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CASE NO. 70814-7-1

IN THE COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

JUDITH ANDERSON

Respondent

v.
RICHARD AND MARGARET ANDERSON

Appellants

BRIEF OF RESPONDENT JUDITH ANDERSON

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I. ASSIGNMENT OF ERROR

Respondent assigns no error to the decision of the court below.

II. INTRODUCTION

Appellant Richard Anderson ("Richard") sought to quiet title to a narrow strip of land he asked the court below to carve out between what are now two adjoining square lots; Lot 4 that Respondent Judy Anderson ("Judy") has owned for the last 38 years, and Lot 2, which Richard previously owned between 1997 and 2008.

Richard sought to quiet title based primarily on his counterclaim pursuant to the Common Grantor Rule ("the Rule"), the only claim still at issue. That Rule operates to bind a seller of land who divides his property to the boundary he established and the initial grantee agreed to, where the established boundary is at odds with the legal description.[1] The policy of this Rule is to protect the initial grantee, in this case Judy, who purchased Lot 4 from Leroy Caverly.

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[1] In order for such a boundary to bind subsequent grantees like Richard, a visual inspection must indicate that something other than the deed line is functioning as the true boundary. The sale to him must be made with reference to that line, and there must be a meeting of the minds as to the exact tract to be transferred.

Richard formally announced at the start of trial that his only remaining claims were based on "use and occupation," and that the "true boundary" was established by physical features, specifically a fence and irregularly shaped swale Richard refers to as a 'curved' boundary.

After failing to prove that claim at trial, Richard sought to raise a new and fundamentally different claim under the guise of a motion to 'reconsider' pursuant to CR 59. Rather than the 'curved' boundary based on physical features he advocated at trial as the 'true boundary,' his new post-trial claim relies on the 1969 Vooeheis survey, which predated the establishment of the subject boundary and therefore did not actually survey it. It is undisputed that the legally described boundary is a straight line. The Voorheis survey is now disfavored because it is not accurate.

Richard's appeal is an extremely narrow one. He does not challenge any of the trial court's factual determinations, and he has specifically waived any claims to the curved boundary he advocated in his trial memo and at trial, thereby also eliminating his other two counterclaims, adverse possession and mutual recognition and acquiescence. Only his Common Grantor Rule claim remains at issue.

As Richard describes the scope of his appeal in his Opening Brief, this is a 'case about Judy' (p. 6), in which he "only seeks to bind Judy" (p.

27) to the 'Voorheis Survey Line.' Richard would thus have this Court ignore perhaps the most fundamental and well-established rule governing quiet title actions. A party seeking to quiet title may only succeed on the strength of his title, and not on any alleged weakness in the title of his adversary. Because he now "only seeks to bind Judy" to a particular line, Richard acknowledges that he cannot carry the burden he undertook when he invoked the Rule; that he cannot prevail on the strength of his own title and can only hope to challenge Judy's title, which Washington law does not permit.

Richard's current position that he "only seeks to bind Judy" to the Voorheis survey also directly contradicts his counterclaim in which he alleges, "The boundaries marked on the ground by the fence . . . are also binding on Defendants [Richard and his wife] as subsequent purchasers with inquiry notice under the Common Grantor Doctrine."

Furthermore, the Voorheis survey itself is not a proper basis for recovery for a variety of reasons. It was not pled as a basis for recovery in Richard's counterclaims, and because it constitutes a compulsory counterclaim it has been waived. Even if his counterclaims are construed broadly enough to include the Voorheis survey as a basis for recovery, Richard affirmatively eliminated it as such by announcing at the start of

trial that his only remaining claims were based on use and occupation to a 'true boundary' established by physical features forming an irregularly shaped line at odds with the legally described straight boundary a survey would necessarily yield. This constitutes a binding election of remedies that also eliminates the Voorheis survey as a basis for recovery.

Additionally, the Rule operates to establish boundaries at odds with the legal description, while a survey does the opposite; it necessarily embraces the legal description and plots it on the ground.

The Voorheis survey was performed years before the common grantor divided a larger parcel of land into separate lots, and established Lots 2 and 4 and the boundary separating them. Voorheis neither surveyed nor marked the boundary in question. Richard cannot properly rely on a boundary line for Lot 4 projected from the Voorheis survey because there was no evidence and no finding by the court that the common grantor or anyone else actually made such a projection at any relevant time. Such a projected line therefore has no factual basis in the record. The 'Voorheis Survey Line' Richard often refers to in his brief is therefore purely theoretical. 'Fictional' is perhaps a more apt description.

As demonstrated in detail below, a boundary for Lot 4 cannot be projected from the flawed and now-disfavored Voorheis survey without engaging in improper speculation.

Finally, as Richard admits on page 29 of his Opening Brief, he believed Mr. Caverly established a 'curved' fence as the boundary. Thus, Richard did not rely on the Voorheis survey or the straight line it would necessarily yield as the boundary when he purchased Lot 2.

The trial court found that Mr. Cavalry established and Judy agreed to a boundary as established by the legal description rather than any particular survey of it. Richard does not challenge that conclusion, but instead seeks to mislead this Court by repeatedly mischaracterizing that agreement as the 'Voorheis Survey agreement.' (Opening Brief pp. 6, 41, 44).

On appeal Richard repeatedly complains that the court below erred by improperly awarding property to Judy. In fact, the trial court awarded no property or other affirmative relief to either party. CP 150.

Richard also repeatedly complains that the trial court erred in determining ownership of the disputed property based on the Cascade survey. To the contrary, the trial court did not in fact adjudicate the ownership of the disputed area, based on that survey or otherwise. The

trial court determined only that Richard failed to prove that *he* had any ownership rights to the disputed area. CP 150.

Consequently, the court below did not err, and could not possibly have erred, in awarding property to Judy or in determining ownership of the disputed area because the trial court did neither.

Richard also repeatedly argues that Judy is seeking a windfall. However, although Judy initially sued Richard for trespass, she voluntarily dismissed her action after Richard sold Lot 2. She has thereafter been the defending party and has sought no relief at trial other than the dismissal of Richard's counterclaims.

The trial court found that Richard's claims are a means of obtaining access to his other real estate holdings to the west of Lots 2 and 4, which he does not claim to be land-locked. Had Richard prevailed at trial, he would have obtained land on which Judy's late husband, Charles, installed a culvert on Lot 4 with the knowledge and assistance of the common grantor himself. The culvert crosses a small stream that flows over parts of both lots. Judy needed that culvert to access the west portion of her Lot 4. Richard's acquisition of that culvert would have provided him with ready access to his other real estate holdings without having to

install his own culvert within the 60 foot access easement he preserved across the south boundary of Lot 2 when he sold it.

Thus, Richard would have obtained a windfall had he prevailed at trial and obtained ownership of the culvert Judy's husband installed.

Over the course of this protracted litigation Richard has claimed a curved boundary and a straight boundary; a boundary at odds with the legal description and a boundary based on the legal description; a boundary based on use and occupation and a boundary based on a survey; a boundary based on physical features and a boundary based on a purely fictional line; a visible line and an imaginary line.

