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2011/12/10 10:15

NO. 66162-1

COURT OF APPEALS, DIVISION I

STATE OF WASHINGTON

SUSAN CONNOR, a single woman

Plaintiff/Appellant,

vs.

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

Defendants/Respondents.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal concerns farm property outside Monroe in Snohomish County. A large farm was split into two parcels with a 1974 deed that referenced an “existing fence” in the legal description. At trial, the court heard from witnesses who lived on the farm from the 1940s to 1966, from 1966 to the 1970s, and from the late 1970s through 1995. The trial court saw a picture of a fence at the edge of a pasture. The court heard early occupants of the farm, including the grantor of the 1974 deed, describe the location of the fence next to the pasture. It was a relatively straight fence below the wooded hill area. The court heard witnesses who testified that this fence no longer exists. The court reviewed aerial photographs from the time period showing a straight line demarcation between the pasture and the wooded hillside.

The court also heard testimony regarding a derelict barbed wire fence that starts in the same approximate location as the old pasture fence, but meanders far up on the hillside. The court heard testimony that this fence acted as a secondary fence during common ownership of the two parcels to keep animals from wandering up the hill onto a busy roadway.

In its decision, the trial court found that the straight fence along the pasture, even though it no longer exists, was the fence that was referred to in the 1974 deed and which was intended to act as a boundary line. The

court rejected Dr. Connor's assertion that the derelict barbed wire fence meandering up the hillside was the fence referred to in the 1974 deed. Based on these findings, the court reformed Dr. Connor's deed to remove the reference to the existing fence and make the legal description match the straight line boundary defined in Mr. King's deed.

The trial court also rejected Dr. Connor's second claim for adverse possession, finding that Dr. Connor's minimal and unobtrusive use of a steep and wooded hillside was not sufficiently open and hostile to rise to the level of adverse possession and Dr. Connor did not prove hostile use for the ten year prescriptive period.

II. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. If a fence that creates a reference point for a deed's legal description in 1974 is later removed, did the trial court err by determining, through testimony and pictures, the approximate location of the fence and the intent of the grantor in 1974? (Appellant's Assignments of Error 1, 3.)

2. Under the facts described in Issue Statement No. 1, does the trial court err by relying on historical photographs supported and authenticated by knowledgeable testimony? (Appellant's Assignment of Error 2.)

3. When a party testifies to seasonal and nonobtrusive recreational use of a steep and heavily wooded area adjacent to farm land, does the trial court err by holding such use is not sufficiently hostile to support a claim of adverse possession? (Appellant's Assignments of Error 4, 6, 7.)

4. When a party claiming adverse possession testifies of occupying property for less than ten years, does the trial court err in relying on such testimony in rejecting her adverse possession claim? (Appellant's Assignment of Error 5.)

5. When a trial court finds that a defendant is the actual owner of a disputed timber area and all the alleged tree cutting is within the defendant's property, is the plaintiff's claim of timber trespass not supported? (Appellant's Assignment of Error 8.)

III. STATEMENT OF CASE

A. Lorenz Ownership to 1966

From at least the 1930s until 1966, the Lorenz family owned and lived on farm property outside Monroe in Snohomish County. As detailed below, the Lorenz farm was later split into the properties that are now owned by the Appellant, Dr. Connor, and the Respondent, Mr. King. Ex. 1; Ex. 13. RP 226:21. The Lorenz property was bordered on the south by Florence Acres Road and on the north by Yeager Road. A

daughter in the Lorenz family, Mrs. Judith Lorenz Bosse, was a witness at the trial. Mrs. Bosse was raised on the farm from the time she was born until she moved off the farm and married in the 1960s. RP 226:21-227:7.

Mrs. Bosse testified that during her time on the property there was a fence that ran in essentially a straight line from the Van Ness property (bordering on the west) to the east border of the farm. The fence was placed along the edge of the southernmost pasture of the family farm but below the trees located on what is now Mr. King's Hill Property. RP 228:1-230:15; RP 232:4-7; *see also* Ex. 38; Ex. 41.

Mrs. Bosse showed the trial court a picture she had taken of her father at the farm in 1965. While taking the picture, Mrs. Bosse was standing on the Hill Property facing north towards the pasture of the Farm Property. RP 228:1-11; Ex. 38. In the foreground, the photo shows the line fence that was historically located between the hill and the flat land. *Id.*

Mrs. Bosse also viewed an aerial photograph of the property from 1969. Ex. 41. She used the aerial photograph to demonstrate the fence's location to the trial court. RP 228-230. She testified that the fence was placed along the pasture area below the trees. RP 230:3-5. In Mrs. Bosse's words, the fence was as straight as they could make it. The aerial

photograph shows a straight line demarcation between pasture and trees.
RP 229:25-230:15; Ex. 41.

