91865-1

No. 70814-7-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JUDITH ANDERSON, a single woman,
Respondent/Plaintiff,
v.
RICHARD and MARGARET ANDERSON,
husband and wife,
Petitioners/Appellants/Defendants

ON PETITION FOR REVIEW FROM
DIVISION 1 OF THE COURT OF APPEALS
NO. 70814-7-1

PETITIONERS RICHARD AND MARGARET ANDERSON'S PETITION FOR REVIEW

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I. PETITIONERS AND COURT OF APPEALS DECISION

Petitioners are Richard and Margaret Anderson, Defendants/ Appellants below. They are no relation to Plaintiff/Respondent Judy Anderson. Petitioners seek discretionary review of Division 1's March 9, 2015 decision and denial of Petitioners' Motion For Reconsideration on April 16, 2015.

II. ISSUES PRESENTED FOR REVIEW

In conformance with RAP 13.4(b)(1), (2) and (4), the following considerations governing acceptance of review are at issue:

(1) The decision of the Court of Appeals is in conflict with this Court's decisions in ***Light v. McHugh***, 28 Wn2d 326, 183 P.2d 470 (1947) and ***Angell v. Hadley***, 33 Wn2d 837, 207 P2d 191 (1949);

(2) The decision of Division 1 is also in conflict with the two "questions" in ***Fralick v. Clark County***, 22 Wn App 156, ***160 and n.1,*** 589 P.2d 273 (1978) ***rev.den.*** 92 Wn2d 1005 (1979) a decision of Division 2 which, since it was denied review, possesses Supreme Court authority; and

(3) This Petition involves two issues of substantial public interest regarding (a) clarification of the Common Grantor Doctrine, as demonstrated by a non-party motion to publish made to, but denied by

Division 1, as well as (b) the superiority of "actual knowledge" to "inquiry notice."

Based on the above RAP considerations, the issues are:

1. Does a Common Grantor case seeking to bind the Original Grantee require proof of ***Fralick's*** second "question" which, by its own express terms, applies only to "subsequent purchasers"?

2. Does an Original Grantee's "actual knowledge" of the Common Grantor's intent and their Original Agreement bind that Original Grantee even if there is some (erroneously) perceived lack of sufficient on-the-ground marking to constitute adequate "inquiry notice"?

3. Would a Common Grantor case

> (a) which differentiated enforcement of the agreement between the Original Parties (***Fralick's*** first question) and what is necessary to bind subsequent purchasers from the Original Parties (***Fralick's*** second question), and
>
> (b) which distinguished and prioritized "actual knowledge" and "inquiry notice", and
>
> (c) which emphasized the acts and words of the Common Grantor in determining what the Original Agreement between the Common Grantor and Original Grantee was,

help clarify the Doctrine in the public interest and thus partially loosen the "hoary knot" which Professor Browder wrote about in ***The Practical***

Location of Boundaries, 56 MICH L REV 487, 489 (1958)?

III. STATEMENT OF THE CASE

This is a boundary case which sought resolution based on the Common Grantor Doctrine or, as it was known prior to ***Fralick v. Clark County, supra,*** "Location Fixed or Established by a Common Grantor."[1] The trial court, and Division 1 in ¶56 of its opinion, held the Common Grantor, LeRoy F. Caverly, intended to convey to the Plaintiff/ Respondent, Judy Anderson, and her late husband, Charlie, two square ten-acre parcels of property, Tracts 3 and 4, based on the Voorheis Survey. Mr. Caverly commissioned the survey in 1969, 7 years before he sold to Judy and Charlie in 1976.

The uncontested evidence also established that Judy and Charlie (as well as other purchasers, Exhs 14, 17 and 56) had actual knowledge of this intent. Therefore, they consistently, and in writing, asserted that the Voorheis Survey had determined Tract boundaries and development. Exhs

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[1] ***See Turner v. Creech***, 58 Wash 439, ***443***, 108 Pac 1084 (1910); ***Roe v. Walsh***, 76 Wash 148, ***151***, 135 Pac 1031, 136 Pac 1146 (1913); ***Windsor v Bourcier***, 21 Wn2d 313 ***headnote 4***, 150 P.2d 717 (1944); ***Strom v. Arcorace***, 27 Wn2d 478, ***480***, 178 P.2d 959 (1947); ***Thompson v. Bain***, 28 Wn2d 590, ***591***, 183 P.2d 785 (1947); ***Atwell v. Olson***, 30 Wn2d 179, ***183***, 190 P.2d 783 (1948); ***Angell v. Hadley***, 33 Wn2d 837, ***839***, 207 P.2d 191 (1949); ***Booten v. Peterson***, 34 Wn2d 563 ***headnote 5***, 209 P.2d 349 and 384 (1949); ***Martin v Hobbs***, 44 Wn2d 787, ***790***, 270 P.2d 1067 (1954); ***Clausing v. Kassner***, 60 Wn2d 12, ***15***, 371 P.2d 633 (1962); ***Kay Corp. v. Anderson***, 72 Wn2d 879 ***headnote 1***, 436 P.2d 459 (1967); and ***Kronawetter v. Tamoshan, Inc.***, 14 Wn App 820, ***826***, 545 P.2d 1230 (1976).

13 and 16, fax pages 8-11. Both courts, therefore, knew that the Original Agreement between the Common Grantor and Original Grantee was that the legal descriptions in their contract and deed fixed or established their boundaries based on the Voorheis Survey and its concrete monuments.

More specifically, the trial court made a number of Findings of Fact (FOF) which are uncontested verities on appeal (although many other FOF not directly involved in this appeal were objected to in detail at CP 151-163). Perhaps chief among them is FOF 31 (CP 48) which provides that:

> All of the individuals who purchased one of the Tracts numbered 1-4 from Mr. Caverly did so based upon Exhibit 20, the original Voorheis Survey. ***The legal descriptions for each of these parcels is based upon the Voorheis Survey.*** (Emphasis supplied. *See also* FOFs 16, 25, 39, 40 and 51 and Conclusions of Law (COL) at CP 56, lines 3-4, CP 57, lines 20-22 and CP 58, lines 4-11 all quoted at pages 4 and 5 of Richard and Margaret Anderson's Reply Brief.)

In ¶54 of its opinion, Division 1 of the Court of Appeals cited the late Professor Stoebuck, from the fourth paragraph of 17 WASH PRAC §8.22. He wrote that, in determining what the Agreement of the Common Grantor and Grantee was:

> The emphasis is on the acts and words of the grantor, who must in some way, usually by pointing out, indicate that a certain line is the boundary.

Then, in ¶56 of its opinion, Division 1 adopted one of the trial court's Conclusions of Law (COL) at CP 57, line 20 – 58, line 8:

> Caverly "intended to deed two square ten-acre parcels" to Charles and Judy Anderson based on the Voorheis survey, his rough sketch of the property, and the legal description.

Since the trial court had already held that the Caverly legal descriptions were based on the Voorheis Survey (FOF 31), and since Division 1 also noted in ¶8 of its opinion that the rough sketch of the Caverly Tracts (Exh 3) contained legal descriptions based on the Voorheis Survey, both courts clearly recognized that the Original Agreement between Common Grantor Caverly and Original Grantee Judy Anderson was based on the Voorheis Survey.

Further, in her Answer to Defendants'/Appellants' Motion For Reconsideration in Division 1, Judy made two very similar acknowledgements. At page 18, lines 1 and 2 of her Answer, Judy wrote that:

> Thus, what Mr. Caverly and Judy agreed to was that the legal descriptions established the subject boundary. (*See* footnote 5 *infra.)*

Then, at page 19, lines 8-15, Judy further wrote that:

> Of course Judy had actual knowledge of her agreement with the common grantor. It is difficult to imagine how one could reach an agreement with someone without having

> actual knowledge of it. So of course Judy is bound by her agreement with Mr. Caverly, which, as the trial court determined in its unchallenged fact finding, was that they agreed to the boundary as set forth in the legal description. (*See* footnote 5 *infra.)*

The uncontested evidence therefore also established that a subsequent 1994 Cascade survey, which located the legal descriptions north of the Voorheis boundaries 18 years later, was not part of or in any way related to the Common Grantor/Original Grantee Agreement. Cascade used a DNR east quarter-corner monument which had not even existed when the Voorheis Survey was performed. Moreover, the DNR east quarter-corner was 48 feet north of the east quarter-corner used by Voorheis, so Cascade shifted all legal descriptions north. Regardless, Cascade's use of the DNR monument is now accepted as correct. CP 47, lines 11-15.

