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No. 62674-4-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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STEPHEN E. WESCOTT and DEBRA WESCOTT,  
husband and wife,

Respondents/Cross-Appellants,

vs.

CURTIS JOHNSON and JOAN JOHNSON,  
husband and wife,

Appellants/Cross-Respondents.

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APPEAL FROM THE SUPERIOR COURT  
FOR SNOHOMISH COUNTY  
THE HONORABLE RONALD L. CASTLEBERRY

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REPLY BRIEF OF CROSS-APPELLANTS

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## I. INTRODUCTION

The Johnsons claim that the doctrine of mutual recognition and acquiescence was correctly applied by the trial court because the parties “behaved as if the boundary was different than the actual boundary.” In fact, as the trial court found, the neighbors for many years “behaved” as though the boundary was irrelevant, and mutually using the boat ramp the trial court used to establish an arbitrary new boundary south of the bulkhead protecting the Wescotts’ property. The trial judge recognized this in recounting a 2004 conversation between the parties:

Dr. Wescott at that time pointed to the “disputed area” and said, “Well, the property line is somewhere in that area, so you can plant somewhere in here. I really don’t want to go to the cost of conducting a survey to find out the precise boundary line.”

(FF 1.8.b, CP 28) The Johnsons refer to the “great harm and detriment” they claim they will experience as a result of the Wescotts now asserting their property rights, but the cost of these proceedings, and any “harm or detriment,” could have been easily avoided by the Johnsons if they had simply continued to act as neighbors, as their predecessors and the Wescotts had for many years until 2004.

In order for the Johnsons to take title to *any* of the Wescotts' property, including a portion of the boat ramp, they were required to prove by clear, cogent and convincing evidence that the Wescotts believed that the last piling of the 1983 bulkhead defined the property line. Johnson's own trial testimony refutes that claim. (RP 200-203) There was simply no justification for the transfer of any of the Wescotts' property to the Johnsons on the basis of the doctrine of mutual recognition and acquiescence, and this court should reverse and quiet title to the surveyed property line on the Wescotts' cross-appeal.

## II. REPLY IN SUPPORT OF CROSS-APPEAL

### A. **The Only "Certain" And "Well-Defined" Straight Boundary Line Is Consistent Only With The Surveyed And Fenced True Boundary.**

As set out in the Wescotts' opening brief at 8-9, mutual recognition requires the parties' agreement and recognition of a specific, well defined line for at least ten years. The bulkhead/ramp junction that the trial court identified as the basis for its transfer of the boat ramp to the Johnsons defines a single point, not a line, and the retaining wall adjacent to the ramp that the trial court used to mark the eastern edge of the property transferred to the

Johnsons was constructed only three years before these proceedings began. (FF 1.8, CP 27-28)

The only other “straight line” between the parties’ properties is the upland cyclone fence. This fence in fact marks the actually surveyed border of the properties. (Ex. 16; RP 212) The Johnsons claim “the trial court erred in refusing to draw the boundary as a straight line,” but cite Mr. Marquiss’ testimony that he believed the boundary to be a straight line, extending from this cyclone fence. (Johnson Reply at 2, 5-6) And there is no evidence or testimony to suggest that either Marquiss’ or the Wescotts’ understanding of this boundary was altered by the presence of the driveway and ramp near the southeast corner of the property. The only “certain” and “well-defined” straight boundary line is consistent only with this surveyed and fenced true boundary, continuing to Puget Sound, see **Frolund v. Frankland**, 71 Wn.2d 812, 819, 431 P.2d 188 (1967), *overruled on other grounds in* **Chaplin v. Sanders**, 100 Wn.2d 853, 676 P.2d 431 (1984), and the trial court erred in transferring ownership of a portion of the boat ramp to the Johnsons inconsistent with that surveyed straight line.

It is illogical to conclude that a fence that was constructed on the property line in the 1960's, and still stands today, was disregarded by both Marquiss and Wescott in establishing the boundary. Yet Johnsons' remedy, drawing a straight line from a single point on the boat ramp to the "northerly property line," would cede this fence to the Johnsons even though this fenced upland area has never been a part of this dispute.

The Johnsons also refer to the bulkhead permit submitted by a contractor for an emergency repair in 2003. (Johnson Reply 13) But the crude drawing included with that permit is a reflection of the contractor's understanding of the boundary, not the Wescotts'. (RP 185) In any event, it cannot meet the ten-year requirement.

The Wescotts agree the boundary is straight – it is a direct extension of the cyclone fence running along the eastern border of the properties to the southern boundary on Puget Sound. There was never any testimony that referenced a line extending from the last piling to the "northerly property line," and the trial court's extension of this imaginary line to cede ownership of a portion of the boat ramp to the Johnsons was error.

