

66162-1

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No. 66162-1-I

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

SUSAN CONNOR, a single woman,
Plaintiff/Appellant,

v.

RICHARD L. KING, and AUDREY J. KING, husband and wife, and the
marital community composed thereof,

Defendants/Respondents.

APPELLANT SUSAN CONNOR'S OPENING BRIEF

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ORIGINAL

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I. INTRODUCTION

Appellant Dr. Susan Connor, a veterinarian, purchased a farm in Monroe, Washington in September 1995. During the inspection of the property prior to purchasing, she learned that the southern boundary ran along an existing barbed wire fence (“Existing Fence”) located approximately half-way up a steep hillside and alongside a dirt path. This hillside meets Florence Acres Road (the “Road”) at its apex. Dr. Connor’s deed reflects that boundary division, describing the boundary as running between point A (located about halfway up the slope) and point B (also located about half way up the slope and 300 feet north (downslope) of the Road) and along an “existing fence.” This language dates back to 1974 when the northern parcel (“North Side”) was first divided from its larger parcel by a common grantor and sold to a third party, creating a North Side and a South Side. Dr. Connor continuously used the path that ran along the Existing Fence for horse riding, hiking and maintaining the fence from the date of her purchase through November 2005, when she sought a mutual restraining order between her and her new neighbor to the south.

In 2003, her new neighbor to the south, Richard King, purchased the southern parcel of the property that had been originally divided in

1974 (“South Side”) with the intention of building a subdivision. In contrast to Dr. Connor’s deed, Mr. King’s deed provides that the boundary runs in a straight line from point A, coincident with point A as described in Dr. Connor’s deed, to point B, which was located 92 feet further north (392 feet north of the Road), at the base of the slope. The language in Mr. King’s deed dates to 1977. Shortly after Mr. King purchased the South Side, the title company reformed his deed and located point B at 300 feet north of the Road.

This dispute arose in early 2005 when Dr. Connor first began seeing surveyors and other third parties on her property; parties she warned off both verbally and in writing. Next, tree cutting and wood burning began. Indeed, Mr. King’s clearing activities destroyed approximately 210 feet of the Existing Fence. Ultimately in 2005, Dr. Connor sought a mutual restraining order prohibiting either party from using the hillside (or maintaining the Existing Fence). Rather than wait until the boundary line dispute could be resolved, in 2008 Mr. King again cut trees and trespassed to the north of the Existing Fence.

The matter went to trial in September 2010. The trial court initially concluded Dr. Connor’s deed had priority over Mr. King’s as it was first in time and set point B at 300 feet from Florence Acres Road.

Oddly, the trial court then adopted the straight line description in Mr. King's deed. The trial court compounded this error by relying on a photograph taken in 1966 that depicted a fence at the base of the hillside. But no evidence supports this finding as the original grantor testified that he could not identify that fence as being the boundary.

The trial court then denied Dr. Connor's adverse possession claim based on assumptions rather than the evidence in the record. First, the trial court assumed that Dr. Connor did not begin using her property until 1996, upon the completion of her house. Yet, Dr. Connor testified without contradiction that she began using her property in 1995 after her purchase closed. The trial court also erroneously found that seasonal use of one's property was legally insufficient to meet adverse possession requirements. Yet settled Washington law holds the opposite.

Based on these rulings, the trial court then dismissed Dr. Connor's claim for timber trespass. Dr. Connor respectfully asks that this Court reverse the trial court and find that the description in her deed takes priority over that of Mr. King and that the Existing Fence constitutes the boundary between the North and South Sides. In the alternative, Dr. Connor asks that this Court find that she has adversely possessed the hillside up to the Existing Fence. Finally Dr. Connor asks that this Court,

find that Mr. King committed timber trespass and remand to the trial court for calculating damages. Finally, Dr. Connor seeks her costs in this appeal.

II. ASSIGNMENTS OF ERROR

A. First Assignment of Error

The trial court erred when it quieted title in favor of Mr. King and reformed Dr. Connor's deed to remove the reference to an existing fence. *See* CP 15-16 (Conclusion of Law ("COL") 2.3, 2.6).

B. Second Assignment of Error

The trial court erred when it relied on Exhibit 38, which depicts a fence at the foot of the hillside as consistent with the location of the "existing fence" described in Dr. Connor's deed, when no witness identified that fence as the boundary fence in question. *See* CP 10-13, 16 (Finding of Fact ("FOF") 1.9, 1.11).

C. Third Assignment of Error

The trial court erred when it found that the Mr. Nelson to Mr. Roberts deed referred to a fence line at the base of the hillside, when no fence has been found in that location, the undisputed location of point A is located on the hillside, and Mr. Nelson admitted to moving the fence after issuing the 1974 deed. *See* CP 11-13, 16 (FOF 1.11, 1.23).

D. Fourth Assignment of Error

The trial court erred when it dismissed Dr. Connor's claim of adverse possession. *See* CP 16 (COL 2.4).