Putting it together like a syllogism:

1. Judy has actual knowledge that she agreed to the boundary of her Tract 4 based on her legal description.

2. Her legal description, as well as Mr. Caverly's rough sketch with her subdivisional legal description (Exh 3), was based on the Voorheis Survey (FOF 31).

3. *Ergo,* the Original Agreement between Common Grantor

Caverly and Original Grantee Judy was that Judy's Tract 4 boundary was based on the Voorheis Survey.

4. Consequently, the Cascade survey, performed on that boundary for the first time in 1994, 18 years after Judy purchased, is not the basis of the Original Agreement.

Nevertheless, both courts concluded the Voorheis Survey provided insufficient on-the-ground marking of Caverly Tracts 2 and 4 to provide inquiry notice of the agreed boundary. Put another way, both courts below held that their perceived lack of ***inquiry notice*** from the Voorheis Survey is superior to Original Grantee, Judy Anderson's ***actual knowledge*** of the agreed boundary based on that Voorheis Survey.

Consequently, the Cascade survey, locating the legal descriptions of Tracts 2 and 4 on the ground for the first time in 1994, 18 years after the 1976 sale, and clearly not consistent or even related to the Common Grantor/Original Grantee Agreement, will determine the ownership boundary in default of sufficient inquiry notice from Voorheis.

IV. ARGUMENT

These rulings below contravene the definition and legal hierarchy of "actual knowledge" in contrast to "inquiry notice." The decisions below also demonstrate a complete misapprehension of the Common Grantor

Doctrine. It is a contract enforcement doctrine. It has no statute of limitations. It takes effect immediately upon contract or deed execution precisely because it is enforcing the Original Agreement between the parties. As stated at the end of ¶3, Stoebuck, 17 WASH PRAC §8.22:

> As a theoretical matter, this suggests that ***an agreement between the parties is the basis of the doctrine*** and not some theory, such as estoppel, that would bind only the grantor. (Emphasis supplied.)

Common Grantor cases are not based on adverse use to a visible line, or implied agreement to a well-defined line based on mutual recognition and acquiescence. Both adverse possession and acquiescence have a ten-year statute of limitations because they are not enforcing an express agreement. However, like parol boundary agreements, the Common Grantor Doctrine has no statute of limitations (Stoebuck, ***supra,*** 17 WASH PRAC §8.22, last ¶) because it is based on an express understanding between adjoining owners regarding their mutual boundary.[2]

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[2] ***See e.g. Piotrowski v. Parks,*** 39 Wn App 37, ***43-44 at headnote 3***, 691 P.2d 591 (1984) ***rev.den.*** 103 Wn2d 1031 (1985): [P]arol agreement does require an express agreement as to the location of the boundary from the beginning; it only requires possessory action concerning that line so as to place successor parties on inquiry notice that the fence (or other suitable structure) has been agreed upon as to the boundary. (Emphasis supplied). ***Compare*** Browder, ***supra,*** 56 MICH L REV at 490: [A]n oral 'agreement' between adjoining landowners will, ... become binding on them, and perhaps also on their successors in interest.

Common Grantor cases also have two distinct levels; first the Original Agreement must be proven and then, if (and only if) subsequent purchasers are sought to be bound, those subsequent purchasers must either have "actual knowledge" of the Original Agreement (whether or not there are on-the-ground markings) or there must be sufficient on-the-ground markings to give "inquiry notice" (as a lesser substitute for actual knowledge) of the agreed boundary.[3]

Here, the second level, binding a subsequent purchaser, was never applicable. Judy Anderson is the Original Grantee. All that had to be proven was the Original Agreement. It was proven. Judy's actual knowledge of the Voorheis Survey as the basis of the Original Agreement binds her to that survey. She may not have her ownership determined by the Cascade survey if the Common Grantor Doctrine is correctly understood and implemented.

Like the 1947 cases of ***Light v. McHugh, supra***, and ***Strom v. Arcorace, supra,*** the instant one also involves an Original Grantee who

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[3] ***Fralick, supra,*** 22 Wn App at 160 and n.1:
(1) was there an agreed boundary established between the common grantor and the 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 "true" boundary?[1]

x x x

[1]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 SW2d 31 (1940); Browder, ***The Practical Location of Boundaries,*** 56 MICH L REV 487, 529 (1958).

wants to gain property by claiming that her legal description should be located on the ground by a subsequent "correct" survey.

This case actually involves three (3) surveys. (1) The first, commissioned by the Common Grantor, LeRoy Caverly (who died in January 1994[4]), was performed in 1969. It is the Voorheis Survey. (2) The second, the RMC survey, was performed sometime between 1974 and 1994, and agreed with the Voorheis Survey. Exh 16, fax page 10, ¶3. RMC also advised the late Charlie Anderson, the Original 1976 Grantee, that the 1974 DNR monument Cascade relied upon was incorrect. *Id.* (3) The third survey, performed in 1994, is the Cascade survey. Exhs 15 and 28. In 2007, Judy Anderson filed this lawsuit claiming that the legal description for her Tract 4 of the Caverly Tracts should be located on the ground using the Cascade survey. CP 381-390. Her complaint never even mentioned the Voorheis Survey. *Id.* Further, this continued to be her position at the time of the 2013 trial. Tr1, p.55, lines 18-21.

Judy also asserted -- at page 2 of her Answer to Appellants' Motion For Reconsideration -- that Appellants' claim based on the

[4] An online search for Mr. Caverly's date of death shows it to be January 18, 1994. www.legacy.com/obituaries/heraldnet/obituary-search.aspx?daterange=99999&firstname=leroy&lastname=caverly. If this Court takes judicial notice of this internet posting under ER 201, it is impossible to conclude that Mr. Caverly could have agreed to the Cascade survey boundary between Tracts 2 and 4 because that was not set until the summer of 1994, 7 months after he died. Exh 28.

Voorheis Survey was not "Effectively" raised at trial. Yet, it was "effective" enough that the trial court and Division 1 both held that the legal description was based on the Voorheis Survey. Judy certainly cannot contend that those courts reached those conclusions based on her testimony. She continued at trial to contend that the Cascade survey -- which her Complaint pleaded without even mentioning the Voorheis Survey -- was the correct survey to determine her Tract 4 boundary. And Judy claimed this even after both courts below held the Voorheis Survey was the basis of her Agreement with Mr. Caverly. It was Appellants who "effectively" taught the trial court that the Voorheis Survey was the basis of (1) Judy's legal description, (2) Mr. Caverly's rough sketch with her subdivisional description (Exh 3), and (3) the Original Agreement. ***See*** Exh 37 as well as Exhs 10, 13, 14, 16, 17, 30, 31, 32, 33 and 56.