Given the confusion created by the shifting shapes, locations and factual bases for the various boundaries Richard has advocated, and his perplexing assertions that the trial court erred by determining ownership and awarding property to Judy, it is rather remarkable that the thrust of his appeal is the oft-repeated complaint that the trial judge was confused.[2] In an apparent effort to bolster that contention, Richard asserts that the trial judge had "little or no real estate law background," "had only recently been appointed" and had a "lack of experience with boundary law." Opening Brief, pp. 4, 20. Such assertions and their insinuations are

[2] References to confusion by the trial court are found in Richard's brief at pages 9, 27, 30, 32, 34, 36, 44, 45 and 46.

irrelevant, completely outside the record and not the least bit probative. They should be ignored or stricken.

At the heart of Richard's appeal is the notion that the trial court was confused because "most common grantor cases involve subsequent purchasers." Opening Brief, p. 34. Yet that is exactly what this is, a common grantor case involving a subsequent purchaser, which Richard unquestionably is. As Richard pled in his counterclaim, "The boundaries marked on the ground by the fence . . . are also binding on Defendants [Richard and his wife] as subsequent purchasers with inquiry notice under the Common Grantor Doctrine."

Richard invoked this Rule and had the burden of proving the Rule's requirements that specifically apply to him as a subsequent purchaser or grantee. The particular requirement Richard unsuccessfully attempted to prove at trial, and now seeks to dodge, is that a visible inspection would demonstrate to a subsequent grantee that something other than the legally described boundary is functioning as the true boundary.

After failing to prove the use-and-occupation-based claims he relied on exclusively at trial, Richard now relies on the Voorheis survey, even though he admits he did not rely on it when he purchased Lot 2.

By repeatedly shifting the shape, location and factual basis for the various boundaries he sought to establish, Richard has revealed himself as an opportunist seeking easy access to his other real estate holdings, rather than the victim of some injustice. He had his opportunity to plead and prove whatever claims he elected. He is not entitled to another opportunity to try a different approach now, especially one the law prohibits. The trial court's decision should be affirmed.

III. COUNTER-STATEMENT OF THE CASE

Richard and Judy were formerly neighbors. For the past 38 years, since 1976, Judy has owned a square, ten acre parcel designated as 'Lot 4.' Richard formerly owned Lot 2, located adjacent to and directly north of Judy's Lot 4, from 1997 to 2008. The land that comprises those two lots was formerly part of a larger, undivided tract consisting of 125 acres owned by Leroy Caverly, who divided a portion of that land into square 10 acre parcels in 1976. CP 42, finding of fact ("f.f.") 12,13. The first such lots Mr. Caverly sold were Lots 3 and 4, which Judy and her late husband, Charlie, purchased in 1976. CP 46, f.f. 21. Mr. Caverly retained ownership of Lot 2 located directly north of Judy's Lot 4.

Judy's Lot 4 was completely forested when she purchased it, and there were no access roads, improvements or other physical features as

possible references to its boundaries. CP 56, ln. 8. Consequently, Mr. Caverly did not point out to Judy or her husband Charlie any physical references to the subject boundary of Lot 4, as there were none. There had been no survey of Lot 4. CP 56, ln. 5 – 7. The only survey in existence at the time Judy purchased Lot 4 had been performed by Voorheis of 80 of Mr. Caverly's 125 acres in 1969, before he divided them into 10 acre square lots. Consequently, Voorheis surveyed neither Lot 4 nor 2 nor the boundary separating them, so that no survey markers were placed by Voorheis at either end of the subject boundary. CP 43, f.f.16, Trial Exhibit ("Ex.") 20.

Mr. Caverly provided Judy and her husband with the lot's legal description and a copy of a rough sketch of the lots he intended to carve out of his 125 acre tract. CP 46, f.f. 21, Exs. 5, 9 55, p. 3. The trial court found that Mr. Caverly established and sold Lot 4 to Judy 'based on his rough sketches and his legal description.' CP 58, ln. 6. Sometime after the sale, Mr. Caverly furnished Judy with a copy of the Voorheis survey map on which someone, possibly Mr. Caverly, made handwritten notations. CP 46, f.f. 22, Ex. 10. There was no evidence regarding when or how those notations were added, and the trial court properly declined to speculate as to their reliability. CP 56, fn. 6.

The legal description provided by Mr. Caverly for Lot 4 is:

> The South half of the Northwest quarter of the Southeast quarter of Section 22, Township 27 North, Range 6 East, W.M.

Exs. 5, 8, 9. [3]

Thus, Lot 4 is not legally described by 'metes and bounds' with terminal points, angles and distances, as is often the case with irregularly shaped properties. Rather, it is described as a fractional portion of a larger square section, the location of which is fixed and not in dispute. There is no contention that this legal description is defective in any way, or that the legal descriptions of this boundary in any of the relevant deeds conflict.

Although Mr. Caverly also pointed out to Judy or her husband the survey monuments set by Voorheis, none of those survey monuments were placed at either end of the disputed boundary. Ex. 20. There was no evidence and no finding by the court that Mr. Caverly 'pointed out' the subject boundary to Judy or her husband.

Judy's husband installed a culvert over a small stream on Lot 4 in order to access the western portion of Lot 4 'decades ago' with the knowledge and assistance of Mr. Caverly. CP 48, f.f. 32; CP 57, ln. 1.

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[3] The property so described is also subject to easements for access and utilities, the legal descriptions of which do not affect its boundaries.

In 1988, Judy's son David installed in the northern part of Lot 4 a meandering, barbed wire fence to create an enclosure for horses. He attached it to trees wherever possible, and to 'T-posts' otherwise. This fence was neither straight nor intended to mark any of Lot 4's straight boundaries. CP 50, f.f. 37. The following year, 1989, Mr. Caverly sold Lot 2 to Caroll Boswell. CP 47, f.f. 27.

Judy cleared Lot 4 between 1992 and 1994. CP 48, f.f. 32. The horse-confinement fence previously installed by Judy's son was removed along with the trees to which portions of it were attached.

Judy had Lot 4 surveyed by Cascade Surveying after it was cleared and the survey markers could no longer be disturbed by the clearing activities. CP 48, f.f. 33. The parties, the trial court and the surveying community all agree that the Cascade survey accurately locates on the ground the subject boundary as legally described, and that the Voorheis survey is not accurate. CP 49, f.f. 34.

More than twenty years after Judy purchased Lot 4, Richard purchased the adjoining Lot 2 from Ms. Boswell in 1997. CP 42, f.f. 9. Richard signed an addendum to his purchase agreement, Exs. 1, 53, stating that there was a discrepancy between the subject boundary as surveyed by Cascade Surveying and what Ms. Boswell described as the

'lines of occupation' to a 'common boundary fence,' which was later determined by the court to be the meandering horse confinement Judy's son installed on Lot 4 the previous year. CP 50, f.f. 37. The addendum further states that Ms. Boswell made no warranties concerning the lot size or boundary locations. Richard therefore acquired Lot 2 with actual notice of these uncertainties regarding the boundary between his new lot and Judy's Lot 4. There is no mention of the Voorheis survey in the purchase agreement, its addendum or in the deed conveying to Lot 2 to Richard, Ex. 1, 53, 54, and he now admits that he did not rely on the Voorheis survey when he purchased Lot 2 in any event. Opening Brief, p. 29.

Thus, by signing the addendum to his purchase agreement for Lot 2, Richard acknowledged that the Rule's requirements applicable to subsequent grantees are not satisfied. His purchase was not made with reference to any particular boundary lines, and there was no meeting of the minds as to the identical tract of land to be conveyed. The terms of this addendum thereby effectively preclude any claim by Richard based on the Rule as a matter of law.