B. Nelson Ownership: 1966-1974/1977

Raymond and Margaret Nelson bought the entire property from the Lorenz family in 1966. Ex. 2. Raymond Nelson was also a witness at the trial. Like the Lorenzes, the Nelson family used the property for a dairy farm. RP 169:11. The Nelsons had their dairy operations in the large pasture area. RP 175:3-4, 14-15. Mr. Nelson's partner in the farm was his brother Vern Nelson. Vern Nelson had a son who was allergic to beef and dairy, so Vern Nelson's family resided away from the dairy operations in a residence on the hillside portion of the property up on Florence Acres Road. RP 175-176:4.

Mr. Nelson also testified to the trial court about Mrs. Bosse's photograph of her father showing the fence. Ex. 38, RP 177:11-178:23. Mr. Nelson testified the fence was retained on the property during his ownership. According to Mr. Nelson, a person riding a horse next to the fence would be in the pasture, not amongst the trees located on the hillside, because there were no trees between the pasture and the fence. RP 173:7-15. Mr. Nelson testified a person could look from one end of the fence down to where it terminated and see the whole fence from the pasture. RP 173:23-174:6; RP 193:8-16.

C. Nelson's Sales to Roberts: 1974-1977

In 1974, Mr. Nelson met at his home with Mr. Homer Roberts and the men negotiated a two-part sale of the Nelson home and farm. The buyer, Homer Roberts, had recently sold his home to Bill Muncey, the well-known Seattle hydroplane driver, so he had cash for the purchase. RP 170-171.

The first part of the sale from Nelson to Roberts included the house and the lower farm land (now the Farm Property). RP 171; RP 181. The men also agreed that Roberts could later buy the upper property (now the Hill Property) for a price that increased by eight percent per year. RP 181.

In December, 1974, the Nelsons conveyed the Farm Property to Roberts. Ex. 4. This was the first time the former Lorenz property was split between the Farm Property and the Hill Property. The description in the 1974 Farm Property Deed describes all of Nelsons' property and then retains for Nelson a parcel "lying South of a line running Southwesterly from Point A to Point B, said line being an existing fence." Point B was defined as 300 feet, "more or less," North of the Florence Acres Road. *Id.*

Mr. Nelson testified that when he sold the Farm Property to Mr. Roberts in 1974 there was a fence in the approximate location as the fence shown in Judy Bosse's picture. RP 178:18-22. The fence was between the pasture of the Farm Property and the trees of the Hill Property as

shown on Exhibit 38. Mr. Nelson testified that the fence was intended to be the boundary between the Farm Property and the Hill Property. RP 177:12-178:23; RP 183:25-184:3; RP 186:1-5; Ex. 38.

In 1977, Nelson followed through with the second half of the agreement by selling the Hill Property to Roberts. Exs. 15-16. Rather than describing the boundary between the Farm Property and the Hill Property as an existing fence, the legal description in the 1977 Hill Property Deed describes the boundary line as a straight line between two points. Ex. 16. And rather than describing Point B at a location “300 feet, more or less” north of the Road, the point was located 392 feet north of Florence Acres Road. *Id.*

Consequently, the boundary line between the Farm Property and the Hill Property was not described the same way in the 1974 and 1977 deeds. The discrepancy was carried forward in every subsequent conveyance of the two properties.

Mr. Nelson testified that before he sold the Farm Property to Roberts he did some repairs and replacements to the fence along the pasture and attempted to make it straighter than it was when he purchased the property from the Lorenzes, although he admitted that in some parts his repairs and replacements gave the fence more of a contour. RP 174:16-175:4. Nevertheless, even with these repairs and modifications the

fence remained along the pasture. RP 175:3-4. After the 1977 sale, Roberts owned both parcels.

D. Roberts and Roffe Partnership and Sale of Farm Property to Roffe

In 1980, the Estate of Homer Roberts assigned a one-half undivided interest in the Farm Property to Sam and Hazel Roffe.¹ Ex. 6. Since 1975, Sam Roffe and Mr. Roberts had been partners in a joint venture called York Farm and Land Co. for the purpose of owning and operating a real estate and a race horse business. Ex. 7. Since only a half-interest was conveyed to the Roffes, the Roberts Estate retained a one-half interest in the Farm Property (and still all of the wooded Hill Property).