E. Fifth Assignment of Error

The trial court erred when it found that Dr. Connor began using her property in 1996 rather than 1995. *See* CP 14-15 (FOF 1.26, 1.32).

F. Sixth Assignment of Error

The trial court erred when it found that Dr. Connor's use of the disputed property was not sufficiently continuous, open, notorious or hostile. *See* CP 14-15 (FOF 1.29-1.33).

G. Seventh Assignment of Error

The trial court erred when it found that seasonal use of the hillside was legally insufficient to constitute continuous, open, notorious and hostile use to support a claim for adverse possession. *See* CP 14-15 (FOF 1.29-1.31).

H. Eighth Assignment of Error

The trial court erred when it dismissed Dr. Connor's claim for timber trespass. *See* CP 16 (COL 2.5).

III. ISSUES RELATED TO THE ASSIGNMENTS OF ERROR

1. Whether the trial court erred in concluding that the only fence existing on the hillside and connecting Point A and Point B was not the boundary fence where no other fence has been located that connects the same points. (Assignments 1-3).

2. Whether the description in Dr. Connor's deed providing the boundary runs along an existing fence connecting point A and point B – as located 300 feet north of the Road – has priority over Mr. King's deed description. (Assignments 1-3).

3. Whether moving the boundary fence after 1974 to give the South Side more square footage constitutes a legally ineffective boundary adjustment. (Assignments 1-3).

4. Whether substantial evidence supports the trial court's finding that Dr. Connor's use of the hillside was not sufficiently continuous, open or hostile where the uncontradicted evidence is the hillside can be used only seasonally. (Assignments 4, 6, 7).

5. Whether Dr. Connor's seasonal use of the hillside constitutes continuous, open and hostile use supporting a claim for adverse possession. (Assignments 4, 6, 7).

6. Whether substantial evidence supports the trial court's finding that Dr. Connor did not begin use of her property until 1996 when such a finding is based on an assumption rather than evidence in the record. (Assignments 4, 5)

7. Whether the trial court erred in dismissing Dr. Connor's timber trespass claim when the boundary between her and Mr. King's property is the Existing Fence, and Dr. Connor gained title of that property either through her deed or adverse possession. (Assignments 1-7).

IV. STATEMENT OF THE CASE

A. The Connor and King Deeds Conflict

Dr. Connor and Mr. King own property in Snohomish County that shares a common boundary. CP 10 (FOF 1.1, 1.2), Ex 28. Because of discrepancies in their deeds, the boundary is one of three potential lines running from Point A to Point B as illustrated in Appendix A, an annotated excerpt from Trial Exhibit 28.

Both properties at one time had a common owner, Raymond Nelson, who purchased it in 1966. *See* CP 11, 12 (FOF 1.10, 1.12, 1.15), Ex 2, RP 171:19-24. Mr. Nelson sold the North Side to Homer Roberts in 1974; Dr. Connor purchased the North Side in 1995. CP 12 (FOF 1.12), Ex 10. In describing the boundary between the North Side owned by

Roberts and the South Side retained by Mr. Nelson, the deed exempts “[A]ll property lying South of a line running southwesterly from Point “A” to Point “B”, said line being an existing fence.” Ex 4.

No dispute exists regarding the location of Point “A” on the east side of the property as illustrated above. RP 130:15-19; *see also* Ex 28. Mr. Robert’s 1974 deed places Point “B” 300 feet north of Florence Acres Road, which is approximately 60 feet above the base of the steep hillside that ends at the Road. CP 15 (COL 2.2); RP 93:1-7; *see also* Exs 4 28, 29. Subsequent transfers of the North Side maintained the boundary description as that of an existing fence running between points A and B. CP 12 (FOF 1.13, 1.14).

Three years later, in 1977, Mr. Nelson sold the South Side – also to Homer Roberts. Mr. Nelson changed the description of the boundary between the North Side and South Side properties to a straight line running between points A and B. CP 12 (FOF 1.17), Ex 15. Further, Mr. Nelson located point “B” 392 feet north of the Road at the base of the slope. RP 25:13-23; Ex 15.

B. Mr. Nelson Changed the Boundaries of the North and South Side Properties *After* He Sold the North Side to Mr. Roberts in 1974

Mr. Nelson testified that he straightened out and changed the location of the fence between 1974 and 1977 *after* he sold the North Side to Mr. Roberts: “Well, it was straightened out, and we included all those cleared in the bottom and the hill ground where the trees were.” RP 183:8-16. And that change “provided more property the hill land...” RP 184:6-10; *see also* 192:9-18; 194:20-195:5. That is, he took land from the North Side, which he sold in 1974, and added it to the South Side, which he still owned.

Mr. Nelson described the fence that ran between the North and South Sides in 1974 as going “up into the hill and then back down again amongst the trees there, but I know the kids always rode their horses out there. They were following the fence line where they were riding the horses.” RP 173:2-6.