Judy filed this law suit against Richard for trespassing on her Lot 4 and using the culvert her husband installed without her consent, and to

quiet title based on the legal description in her deed, which is accurately represented by the Cascade survey. CP 379.

While the parties were engaged in pretrial discovery, Judy met her new neighbor, Mrs. Massey, and was thereby surprised to learn that Richard had sold Lot 2 to the Massey family, with whom Judy had no quarrel about their common boundary.

Several months after Richard sold Lot 2, he filed an amended answer containing counterclaims by which he asked the court to carve out a narrow strip of land interposed between Judy's Lot 4 and the Massey family's adjoining Lot 2, and to quiet title to that strip in Richard's favor. The culvert Judy's husband installed lies within the area to which Richard claimed title. CP 57, lns. 1 – 9; Ex. 23. The location of the culvert is such that if Richard acquired it he could use it to cross the small stream that flows through both lots to gain access to his other real estate holdings to the west of Lots 2 and 4. As the trial court concluded, Richard's counterclaims are ". . . a means of establishing access to Richard Anderson's land to the west." CP 42, f.f. 10.

Richard has not alleged that his real estate holdings to the west of Lots 2 and 4 are land-locked, nor does he claim entitlement to an easement for access. Indeed, when Richard sold Lot 2 he reserved a 60 foot wide

easement across its south end for access to his land to the west. CP 42, f.f. 10. However, there is no evidence of any culvert crossing the stream within the access easement Richard reserved.

Rather than use the access easement he reserved when he sold Lot 2, Richard saw an opportunity to turn Ms. Boswell's mistaken belief that the horse fence marked the boundary to his advantage, so that he rather than Judy would benefit from the efforts expended by Judy's late husband in installing the culvert on the land Richard claimed. Richard's assertion that Judy, who voluntarily dismissed all her claims and sought no affirmative relief at trial, is attempting to obtain a windfall is remarkably frivolous.

Both parties moved for summary judgment. Richard's motion was denied. In denying Richard's motion Judge Castleberry entered an order noting that the parties were in agreement that the only survey in existence when Lots 2 and 4 and the boundary separating them were established was the 1969 Voorheis survey. That order further states that if Richard proved any of his counterclaims based on a survey, it would have to be the Voorheis survey because it was the only survey of the general area in the relevant time frame, although it did not actually survey Lot 2 or 4 or the boundary separating them.

Judy asserted in her summary judgment motion that Richard's claims became moot and he lost his standing to assert them when he sold Lot 2 during the pendency of this action, and therefore no longer owned any property on either side of the boundary in question. Judy also requested and was granted to leave voluntarily dismiss her claims against Richard, CR 350. CP 41, ln. 6. Judy's summary judgment motion was granted, and Richard appealed to this Court. No. 64504-8-1.

This Court affirmed the voluntary dismissal of Judy's claims, reversed the dismissal of Richard's counterclaims and remanded the case for trial on Richard's counterclaims.

The Voorheis survey itself had not been pled among Richard's counterclaims as a basis of recovery. To the contrary, the theories of recovery in his counterclaims by their nature all operate to quiet title to a boundary at odds with the legal description, while a survey necessarily does the opposite, it embraces the legal description.

However, if there was any uncertainty about whether Richard's claims were based on the Voorheis survey itself, he eliminated any such uncertainty at the start of trial. Richard announced in his trial memo that ". . . only Rich's claims based on use and occupation . . . remain . . . More particularly, the evidence will establish the 'True Boundary' in this

case is the 'persistent line created by the swale and fence remnant . . ."
(CP 288, CP 295, Emphasis added.)

Thus, even if Richard's counterclaims can be construed broadly enough to include a claim based on the Voorheis survey itself, Richard affirmatively eliminated it as a basis for recovery at the start of trial.

The relevance of the Voorheis survey at trial was therefore limited to, at most, (a) possibly establishing the location of the straight part of the fence/ swale line on which Richard relied, and (b) the remedy to which Richard could be entitled pursuant to Judge Castleberry's order if he prevailed at trial on one of his counterclaims based on a survey.

Following four days of trial, the lower court ruled that Richard failed to carry his burden of proving any of his claims. The court concluded that the evidence did not support Richard's theory that an express physical boundary had been established by Mr. Caverly, i.e. a fence and irregularly shaped swale. Rather, the court found that:

> . . . [Mr. Caverly] sold Charles and Judy Anderson Tracts 3 and 4 based upon his rough sketches and his legal description, not upon physical features visible to the common grantor and the buyers.

The court therefore ruled:

> . . . that Defendants have not established by clear, cogent and convincing evidence that the common grantor established a boundary other than the one set

> forth in the legal description. It follows that there could not have been an agreement or meeting of the minds between Mr. Caverly and Charles and Judy Anderson regarding such a boundary.

CP 58.

The court also noted that Richard did not establish any of his claims by a preponderance of the evidence either. CP 58, fn. 9.

Richard does not challenge any of the trial court's factual determinations. Opening Brief, p. 27. The terms of an agreement are matters of fact. Spradlin Rock Prods., Inc. v. Pub. Util. Dist. No. 1, 164 Wn. App. 641, 266 P.3d 229 (2011), P.E. Sys., LLC v. CPI Corp., 176 Wn.2d 198, 289 P.3d 638, (2012). Richard therefore does not challenge the trial court's determination that Mr. Caverly established and Judy agreed to the boundary based on the legal description and rough sketch he provided. That unchallenged ruling is a verity on appeal. Robel v. Roundup Corp., 148 Wn.2d 35, 59 P.3d 611(2002).

Furthermore, even if the Voorheis survey had been pled and not eliminated as a basis for recovery at the start of trial, Richard failed to demonstrate, and the court did not find any correlation between a fictional Voorheis survey line and any line of use and occupation which constituted the only basis for his remaining claims. To the contrary, the court found

that the fence Richard relied on was not a boundary fence, but rather the meandering horse fence Judy's son installed in 1988. CP 50, f.f. 37.

The trial court therefore ruled that Richard failed to carry his burden of proving that Mr. Caverly established and Judy agreed to a boundary other than the legally described boundary.

Although the trial court dismissed all of Richard's counterclaims, it initially directed reformation of the boundary's legal description. This was due to the trial court's acknowledged misunderstanding of what the parties had agreed to as reflected in Judge Castleberry's order. As the order states, the parties merely agreed that the Voorheis survey was the only survey of the general area existing when Mr. Caverly created Lot 4 and conveyed it to Judy in 1976. CP 341.

Judge Castleberry ordered that if Richard prevailed at trial on any of his counterclaims, and if he did so based on a survey, it would have to be the only survey then existing, the Voorheis survey. This order plainly established conditions precedent to any such reformation. Its operative language states:

> If the Common Grantor Doctrine, Mutual Recognition and Acquiescence and/or Adverse Possession are found to be applicable based on a survey, it would be the Voorheis Survey. Any award of property under any of those three boundary doctrines shall then be legally described using the Cascade Survey methodology.

(CP 341, Emphasis added.)

Judy filed a timely motion for partial reconsideration because any such reformation first required satisfaction of the conditions precedent in Judge Castleberry's order, and the trial court's findings actually established that those conditions were not satisfied. Upon reconsideration, the court concluded that reformation was subject to the conditions precedent Judge Castleberry ordered, and that they were not in fact satisfied. The court therefore properly granted Judy's motion and entered amended findings with the language reforming the boundary removed.