Moreover, Judy's Answer to the Motion For Reconsideration also contended in the last 3 lines at page 19, that "They agreed to the boundary as legally described,[5] ***which simply requires a survey to plot it accurately on the ground.***" Judy argues that ***Fralick's*** meeting of the minds to the identical tract of land legally described was ***to be surveyed***! Judy asserted at page 18, lines 12-14, however, that the first survey which located the

[5] Judy's repeated argument that property was purchased "by legal description only" was specifically rejected in ***Winans v. Ross***, 35 Wn App 238, ***241-242***, 666 P.2d 908 (1983).

boundary was the Cascade survey in 1994, 18 years after the sale. But that ignores Charlie Anderson's memo to Cascade in 1994 where he wrote that there had already been 2 surveys of Tracts 1-4; the Voorheis Survey and the RMC survey. Exh 16, fax page 10, ¶3. So Cascade's was not the first survey, even though the original Voorheis Survey did not mark the north boundary of Tract 4. Exh 10. Moreover, even if Mr. Caverly did not mark that line by 1975 as Exhibit 10 indicates he did, RMC would have been first to do so and RMC agreed with Voorheis. *Id.*

Even more importantly, since Cascade's survey did not mark the boundary until 1994, 18 years after the sale, how can it defeat what both courts have held was the basis of the Original Agreement; that is, the Voorheis Survey? Since the Voorheis Survey was the basis of the legal descriptions and Original Agreement, and since Judy admits actual knowledge of that, how is a Cascade measurement 18 years later better than any post 1976 measurement/"dimension" (Exh 16, fax pages 8, ¶2) using Voorheis monuments and methodology? If a later measurement by Cascade is legally sufficient for Judy now, how could "dimensioning" from Voorheis done between 1976 and 1994 be legally insufficient? How could "dimensioning" from Voorheis monuments, which Mr. Caverly pointed out (Exh 13), be legally insufficient for 18 years between 1976

and 1994, if measurement by Cascade, 7 months after Mr. Caverly was dead, be legally sufficient? How can measurement based on the agreed Voorheis Survey, as Mr. Caverly intended, be legally insufficient, but measurement by Cascade, in contravention of Mr. Caverly's intent, be legally sufficient? Since we know what Judy bargained for, and since Mr. McHugh and Mr. Strom were held to what they bargained for in 28 Wn2d at 331 and 27 Wn2d at 481-482, the trial court and Division 1 should not have held that the Common Grantor Doctrine was not proven.

A. Trial Court Error

The trial judge thought there was a stipulation to the Voorheis Survey (Tr 2, p. 12, lines 8 – 18 and p.24, lines 15-20) and therefore initially directed both litigants – twice – to have their legal descriptions reformed so that the Voorheis Survey boundary was described based on the Cascade methodology. CP 253, lines 6-8 and 273, lines 6-9. Judy later persuaded the trial court to reverse that decision because the judge believed the Doctrine was not proven.

The trial court reached that "unproven" conclusion, however, because it mis-applied the inquiry notice alternative (and only that alternative) of ***Fralick's*** second question in the Common Grantor Doctrine. ***Contrast*** CP 55, lines 1-5 with ***Fralick, supra,*** 22 Wn App at

160, n.1. ***Fralick's*** second question was first mis-applied because both its actual and inquiry notice alternatives relate exclusively, by their own express terms, only to "subsequent purchasers," not to the Original Grantee, Plaintiff/Respondent Judith Anderson.

It was also mis-applied because the trial court never even considered Judy's admitted actual knowledge of her Original Agreement with Mr. Caverly. Even a subsequent purchaser with actual knowledge of the Original Agreement is bound by it. ***Contrast Fralick, supra,*** 22 Wn App at 160 n.1 with CP 55, lines 1-5.

The trial court also mis-applied a clear, cogent and convincing burden of proof. CP 54, line 23 and 58, lines 9-13. Neither litigant even suggested that burden applied. CP 288-328. The trial court even acknowledged there was no precedent supporting it. CP 13, line 19 - CP 14, line 4.[6]

B. Division 1 Error

Division 1 correctly observed in ¶3 of its opinion that the Common Grantor's 1969 Voorheis Survey did not mark the NW corner of what became Judy Anderson's Tract 4 (which was also the SW corner of

[6] In fact, the case the trial court relied upon, and another more recent, twice applied the substantial evidence burden. ***Winans v. Ross, supra,*** 35 Wn App at ***241 and 242*** and ***Schultz v. Plate***, 48 Wn App 312, ***316***, 739 P.2d 95 (1987).

Common Grantor Caverly's Tract 2). However, it incorrectly ignored that Tract 4 was not sold until 7 years later in 1976. During that 7 years uncontested evidence established that Mr. Caverly (1) cleared the east half of Tract 2 to its south boundary by 1974 (Exhs 51 and 48), (2) indicated he marked that corner by 1975 (Exh 10), (3) started a fence between Tracts 2 and 4 (Exh 16, pg 2, lines 4-6), and (4) cleared the west half of Tract 2 and, based on what the trial court and Division 1 held was by permission (¶9), the NW corner of Tract 4 before the 1976 sale (Exhs 44, 45 and 46). Division 1 also ignored written (in one case notarized) statements by Judy and her late husband, Charlie, asserting that: (5) When they purchased in 1976 Mr. Caverly gave Charlie and Judy a copy of the Voorheis Survey and pointed out its cement monuments (Exh 13); (6) the western corners of Tracts 2, 4 and 6 were marked, just as were the eastern corners of Tracts 1, 3 and 5 (Exh 13); (7) Tracts 1-4 were surveyed by RMC sometime prior to 1994 and RMC told Charlie the 1974 DNR monument at the east quarter corner of Section 22 was incorrect (Exh 16, fax pg. 10,¶2); (8) Tract boundaries, fences, underground power and other improvements were all "dimensioned" off the Voorheis Survey monuments (Exh 16, fax page 8); (9) Snohomish County used the Voorheis Survey to locate and construct its U-shaped bridge on High

Bridge Road, the County Road providing access to the Caverly Tracts (Exh 13); and (10) even 4 years after their own Cascade survey was commissioned (Exh 28), and 3 years after it was recorded (Exh 15), Charlie and Judy were still advocating by their notarized signatures that the appropriate survey to determine Tract boundaries and ownership was the Voorheis Survey (not the Cascade survey). Exh 13. Further, (11) Charlie and Judy wrote in 1998 they would have a surveyor "revise" their legal descriptions to describe the Voorheis lines based on the 1994-1995 Cascade methodology. *Id.* Later, to gain property, Judy chose Cascade.

Division 1 apparently reasoned, contrary to all the above written evidence, that if the 1969 Voorheis Survey did not mark the NW corner of Tract 4 before it was sold 7 years later in 1976, it was not marked at all or not sufficiently for ***inquiry notice***. Consequently, Charlie and Judy's ***actual knowledge*** was apparently deemed irrelevant, not to mention unenforceable. Thus, contrary to its own citation (in ¶54 of its opinion) of the late Professor Stoebuck in 17 WASH PRAC 8.22, contrary to its own holding that Mr. Caverly intended to sell Charlie and Judy two square ten-acre parcels based on the Voorheis Survey, and contrary to its oft-repeated paramount rule of deed interpretation to determine the original intent, especially of the grantor, Division 1 affirmed the trial court's conclusion

that the Common Grantor Doctrine was not proven.[7] Therefore, the Cascade survey is to determine ownership of Tracts 2 and 4. Judge Castleberry knew and held that was wrong before trial. CP 341.

C. Actual Knowledge Is Superior To Inquiry Notice

There were no on-the-ground markings mentioned in ***Light v. McHugh, supra,*** but Mr. McHugh's actual knowledge that his legal description distances were drafted on the erroneous assumption that a fence from which distances were measured was on a government survey line made his agreement with Mrs. Dreazy binding on him. In support of this decision, this Court cited three Common Grantor cases and one parol agreement case. All four cases involved express agreement doctrines. 28 Wn2d at 331. Actual knowledge is and was binding.

Fralick, supra, 22 Wn App at 160 cited ***Light v. McHugh*** as authority for its first question – the Original Parties' Agreement – being answered "in the affirmative." Regarding its second question, ***Fralick*** twice noted the County's predecessor "did *not* in any way indicate," and

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[7] ***See e.g. Newport Yacht Basin Ass'n of Condo Owners v. Supreme Northwest, Inc.,*** 168 WnApp 56, ***64***, 277 P.3d 18 (2012); ***Bale v. Allison,*** 173 Wn App 435, ***444***, 294 P.3d 789 (2013); ***Wash State Grange v.Brandt***, 136 Wn App 138, ***146***, 148 P.3d 1069, ***rev.den.*** 161 Wn2d 1024, 171 P.3d 1059 (2006) and ***Ray v. King Co.,*** 120 Wn App 564, ***573***, 86 P.3d 183, ***rev.den.*** 152 Wn2d 1027, 101 P.3d 421 (2004). For the most recent case from Division 2 also so holding, ***see Kitsap Co., v. Kitsap Rifle,*** 184 Wn App 252, ***289-290*** (2014).

"nothing in the record indicated that the County ... had any knowledge of" the Original Agreement. 22 Wn App at 159 and 160. This lack of actual knowledge holding was accented by ***Fralick's*** n.1 which expressly held that "even in the absence of on-the-ground marking, a subsequent purchaser with actual notice of the agreement is bound." Only then did ***Fralick*** hold the County was not bound because inquiry notice was also insufficient.