In 1987, the Estate of Homer Roberts then conveyed the Hill Property in two deeds to trusts created by the Roberts Estate for the benefit of Homer Roberts' children (Janelle Roberts Privett and Douglas Roberts). Exs. 17-18.

The Roffes and the Estate of Roberts apparently maintained dual ownership of the Farm Property until 1990, when the Estate quit claimed its interest in the Farm Property to Roffe. Ex. 9.

Sam Roffe hired Mr. Teyo Santana to be his farm manager in the late 1970s. RP 197:24. Mr. Santana lived and worked at the farm for

¹ Mr. Roffe owned the Roffe Sportswear Company in Seattle.

approximately 17 years until it was sold to Dr. Connor in 1995. RP 197:24. Mr. Santana was also a witness at the trial.

Mr. Santana testified there was no fence at the base of the Hill Property when he started working at the farm. RP 199:1-3. Regarding use of the hillside, Mr. Santana's testimony was that Mr. Roberts owned the Hill Property. RP 200:20-21; RP 201-202:1-11; RP 212:16. Mr. Santana testified about one incident where Homer Roberts' father ran a bulldozer above and below the meandering barbed wire fence. This reflects the owner of the Hill Property's use of the entire hill property above and below the meandering barbed wire fence.

Mr. Santana made minor repairs to the barbed wire fence that ran up the hillside. RP 199:4 through RP 200:3. This barbed wire fence was not the primary means of keeping horses in the pasture; rather, it was used to prevent any horses that had wandered up the hill from being injured by going onto Florence Acres Road. RP 212:4-5; RP 223:1-3. "Only if animals escape out. Because the animals hardly ever went in there. What I did, I replaced the fence, not fancy, but just enough." RP 223:1-3.

Mr. Santana testified that he had Roberts' permission to maintain the fence. RP 221:15. Mr. Roberts was killed in a plane crash. At trial, no evidence was introduced to establish Mr. Roberts' date of death. RP 224. In Appellant's Brief, at 14, they refer for the first time to Exhibit 7,

which lists Roberts' date of death at 1980. This fact was not brought to the trial court's attention. *See* FOF 1.28.

E. Connor Ownership: 1995 to Current

Before it was sold to Dr. Connor in 1995, the York Farm property was surveyed by Harmsen & Associates, a Monroe land surveying company. The York Farm survey was dated April 17, 1995 and the deed to Dr. Connor was dated September 12, 1995. Ex. 25; Ex. 11. This survey did identify encroachments on the eastern property line, but the survey did not show any encroachment or variation from a straight line demarcating the south property line. *Id.* The southern boundary of the property is displayed as a perfectly straight line between a Point B located at 300 feet north of Florence Acres Road and Point A near the eastern side of the property. Ex. 25.

Before her purchase, Dr. Connor visited the Farm Property and was shown around the property by Teyo Santana. Dr. Connor's testimony at trial contradicts Mr. Santana's testimony at trial. Dr. Connor testified that she walked the boundary of the property with Mr. Santana and saw surveying flags attached to the barbed wire fence up in the hillside. RP 8:3-22. Mr. Santana testified they walked down the length of the surveyed flags along a straight line at the bottom of the hill. RP 212:22 through RP 213:6; RP 209:6-8.

Dr. Connor acquired title to her property in 1995. She built a home on the property that was completed in November, 1996. CP 111:14; FOF 1.7.

F. King Ownership of Hill Property.

Richard King is a home builder.² He bought his property in 2003. Ex. 22. When Mr. King took title to his property, there was confusion as to the size of his property. His first deed described a point 392 feet north of Florence Acres Road. Mr. King had the property surveyed. Mr. King's title company reviewed the legal description. Eventually, Mr. King's title company recorded two new deeds attempting to correct this error. The final deed changed the original dimension from 392 feet north of Florence Acres Road to 300 feet north of Florence Acres Road. RP 128:6-14.

Mr. King walked the entire property. He came across what he now understands was Dr. Connor's pet cemetery. He described the pet cemetery as follows: "I ran into some – 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 decorations, I don't know, a party or whatever ... (The area was) probably a fourth as big as this room (the courtroom) or a little less." RP 122.

²Audrey King, Mr. King's wife and the Defendant in this action, passed away after this action was filed.

As part of the preparation for his property development, Mr. King cut trees that endangered his building area. RP 128:21-130:1. This occurred in 2005. RP 28:6-7; RP 30:4.