This 1974 fence boundary description correlates with that of the “zig zag” fence referred to elsewhere in Mr. Nelson’s testimony. *See* RP 190:11-191:13. Although Mr. Nelson testified that he did not intend for the “zig zag” line to be the boundary, that testimony in fact corroborates his post-1974 actions of “straightening the fence” and providing more

property for the “hill land.” Indeed, moving point B from 300 feet north of the Road to 392 feet north also corroborates Mr. Nelson’s testimony that he moved the boundary *after* 1974 since, in the 1977 sale, point B moved to the base of the slope. *Compare* Ex 4 & Ex 15.

When he sold the South Side to Mr. Roberts in 1977, he knew the boundary was different than expressed in the 1974 deed. RP 183:4-184:12. No evidence exists that Mr. Roberts was complicit in this boundary adjustment or that the boundary adjustment was ever formalized. RP 185:9-12. Indeed, without such agreement and after conveying the South Side to Roberts in 1974, Mr. Nelson had no power to take any of it back.

C. No Witness Testified That the Fence Depicted in Ex 38 was the Intended Boundary

The trial court relied on Ex 38 to establish the location of the boundary fence at the base of the hill. CP 11 (FOF 1.9). However, no witness identified this fence as the boundary. Ms. Judy Bosse, who took the picture, moved off the property in 1966. RP 227:8-18, 228:1-11. And during her tenure on the property no fence existed on the hillside except for one at its apex on the Road. RP 234:2-5. Further, Ms. Bosse was never asked whether the photo depicted a fence running north to south or

east to west. *See generally* 226:8-234:5. If the photo were taken at an angle from the north east corner of the North Side it could depict either direction. *See* Ex. 29.

Mr. Nelson testified about several of the fences that existed on the North Side between 1974 and 1977, but he never established the location of the fence described by the 1974 Robert's deed. Further, when looking at Ex 38, he testified "[w]ell I don't know if this is the fence that the boys fixed up and moved. I'm not sure about that." RP 179:17-18. And he never answered the question as to the location of the fence on the hillside. *See* RP 173:16-22. In the absence of testimony that the fence depicted in Ex 38, taken in 1966, was the same fence intended to be the boundary in 1974, the trial court erred by relying on that exhibit to establish the boundary's location.

D. The Existing Fence is the *Only* Fence Located Between Point A and Point B

Three surveyors testified at trial: Harley Pawley on behalf of Dr. Connor, Doug Slager on behalf of Mr. King, and Jon Pendergraft on behalf of Mr. King. RP 73-109; RP 138-155. None of the three located any fence between points A and B other than the Existing Fence. RP 78:11-17; 142:19-25; RP 247:10-19. And Dr. Connor in her 15 years on

the property has not located any other fence in the area between points A and B. RP 15:3-14.

Further, if the goal of the Existing Fence were to keep “critters” away from the Road, it would be less burdensome to place the fence at the base or the top of the hillside, not half way up a steep, wooded and wet slope. *See* Ex 29, RP 9:19-10:4; 16:11-20; *see also* RP 69:24-65:19. Indeed, Mr. Nelson once owned the entire property and had access to both the top and bottom of the slope when deciding where to put a fence to contain his animals. RP 169:4-5, 171: 19-21.

Regardless of whether point B is located 300 or 392 feet north of the Road, a straight line between points A and B must be located necessarily on the hillside, not at the base of the hill: Point A is not located at the base of the hill, hence it is impossible for any fence to follow a straight line from point A to point B – even along the base of the hill. RP 94:7-12; Ex 29.

The Existing Fence depicted in Ex 28, and referred to by Mr. Nelson as the “zig zag” fence, is the only fence located on the hillside whose location corresponds with point A and point B (when located at 392

feet north of Florence Acres Road).¹ The Existing Fence follows the contour of the hillside so that one looking at it in elevation could believe that it ran in a straight line across the hillside. *See, e.g.*, RP 26:16-27:8; 65:5-66:3; 68:3-23. However, looking at it from an aerial view would cause it to appear to meander or “zig zag” due to the topography of the hill and the fact that it follows a natural break in the slope. RP 69:24-70:19; RP 94:2-5, *compare* Ex 28 & 29. To install a straight line fence between points A and B requires one not to follow the contours of the hillside, but to run it diagonally down the side of the hill. Indeed, because of the contours of the hill, portions of a fence run on a straight line would be located hanging several feet in the air; a tortuous path and almost impossible construction for anyone installing such a fence. RP 91:23-92:8, 94:7-12, *see also* Exh. 29.

E. The Use of the Land to the North of the Existing Fence has Been Open, Hostile and Continuous for More Than Ten Years

The hillside on which the Existing Fence traverses has a steep slope. Dr. Connor testified that at its base, the slope is approximately 20

¹ Mr. Nelson’s testimony that he moved the fence after 1974 also explains the fact that the Existing Fence begins at a point 392 feet north of the Road rather than 300 feet north of it as called for in Dr. Connor’s deed.

percent grade, but it soon becomes steeper, ranging from 30 to 60 percent grade. RP 9:19-10:4; *see also* Ex. 29, 32. Because of the steepness of the slope, the softness of the soil, and the runoff of water in the winter, any use of the hill side is by necessity seasonal. RP 17:21-18:25; RP 19:1-11. No witness at trial contradicted the testimony that the hillside could only be used seasonally.