Richard thereafter filed his own CR 59 motion for 'reconsideration' in which he urged the trial court to reform the boundary based on the Voorheis survey.

Unlike his claims based on 'use and occupation' which he represented to be his only remaining claims at the start of trial, Richard's new post-trial claim is not based on use and occupation at all. It is based instead on the Voorheis survey itself, or at least on a line hypothetically projected from it since Voorheis survey never surveyed the boundary at issue. Thus, although Richard's counsel styled his motion as one for 'reconsideration,' he did not ask the trial court to reconsider this new (or previously eliminated) claim, but rather to give it an initial consideration,

after the trial's completion. The trial court was well within its discretion in denying Richard's motion for 'reconsideration.'

In summary, the court below ruled that Richard failed to carry his burden of proof at trial, and also denied his motion for 'reconsideration.' Once again, Richard's counterclaims were dismissed, this time on their merits, and once again Richard appeals their dismissal to this Court.

In addition to Richard's failure to carry his burden of proof at trial, the addendum to his purchase agreement constitutes affirmative proof that the requirements of the Rule are absent. That addendum is dispositive, and the trial court's decision may be affirmed on that basis alone.

On appeal, Richard acknowledges on page 29 of his Opening Brief that he believed Mr. Caverly established a curved boundary. Richard therefore admits that he did not purchase Lot 2 in reliance on the Voorheis survey or on the straight boundary a line projected from that or any survey would necessarily yield. He nonetheless hopes to interject that survey into the case now as a last ditch attempt to prevail by improperly challenging Judy's title, since the strength of his own title to the disputed area was demonstrated at trial to be inadequate.

The trial court's dismissal of Richard's counterclaims and its denial of his motion for 'reconsideration' should both be affirmed.

IV. ARGUMENT

A. THE SCOPE OF THIS APPEAL IS EXTREMELY NARROW.

As set forth on page 27 of his Opening Brief, Richard does not challenge any of the trial court's fact findings, and asserts only that the court below committed errors of law.

The trial court ruled that Richard failed to prove the visible, irregularly shaped boundary he advocated at trial and referenced in his trial memo as the "True Boundary." Richard does not challenge that ruling. As he stated on page 30 of his opening brief, "That curved line claim is now WAIVED." (Richard's emphasis.) Richard also acknowledges on page 28 of his Opening Brief that his counterclaims for adverse possession and mutual recognition and acquiescence are premised on that same 'curved' boundary, and are therefore now out of the case as well. Richard's common grantor counterclaim is therefore the only claim arguably at issue on appeal.

Thus, the only 'True Boundary' Richard asserted at trial and in his trial memo, i.e. the 'curved' one, is now admittedly out of the case, which begs the question, 'What, if anything, is left to decide?' According to Richard, left to decide is whether the trial court erred by not recognizing

the Voorheis survey itself, or a fictional 'Voorheis survey line' projected from it as the boundary based on the common grantor rule.

1. Richard did not Plead a Voorheis survey Line as a Basis for Recovery in his Counterclaims.

Richard's common grantor counterclaim states in relevant part:

> The Common Grantor had built a fence on the Voorheis Survey line years before [Ms. Boswell purchased Lot 2 in 1989]. The boundaries marked on the ground by the fence, and used by the Common Grantor as well as Boswell, were immediately binding on Boswell. . . Said boundaries are also binding on Defendants as subsequent purchasers with inquiry notice under the Common Grantor Doctrine.

CP 369, Emphasis added.

Thus, Richard's common grantor counterclaim is based directly on a physical boundary, one marked on the ground by the fence, and necessarily at odds with the legally described boundary. All three of Richard's counterclaims share a distinctive, defining feature. They each provide a means of establishing a boundary that is at odds with the boundary reflected in an accurate survey of the boundary legally described in the deed. Lamm v. McTighe, 72 Wn.2d 587, 591, 434 P.2d 565 (1967).

Thus, the Rule operates to establish a boundary at odds with the legal description. A survey by its nature relies on the legal description, and the Voorheis survey as a basis for recovery was therefore not pled.

A claim based on the Voorheis survey constitutes a compulsory counterclaim Richard was required to plead pursuant to CR 13(a) but did not do so. A claim constitutes a compulsory counterclaim that must be pled pursuant to CR 13(a) ". . . if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . ." Defendants' new claim based on the Voorheis survey certainly arises out of the transactions and/or occurrences that are the subject of Richard's claims, i.e. the real property conveyances at issue. Failure to plead a compulsory counterclaim bars the claimant from raising it thereafter, Krikava v. Webber, 43 Wn. App. 217, 716 P.2d 916 (1986).

Richard claims on page 33 of his brief that the trial court erred by 'assuming' the fictional Voorheis survey line was not part of his common grantor counterclaim. It is rather telling that Richard does not point to the language of the counterclaim itself to support this contention. Rather, he argues that he sufficiently asserted the Voorheis survey line as a basis for recovery simply by mentioning it among the denials (but not his affirmative defenses) in his initial answer to Judy's complaint, in which he did not plead any counterclaims. His actual counterclaims were filed subsequently with his amended answer. CP 371 – 378.

CR 13 provides that where, as here, a defendant has a claim against the plaintiff, the defendant shall state such a claim "as a counterclaim." Richard points to no language of his counterclaim asserting the Voorheis survey itself as a basis for recovery, and cites no authority that would excuse him from complying with the requirements of CR 13. Furthermore, Richard did not seek leave to amend his counterclaims to include the Voorheis survey as a basis for recovery.

The Voorheis survey was not pled as a basis for recovery.

2. Richard Affirmatively Eliminated the Voorheis Survey as a Basis for Recovery at the Start of Trial.

Even if Richard's counterclaim could be construed broadly enough to include the Voorheis survey as a basis for recovery, Richard eliminated it as such at the outset of trial. He stated in his trial memorandum in relevant part that ". . . only Rich's claims based on use and occupation . . . remain . . . More particularly, the evidence will establish the True Boundary ' in this case is the 'persistent line created by the swale and fence remnant . . . CP 288, 295. Emphasis added.

Thus, Richard affirmatively limited his claims to only those based on use and occupation. A claim based on a survey necessary conflicts with that limitation because surveys plot boundaries on the ground based on legal descriptions rather than on considerations of use and occupancy.

A claim based on the Voorheis survey also conflicts with the curved line along physical features he identified as the 'True Boundary.' The Voorheis survey was therefore not a potential basis for recovery at trial.

As with many of the shortcomings of his case, Richard unfairly blames the trial court. As he stated on page 34 of his Opening Brief:

> . . . the trial court overlooked and did not recognize the lack of logic, injustice and error in throwing out the Voorheis Survey line. . .

If anyone 'threw out' the 'Voorheis survey line' from this case it was Richard himself, who is now in the unenviable position of arguing that the trial court erred by relying on his own representation regarding which of his claims remained. To the contrary, the court would have erred by allowing Richard to pursue such a claim in contravention of his trial memo representations, which would have unfairly prejudiced Judy.

Richard did seek to raise the Voorheis survey as a basis for recovery after trial in a motion for 'reconsideration' pursuant to CR 59. In a procedurally analogous situation the court in JDFJ Corp. v. International Raceway, Inc., 97 Wn. App. 1, 970 P.2d 343(1999) stated:

> Civil Rule 59 does not permit a plaintiff, finding a judgment unsatisfactory, to suddenly propose a new theory of the case. JDFJ's motion for reconsideration was in essence an inadequate and untimely attempt to amend its complaint in general, violating equitable rules of estoppel, election of

> remedies, and the invited error doctrine. We refuse to permit such a perversion of the rules.