Dr. Connor filed suit against King on October 26, 2005, asking the trial court to quiet title to her property, for trespass to trees, and for damages. CP 351. Her complaint also requested “such other and further relief as the court deems just and equitable in the premises.” CP 360.

G. Property Surveys and the Zig-Zag Barbed Wire Fence

The trial court reviewed a number of surveys. An unrecorded survey for the Hill Property dated April 12, 1989 from Harmsen & Associates shows a straight line property boundary. Ex. 45. As noted above, the York Farm survey in 1995 showed the boundary as a straight line. Ex. 25.

In 2004, a survey performed for Mr. King by NorthStar Land Surveying of the Hill Property identified a straight boundary line between the Hill Property and the Farm Property. Ex. 26.

Believing that Mr. King’s surveyor was finding the wrong boundary points, Dr. Connor hired Harmsen & Associates, the same surveyors who had performed the York Farm survey, to find the existing fence line. RP 140:7; RP 141:5-16; RP 142:11-14. Harmsen’s surveyors

reviewed NorthStar's points and found they were in the correct location.

Dr. Connor found a new surveyor and sued Harmsen. RP 144:21-23.

None of the above surveys identified the barbed wire fence running up the hillside as the property line or even made reference to the barbed wire fence. Mr. Pendergraft, the surveyor who performed the 2004 survey on behalf of Mr. King, testified at trial that although he located the barbed wire fence, he never considered it to be the boundary fence called out in the 1974 Farm Property Deed because of its condition and his research as to the history and original purpose of the fence which indicated it was built as "a secondary fence to keep the critters out of the road." RP 247:17-251:1.

Mr. Slager of Harmsen and Associates similarly testified at trial, stating the surveying crew from Harmsen and Associates saw "an old fence going up the hill that was tied to trees" but that "[t]ypically, those are not boundary fences, and our survey crews don't locate those kind of fences as boundaries." RP 142:15-143:2. Furthermore, Mr. Slager testified that in his opinion what was left of the barbed wire fence "was not indicative of the property line. There was no way it was a straight line, and I concluded it was not the fence that was being referred to in the deed." RP 144:5-10.

However, in 2008, over two years after filing suit, Dr. Connor's new surveyor, Harley Pawley of A.S.P.I, provided her with a survey showing the boundary line to be the zig-zag barbed wire fence. RP 10:25-11:7; Ex. 28.

H. Trial: September 1 – 3, 2010

Trial was held in the Snohomish County Superior Court between September 1-3, 2010.

In its Findings of Fact, the trial court noted Judy Bosse's 1965 photograph showing the fence at the edge of the pasture. FOF 1.9. The trial court found the fence shown in Mrs. Bosse's photograph was the fence referred to in the 1974 Nelson to Roberts deed. FOF 1.11. The trial court found that when Mr. Nelson conveyed the Farm Property to Roberts in 1974, the existing fence called out in the deed was the fence that in 1974 was situated along the edge of the pasture. CP 13 (FOF 1.23, 1.25).

Relying on the 1974 Farm Property Deed, as well as Mr. Nelson's, Mrs. Bosse's and Mr. Santana's testimony, the surveys submitted as exhibits at trial, and other testimony provided during the trial, the trial court held that the property line is a straight line between Point "A" at 425 feet North of the Road and Point "B" located 300 feet North of the Road. CP 11-13 (FOF 1.11, 1.19-1.21, 1.23); CP 15-16 (COL 2.2-2.3).

The trial court rejected Dr. Connor's assertion that the irregular barbed wire fence that meanders up the hillside was the fence referred to in the deeds. CP 13 (FOF 1.24).³

In the trial court's oral ruling, the court stated: "So I'm satisfied that a fence existed. It can't be located. By 1978, 1977, the fence was no longer there. So I think the only rational thing to do is to reform the deed to Ms. Connor to strike any reference to the fence, leaving the property lying at that 300-foot point, which has been referred to as Point B by some." RP 274:18-24.

The trial court also rejected Dr. Connor's adverse possession claims. COL 2.4. The trial court found if Dr. Connor's claim was based on her own use of the property, she had not shown use for the sufficient ten year period since she did not begin to live at the property until November, 1996 and she stopped entering the disputed area under the mutual restraining order dated November, 2005. FOF 1.26.

The trial court found the nature of Dr. Connor's use of the property was also insufficient to support adverse possession. FOF 1.31. Dr.