The hillside had been used by both of Teyo Santana's employers, Mr. Sam Roffe and Mr. Roberts, who were partners on the North Side. In contrast, Mr. Roberts owned the South Side by himself until his death in 1980 at which time it passed to a trust. RP 200: 17-19; Ex 7 (reciting 1980 as date Mr. Roberts died). Mr. Santana testified that Mr. Roberts' father, Tex, bulldozed the hillside north of the Existing Fence (i.e. downslope), but did not disturb the fence. RP 200:22-202:4, 203:20-22. After Mr. Roberts' death, Mr. Roffe continued to use the downslope portion of the hillside. RP 218:14-18, 220:8-24, 222:10-21.

Mr. Roberts was killed in an airplane accident during Mr. Santana's employment on the North Side. RP 223:4-224:24. With him died whatever permission he may have granted to use the hillside. CP 14 (FOF 1.28).

The trial court found that the date of death could not be established. CP 14 (FOF 1.28). But direct evidence of the date of death is in the record. In 1980 Seattle Trust and Savings Bank took possession of Mr. Robert's one-half ownership of the North Side as "trustee for the Estate of Homer Douglas Roberts" and transferred it to Sam and Hazel Roffe, reserving in itself an option to purchase should certain events occur. Exs. 6, 7. The option to purchase land (entered into evidence without objection by Mr. King or limitation by the trial court) recites that "On February 13, 1980 Homer D. Roberts died in Snohomish County Washington and his estate is being probated under Snohomish County Superior Court Cause No. 80-4-00121-9." Ex. 7. Mr. Roffe continued to use the hillside north of the Existing Fence. RP 218:8-20. And in 1995 Dr. Connor purchased the North Side. Ex. 10.

From September 1995 through November 2005, when Dr. Connor sought a mutual restraining order, she maintained the trail alongside the Existing Fence for the purposes of riding horses, hiking and walking her dogs. RP 110:15-111:6. During the summer she rode her horse on the trail "almost every day." RP 17:21-18:25. She walked her dogs, maintained the fence, and cleared blackberries with a machete to keep them under control. *Id.*; RP 110:15-111:6.

Ms. Connor actively monitored her property. She put up no trespassing signs to keep the local kids from trespassing. RP 110:15-111:6. When she discovered trespassers on her property – the surveyors hired by Mr. King – she verbally told them to leave and followed that up with a letter. RP 20:16-21:14. When they returned and put stakes down, she pulled them up not knowing that she was not legally permitted to do so. RP 21:15-22:20.

Teyo Santana also used the hillside. For example, he used the path to maintain the fence. RP 212:4-13. He kept an eye on Tex Roberts while he bulldozed the hillside. RP 200:22-202:4. He meditated on the hillside and kept the trail next to the Existing Fence clear. RP 13:17-25.

Dr. Connor also created a pet cemetery on the hillside. RP 39:1-22. She planted shrubs and other plants on the hillside and along the creek. RP 38:22-39:22. Mr. King testified that when he walked what he assumed to be the northern edge of the South Side he saw “not signage, but all kinds of ribbons and ornaments and things hanging in the trees, and I couldn’t understand what that was all about, so I just wrote it off as somebody’s decoration, I don’t know a party or whatever.” RP 122:11-24.

F. The Trial Court Erred When it Assumed Dr. Connor did not Begin Using Her Property Until 1996

Because Dr. Connor's home was not completed until 1996, the court erroneously assumed that her activity on the property did not begin until that time. CP 15 (FOF 1.32). But when testifying about the use of her property, Dr. Connor spoke of her use *for the last 15 years* (i.e. from September 1995 when she bought the North Side, through the date of the restraining order in November 2005, through the date of trial in 2010). RP 17-18:25. Indeed, Dr. Connor created her pet cemetery on the property before her house was completed. RP 39:1-25. No evidence exists that contradicts her testimony on this point. Hence, eliminating the year during which her house as being built is based on assumption, not the evidence before the court.

G. The Existing Fence Was Installed Before 1979

The Existing Fence was old when Teyo Santana moved to the North Side in approximately 1978 or 1979. RP 198:11-16; 199:25-200:2; 217:3-10. Mr. Santana testified that a couple times a year a horse would get loose on the Road, which is why he started replacing fence posts and maintaining the barbed wire. RP 212:2-13.

Over the 20 years he was on the property he repaired the fence “not fancy, but just enough”; animals had access to the hillside; and no one but Mr. Santana’s employer, York Farms, ever used the area between the pasture and the Existing Fence. RP 217:11-22; 219:8-220:13; 221:220:8-24; 222:21-223:3. Further Mr. Santana testified that the Existing Fence was always visible even though the area was somewhat overgrown. RP 221:1-8. When Dr. Connor inspected the property before purchasing it, Mr. Santana informed her that he kept the trail clear and mended the fence. RP 13:11-25. The fence was obvious to anyone using the hillside. Indeed, Jon Pendergraft, a surveyor testifying for Mr. King, testified that he tripped over the fence “multiple times.” RP 266:25-267:4.