**B. The Trial Court's Mutual Acquiescence Theory Required Independent Mutual Error In Measuring The Boundary, As There Is No Evidence The Neighbors Agreed To Any Boundary Other Than The Surveyed Line.**

The Johnsons claim the Wescotts "misstate the test for mutual recognition" by challenging the trial court's findings that both neighbors independently mismeasured the boundary at the bulkhead. (Johnson Reply 2) But the Wescotts have never claimed that the *test* for mutual acquiescence required both parties to independently err in measurement. Instead, under the facts of this case, both parties would necessarily have independently erred by the same amount, measuring from opposite sides of their properties, in order for one of the three requirements for mutual acquiescence to be met. As argued in the Wescotts' opening brief at 19, the Johnsons can meet none of the requirements for mutual acquiescence. However, the trial court's analytical error is most evident in its faulty reasoning based on mutual independent mismeasurement:

If Marquiss erred in his measurement and Spiger simply 'built over' to the last (incorrectly placed) piling, Spiger would likely have known of the error, because he too had measured his own property. The Johnsons' claim, then, must be one of adverse

possession, as they originally argued. See *Green v. Hooper*, 149 Wn. App. 627, 205 P.3d 134 (2009) (discussed in Wescott Opening 12-14) The trial court rejected that claim (RP 221), and the Johnsons have conceded there was no such adverse possession here. The trial court found instead that both Marquiss and Spiger measured their property and both were wrong. (FF 1.4, CP 22-23) Clear, cogent and convincing evidence does not support that conclusion.

Spiger designed, situated and constructed his own residence and driveway on his surveyed lot. Spiger accurately located the eastern boundary when building his house and deck. Mr. Marquiss testified that Spiger knew he “needed more room.” Spiger testified he asked Marquiss to limit the return of his pilings when the eastern termination of the bulkhead was reached in 1983. (RP 52) Mr. Marquiss also testified he thought the bulkhead had been altered after he finished construction. (RP 28) More importantly, there was no testimony that the construction of the driveway/ramp changed any of the neighbors’ opinion of the boundary as a straight line extending south from the cyclone fence.

**C. Years Of Mutual Use Of Boundary Property, Which Only Became “Disputed” Less Than Ten Years Ago, Cannot Support A Claim Of Mutual Acquiescence.**

As argued in Wescotts’ opening brief at 10-15, regardless where they thought the boundary was, Spigers’ and Marquiss’ beliefs and actions also are insufficient to find mutual recognition because of the ten-year requirement. The Marquiss estate was sold in 1987 to the Wescotts, only four years after construction of the bulkhead and driveway/ramp. The Johnsons do not respond to or address this time requirement at all. Mutual recognition and acquiescence requires a line that is “certain, well defined, and in some fashion physically designated upon the ground” for at least ten years. In this case, there was never a line extending from the ramp that could support the trial court’s mutual acquiescence theory.

The Johnsons argue that “both parties treated the line between the ramp and the bulkhead as the boundary, made their improvements accordingly, and that behavior continued over a ten year period,” ignoring the fact that Spiger expanded his curved driveway westward with permission, planted well beyond any “line,” and worked with Wescott to construct a curved rockery on

Wescott's property to protect the entire area. (FF 1.4, CP 24) In fact, there is no evidence that any improvements, including the boat ramp, were made with respect to an imagined line.

The Johnsons acknowledge that the Wescotts freely used the lower driveway and boat ramp, but claim the Wescotts never "asserted ownership" to the driveway or boat ramp. (Johnson Reply 11) The trial court found, however, that *none* of the neighbors ever discussed the property line in any manner – that is, that none "asserted ownership." (FF 1.9, CP 29) Spiger admitted he, too, never "asserted ownership," and the trial court found that he never claimed any property beyond the survey line. (FF 1.5, CP 26) "Between the Marquisses, the Spigers and the Wescotts the parties shared a general permissive attitude toward all of the property in the area." (FF 1.8, CP 28)

Why would the Wescotts feel compelled to "assert ownership" of a boat ramp they used freely, without regard to a specific boundary line, and to which their neighbors also did not "assert ownership"? No one ever "asserted ownership" until the Johnsons did, in 2004. (FF 1.9, CP 29) Years of mutual use of

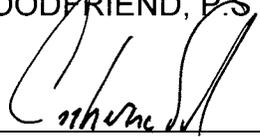
boundary property, which only became “disputed” less than ten years ago, cannot support a claim of mutual acquiescence.

### III. CONCLUSION

The parties agree on one point – the boundary should be a straight line. In keeping with both the 1982 and 2004 surveys, this line extends straight from the cyclone fence on the eastern border of the Wescotts’ property to Puget Sound. Such a line would be in agreement with the testimony of both Marquiss and Wescott; this direct extension of the existing fence was visually apparent and obvious to even the most casual observer – including the trial judge. (RP 212) The trial court’s acceptance of the Johnsons’ claim of mutual recognition to a changed boundary at the bulkhead to the contrary, was in error. The court should restore title of that portion of the Wescotts’ property in accordance with the surveyed boundary.

Dated this 2nd day of September, 2009.

EDWARDS, SIEH, SMITH  
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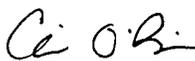
**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 2nd, 2009, I arranged for service of the foregoing Reply Brief of Cross-Appellants, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 2nd day of September, 2009.

  
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Carrie O'Brien