³ Dr. Connor's briefing refers to the barbed wire fence identified in the 2008 survey as the "Existing Fence." While it is true that the barbed wire fence probably existed in the 1970s and remnants of it still exist today, it is a central issue in this case (and disputed by the Respondent King) whether this barbed wire fence is the same fence referred to in the 1974 deed creating the Farm Property. Dr. Connor's labeling of the barbed wire fence as "the existing fence," or to say that the surveyors found the "Existing Fence" (Appellant's Brief, p. 11) is confusing.

Connor's use consisted merely of entering the area with a horse. Such use was only possible during seasons when the hillside and soils were dry enough (approximately seven months of the year). FOF 1.29. The trial court found Dr. Connor made some repairs to the barbed wire fence. She created a pet cemetery on her side of the 300-foot Point B line. She collected boughs and branches and things in the winter. She placed No Trespassing signs in the woods, but without better proof of the signs, the trial court could not give weight to her testimony about the signs. FOF 1.30.

The trial court found that Dr. Connor's use was not sufficiently continuous, and not of a sufficient character to be hostile. FOF 1.31. Her use was not of such a character to constitute open and notorious use of the property sufficient to establish adverse possession and give notice to Mr. King or anyone else who owned the property. *Id.*

The trial court rejected Dr. Connor's effort to tack the use of prior owners to her use for purposes of adverse possession. The trial court identified one year when the property was not used between the Roffe's ownership and Dr. Connor's. FOF 1.32. The type of use of the former owners also did not rise to the level of adverse possession. The trial court found that Teyo Santana's use of the property (during the Roffe ownership of the Farm Property) was done with the permission of the property owner

(Roberts) to enter the hill area when animals entered and to repair the fence. FOF 1.27. Even without Roberts' permission, the trial court held that Mr. Santana's use of merely rounding up stray animals who wandered up the hillside was not sufficient to meet adverse possession standards. FOF 1.33.

Based on these findings and conclusions, the trial court also dismissed Dr. Connor's claims for timber trespass and emotional distress damages. COL 2.5; RP 277:11-16. This appeal followed.

IV. ARGUMENT

A. Standard of Review.

When findings of fact and conclusions of law are entered following a bench trial, appellate review is limited to determining whether the findings are supported by substantial evidence, and if so, whether the findings support the trial court's conclusions of law and judgment. *Sunnyside Valley Irr. Dist. v. Dickie*, 111 Wn. App. 209, 43 P.3d 1277 (2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959). Findings of fact supported by

substantial evidence are treated as verities on appeal. *Doe v. Boeing Co.*, 121 Wn.2d 8, 846 P.2d 531 (1993); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992).

The appellate tribunal is not entitled to weigh either the evidence or the credibility of witnesses, even though the appellate court may disagree with the trial court in either regard. *Bartel v. Zuckriegel*, 112 Wn. App. 55, 47 P.3d 581 (2002). It is not role of the appellate court to weigh and evaluate conflicting evidence. *Burnside v. Simpson Paper Co.*, 66 Wn. App. 510, 832 P.2d 537 (1992). Reviewing courts defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Circumstantial evidence and direct evidence are equally reliable. *State v. Ainslie*, 103 Wn. App. 1, 11 P.3d 318 (2000).

In this case, there are two standards of review that apply. As to determining the intent of a grantor of a deed, this is a question of fact. *Thompson v. Schlittenhart*, 47 Wn. App. 209, 212, 734 P.2d 48 (1987). On the issues related to adverse possession, adverse possession is a mixed question of law and fact. *See Anderson v. Hudak*, 80 Wn. App. 398, 401-02, 907 P.2d 305 (1995).

B. Substantial Evidence Supports The Trial Court's Findings That The 1974 Nelson To Roberts Deed Referred To A Now-Removed Fence. (FOF 1.11; 1.23).

The existence of a fence at the edge of the pasture was supported by the testimony and photographs from Judy Bosse (RP 228-232) and by the testimony of the original grantor Raymond Nelson (RP 172-175; 178-186). Mr. Nelson testified directly that he intended to use the straight line fence along the pasture as the boundary line in his 1974 sale to Roberts. RP 182:2-9. This is substantial evidence from which the trial court could readily make the critical findings supporting the reformation of Dr. Connor's deed. FOF 1.11, 1.23, COL 2.3. Dr. Connor's arguments that the trial court was wrong are simply arguments that the testimony should have been viewed differently.

Dr. Connor first walked the Farm Property before she bought it in 1995. RP 7:1-22. Consequently, Dr. Connor's conjecture that there was not a fence in 1974 based on her observations beginning in 1995 is not proof that there was not a fence in 1974.