H. Because the “Existing” Fence Constitutes the Boundary Between the North and South Side Properties, Mr. King Committed Timber Trespass When he Logged Trees to the North of it

Before Mr. King began any logging operations on the hillside, he knew that Dr. Connor disputed the boundary line. RP 124:6-20. And he knew that a discrepancy between his deed and Dr. Connor’s deed existed. *Id.* Yet knowing that these issues were disputed, he proceeded to log on the hillside. RP 129:3-4; *see also* Ex. 28.

Mr. King destroyed portions of the Existing Fence in 2005 with logging operations on the hillside. RP 28:21-29:5; 78:19-24. Ultimately Dr. Connor obtained a mutual restraining order in November 2005. RP 30:13-17. Since that time the fence has fallen into disrepair because Dr. Connor could no longer access the hillside to repair it. RP 42:10-19.

Despite the restraining order, in 2008 workers under Mr. King's direction again cut trees in the area to the north of the Existing Fence. RP 131:8-21. Approximately 15 to 20 trees on the North Side of the Existing Fence were cut. RP 29:6-16; *see also* Ex 34, 35. Mr. King testified that he received \$30,000 for the lumber. RP 136:10-13.

Mr. King's trespass was neither casual nor involuntary. Because these trees were located to the north of the Existing Fence, and because the Existing Fence constitutes the boundary between the two properties through either grant of title or adverse possession, the trial court committed error when it dismissed Dr. Connor's timber trespass claim.

V. ARGUMENT

A. Standard of Review

The standard of review on appeal is a two-step process. First, the court must determine if substantial evidence in the record supports the findings of fact. The next step asks whether those findings support the

conclusions of law. *Landmark Devel., Inc. v. City of Roy*, 138 Wn.2d 561, 575, 980 P.2d 1234 (1999). Here, the trial court made findings unsupported by the evidence in the record. Further, certain conclusions of law drawn from those findings run contrary to established Washington precedent.

B. The Connor Deed Description is Superior to the Description in the King Deed

The trial court correctly concluded that the Connor Deed, being first in time, had priority over the King Deed and set point B at “300 feet more or less” north of the Road. CP 15-16 (COL 2.2). Yet, the trial court then went on to erroneously hold that the straight line between points A and B as described in the King Deed, rather than the “existing fence” as called out in the Connor Deed, controlled the boundary location. *Id.* In forming its remedy the trial court appears to have “split the baby,” a method that does not conform to Washington law governing the interpretation and priority of deeds and deed descriptions.

“It is an invariable rule that a valid deed, if once delivered (*sic*), cannot be defeated by any subsequent act unless it be by virtue of some condition contained in the deed itself.” *Miller v. Miller*, 32 Wn.2d 438, 443, 202 P.2d 277 (1949) (quoting *Jobse v. United States Nat’l Bank*, 142

Or. 692, 21 P.2d 221, 222 (1933)). That is, the title of the deed issued first in time controls and is superior to that issued at a later date. *See also Groeneveld v. Camano Blue Point Oyster Co.*, 196 Wash. 54, 60-61, 81 P.2d 826 (1930).

The inquiry into the location of the boundary between Dr. Connor's and Mr. King's property is both legal and factual: "What are the boundaries is a question of law, and where the boundaries are is a question of fact." *DD&L, Inc. v. Burgess*, 51 Wn. App. 329, 335, 753 P.2d 561 (1988) (quoting *Rusha v. Little*, 309 A.2d 867, 869 (Me. 1973)). Because Dr. Connor's deed issued first in time, the legal question of "what" is the boundary is answered by the language of her deed: the "existing fence" between points A and B. The trial court erred in holding otherwise. The next question is one of fact: "Where" is the location of that fence.

C. The "Existing Fence" Located on the Ground Controls

"In construing a description in a deed the court should consider the circumstances of the transaction between the parties and then read and interpret the words used in the deed in light of these circumstances." *DD&L*, 51 Wn. App. at 335. Ambiguities in a deed are construed against the grantor. *Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass'n*, 156 Wn.2d 253, 272, 126 P.3d 16 (2006).

Washington courts follow the rule that when conflicting calls exist between two deeds, the priority of calls stands as follows: “(1) lines actually run in the field, (2) natural monuments, (3) artificial monuments, (4) courses, (5) distances, (6) quantity or area.” *DD&L*, 51 Wn. App. at 335-36. When a monument described in a deed does not match the monument on the ground, the monument on the ground controls. *Id.* at 336. A fence is categorized as an “artificial” monument. *Id.* at 332 n.3.

Here, the call to the “existing fence” between points A and B controls, not only because the 1974 deed is first in time, but also because it is an existing monument on the ground. Indeed, no other fence existed when Mr. Santana began working on the South Side; Dr. Connor has never located any other fence between these points; and perhaps most tellingly, none of the three surveyors who testified located any other fence running between points A and B.