Id. at 7.

Richard's motion for 'reconsideration' is the same 'perversion of the rules' this Court refused to permit in JDFJ, *Id.*[4] Indeed, Richard's CR 59 motion did not actually seek 'reconsideration' at all. Rather, it sought under the guise of a motion for reconsideration the initial consideration of a new (or previously eliminated) claim fundamentally different than what he represented to the trial court as his 'only remaining claims.' Richard should properly be estopped from contradicting his representation to the court and Judy about what claims remained to be tried.

Furthermore, by identifying an irregularly shaped line formed by physical features as the true boundary in his trial memo, Richard made a binding election of remedies that also operates to eliminate the Voorheis survey as a possible basis for recovery. The Court in Birchler v. Castello Land Co., 133 Wn. 2d 106, 942 P.2d 968 (1997) described the elements of the doctrine of election of remedies as follows:

> Three elements must be present before a party will be held bound by an election of remedies. Two or more remedies must exist at the time of the election; the remedies must be repugnant and inconsistent with each other; and the party to be bound must have chosen one of them.

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[4] JDFJ, *Id.*, is not distinguishable on the basis that Richard is not the plaintiff. Richard was the 'counterclaim plaintiff' at trial. He was the only party who asserted a claim at trial and had a burden of proof to carry.

Id. at 112.

The three requirements for a binding election of remedies are all present. First, two or more remedies clearly existed at the start of trial when Richard made his election. These included the counterclaims he pled of title to a straight, physical fence line; title to an irregularly-shaped fence / swale line and possibly the Voorheis survey itself, assuming his counterclaims can be construed broadly enough to include such a claim. Richard specifically elected the remedy of title based on use and occupation to a physical, irregularly shaped line.

Second, the remedy sought in Richard's reconsideration claim' is 'repugnant and inconsistent' with his trial claim. Richard's trial claim was for title at odds with the legally described boundary. His post-trial claim is based on a survey and therefore embraces rather than rejects the boundary as legally described. Richard's trial claim was premised on occupation to an irregularly-shaped line formed by physical features. Richard's post-trial claim does not rely on occupation or physical features at all, but rather on a straight survey line that is purely fictional rather than physical.

Third, Richard clearly made an election among the available remedies at the commencement of trial by formally announcing that his 'only remaining claims' were based on use and occupation, and that the

true boundary is established by physical features, i.e., the irregularly shaped fence / swale line rather than any straight survey line.

Thus, all three elements of an election of remedies are present, and Richard is therefore bound by the election he made at the commencement of trial, which the trial court and Judy both reasonably relied on.

The relevance of the Voorheis survey at trial was therefore limited to, at most, (a) possibly establishing the location of the straight part of the fence / swale line on which Richard relied (which he failed to accomplish), and (b) the remedy to which Richard could be entitled pursuant to Judge Castleberry's order if he prevailed at trial on one of his counterclaims s based on a survey. It was not a possible basis for recovery.

B. STANDARD OF REVIEW.

As set forth in his amended notice of appeal, CP 1, Richard appeals from two separate rulings of the trial court; (1) its determination that Richard failed to carry his burden of proof at trial and the resulting dismissal of his counter claims; and (2) its denial of Richard's motion for 'reconsideration,' purportedly pursuant to CR 59.

1. Standard Governing the Dismissal of Appellants' Counterclaims.

a) A Trial Court's Rulings should be Affirmed on any Basis Supported by the Record.

"It is well recognized that an appellate court may uphold the trial court's ruling on appeal on any basis supported by the record." Stieneke v. Russi, 145 Wn. App. 544, 559 – 560, 190 P.3d 60 (2008).

Richard does not challenge any of the trial court's findings of fact, but rather contends that he is entitled to judgment as a matter of law based on the unchallenged fact findings. Opening Brief, p. 27. "Judgment as a matter of law is proper if viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." Estate of Dormaier v. Columbia Basin Anesthesia, 177 Wn. App. 828, 313 P.3d 431, 446 (2013).

Thus, the relevant inquiry on appeal is whether there any basis in the record, when viewed in the light most favorable to Judy as the verdict winner, upon which the trial court's rulings may be affirmed.

b) A Party Seeking to Quiet Title Must Succeed on the Strength of his own Title, not on any Weakness in his Opponent's.

It is well established in Washington that "A party seeking to quiet title must succeed on the strength of its own title, and cannot prevail based on the weakness of the other party's title." Secs. & Inv. Corp. v. Horse Heaven Hgts., 132 Wn. App. 188, 195, 130 P.3d 880 (2006).

Accordingly, appellate review necessarily focuses on the extent to which Richard demonstrated the strength of his own title at trial, rather than any alleged weaknesses in Judy's title to the disputed area. Thus, even if there had been some weakness in Judy's title to the disputed area, it could not constitute a basis upon which to reverse the trial court.

As Richard explains on pages 6 and 27 of his Opening Brief, this is a 'case about Judy,' in which he "only seeks to bind Judy" to a boundary hypothetically projected from the Voorheis survey. Richard thereby admits that he is no longer relying on the strength of his own title, and instead relies improperly on an alleged weakness in Judy's. This alone constitutes a sufficient basis upon which to deny Richard's appeal.

2. The Trial Court's Denial of Defendants' Post-Judgment Motion for Reconsideration is Reviewed for Abuse of Discretion.

The second ruling from which Richard appeals is the denial of his motion for 'reconsideration' by which he seeks to bind Judy to the Voorheis survey. The court in River House Dev., Inc. v. Integrus Architecture, PS, 167 Wn. App. 221, 272 P.3d 289 (2012) stated, "We review a trial court's denial of a motion for reconsideration for abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.* at 231. "The trial court's

discretion extends to refusing to consider an argument raised for the first time on reconsideration absent a good excuse." *Id.*

3. Richard failed to carry his Burden of Proof on his Common Grantor Rule Claim by any Standard of Proof.

The trial court ruled that Richard failed to carry his burden by clear and convincing evidence, or even by the less demanding preponderance of the evidence standard. CP 58. Which of these two standards of proof should apply is not critical on this appeal because the court below considered both and concluded that Richard satisfied neither. There is no possibility of reversible error by the trial court on this issue. [5]

C. RICHARD FAILED TO SATISFY THE REQUIREMENTS OF THE COMMON GRANTOR RULE.

Richard's three counterclaims all share a distinctive, defining feature. They each provide a means of establishing a boundary that is at

[5] No published appellate decision has directly established the plaintiff's (or as here, counterclaim plaintiff's) burden under the Rule. Related doctrines require proof by clear and convincing evidence. See Thomas v. Harlan, 27 Wn.2d 512, 518, 178 P.2d 965 (1947) ("Title to real property is a most valuable right which will not be disturbed by estoppel unless the evidence is clear and convincing."); Merriman v. Cokeley, 168 Wn.2d 627, 630, 230 P.3d 162 (2010) (Acquiescence and mutual recognition must be proved by clear, cogent, and convincing evidence.); *accord* Keierleber v. Botting, 77 Wn.2d 711, 715, 466 P.2d 141 (1970); (Reformation of a deed conveying a property interest for mutual mistake requires proof by clear, cogent, and convincing evidence.). The common grantor rule is similar in kind to these doctrines; the rationale that boundary adjustments require this higher standard of proof is equally applicable to it.

odds with the true boundary reflected in an accurate survey of the boundary legally described in the deed.