As Dr. Connor herself testified, fences come and go on farms. RP 55:3-11. Therefore, it is unsurprising that the fence between the pasture and the trees that Mr. Nelson testified was the intended boundary line no longer exists. Several possible explanations for the removal of the

boundary fence were offered at trial. For instance, one of the surveyors who testified, Douglas Slager, had assumed that the fence had been washed away by one of the many floods that passed through the valley. RP 144:11-17.

Another plausible explanation for the removal of the historic boundary fence has to do with the change in the use of the Farm Property between the Nelsons and the Roberts. Judy Bosse testified that the fence along the pasture consisted of four or five strands of barbed wire strung between fence posts. RP 230:16-18. Mr. Nelson operated the Farm Property as a dairy farm and he testified that they used barbed wire for the cows. RP 179:23-180:3. On the other hand, after 1977 Roberts used the Farm Property for race horses. RP 197:17-198:4; Ex. 7. Several witnesses testified that barbed wire fencing should not be used with horses because of the potential for injury. RP 179-180:23-3 (Mr. Nelson); RP 191:6-9 (Mr. Nelson); RP: 222:8-20 (Teyo Santana); RP 54:9-11 (Dr. Connor). Accordingly, it would have been perfectly reasonable and expected for Roberts to remove the boundary fence when he assumed title and possession of both parcels in order to prevent injury to his horses from the barbed wire.

C. Substantial Evidence Supports The Trial Court's Finding That The Zig-Zag Barbed Wire Fence Was Not The Boundary.

The trial court found "The evidence shows that the barbed wire fence shown in Exhibit 28 (ASPI survey) is not the fence referred to in the farm property (Connor's) legal descriptions. The barbed wire fence is a very irregular fence, apparently intended to keep animals, primarily cows on the dairy farm, off the upper part of the property and the busy road (Florence Acres Road) above." FOF 1.24. There is substantial evidence to support this finding.

According to the testimony of witnesses, at its best, the barbed wire fence is strung irregularly between trees and t-posts. RP 15:17-25. At its worst, the fence is buried under mud and leaves, has been knocked down by falling trees, or overtaken by blackberry bushes and other vegetation. RP 247:20-248:5; RP 264:23-25; RP 266:1-7; RP 267:1-18; RP 136:23-138:18. In some places, the fence terminates unexpectedly amongst the dense vegetation and trees on the hillside only to reappear, seemingly randomly, elsewhere. *Id.* The fence does not follow a straight line but rather darts in a zig-zag fashion amongst the trees on the hillside. Ex. 28.

The only picture of the barbed wire fence offered by Dr. Connor at trial shows an overgrown, mossy fence post. Ex. 30. Barbed wire strands

on one side lay underneath a fallen log that is covered in thick moss. Even though this was the only photograph of the barbed wire fence offered by Dr. Connor, she did not know where the post was located. RP 15-16.

Mr. Pendergraft, who first visited the properties in 2004, testified the condition of the barbed wire fence that ran up the hillside was poor and in some places it “had to be located with a metal detector to find the wire that was buried under the leaves.” RP 247:20-248-5; RP 264:23-25; RP: 266: 1-7 RP 267: 1-18. He further testified the fence was so obscure in some places that he tripped over it multiple times during his many outings on the property but yet in other places a person could walk down the hill and never hit the fence. RP 267:3-18.

Mr. King testified that when he examined the Hill Property before he purchased it in 2003 that it was apparent that the zig-zag fence had not been maintained for quite awhile and that “[t]here was alder trees laying across it tearing it down, and blackberries and brush and no sign of any cutting.” RP 136:23-137:9. He described the fence as being up in some places but laying down in others with “a good share that was down with trees and brush over the top of it.” RP 136:23-138:18.

As noted above, the surveyors to the property, other than the surveyor hired by Dr. Connor after litigation, all were aware of the barbed wire fence but determined that it was not the boundary fence.

Dr. Connor bases her assertion that the barbed wire fence was the intended boundary line primarily on the grounds that (i) none of the three surveyors who testified at trial found any fence other than the barbed wire fence between points A and B and (ii) Dr. Connor has not located any other fence than the barbed wire fence between points A and B. (Appellant's Br. 22.) Therefore, Dr. Connor summarily concludes, the barbed wire fence must be the "existing fence" called out in the 1974 Farm Property Deed. Her argument essentially asks the Appellate Court to revisit and reinterpret the evidence presented at trial.