D. In the Alternative, Dr. Connor has Adversely Possessed the Property North of the Existing Fence

“Adverse possession requires proof of “actual possession which is uninterrupted, open and notorious, hostile” for 10 years. *Howard v Kunto*, 3 Wn. App. 393, 477 P.2d 210 (1970), *overruled in part by Chaplin v. Saunders*, 100 Wn.2d 853, 861-62 & n.2, 676 P.2d 431 (1984)

(eliminating element of subjective intent to dispossess another from the adverse possession analysis). “Adverse possession is a mixed question of law and fact. The trier of fact determines whether the essential facts exist, and the court determines whether those facts constitute adverse possession.” *Maier v. Giske*, 154 Wn. App. 6, 18, 223 P.3d 1265 (2010). Seasonal use of property does not defeat an adverse possession claim. *Howard*, 3 Wn. App. at 398. “If the land is occupied during the period of time during the year it is capable of use, there is sufficient continuity.” *Id.*

1. Dr. Connor’s Continuous Seasonal Use Supports Her Claim of Adverse Possession

The uncontradicted testimony at trial indicated that the trail by the Existing Fence was put to use seasonally because of the softness of the soil and the water present in the wintertime. The trial court found that this seasonal use lasted for seven months of the year. CP 14 (FOF 1.29). Given this finding of seasonality, it was error to conclude that seasonal use was not legally sufficient to constitute continuous use to support an adverse possession claim. *Howard*, 3 Wn. App. at 398, *Lee v. Lozier*, 88 Wn. App. 176, 185-86, 945 P2d 214 (1997) (“Given the water and air temperatures in the wintertime on Lake Washington, we can only conclude that use of the dock more frequently in the summer than winter

was entirely consistent with use most likely made of similar docks.”); *810 Properties v. Jump*, 141 Wn. App. 688, 702, 170 P.3d 1209 (2007) (“[C]ontinuous and uninterrupted use’ does not imply *constant* use of a roadway.”).

2. Dr. Connor’s Use Was Sufficiently Open, Notorious and Hostile to Support Her Adverse Possession Claim

“It is well settled that to constitute adverse possession there need not be a fence, building, or other improvement made . . . [i]t suffices for this purpose that visible and notorious acts of ownership are exercised over the premises in controversy.” *Grays Harbor Commercial Co. v. McCulloch*, 113 Wn. 203, 212, 193 P. 709 (1921) (citing *Ewing v. Burnet*, 36 U.S. 41, 9 L.Ed. 624 (1837)). “The open and notorious element is satisfied where the use of the property is such that ‘any reasonable person would assume’ the claimant was the owner.” *Maier*, 154 Wn. App. at 18. And the hostility element requires only that “the claimant treat the land as his own as against the world...” *Id.* at 19 (quoting *Chaplin*, 100 Wn.2d at 860-61). Successful claims of adverse possession present evidence of usage such as clearing land, mowing grass and maintaining shrubs and

plants. *Id.* (quoting *Riley v. Anderson*, 107 Wn. App. 391, 397, 27 P.3d 618 (2001)).

Here, a visible fence exists that has been maintained over the years and a trail that has been used. Mr. Santana recalls watching Tex Roberts clear the North Side up to the Existing Fence with a bulldozer. He also testified that the Existing Fence remained visible during his tenure on the property. And he maintained the fence “not fancy, but just enough.” RP 222:21-223:3.

Dr. Connor continued to maintain the fence and the trail until she was no longer able to do so because of the mutual restraining order entered in 2005. RP 30:13-17; 42:10-19. Mr. King knew she had installed and maintained a pet cemetery on the hillside and that she had planted trees and shrubs to mark the area. RP 38:22-39:22. These actions meet the requirements of “open and notorious” because they put others on actual notice of an adverse use. *Chaplin*, 100 Wn. 2d at 862 (citing *Hovila v. Bartek*, 48 Wn.2d 238, 242, 292 P.2d 877 (1956)). Further, the trial court found Dr. Connor used the trail on the hillside as a true owner would – seasonally for seven months of the year. When taken together these facts are sufficient to establish the open, notorious and hostile elements of an adverse possession claim.

3. Dr. Connor Used the Property for the Statutory Time Period of 10 Years

Dr. Connor purchased her property in September 1995 and entered into a mutual restraining order with Mr. King regarding the use of the disputed area on the hillside in November 2005. Her ownership and dominion over the hillside lasted for ten years and two months – two months longer than the ten year period required to establish adverse possession. RCW 4.16.020. As pointed out above, the trial court ignored the evidence before it and assumed that Dr. Connor was not making any use of her property during the year that her house was being built. Substantial evidence does not support this finding by the court.