Thus, only because it had ***no actual knowledge*** was the County not bound. Both actual knowledge and inquiry notice were absent. The footnote made it clear that if the County had been given actual knowledge, it would have been bound by the Original Agreement despite a lack of inquiry notice. Actual knowledge is and would have been binding.

Actual knowledge is binding without inquiry notice. If there is no actual knowledge, inquiry notice may be binding if sufficient. Inquiry notice is a substitute for actual knowledge but is unnecessary if there is actual knowledge. In fact, if there is actual knowledge, inquiry notice is virtually irrelevant. Most importantly, since Original Parties have actual knowledge of their Original Agreement, inquiry notice is absolutely irrelevant because actual knowledge is superior to inquiry notice. And in regard to this superiority, boundary doctrines are no different than any

other area of law. Cases from a wide range of periods and areas of law recognize the same point.[8]

CONCLUSION

The previous decisions in this case are in conflict with ***Light v. McHugh, supra,*** the Common Grantor case most on point, because they have ignored their own fact findings which document that Common Grantor Caverly's intent, of which Judy and Charlie Anderson had actual knowledge, made the Voorheis Survey the basis of the sale of Tracts 3&4.

The previous decisions in this case are also in conflict with ***Fralick v. Clark County, supra***, which followed ***Light v. McHugh*** regarding the Agreement between the Original Parties. ***Fralick*** clearly held that actual knowledge of the Original Agreement is also binding on a subsequent purchaser even in the absence of inquiry notice from on-the-ground

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[8] ***See e.g. Atwell v. Olson, supra,*** 30 Wn2d at ***184***, and ***Schultz v. Plate, supra,*** 48 Wn App at ***317***. ***Compare*** "Knowingly" means knew or had such information as would lead a prudent man to believe which, followed by inquiry, would bring knowledge. ***State v. Constantine,*** 43 Wash 102, ***106***, 86 Pac 384, 117 AmStRep 1043 (1906) and ***State v. McCormick***, 56 Wash 469, ***474***, 105 Pac 1037 (1909). "Inquiry notice" is when a person is aware of facts that would lead a reasonable person to investigate and consequently acquire actual knowledge. ***Getty v. Harmon,*** 53 F.Supp.2d 1053 (Wash 1999) and ***Paganelli v. Swendsen***, 50 Wn2d 304, ***308***, 311 P.2d 676 (1957). ***See also McKasson v. State***, 55 Wn App 18, ***27***, 776 P.2d 971, ***rev.den.*** 113 Wn2d 1026 (1989). ***In Re Forfeiture of One 1970 Chevrolet Chavelle***, 166 Wn2d 834, ***842***, 215 P.3d 166 (2009) and ***Michak v. Transnation Title Ins. Co.***, 108 Wn App 412, ***425***, 31 P.3d 20, ***rev. granted*** 145 Wn2d 1033, 43 P.3d 20, ***rev'd on other grounds***, 148 Wn2d 788, 64 P.3d 22 (2001).

markings. Therefore, the previous decisions in this case are also in conflict with this Court's decision in ***Angell v. Hadley***, 33 Wn2d 837, 207 P.2d 191 (1949), which Professor Stoebuck pointed out also holds that subsequent purchasers with actual knowledge, but without inquiry notice, are bound. 17 WASH PRAC §8.22, ¶6.

There is public interest to be served by (1) clarifying the Common Grantor Doctrine as a contract enforcement remedy, (2) differentiating between ***Fralick's*** question 1 involving enforcement against an Original Party and ***Fralick's*** question 2 relating exclusively to subsequent purchasers, (3) distinguishing between and prioritizing actual knowledge and its lesser substitute, inquiry notice, and (4) emphasizing the words, acts and intent of the Common Grantor as being paramount in interpreting the contract and deed conveyed to the Original Grantee.

To correctly address these issues, this case must be accepted for review, and reversed and remanded for entry of a judgment resolving this case based on the Voorheis Survey by legally describing the Voorheis boundary using Cascade's methodology. That is Petitioners' request.

RESPECTFULLY SUBMITTED this 8th day of May, 2015.

Gary W. Brandstetter, WSBA # 7461
Attorney for Defendants/Respondents/Petitioners

Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JUDITH ANDERSON, a single woman, Respondent, v. RICHARD ANDERSON and MARGARET ANDERSON, Husband and Wife, Appellants.	No. 70814-7-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

The appellants Richard and Margaret Anderson filed a motion for reconsideration herein and the respondent filed an answer to the motion. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Dated this 16th day of April, 2015.

For the Court:

Judge

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JUDITH ANDERSON, a single woman, Respondent, v. RICHARD ANDERSON and MARGARET ANDERSON, Husband and Wife, Appellants.	No. 70814-7-I DIVISION ONE ORDER DENYING MOTION TO PUBLISH

Nonparties Catherine C. Clark and William R. Kiendl filed a motion to publish the opinion filed on March 9, 2015 in the above case. Appellants Richard and Margaret Anderson and respondent Judith Anderson filed answers to the motion. A majority of the panel has determined that the motion should be denied;

Now, therefore, it is hereby

ORDERED that Catherine C. Clark and William R. Kiendl's motion to publish the opinion is denied.

DATED this 16th day of April, 2015.

For the Court:

Judge

Anderson v. Anderson

Court of Appeals of Washington, Division One

November 10, 2014, Oral Argument Date; March 9, 2015, Filed

No. 70814-7-I

Reporter
2015 Wash. App. LEXIS 494

JUDITH ANDERSON, *RESPONDENT*, v. RICHARD ANDERSON ET AL., *APPELLANTS*.

NOTICE: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Prior History: [*1] Appeal from Snohomish Superior Court. Docket No: 07-2-03928-5. Judge signing: Honorable Janice E Ellis. Judgment or order under review. Date filed: 07/26/2013.
Anderson v. Anderson, 158 Wn. App. 1039, 2010 Wash. App. LEXIS 2627 (2010)

Core Terms

Tract, fence, boundary line, ***common grantor***, monuments, swale, barbed wire fence, installed, legal description, counterclaims, feet, Southeast, corner, concrete, ditch, contractor, culvert, parcel, property line, designated, reconsideration motion, adverse possession, original grantee, fact finding, rough sketch, acquiescence, built, deed, warranty deed, Surveying

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Judges: Authored by Ann Schindler. Concurring: Marlin Appelwick, J. Robert Leach.

Opinion by: Ann Schindler

Opinion

¶1 SCHINDLER, J. — A ***common grantor*** may establish a binding boundary line if the grantor sells the land with reference to such line and the grantor and original grantees agree to the identical tract of land to be transferred by the sale. Here, the prior owners of Tract 2, Richard and Margaret Anderson (Richard), claimed title to property along a disputed boundary line located between the southern boundary of Tract 2 and the northern boundary of the property owned by Charles and Judith (Judy) Anderson, Tract 4.[1] Following a four-day bench trial, the court ruled Richard did not prove that a swale and barbed wire horse fence established the boundary line between the two tracts under the ***common grantor*** doctrine. Richard contends the court erred in applying the ***common grantor*** doctrine and abused its discretion in denying [*2] his motion for reconsideration. We affirm the court in all respects.

FACTS

¶2 LeRoy Caverly owned 125 acres of forested, rural land in Snohomish County near Monroe. Caverly logged and built a house near the north boundary of what he later designated as Tract 1 and Tract 2.

¶3 In 1969, Caverly hired Voorheis-Trindle-Nelson Inc. (Voorheis) to conduct a survey of the 80 acres. Voorheis placed five concrete monuments along the outer boundary of the rectangular 80-acre parcel: a monument at the northeast corner of what Caverly later designated Tract 1, a monument at the northwest corner of what Caverly later designated Tract 2, a monument at the east end of the boundary between what Caverly later designated Tract 1 and Tract 3, a monument at the west end of the boundary between what Caverly later designated Tract 4 and Tract 6, and a monument at the southwest corner of what Caverly later designated Tract 8.

[1] Because the parties have the same last name, we refer to them by their first names for purposes of clarity.