As an initial matter, two of the surveyors, Harley Pawley and Jon Pendergraft, did testify that they found remnants of the historic pasture fence along the bottom of the slope running east from Point "B" (at 392 feet from Florence Acres Road). RP 99-102; Ex. 44; RP 260:19-22; RP 261:1-262:14. That being said, the base problem with Dr. Connor's assertions is that they rely on evidence observed or taken over twenty years after the critical conveyance of the Farm Property from the Nelsons to Roberts in 1974. In contrast, Raymond Nelson and Teyo Santana both provided testimony at trial based on their personal knowledge that the barbed wire fence was not intended to be the boundary. RP 18.

As between the barbed wire fence and the old fence at the edge of the pasture, Dr. Connor contends the barbed wire fence must be the existing fence described in the 1974 Farm Property Deed because it would be “impossible for any fence to follow a straight line from point A to point B – even along the base of the hill” and regardless as to whether point B is located 300 or 392 feet north of the Road. (Appellant’s Br. 12-13.)

The evidence in the record, however, does not demonstrate that the historic fence used by Mr. Nelson as the intended boundary line was an absolutely rigid straight line. For instance, Mrs. Bosse testified that the fence was as straight as they could make it. RP 228-230; RP 229:25-230:15; Ex. 49. Mr. Nelson also testified that before he sold the Farm Property to Roberts he repaired and replaced the fence and, although for the most part he tried to straighten it out, in some parts his repairs and replacements gave the fence more of a contour. RP 174:16-175:4. Accordingly, the testimony describes a fence as straight as possible but built of practicality and mindful of the geographic constraints of the terrain upon which it was built.

If substantial evidence supports the trial court’s findings listed above—that the legal descriptions referencing a fence were based on a fence that no longer exists, and the legal descriptions do not refer to the

barbed wire fence as Dr. Connor asserts—then the trial court’s action of reforming Dr. Connor’s deed should be affirmed.

D. The Trial Court Properly Reformed Dr. Connor’s Deed To Conform To The Grantor’s Intent.

In *Thompson v. Schlittenhart*, 47 Wn. App. 209, 211-212, 734 P.2d 48 (1987), the Court of Appeals set forth the responsibilities of courts when construing deeds where a boundary is uncertain and there is conflicting evidence as to the grantor’s original intent. The *Thompson* court stated the rule as follows:

Although the construction of a deed is a matter of law for the court, the court’s purpose is to ascertain the parties’ intent which is a factual matter. In determining a boundary, the fundamental question is what was the grantor’s intent. The intent is to be gathered from the language of the deed if possible, but when necessary by resort to the circumstances surrounding the entire transaction. Where a boundary is uncertain, it may be established by the best evidence available. That evidence may include other deeds made as part of substantially one transaction or a recorded plat referred to in a subsequent deed. Where the evidence conflicts as to the validity of a monument used to begin the original survey, the trial court, as finder of fact, may determine a boundary based on a modern survey.

Id. (citations omitted).

In *Thompson*, two adjacent properties were originally held by a common grantor, Elmer and Jane Conger (the “Congers”). *Id.* at 210. One property was conveyed to Lulu Conger in May, 1936; the other was

conveyed to V.J. Wade in September, 1936. *Id.* Just like in the present case, the deed to Lulu Conger described all of the Congers' property and then excepted out a parcel. *Id.* Presumably the excepted parcel was to be the parcel conveyed to V.J. Wade in September, 1936. However, the legal description of the property conveyed to V.J. Wade did not coincide exactly with the property excepted from the deed to Lulu Conger. *Id.* Consequently, the boundary line between the properties was not the same in both deeds. *Id.* In 1979, the City of Auburn widened the street on the east of both properties which created additional uncertainty as to the location of the boundary because the street was a monument used in the original deeds. *Id.* at 211.

The trial court in *Thompson* found, based on the evidence before it, that the boundary was uncertain and therefore it used a modern survey to assist it in ascertaining the common grantor's original intent. *Id.* at 212. In applying the above rule, the Court of Appeals upheld the trial court's use of a modern survey because it closely followed the Conger's intent and was supported by the evidence. *Id.*

The trial court in this case was presented with substantially similar circumstances. The common grantors, the Nelsons, created uncertainty as to the boundary between the Farm Property and the Hill Property by

referring to an “existing fence” between Points A and B in the 1974 Farm Property Deed (with Point “B” located 300 feet more or less North of the Road) and then describing the boundary as a straight line between Points A and B in the 1977 Hill Property Deed (with Point B located 392 feet North of the Road). This uncertainty was exacerbated by the subsequent removal of the fence. The trial court correctly found that the boundary was uncertain because the deeds are not congruent and because the monument called out in the 1974 Farm Property Deed is no longer present. CP 11-13 (FOF 1.11, 1.17, 1.19, 1.20, 1.23, 1.25).