> Boundaries between adjoining properties, at odds with the true boundary as revealed by subsequent survey, may be established, under appropriate circumstances, through the following doctrines, all of which have been recognized in this state: (1) Adverse possession . . . (4) location by a Common grantor; and/or (5) mutual recognition and acquiescence in a definite line by the interested parties for a long period of time.

Lamm v. McTighe, 72 Wn.2d 587, 591, 434 P.2d 565 (1967).

The requirements for application of the common grantor rule in particular, Richard's only remaining basis for recovery, are as set forth in Fralick v. Clark County, 22 Wn. App. 156, 160; 589 P.2d 273,275 (1978), which the parties and trial court have all cited as controlling:

> It is clear that a grantor who owns land on both sides of a line which he has established as the common boundary is bound by that line. . . However, for the boundary line to become binding and conclusive on grantees,
>
> It must plainly appear that the land was sold and purchased with reference to the line, and that there was a meeting of the minds as to the identical tract of land to be transferred by the sale.
>
> In other words, the question of applicability of the common-grantor theory presents two problems: (1) was there an agreed boundary established between the common grantor and original grantee, and (2) if so, would a visual examination of the property indicate to subsequent purchasers that the deed line was no longer functioning as the "true boundary?"

Id. at 160 (Emphasis added.)

1. The Common Grantor did not Establish an Agreed-Upon Boundary Other than the Legally Described Boundary.

The first level of analysis under this Rule, i.e the first of the two 'problems' identified by the court in Fralick, *Id.,* focuses on the common grantor and the original grantee, Mr. Caverly and Judy respectively. It specifically focuses on whether the common grantor established and the original grantee agreed to a boundary at odds with the boundary legally described in the deed. Fralick, *Id.* Lamm v. McTighe, *Id.* Had the common grantor established an agreed-upon boundary at odds with the legal description, the Rule would have bound him to the boundary he established. Conversely, if the common grantor and original grantee did not agree on a boundary at odds with the legal description, the Rule by its terms does not apply.

Where, as here, the grantor establishes a boundary by its legal description, he is of course bound by it, but not by operation of this Rule.

The trial court concluded from the evidence that Mr. Caverly sold Lot 4 to Judy ". . . based upon his rough sketches and his legal description . . ." The court found that Richard therefore failed to prove that ". . . the common grantor established a boundary other than the one set forth in the legal description." Thus, the court ruled that Mr. Caverly

and Judy agreed to a boundary based on the legal description rather than one at odds with it. CP 58.

In order for Richard to overcome the court's finding that the common grantor and initial grantee agreed by a boundary established by the legal description rather than at odds with it, he would first have to properly challenge it. However, Richard makes it clear is that ". . . this appeal is not a factual appeal at all. It is a purely legal appeal." (Opening Brief, p. 27). The terms of an agreement are questions of fact, Spradlin Rock Prods., Inc. v. Pub. Util. Dist. No. 1, 164 Wn. App. 641, 266 P.3d 229 (2011), P.E. Sys., LLC v. CPI Corp., 176 Wn.2d 198, 289 P.3d 638, (2012), and Richard does not challenge any of the trial court's factual determinations. The trial court's unchallenged finding that the agreement between Mr. Caverly and Judy was that of a boundary established by the legal description, not by a particular survey, is a verity on appeal. Robel v. Roundup Corp., 148 Wn.2d 35, 59 P.3d 611(2002).

Yet Richard disingenuously refers to the agreement between Mr. Caverly and Judy as the "Voorheis Survey agreement" on page 6 of his brief, and similarly claims on pages 42 and 44 that they agreed to the "Voorheis Survey line." This contention is directly contradicted by the record.

Even if Richard had effectively challenged the trial court's fact finding that the only boundary established by Mr. Caverly and agreed to by Judy was the legally described boundary, any such challenge would necessarily fail. Richard admits that he did not rely on the Voorheis survey. He believed Mr. Caverly established a curved boundary rather than the straight boundary a line projected from the Voorheis survey would necessarily yield. Opening Brief, p. 29.

Consequently, the first requirement of the Rule, that the common grantor established an agreed-upon boundary at odds with the one legally described, is not satisfied. This finding is dispositive of Richard's common grantor claim. The Rule's second 'problem,' directly applicable to subsequent grantees such as Richard, arises only if the first 'problem' is resolved in favor of the Rule's applicability. Fralick. *Id.* In other words, because the common grantor and Judy did not agree to a boundary at odds with the legal description, there is no basis on which to apply the second half of the Rule, which operates only to determine whether a boundary at odds with the legal description should also bind subsequent grantees.

Richard's reliance on Light v. McHugh, 28 Wn. 2d 326, 183 P.2d 470 (1947) is misplaced. The Common Grantor Rule was not involved or even mentioned in that decision, which thus provides no authority here.

Because Richard failed to clear the Rule's first hurdle, he did not reach its second one. This is yet another basis upon which Richard's appeal should be rejected.

2. The Evidence Precludes Application of the Rule to Subsequent Grantees Like Richard.

Even if Mr. Caverly had established an agreed-upon boundary other than the one he legally described, Richard failed to demonstrate that such a boundary would be conclusive as to subsequent grantees, because he did not satisfy the Rule's visual inspection requirement. Fralick, *Id.*

Indeed, not only did Richard's evidence fail to satisfy the Rule, his evidence affirmatively establishes that the requirements of the Rule are absent. As Richard pled in his counterclaim, he is a subsequent grantee under the Rule. As such, he must satisfy the requirements of the Rule he invoked that are directly applicable to him.

Richard did not prove, and the trial court made no finding that Ms. Boswell acquired any rights to the disputed area pursuant to the Rule from Mr. Caverly. Ms. Boswell therefore had no such property rights to the disputed area to convey to Richard.

However, even assuming for argument's sake that Ms. Boswell had acquired rights to the disputed area under the Rule, she did not convey any such rights to the disputed area to Richard. To the contrary,

Ms. Boswell made it unmistakably clear in the addendum to Richard's purchase agreement that she did not purport to convey to Richard any property rights other than those established by the legal description for Lot 2. That addendum states that there was a discrepancy between the subject boundary as surveyed by Cascade and what Ms. Boswell described as the 'lines of occupation' to a 'common boundary fence.'[6] It further states that Ms. Boswell made no warranties to Richard concerning the lot size or boundary locations. Richard therefore acquired Lot 2 with actual notice of these uncertainties regarding the true boundary between Lots 2 and 4. Ex. 1, 53, p. 3; CP 49, f.f. 37.

Thus, by signing the addendum Richard acknowledged that his purchase was not made with reference to any particular boundary lines other than those legally described, and there was no meeting of the minds as to the identical tract of land to be conveyed. The Rule states that in order for a boundary established by the common grantor at odds with the legal description (had Mr. Caverly actually established such a boundary), to become conclusive as to subsequent grantees:

> It must plainly appear that the land was sold and purchased with reference to the line, and that there was a meeting of the minds as to the identical tract of land to be transferred . . .

[6] The court found that this fence was actually the meandering horse-confinement fence installed by Judy's son, which was not intended to mark the straight boundary.

Fralick, *Id.* at 22 Wn. App.160. Emphasis added.

The addendum is therefore dispositive of Richard's common grantor claim as a matter of law.