¶4 Charles and Judy Anderson were interested in purchasing rural property in Snohomish County. In 1975, Charles contacted Caverly. At first, Caverly told Charles he was not interested in selling [*3] "any portion of his land." But after deciding Charles and Judy "had a genuine interest in purchasing land," Caverly decided to sell property to them.

¶5 Caverly gave Charles and Judy a copy of the Voorheis survey and a rough sketch based on the Voorheis survey. The rough sketch depicts a rectangular 80-acre parcel of property divided equally into 12 square tracts with one irregularly shaped "entry parcel." The two northernmost square tracts are designated as Tract 1 and Tract 2. Tract 1 is located east of Tract 2. Tracts 3 and 4 are located south of Tracts 1 and 2. Tract 5 and Tract 6 are located south of Tract 3 and Tract 4.

¶6 Charles and Judy were interested in purchasing Tract 1 and Tract 2. But Caverly "did not want to sell those tracts at that time." Caverly agreed to sell Charles and Judy Tract 3 and Tract 4. On March 1, 1976, Caverly and Charles and Judy entered into a real estate contract to purchase Tract 3 and Tract 4. The statutory warranty deed describes the property as "[t]he South half of the Northwest quarter of the Southeast quarter of Section 22, Township 27 North, Range 6 East, W.M., together with and subject to an easement for ingress, egress and utilities."[2]

¶7 On March 22, Caverly recorded "Covenants and Agreements." Section I describes Caverly's intent to divide and sell his land:

> LeRoy F. Caverly, being the owner of a parcel of land (approximately 125 acres) having maintained ownership for over 25 years and having decided to divest himself of said property by selling tracts of raw, undeveloped land and at the same time desiring to maintain a semblance of esthetic country living, has offered to sell the land described in Section II.

¶8 Section II describes the division of the property into 13 tracts: "The three (3) one sixteenth's (1/16) of a section parcel shall be quartered making 12 [*5] tracts identified as Tracts 1 through 12 (see map Schedule A) and the entry parcel identified as 'Tract E.'" Attached is a copy of the rough sketch that Caverly gave Charles and Judy.

¶9 After selling Tracts 3 and 4 to Charles and Judy, Caverly began "extensively clearing [Tracts] 1 and 2 so that he could put the road in that would access all of the lots." Charles and Judy gave Caverly permission to clear between Tract 2 and Tract 4 "wherever it made sense" based on the "contour of the land." After Caverly installed the access road, Charles and Judy began clearing Tract 3.

¶10 Charles and Caverly became good friends and worked together on projects. Charles helped Caverly build a cattle barn on Tract 2 and install livestock containment fences in several different locations. Caverly helped Charles install a culvert across a creek that runs north-south along the west end of Tract 2 and Tract 4. Caverly also helped Charles build a gravel path over the culvert near the northwest corner of Tract 4 in order to facilitate access to the west side of the property.

¶11 In July 1979, Caverly sold Tract 1 to John and Christine Campbell. The statutory warranty deed describes Tract 1, in pertinent part, as "[t]he Northeast [*6] quarter of Northwest quarter of Southeast quarter of Section 22, Township 27 North, Range 6 East, W.M."

¶12 After selling Tract 1 to the Campbells, Caverly created "for his own purposes" an annotated version of the Voorheis survey, the "Caverly Reference Copy." The Caverly Reference Copy contains handwritten notations that do not appear on the Voorheis survey. At some point, Caverly gave Charles and Judy a copy of the Caverly Reference Copy.[3]

¶13 In the 1980s, the Campbells used the concrete monument Voorheis placed at the southeast corner of Tract 1 to build a fence. By 1984, the Campbells had cleared Tract 1 and built a house on the property.

¶14 In the early 1980s, Cascade Surveying & Engineering Inc. (Cascade) conducted a survey of land located near the Caverly tracts. Cascade did not use the 1969 Voorheis survey concrete monuments. Instead, Cascade used the concrete monuments placed by the Washington State

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[2] (Capitalization omitted.) The [*4] deed also describes a roadway easement and an easement for an equestrian and bridle trail. The description of the roadway easement states, in pertinent part, "Thence South along the North-South centerline of the West half of the Southeast quarter of Section 22." (Capitalization omitted.) The description of the equestrian and bridle trail easement states, in pertinent part, "[O]ver and across the South 15 feet of the Northeast quarter of the Northwest quarter of the Southeast quarter of Section 22." This deed was delivered upon fulfillment of the contract and recorded September 17, 2009.

[3] The Caverly Reference Copy identifies Tract 1 as owned by the Campbells.

Department of Game[4] in 1974. In 1974, the Department of Game placed two concrete monuments "that had previously been placed in a different location by Voorheis." The discrepancy between the Cascade survey and the Voorheis survey created [*7] uncertainty about boundary lines "throughout the Caverly tracts."

¶15 In 1988, Charles and Judy's son installed a barbed wire fence on Tract 4 to contain their horses by stringing the wire along "T posts" and trees. The barbed wire fence "meandered along the north portion of Tract 4" and created a horse enclosure for approximately one-third of Tract 4.

¶16 In 1989, Caverly sold Tract 2 to Charles Vollstedt and Carol Boswell (Boswell). The statutory warranty deed describes Tract 2 as "[t]he Northwest quarter of the Northwest quarter of the Southeast quarter of Section 22, Township 27 North, Range 6 East, W.M.; Situate in the County of Snohomish, State of Washington."[5]

¶17 Caverly died in the early-to-mid-1990s.[6]

¶18 Between 1992 and 1994, Charles and Judy removed the barbed wire fence and cleared Tract 4. Charles and Judy hired a contractor to build a pond and to excavate an overgrown drainage ditch running along the northern portion of Tract 4 near Tract 2 (the "swale"). While excavating the swale, the contractor "encountered a large [*8] rock." To avoid the rock, the contractor "angl[ed] the ditch southward," resulting in a swale that curved south at the western end of Tract 4. To divert drainage from the swale and the pond, the contractor also installed a second culvert approximately 15 feet south of the culvert Charles and Caverly installed near the northwest corner of Tract 4.

¶19 In 1994, Charles and Judy; the Campbells, the owner of Tract 1; Boswell, the owner of Tract 2; and Jim and Rhea Gately, the owner of Tract 5, hired Cascade to conduct a survey of their property. Consistent with its previous survey, Cascade used the concrete monuments placed by the Department of Game in 1974. Cascade completed the survey in October 1994.

¶20 On July 16, 1995, Charles and Judy sent a letter in an effort to "reach a common agreement with all the affected tract owners" to the Campbells, Boswell, and the Gatelys. Charles and Judy proposed accepting the boundary lines in the Cascade survey but entering into agreements to "leave all the fences as they are presently placed." The letter states, in pertinent part:

> If the Cascade survey is accepted by everyone my suggestion to the other owners is — we leave all the fences as they are presently placed [*9] with a written agreement between the owners of our concurrence with the survey and corresponding property lines. The fences can be handled on an individual basis as circumstances dictate.

¶21 In 1997, Boswell sold Tract 2 to Richard and Margaret Anderson (Richard). An addendum to the real estate contract discloses "a possible deviation of 20[feet plus/minus] between lines of occupancy and the deed boundary lines as surveyed by Cascade." The addendum states that Charles and Judy "removed the common boundary fence" between Tract 2 and Tract 4. The addendum states, in pertinent part:

> Subject property was platted in the 1970's. A recent survey by Cascade Surveying and Engineering, Inc. discloses a possible deviation of 20[feet plus/minus] between lines of occupancy and the deed boundary lines as surveyed by Cascade. The neighbor immediately south of subject premises ([Charles and Judy]) has removed the common boundary fence between Boswell and [Richard]. Seller shall execute her warranty deed subject to questions of survey and boundary as disclosed by the Cascade survey.

¶22 In late 1997 or early 1998, the Campbells' attorney notified Charles and Judy that "based on the doctrines of adverse possession [*10] and boundary by acquiescence, the appropriate boundary lines are those reflected by the cement monuments, the Voorheis survey, and the fences." Charles and Judy agreed that the fences located between Tract 1 and Tract 3 had been in place for more than 10 years and that the fence established the boundary line between the two tracts. Charles and Judy and the Campbells entered into and recorded a "Survey/Property Line Acknowledgment Affidavit."[7]

¶23 After the Gatelys sold Tract 5 to Vern Cohrs, Charles and Judy sent a letter to Cohrs describing the "history of the

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[4] Now known as the Washington State Department of Fish and Wildlife.