4. In the alternative, Dr. Connor May Tack

“Where there is privity between successive occupants holding continuously and adversely to the true title holder, the successive periods of occupation may be tacked to each other to compute the required 10-year period of adverse holding.” *Draszt v. Nacarrato*, 146 Wn. App. 536, 542, 192 P.2d 921 (2008) (quoting *Roy v. Cunningham*, 46 Wn. App. 409, 413, 731 P.2d 526 (1986)). Privity exists when the dispute property “is transferred by deed and physically turned over.” *Id.* (citing *Shelton v. Strickland*, 106 Wn. App. 45, 53, 21 P.3d 1179 (2001)). Indeed, one may

tack a prior owner's use even when that use has exceeded the ten years required for adverse possession. *Shelton*, 106 Wn. App. at 53-54. In that instance, title passes at the end of the ten year period regardless of whether the adverse possessor ever made a claim for the property. *Id.* Thereafter the adversely possessed property may be conveyed to another purchaser regardless of whether it is specifically described in the deed. *Id.*

Here, privity exists because all of the North Side deeds from 1974 to the present have transferred that portion of the hillside running from point A to point B along an existing fence. *See Exs. 2-10.* Dr. Connor may tack the time period she used the hillside to that time period running from Mr. Robert's death in 1980 through September 1995 when she purchased the North Side. Indeed, the time period required for adverse possession was fulfilled before Dr. Connor even purchased the property. Dr. Connor has never abandoned her claim of title to the property. Hence, adverse possession of the property north of the Existing Fence took place as of 1990 – ten years after the date of Mr. Roberts' death and the withdrawal of his permission to use the land.

E. Mr. King Committed Timber Trespass

RCW 64.12.030 provides:

Whenever any person shall cut down, girdle, or otherwise injure, or carry off any tree, including a Christmas tree as defined in RCW 76.48.020, timber, or shrub on the land of another person, or on the street or highway in front of any person's house, city or town lot, or cultivated grounds, or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, in an action by the person, city, or town against the person committing the trespasses or any of them, any judgment for the plaintiff shall be for treble the amount of damages claimed or assessed.

Mr. King violated this statute when he took down trees north of the Existing Fence. *See* Ex 34. Further, Mr. King knew of the property dispute before his logging operation began in 2005. His surveyors had been warned off the property by Dr. Connor both verbally and in writing. He also violated the mutual restraining order in 2008 by further logging on the hillside.

His trespass was neither casual nor involuntary; hence he is liable for treble damages. *Maier*, 154 Wn. App. at 21 (“Where a person has knowledge of a bona fide dispute, and thereafter consciously, deliberately, and intentionally enters upon the disputed area for the purpose of destroying, and does destroy, trees or other property ... such acts are neither casual nor involuntary ... and will subject such person to treble

damages...” (quoting *Mullally v. Parks*, 29 Wn.2d 899, 911, 190 P.2d 107 (1948)).

F. Dr. Connor is Entitled to her Costs on Appeal

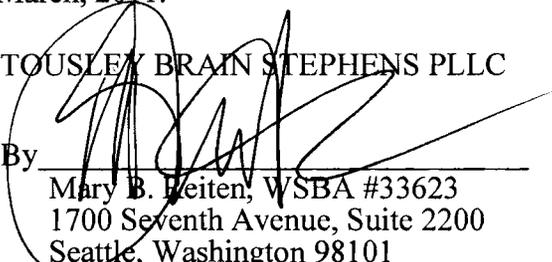
Pursuant to RAP 14.2, Dr. Connor respectfully asks that this Court grant her appeal, declare her to be the prevailing party, and order that Mr. King pay her costs on appeal.

VI. CONCLUSION

For the foregoing reasons, Appellant Susan Connor respectfully moves the Court to reverse the trial court and hold that as a matter of law the boundary between her property and that of Mr. King is established by the existing fence running between points A and B as depicted on Ex 28. In the alternative, Dr. Connor asks that the trial court find she has adversely possessed the area of land to the north of the Existing Fence as depicted on the same exhibit. Finally, Dr. Connor respectfully asks that should the Court grant relief under color of title or adverse possession, that it then find Mr. King has committed timber trespass and remand to the trial court to assess damages. Finally Dr. Connor asks that this Court declare her to be the prevailing party and award her costs on appeal.

DATED this 21st day of March, 2011.

TOUSLEY BRAIN STEPHENS PLLC

By 

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*Attorneys for Plaintiff/Appellant,
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CERTIFICATE OF SERVICE

I, Betty Lou Taylor, hereby certify that on the 22nd day of March, 2011, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

Earl Morriss, WSBA #34969
LAND LAW WASHINGTON PLLC
2920 Colby Avenue, Suite 214
Everett, WA 98201-4047

- U.S. Mail, postage prepaid
- Hand Delivered
- Overnight Courier
- Facsimile
- Electronic Mail

Co-Counsel for Plaintiff/Appellant

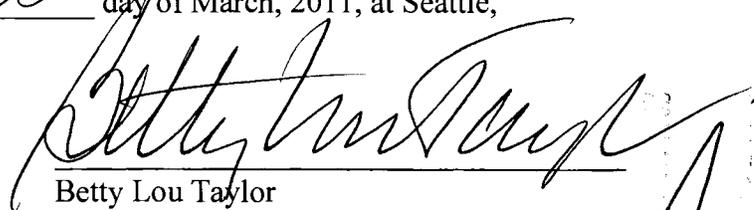
Karl F. Hausmann WSBA #21006
MARSH MUNDORF, ET AL.
16504 9th Avenue SE, Suite 203
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- U.S. Mail, postage prepaid
- Hand Delivered
- Overnight Courier
- Facsimile
- Electronic Mail

Attorneys for Defendants/Respondents

I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 22nd day of March, 2011, at Seattle, Washington.