It is also noteworthy that the Voorheis survey is not mentioned in Richard's purchase agreement, its addendum or his deed. Ex. 1, 53, 54. In fact, Richard believed Mr. Caverly established a curved boundary. He therefore did not rely on the Voorheis survey or the straight boundary a line projected from it would necessarily yield when he purchased Lot 2.

Richard relies on a footnote to the Fralick decision which recognizes an exception, not applicable here, to the Rule's visual inspection requirement. It states:

> Of course, even in the absence of an on-the-ground marking, a subsequent purchaser with actual notice of the agreement is bound by the line. Furlow v. Dunn, 201 Ark. 23, 144 S.W.2d 31 (1940); Browder, The Practical Location of Boundaries, 56 Mich. L. Rev. 487, 529 (1958).

(Fralick, 22 Wn. App., 160, fn. 1, Emphasis added.)

The agreement to which Furlow, *Id.* specifically applies is an agreement between the common grantor and original grantee to a boundary at odds with the legal description. The trial court concluded that no such agreement was reached. CP 58. Furthermore, the actual notice to which Furlow refers is a subsequent grantee's actual notice of such an

agreement between the common grantor and the initial grantee. Richard admits that he did not have such notice, since he believed Mr. Caverly established a fence along the curved visible line as the southern boundary of Tract 2 . . ." Opening Brief, p. 29.

Furlow is therefore inapplicable because the types of agreement and notice it requires are both absent. Richard nonetheless argues Furlow's applicability by misstating its holding. He argues that Furlow applies because Judy had actual notice of her agreement with Mr. Caverly and is bound by it. However, Furlow's exception to the Rule's visual inspection requirement is satisfied only by a subsequent grantee's actual notice of an agreement between the common grantor and initial grantee to a boundary at odds with the legal description. What Judy and Mr. Caverly agreed to was the boundary as legally described in any event. The Rule has no applicability because neither the visual inspection requirement nor the alternative of proving a subsequent grantee's actual notice of an agreement to a boundary at odds with the legal description is satisfied.

The addendum alone provides a yet another basis upon which the trial court's verdict should be affirmed because it is undisputed proof that the Rule's requirements applicable to subsequent grantees are absent.

D. RICHARD'S POSITION ON APPEAL IS CONTRARY TO THE RULE HE INVOKED.

At the heart of Richard's appellate argument is yet another unfounded claim of confusion by the trial court. Richard claims the trial court was confused because "Most Common Grantor Cases Involve 'Subsequent Purchasers.'" Opening Brief, p. 34. Yet that is exactly what this is, a common grantor case involving a subsequent purchaser. His counterclaim states: "The boundaries marked on the ground by the fence . . . are also binding on Defendants as subsequent purchasers with inquiry notice under the Common Grantor Doctrine." (Emphasis added.)

Richard invoked this Rule. He is admittedly a subsequent grantee, and as such had the burden of satisfying the Rule's requirements that relate specifically to subsequent grantees. He briefed and took great pains at trial to satisfy the Rule's requirement that a visual inspection by a subsequent grantee would indicate that something other than the legally described boundary was functioning as the true boundary. CP 293 – 295, Fralick, *Id.* Richard could not satisfy the Rule's visual inspection requirement at trial, so he now simply pretends it does not apply to him after all, contrary to the Rule and to his own allegations of his counterclaim under this specific Rule.

On appeal, Richard takes this frivolous notion to an even greater extreme, arguing in essence that the Rule's visual inspection requirement

does not apply to anyone covered by the Rule; not to subsequent grantees like him, not to the common grantor and not to Judy as the initial grantee.

Richard's specific contention is that the court below improperly applied Rule's visual inspection requirement to Judy, which is simply not the case. In ruling on Richard's common grantor claim, the trial court stated in relevant part, "Here, Defendants must establish . . . (2) [t]hat a visual inspection by subsequent purchasers would indicate that the deed line was no longer serving as the true boundary." CP 54, l. 23. That is an entirely accurate reflection of the Rule's second 'problem' which is directly applicable to subsequent grantees. Fralick. *Id.*

The lower court's written decision then addresses the evidence Defendants Richard and his wife introduced ". . . to support their theory that an express physical boundary had been established by Mr. Caverly and agreed to by Judy . . ." CP 58. The court concluded that Mr. Caverly sold Tracts 3 and 4 to Judy ". . . based upon his rough sketches and his legal description, not upon physical features visible to the common grantor and the buyers."

This in no way imposed the Rule's visual inspection requirement on the conveyance from the common grantor to the initial grantee. Rather than imposing that requirement on Judy, the court was announcing its

rejection of Richard's contention that Mr. Caverly established a boundary based on physical features, i.e, a fence line and swale. CP 58.

Richard's rationale for adopting the untenable position that he can circumvent this requirement of the Rule he invoked is that "[t]his is a 'case about Judy,' in which he "only seeks to bind Judy" to the boundary Richard favors, specifically a boundary hypothetically projected from the Voorheis Survey. Opening Brief pp. 6, 27.

To the contrary, this appeal is about whether the court below erred in holding that Richard failed to carry his burden of satisfying the requirements of the Rule he invoked that directly apply to him as a subsequent grantee. Richard cited no authority for the proposition that a subsequent grantee can prove a common grantor rule claim without satisfying either the visual inspection requirement or the Rule's alternative requirement of proving his actual notice of an agreement between the common grantor and the initial grantee to a line at odds with the legal description.

This appeal is about whether Richard proved the specific allegation of his counterclaim, that "The boundaries marked on the ground by the fence . . . are also binding on Defendants as subsequent purchasers with inquiry notice under the Common Grantor Doctrine."

Richard's current position not only directly contradicts his counterclaim and the Rule he invoked, it also violates the even more fundamental rule that a party seeking to quiet title must succeed on the strength of his own title rather than on an alleged weakness in his adversary's title. Secs. & Inv. Corp. v. Horse Heaven Hgts., 132 Wn. App. 188, 130 P.3d 880 (2006). By admitting that he now seeks only to bind Judy to the Voorheis survey, Richard has abandoned any further attempt to quiet title on the strength of his own title. His appeal must therefore fail.

Furthermore, Richard's attempt to apply the Rule against Judy is contrary to the policy behind the Rule. The court in Levien v. Fiala, 79 Wn. App. 294, 902 P.2d 170 (1995) stated, "The common grantor doctrine recognizes the original grantee's good faith reliance on the boundary description provided by the common grantor who originally owned both lots in their entirety and thus had it completely within his power to determine the location of that boundary . . . The common grantor doctrine is based on this special relationship between the original grantee and the common grantor. . ." The court further noted that the policy of this Rule is ". . . protecting an innocent original good faith grantee." *Id.* at 302.

The trial court's rulings are consistent with the Rule's policy of protecting innocent good faith grantees such as Judy. Richard's attempt to use the Rule as a weapon against Judy directly conflicts with that policy, and with the rule that Richard can only succeed in a quiet title action on the strength of his own title. His appeal must therefore fail.

E. A BOUNDARY LINE PROJECTED FROM THE VOORHEIS SURVEY IS NOT SUPPORTED BY THE FACTUAL RECORD, AND WOULD BE UNDULY SPECULATIVE.

Even if the Voorheis survey had been properly pled as a basis for recovery, and even if Richard had not eliminated it as such at the start of trial, a 'Voorheis Survey Line' has no basis in fact, and such a line cannot be established without improper speculation.