[5] Capitalization omitted.

[6] His spouse sold the property they owned north of Tract 1 and Tract 2 to Claude and Maureen DeShazo.

[7] The Survey/Property Line Acknowledgment Affidavit states, in pertinent part:

development of the area." In the February 1998 letter, Charles and Judy agreed that "based on the doctrines of adverse possession and boundary by acquiescence," the existing fence established the boundary between Tract 3 and Tract 5. [*11] The letter states, in pertinent part:

> John and Chris[tine] Campbell consulted with an attorney, who informed us that regardless of a new survey, based on the doctrines of adverse possession and boundary by acquiescence, the appropriate boundary lines are those reflected by the cement monuments, the Voorheis survey, and the fences.
>
> [Charles and Judy] and the Campbells[ ] have agreed with this legal decision and will leave the fences where they are and have a surveyor revise the legal description for each tract accordingly.
>
> As you and I discussed[,] our mutual east-west property line between tracts 3 and 5 would be treated the same. The fence installed on this property line per the original survey will remain and we will have a surveyor revise the legal description for each tract accordingly.

¶24 In 2001, Richard purchased two tracts of land located directly west of Tract 2 and Tract 4. Richard widened and extended the gravel path that Charles and Caverly had built over the original culvert in the northwest corner of Tract 4 to reach the tracts from the access road.

¶25 In 2003, Charles and Judy decided to install a fence on Tract 4 and hired a surveyor to place corner stakes on the boundary lines based on [*12] the Cascade survey. Richard wrote to Charles and Judy "ask[ing] them to stop a survey for a fence between Tracts 2 and 4." Richard claimed the "drainage ditch" established the boundary line between Tract 2 and Tract 4. The letter states, in pertinent part:

> The Alta insurance policy we purchased on the title to our land specifically designated the drainage ditch as the south property line for our parcel based on the survey of record at that time. Other factors also establish history for that line.

¶26 Charles Anderson died in July 2006.

¶27 In 2007, Judy filed a quiet title and trespass action against Richard. Judy alleged the Cascade survey located the boundary line between Tract 2 and Tract 4 and Richard trespassed on Tract 4 "by operating vehicles across it to gain access" to the other tracts he owns to the west of Tract 2 and Tract 4.

¶28 Richard filed an answer denying the Cascade survey located the boundary between Tract 2 and Tract 4. Richard asserted that Caverly sold his property "with reference to his Voorheis survey map and said Voorheis monuments" and the concrete monuments placed "at the corners of most Tracts." Richard alleged that Boswell purchased Tract 2 in reliance on the Voorheis survey [*13] as well as a "fence built, ditch dug and culvert installed in reliance on said Voorheis monuments." Richard alleged the "fence was taken down unlawfully by [Judy]'s late husband, but Boswell and [Richard] continued to hold to the line and swale established as a result of said fence and ditch."

¶29 In August 2008, Richard sold Tract 2 to Darren and Barbara Massey (Massey) based on the Cascade survey but retained the right to litigate the boundary dispute with Judy. Richard also retained a 60-foot easement along the south boundary of Tract 2 to allow access to the two tracts he owns to the west. Massey and Judy entered into an agreement to establish the boundary line between Tract 2 and Tract 4 consistent with the Cascade survey. Richard refused to enter into a stipulation to dismiss the quiet title and trespass action.

¶30 Richard filed an amended answer asserting counterclaims under the ***common grantor*** doctrine and for adverse possession and mutual recognition and acquiescence. Richard claimed title to a strip of land between Tract 2 and Tract 4 with a curved boundary line measuring 620 feet long, east to west, 33.5 feet wide on the east end and 58.1 feet wide on the west end.

¶31 The ***common grantor*** [*14] doctrine counterclaim alleged, in pertinent part:

> Through a series of transactions, ***Common Grantor*** Caverly deeded many, if not all, of these 13 Tracts based upon legal descriptions which were assumed to match lines specifically identified on the ground

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We acknowledge and agree that the common property line of these two properties, which is the south property line and boundary of [Tract] 1 of High Meadow and the North property line and boundary of [Tract] 3 of High Meadow, is currently delineated by the existing location of the fence belonging to the owners of said [Tract] One.

> when sold to original grantees by Voorheis concrete monuments with brass caps. . . . The original lines, and the improvements built within them, established lines clearly evidencing the meeting of minds as to the identical Tracts of land to be transferred from the ***Common Grantor*** to each of his grantees. Defendants' predecessor, Carol Boswell, purchased her Tract 2 from the ***Common Grantor*** in 1989. The ***Common Grantor*** had built a fence on the Voorheis survey line years before. The boundaries marked on the ground by the fence, and used by the ***Common Grantor***, as well as Boswell, were *immediately* binding on Boswell. Likewise, said boundaries were *immediately* binding, based upon their March 1976 REK [(real estate contract)], on Plaintiff and her late husband, as grantees.[8]

¶32 In the adverse possession counterclaim, Richard alleged an irregularly shaped, curved strip of land located between the two tracts had been "openly and [*15] notoriously, continuously and exclusively used, possessed and occupied" for more than 10 years. Richard asserted Caverly "constructed a fence, dug a ditch, put in a culvert and established a crossing along the Voorheis survey line."[9]

¶33 The mutual recognition and acquiescence counterclaim alleged that "a fence built, ditch dug and culvert crossing established in reliance on said Voorheis monuments over 30 years ago by the ***Common Grantor***, LeRoy Caverly," established the boundary [*16] line between Tract 2 and Tract 4.[10]

¶34 Judy filed a summary judgment motion to dismiss the lawsuit. The court entered an order dismissing Judy's quiet title and trespass action. The court dismissed Richard's counterclaims for lack of standing. In the first appeal, we affirmed dismissal of Judy's claims against Richard but reversed dismissal of the counterclaims and remanded for trial. *Anderson v. Anderson*, 158 Wn. App. 1039, *2010 WL 4595972, at *3, 2010 Wash. App. LEXIS 2541, at *9*.[11]

¶35 On remand, the court scheduled a trial on Richard's counterclaims. In his trial memorandum, Richard asserts the ***common grantor*** doctrine "best fits the factual and legal issues in this case." The memorandum states that case law sets out "two elements involved in the ***Common Grantor*** Doctrine. . . . Was There An Agreed Boundary? [and] What Does A Visual Examination Establish?"[12]

¶36 A number of witnesses testified during the four-day bench trial, including Richard, his photograph expert Terry Curtis, Judy, and the contractor Charles and Judy hired to excavate the swale. The court admitted into evidence a number of exhibits, including the 1969 Voorheis survey, the rough sketch Caverly gave to Charles and Judy, the Caverly Reference Copy, the 1981 and 1994 Cascade surveys, statutory warranty deeds, boundary line agreements, and photographs.

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[8] Emphasis in original.

[9] The adverse possession counterclaim states, in pertinent part:

> Said strip is approximately 33.5 feet wide, north to south, on the east, approximately 58.1 feet wide, north to south, on the west, and approximately 620 feet long, east to west. Said strip has been actually, openly and notoriously, continuously and exclusively used, possessed and occupied by Defendants . . . . Specifically, Plaintiff's predecessor in title, LeRoy Caverly, the ***Common Grantor***, constructed a fence, dug a ditch, put in a culvert and established a crossing along the Voorheis survey line over 30 years ago. The fence (unlawfully removed by Plaintiff's late husband) and ditch created a demarcation which included a swale which continues to exist.

[10] The counterclaim based on mutual recognition and acquiescence states, in pertinent part:

> Defendants and Plaintiff, as well as their predecessors, have all used, possessed and developed their properties based upon Voorheis survey monuments, as well as a fence built, ditch dug and culvert crossing established in reliance on said Voorheis monuments over 30 years ago by the ***Common Grantor***, LeRoy Caverly. This fence was used to locate a farm access road which divides the properties, until Plaintiff's late husband unlawfully removed the fence during Boswell's ownership.

