the property."

1           So the fence was a piece of structure that outlined  
2 where the property was for both of these parties, and I  
3 will so find.

4           I will grant the summary judgment.

5           MR. ANDERSON: Thank you, Your Honor.

6           THE COURT: Do you have any Order to that  
7 effect?

8           MR. ANDERSON: Yes, Your Honor.

9           MR. SKINNER: This (indicating) is the exhibit  
10 that was part of the deposition that we published.

11          THE COURT: You can just provide that later, if  
12 you're going to be approving it as to form.

13          MR. SKINNER: I'm sorry.

14          THE COURT: You can just provide that for my  
15 signature later as to form. I'm sure that's the way you'd  
16 want to enter it.

17          MR. ANDERSON: Okay.

18          MR. SKINNER: Yes. Thank you, Your Honor.

19          THE COURT: All right. Thank you.

20          THE CLERK: Please rise.

21                 (Hearing concluded.)  
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C E R T I F I C A T E

I, Karen P. Shipley, do hereby certify that the foregoing Verbatim Report of Proceedings was taken by me to the best of my ability and completed on July 22, 2011, and thereafter transcribed by me by means of computer-aided transcription;

That I am not a relative, employee, attorney or counsel of any such party to this action or relative or employee of any such attorney or counsel, and I am not financially interested in the said action or the outcome thereof.

That I am herewith affixing my seal this 15th day of November, 2011.

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Karen P. Shipley, CSR No. 2051