The court below found that "All of the individuals who purchased one of the Tracts numbered 1 – 4 from Mr. Caverly did so based upon . . . the Voorheis survey."[7] CP 48, f.f. 31. However, that survey had significant limitations. Voorheis did not actually survey Lots 2 or 4 or their common boundary. Ex. 20. The court found that even with its limitations, the Voorheis survey was the best, i.e. only, survey of the general area available at the time. CP 57, l. 21.

[7] Richard did not purchase from Mr. Caverly, nor did he otherwise rely on the Voorheis survey. The addendum he signed precludes any such reliance, and he admittedly believed Mr. Caverly and Judy agreed to a curved boundary that conflicts with any survey which would necessarily yield a straight line per the legal description.

Thus, while Judy may have relied on the Voorheis survey in the sense that it was the only available survey of the general area, she could not have relied on that survey for purposes of locating the boundaries of Lot 4. For that she would have to obtain a survey of Lot 4 itself, which she did once her lot was cleared and the survey stakes could not be disturbed by the clearing activities.

At least with respect to Lots 2 and 4, there was no evidence at trial, and the court made no finding that Mr. Caverly, some surveyor or anyone else projected a line from the Voorheis survey to locate the subject boundary at or near the time of the conveyance to Judy. A boundary line projected from the Voorheis survey therefore has no factual basis in the trial record. The 'Voorheus survey line' to which Richard repeatedly refers in his brief never existed in fact. It is pure fiction.

Furthermore, projecting a boundary for Lot 4 from the Voorheis survey would necessarily be an exercise in speculation. Before Judy's purchase in 1976, the Game Department's surveyor correctly plotted the location of a missing quarter corner monument in 1974, thereby revealing the error made by the 1969 Voorheis survey in using an existing pipe located more than 40 feet from the correct location. CP 47, f.f. 25, CP 49, f.f. 34. Thus, if Mr. Caverly or Judy had Lot 4 surveyed at or around the

time of Judy's conveyance, the surveyor would have necessarily encountered both the incorrectly located pipe Voorheis relied on and the monument correctly placed by the Game Department's surveyor.

Thus, a boundary line could not be projected from the 1969 Voorheis survey without speculating whether a surveyor in 1976 when Judy purchased Lot 4 would have used the incorrectly located pipe on which Voorheis relied, or the replacement monument correctly located and placed by the Game Department's surveyor in 1974. However, viewing the facts in the light most favorable to Judy, and giving her the benefit of all inferences reasonably drawn from the evidence, a surveyor in 1976 would more likely have chosen the Game Department surveyor's correctly located replacement monument, as the now generally accepted Cascade survey did. Such speculation would likely be resolved in Judy's favor.

F. EVIDENCE OF BOUNDARY DISPUTES REGARDING OTHER LOTS DOES NOT SUPPORT THE APPELLANT.

Richard also focuses on how some of the other landowners within the 'Caverly Tracts' dealt with boundary issues on their lots which arose from the errors in the now-disfavored Voorheis survey. The trial court's fact finding on this point, which Richard does not contest, is that many such other owners reformed their boundaries based on the accurate Cascade survey. CP 49, f.f. 35.

However, Richard focuses on the other lot Judy purchased from Mr. Caverly, Lot 3, which is not involved in this litigation. Located directly north of Judy's Lot 3 is Lot 1 owned by Mr. Campbell. Directly south of Judy's Lot 3 is Lot 5 owned by Mr. Cohrs. Ex. 3.

Fences had been in place along the north and south boundaries of Judy's Lot 3 for more than 10 years. Richard claims that these fences were purportedly installed along lines consistent with the Voorheis survey, but there was no evidence at trial of any surveys that actually projected such boundaries from the Voorheis survey.

With respect to Mr. Campbell's Lot 1 north of Judy's Lot 3, Mr. Campbell, Judy and her husband recorded a property line adjustment establishing Mr. Campbell's fence as the boundary between Lots I and 3, CP 50, f.f. 39, CP 51, f.f. 41, the 10 year adverse possession having already been exceeded. Lot 3's other three boundaries were unaffected.

With respect to Mr. Cohr's Lot 5 south of Judy's Lot 3, Mr. Cohrs, Judy and her husband all executed a 'letter of understanding.' Ex. 13. That letter references the property line adjustment solution with Mr. Campbell and his Lot 1, and states that ". . . the property line between tracts 3 and 5 would be treated the same." They agreed the fence purportedly installed per the original survey will remain as the boundary

and the legal description would be adjusted accordingly. Ex. 13. Once again, Lot 3's other three boundaries were unaffected by the resolution reflected in the letter of understanding. These resolutions therefore affected only the two boundaries of Lot 3 where fences were in place.

Richard argues from these facts that Judy had accepted the Voorheis survey in connection with her Lot 3, and that she should be somehow deemed to have done so with respect to her subject Lot 4 as well. This argument has no merit for numerous reasons. First, these boundary resolutions dealt only with Judy's Lot 3, which is not involved in this action. Neither resolution involves either Lot 2 or 4 or the subject boundary that separates them.

Second, those resolutions regarding Lot 3 reflect the acceptance of fences present for more than the 10 year adverse possession period rather than the Voorheis survey itself. Whether either of those fences is actually consistent with the Voorheis survey is not established on this record.

Third, the only boundaries addressed by these resolutions were those on which fences were present for more than 10 years. Lot 3's other boundaries were without fences and thus unaffected by these resolutions.

Fourth, the circumstances surrounding the boundary between Lots 4 and 2 are completely different. No boundary fence was present there for

over ten years. The meandering horse-confinement fence installed by Judy's son was no boundary fence at all. It did not stretch across the entire lot east-to-west, and was attached mostly to trees. It existed only from 1988 to 1994 at the latest. The letter of understanding therefore has no actual relevance to Lot 4 or its north boundary.

Finally, although the letter of understanding refers to certain Voorheis monuments, it does not refer to any such monuments at either the critical northeast or northwest corners of Lot 4. The Voorheis surveyor did not set a monument at either end of the subject boundary, which Mr. Caverly had not yet established when the Voorheis survey was performed. Ex. 20. The boundary resolutions affecting only the fenced north and south boundaries of Lot 3 are of no significance here.

IV. CONCLUSION

The trial court's decision may be affirmed on any and all of the several separate bases outlined above. The appellants' arguments conflict with their own pleadings, with the Rule they invoke yet seek to evade, and with Washington's well-settled law governing all quiet title claims.

Appellants provided no basis upon which to reverse, and Judy has demonstrated numerous bases upon which to affirm. The trial court's decision should be affirmed in all respects.

Respectfully Submitted this 11th day of April, 2014,

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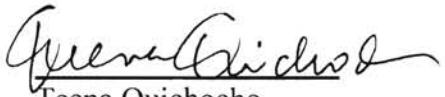
Krista L. White & Assoc., P.S.
Attorneys for Respondent Judith Anderson

CERTIFICATE OF SERVICE

I declare, under penalty of perjury under the laws of the State of Washington and the United States of America, that on the _____ of April, 2014, I caused a copy of Brief of Respondent Judith Anderson to be served on all parties and/or their counsel of record in the manner indicated below:

Gary W. Brandsetter	☒ By First Class Mail
PO Box 1331	[ ] By ABC Legal Messenger
Snohomish, WA 98291-1331	[ ] By Email
	[ ] By Facsimile

Dated this 11th day of April, 2014, at Seattle, Washington.



Teena Quichocho