[11] We held that Richard did not lose standing to assert the counterclaims when he sold Tract 2 to Massey because he "did not relinquish his claim of ownership of the disputed property between the Cascade survey's boundary line and the Voorheis survey's [*17] boundary." *Anderson*, 2010 WL 4595972, at *3, 2010 Wash. App. LEXIS 2541, at *8.

[12] Boldface omitted.

¶37 Richard testified that when he purchased Tract 2, Boswell told him the barbed wire fence that Charles and Judy had removed marked the boundary between Tract 2 and Tract 4. Richard testified Boswell "very emphatically stated she was told by LeRoy Caverly when she bought the property that that south fence line defined the line — south [*18] line of that tract." Richard conceded "that the Voorheis survey map does not show [a] Voorheis monument at or near the southwest corner of [Tract] 2."[13]

¶38 Richard's photograph expert Curtis examined a number of aerial photographs taken between 1969 and 2011 "to determine the visible limits of historical occupation and use of Tract 2." Curtis testified that based on all of the aerial photographs, "he perceived a persistent and consistent use/occupation line concurrent with the swale." The court admitted a report prepared by Curtis. The report states that two 1995 photographs show part of the swale was excavated "in alignment with the observed fenceline [sic] that runs along the southern boundary of Tract 1 to the East," but then the swale "curves noticeably to the South at its western end."

¶39 Judy testified that she and Charles purchased Tract 3 and Tract 4 based on "a pretty basic diagram" and that Caverly never showed her "any markers or monuments anywhere, either around [her] lot or in the general vicinity." Judy testified there was no fence between Tract [*19] 2 and Tract 4 until her son installed the meandering barbed wire fence in 1988, and they never intended the barbed wire fence to serve as the boundary line.

¶40 Judy testified that she and Charles entered into the property line agreement with the owner of Tract 1 and the owner of Tract 5 because the fences had been in place for more than 10 years. Judy also testified that the purpose of having a contractor excavate the swale in the early 1990s was not to create a boundary between Tract 2 and Tract 4, but "to allow drainage on the west side [of Tract 4] because the elevation back [t]here is quite steep."

¶41 The contractor testified that "the area had not been cleared when he started, [and] that the swale was a depression overgrown by brush." The contractor said he did not excavate the swale along any particular line because he "was just directed to take the easiest path and clean up what was naturally there."

¶42 The court entered extensive findings of fact and conclusions of law. The court ruled Richard did not establish that the ***common grantor*** doctrine applied.

¶43 The court concluded the evidence did not show "that an express physical boundary had been established by Mr. Caverly and agreed to by Charles and [*20] Judy Anderson." The court rejected Curtis's testimony that "Caverly departed from this pattern [of platting square parcels] to include a meandering boundary line demarcated by the swale between Tracts 2 and 4."

¶44 The court found the testimony of Judy and her contractor credible and that neither the barbed wire fence nor the swale established the boundary between Tract 2 and Tract 4.

> The "common boundary fence" refers to a horse fence that meandered along the north portion of Tract 4. . . . The fence was not straight and was not intended to demarcate the property boundary; it was only intended to establish a horse enclosure. . . . The Court finds that there was an imprecise break between Tracts 2 and 4 and that it did not follow the swale.

¶45 The court concluded Richard did not prove that Caverly and Charles and Judy agreed to a boundary line between Tract 2 and Tract 4 "other than the one set forth in the legal description." The court found that the legal descriptions for Tracts 1 through 4 were "based upon the Voorheis Survey" but neither "Caverly nor Charles and Judy Anderson conducted a specific survey to definitively establish the boundaries of Tracts 3 and 4." The findings state, in pertinent [*21] part:

> Caverly clearly expressed his desire to plat 13 ten-acre tracts, that he did so, and that he 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.

¶46 The court also ruled Richard did not establish adverse possession or mutual recognition and acquiescence.

¶47 Richard filed a motion for reconsideration and "Formal Objections To Specific Portions of the Court's Amended Findings of Fact and Conclusions of Law." The court entered amended findings of fact and conclusions of law and denied the motion for reconsideration.

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[13] Likewise, his trial memorandum states that "there is no specific designation for placement of such a monument at the corner in question."

¶48 Richard appeals dismissal of his counterclaim under the ***common grantor*** doctrine and denial of his motion for reconsideration.[14]

ANALYSIS

Standard of Review

¶49 We review the decision following a bench trial to determine whether substantial evidence supports the findings of fact and whether those findings, in turn, support the conclusions of law. *Ridgeview Props. v. Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982)*. "Substantial evidence" is the quantum of evidence "sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003)*. We will not "disturb findings of fact supported by substantial evidence even if there is conflicting evidence." *Merriman v. Cokelet, 168 Wn.2d 627, 631, 230 P.3d 162 (2010)*. We defer to the trial judge on issues of witness credibility and persuasiveness of the evidence. *Boeing Co. v. Heidy, 147 Wn.2d 78, 87, 51 P.3d 793 (2002)*; *City of Univ. Place v. McGuire, 144 Wn.2d 640, 652, 30 P.3d 453 (2001)*. Unchallenged findings of fact are verities on appeal. *In re Estate of Jones, 152 Wn.2d 1, 8, 93 P.3d 147 (2004)*.

¶50 Preliminarily, Judy asserts that because Richard does not assign error to any of the findings of fact, they are verities on appeal. *See RAP 10.3(g)* (the court only reviews a claimed error "which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto"). Without citation to authority, Richard claims he preserved his right to challenge the findings on appeal by objecting to specific findings of fact below. But Richard also asserts "this appeal is not a factual appeal at all. It is a purely legal appeal. The facts are undisputed and undisputable. Misapplication of [*23] the law is the only issue on appeal." Because Richard does not challenge the findings of fact on appeal, we treat the findings as verities.[15]

Common Grantor Doctrine

¶51 A quiet title action is an "equitable proceeding." *Walker v. Quality Loan Serv. Corp., 176 Wn. App. 294, 322, 308 P.3d 716 (2013)*; *Kobza v. Tripp, 105 Wn. App. 90, 95, 18 P.3d 621 (2001)*. "The goal of the court in equity is to do substantial justice and to end litigation." *Carbon v. Spokane Closing & Escrow, Inc., 135 Wn. App. 870, 878-79, 147 P.3d 605 (2006)*. Trial courts have broad discretion to fashion equitable remedies. *In re Proceedings of King County for the Foreclosure of Liens for Delinquent Real Property Taxes, 123 Wn.2d 197, 204, 867 P.2d 605 (1994)*.

¶52 The purpose [*24] of the ***common grantor*** doctrine is to protect an original grantee who acquired property in "good faith reliance on the boundary description provided by the ***common grantor*** who originally owned both lots in their entirety." *Levien v. Fiala, 79 Wn. App. 294, 302, 902 P.2d 170 (1995)*. A property owner may establish a binding boundary line if the grantor sells the land with reference to such line, and the grantor and the original grantee agree to the identical tract of land to be transferred by the sale. *Fralick v. Clark County, 22 Wn. App. 156, 159, 589 P.2d 273 (1978)*.

¶53 As the court states in *Fralick*, whether the ***common grantor*** doctrine applies "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 'true' boundary?" *Fralick, 22 Wn. App. at 160*. To establish a binding boundary line under the ***common grantor*** doctrine,

> "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."