Betty Lou Taylor

APPENDIX

The Connor Property is bounded on the north by Yeager Road and on the south by the disputed boundary. Unlike Mr. King's property it continues to the east past Point A.

Point A

Connor Deed/ Fence Line

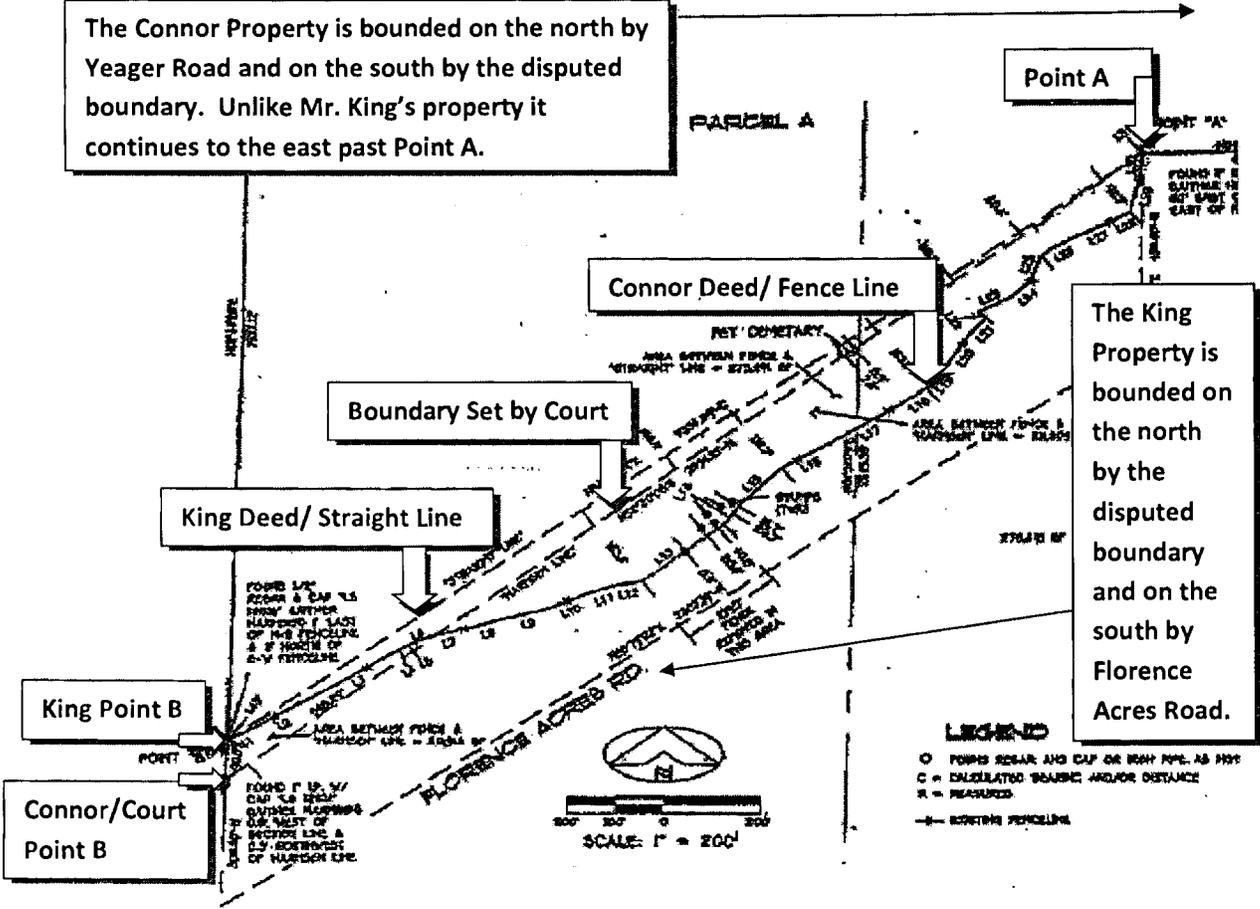
Boundary Set by Court

King Deed/ Straight Line

The King Property is bounded on the north by the disputed boundary and on the south by Florence Acres Road.

King Point B

Connor/Court Point B



- LEGEND**
- POINTS SET BY AND CAP OR MARK PIPE AS NOTED
 - C = CALCULATED BEARING AND/OR DISTANCE
 - M = MEASURED
 - FENCING