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[14] Richard does not appeal dismissal of the adverse possession or mutual recognition and acquiescence counterclaims. Before oral argument, Richard filed a "Motion to File Corrected Pages in Appellant's Opening Brief and Reply Brief." The motion to correct the reply brief at page 22, line 2 and at page 23, line 13 is granted. RAP 10.1(h). In all other respects, we deny the motion as an untimely attempt to make substantive changes. *See In re Adoption of Doe, 45 Wn.2d 644, 647, 277 P.2d 321 (1954)*; *Paulson v. Higgins, 43 Wn.2d 81, 82, 260 P.2d 318 (1953)*. [*22]

[15] In two footnotes in his brief on appeal, Richard appears to argue substantial evidence does not support a portion of finding of fact 37 and finding of fact 47. Because "'placing an argument of this nature in a footnote is, at best, ambiguous or equivocal as to whether the issue is truly intended to be part of the appeal,'" we do not treat these arguments as assignments of error. *Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 497, 254 P.3d 835 (2011)* (quoting *St. Joseph Gen. Hosp. v. Dep't of Revenue, 158 Wn. App. 450, 472, 242 P.3d 897 (2010)*). In any event, substantial evidence supports finding of fact 37—that the barbed wire fence did not demarcate the boundary between Tracts 2 and 4. The evidence at trial established there was no fence between Tract 2 and Tract 4 until Charles and Judy installed the barbed wire fence in 1988. As to finding of fact 47, Richard objects to the finding only on credibility grounds. We defer to the court on issues of credibility. *Heidy, 147 Wn.2d at 87*; *McGuire, 144 Wn.2d at 652*.

Fralick, 22 Wn. App. at 159 (quoting *Kronawetter v. Tamoshan, Inc., 14 Wn. App. 820, 826, 545 P.2d 1230 (1976)*).

¶54 A formal agreement is not necessary if "the parties' manifestations of ownership after the sale" clearly demonstrate there [*25] was a meeting of the minds as to an agreed boundary line. *Winans v. Ross, 35 Wn. App. 238, 241, 666 P.2d 908 (1983)*. "[T]he emphasis is on the acts and words of the grantor, who must in some way, usually by pointing out, indicate that a certain line is a boundary." 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 8.22, at 547 (2d ed. 2004).

¶55 Richard argues the court erred in applying the ***common grantor*** doctrine by treating Judy as a subsequent purchaser rather than the original grantee and improperly focusing on the question of whether a visual examination of the property established the true boundary between Tract 2 and Tract 4. The court's unchallenged findings of fact and conclusions of law do not support Richard's argument.

¶56 The court clearly addressed whether there was "an agreed boundary" between Caverly as the ***common grantor*** and Judy as the original grantee. The court rejected Richard's claim that the barbed wire fence and the swale established the boundary line between the two tracts. The court ruled that Caverly as the ***common grantor*** did not establish a boundary between Tract 2 and Tract 4 "other than the one set forth in the legal description" and there was no "agreement or meeting of the minds between [*26] Mr. Caverly and Charles and Judy Anderson regarding such a boundary." The court found that Caverly "intended to deed two square ten-acre parcels" to Charles and Judy based on the Voorheis survey, his rough sketch of the property, and the legal description.

¶57 The undisputed record establishes the Voorheis survey does not locate the boundary line between Tract 2 and Tract 4. The 1969 Voorheis survey concrete monuments mark only (1) the northeast corner of Tract 1, (2) the northwest corner of Tract 2, (3) the east end of the boundary between Tracts 1 and 3, (4) the west end of the boundary between Tracts 4 and 6, and (5) the southwest corner of Tract 8.

¶58 The legal description of Tract 2 and Tract 4 provides the only description of the boundary between the two tracts. The statutory warranty deed conveying Tract 2 from Boswell to Richard states, "The Northwest quarter of the Northwest quarter of the Southeast quarter of Section 22, Township 27 North, Range 6, East W.M." The 1976 statutory warranty deed conveying Tracts 3 and 4 to Charles and Judy states, in pertinent part, "The South half of the Northwest quarter of the Southeast quarter of Section 22, Township 27 North, Range 6 East, W.M." The legal description [*27] of Tract 4 as depicted on Caverly's rough sketch states, "SW 1/4 NW 1/4 SE 1/4 Sec 22."

¶59 Judy testified that she and Charles purchased Tract 3 and Tract 4 from Caverly based on "a pretty basic diagram." The rough sketch Caverly gave to Charles and Judy does not identify survey lines or show any measurements. Judy testified Caverly did not give them, and they did not ask for, any more information. The findings also establish that Caverly and Charles and Judy "were not concerned about what they considered insignificant uncertainties about precise boundary lines."

¶60 The case Richard relies on, *Light v. McHugh, 28 Wn.2d 326, 183 P.2d 470 (1947)*, is distinguishable. In *Light*, the undisputed evidence established that the ***common grantor*** sold the property to the original grantee with the express understanding that the fence had existed for more than 33 years and, as shown on a plat map, marked the south boundary of the property. *Light, 28 Wn.2d at 328-29*. While a subsequent survey determined the fence was not on the boundary line, the trial court found that "at all times prior to the survey, the people connected with the properties considered the old fence to be the south boundary line." *Light, 28 Wn.2d at 329*. On appeal, the Washington State Supreme Court held that the trial court did not err in rejecting the [*28] line established by the survey and concluding the "true boundary lines upon the merits as shown by the undisputed evidence." *Light, 28 Wn.2d at 330-31*.

> It was definitely decided by the parties concerned that the southeast point of appellant's land, deeded to him by [respondent], should be thirty feet west, and one hundred fifty feet north of the southeast corner of lot three, and it was the opinion and conclusion of all concerned that the old fence line, as it connected with the east line of lot three, made the southeast corner of lot three. Appellant purchased a piece of property, and he secured just that definite parcel of real estate which was pointed out to him at the time he purchased it.

Light, 28 Wn.2d at 331.

¶61 Here, unlike in *Light*, there was no agreement between Caverly and Charles and Judy establishing a boundary line between Tract 2 and Tract 4 or that the barbed wire fence or

the swale marked the boundary line. The undisputed record shows that in 1988, Charles and Judy's son installed a meandering barbed wire fence on Tract 4 to contain the horses. As previously described, there is no evidence that either the barbed wire fence or the swale the contractor installed were intended to demarcate the boundary between Tract 2 [*29] and Tract 4.

¶62 The findings support the court's conclusion that Caverly sold Tract 3 and Tract 4 to Charles and Judy based only on a rough sketch and a legal description that provides the only description of the boundary lines, and that there was no meeting of the minds as to a physical boundary line between Tract 2 and Tract 4 that differs from the legal description.[16] The court did not err in ruling Richard did not meet his burden of proof under the ***common grantor*** doctrine.[17]

Motion for Reconsideration

¶63 Richard contends the court abused its discretion in denying his motion for reconsideration. For the first time in the motion for reconsideration, Richard argued the "true boundary" between Tract 2 and Tract 4 was a straight line projected from the concrete monument [*30] that Voorheis placed at the southeast corner of Tract 1 rather than a curved line established by the barbed wire fence and the swale.

¶64 In opposition to the motion for reconsideration, Judy asserted Richard was raising a new claim of title based on "a *straight* line hypothetically projected from the Voorheis survey" rather than on an "irregularly shaped boundary" formed by the fence and the swale.[18]

¶65 In reply, Richard conceded that he "sought more than just the Voorheis Survey line" at trial by asserting title to "that additional area" where the swale curves to the south. But Richard argued that he presented evidence to support a straight boundary line theory at trial by attempting to show that the eastern 350 feet of the barbed wire fence and the swale were installed based on the Voorheis survey and its concrete monuments.

¶66 The court denied the motion on the grounds that Richard's argument on reconsideration was "inconsistent" with "the position [Richard] took throughout the trial: that the Court should recognize a visual line and reform the legal description based upon that evidence pursuant to the ***common grantor*** doctrine."

¶67 Motions for reconsideration are addressed to the [*31] sound discretion of the trial court. *Wilcox v. Lexington Eye Inst., 130 Wn. App. 234, 241, 122 P.3d 729 (2005)*. We will not reverse denial of a motion for reconsideration absent a manifest abuse of discretion. *Wilcox, 130 Wn. App. at 241*. *CR 59* does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision. *Wilcox, 130 Wn. App. at 241*. The court did not manifestly abuse its discretion in denying the motion for reconsideration.

¶68 We affirm the trial court's decision and entry of the judgment dismissing the counterclaims.

APPELWICK and LEACH, JJ., concur.

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[16] Richard does not challenge this particular conclusion of law. In fact, he characterizes it as a verity.

[17] Richard also asserts the court erred in requiring him to prove the ***common grantor*** doctrine by clear, cogent, and convincing evidence. However, because the court specifically found that it "would reach the same conclusion, even if the burden of proof were based on a preponderance of the evidence," we need not address this argument.

[18] Emphasis in original.