Consistent with the rule espoused in *Thompson*, the trial court then determined the grantor’s (i.e., Mr. Nelson) intent in 1974. Mr. Nelson’s intent was reflected in the language of the deeds themselves; the testimony of the grantor, Mr. Nelson, regarding the relatively straight fence between the pasture and the trees that he intended to use as the boundary; multiple modern surveys of both the Farm Property and the Hill Property showing the boundary as a straight line; the expert testimony of Mr. Pendergraft and Mr. Slager how they ascertained Mr. Nelson’s original intent in conducting their surveys; and the testimony of Mrs. Bosse regarding the presence of the same fence that Mr. Nelson testified was his intended boundary.

Accordingly, the trial court's decision to reform the deeds to show a straight boundary line between Point A and Point B with Point B located 300 feet North of Florence Acres Road was supported by substantial evidence in the record. It also comported with Washington precedent on how trial courts are to determine a grantor's intent using the best evidence available where grantors and changing circumstances on the ground create uncertainty as to the location of a boundary.

Dr. Connor argues the trial court failed to apply the Washington rule that the title of the deed issued first in time controls and is superior to a conflicting deed issued at a later date. Appellant's Opening Brief, 20-21, citing *Groeneveld v. Camano Blue Point Oyster Co.*, 196 Wash. 54, 60-61, 81 P.2d 826 (1930). However, before this rule can be applied, the trial court needed to factually determine where the fence was located when it was referred to in the 1974 Nelson to Roberts deed. If the fence was along the pasture in a relatively straight line in 1974, and the 1977 deed from Nelson to Roberts also refers to a straight line, then the only conflict between the two deeds is between the "300 feet, more or less" dimension in the 1974 deed and the specific 392 feet dimension in the 1977 deed.

It is King's contention that the specific 392 feet dimension should control, since remnants of the old pasture fence were found at the 392 foot mark. However, the trial court decided that the 300 foot call, being the

earlier deed, should control. However, the trial court also factually found that the straight line pasture fence was what the 1974 deed referred to. Thus, the trial court did apply the “first deed controls” rule and proceeded to reform Dr. Connor’s deed to remove any ambiguities caused by the fence language.

E. The Trial Court’s Factual Findings Preclude Dr. Connor’s Claims Of Adverse Possession.

In order to establish a claim of adverse possession, there must be possession that is: (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile. *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989). Possession of the property at issue with each of the necessary concurrent elements must exist for the statutorily prescribed period of ten years. RCW 4.16.020. The burden of establishing that each of the elements existed for the full ten years resides squarely with the party claiming property through adverse possession. *See ITT Rayonier*, 112 Wn.2d at 757.

Adverse possession is a mixed question of law and fact. *See Anderson v. Hudak*, 80 Wn. App. 398, 401-02, 907 P.2d 305 (1995). The duty of the trier of fact is to determine whether the essential facts exist, but whether those facts constitute adverse possession is for the court to determine as a matter of law. *Id.* On appeal, a reviewing court must

uphold a trial court's finding regarding a claim for adverse possession if those findings are supported by substantial evidence. *See Bryant v. Palmer Coking Coal Company*, 86 Wn. App. 204, 210, 936 P.2d 1163 (1997).

Dr. Connor claims adverse possession on two grounds. First she contends that she adversely possessed the area below the barbed wire fence during her ownership of the Farm Property through her own actions. (Appellant's Br. 22-26.) Second, and in the alternative, she argues that her predecessor in the Farm Property, Sam Roffe, adversely possessed the area below the barbed wire fence and that she may tack to his supposed interest. (*Id.* at 26.) However, as demonstrated below, because Dr. Connor failed to establish each of the concurrent elements of adverse possession under either of her alternative theories, the trial court properly rejected her adverse possession claim and this Court must likewise reject her fourth through seventh Assignments of Error.

1. Dr. Connor's use was not sufficiently open and notorious.

“The open and notorious requirement is met if (1) the true owner has actual notice of the adverse use throughout the statutory period, or (2) the claimant uses the land so that any reasonable person would assume that the claimant is the owner.” *Anderson*, 80 Wn. App. at 404-05. As stated by the Court of Appeals in *Bryant*:

The acts constituting the warning which establishes notice must be made with sufficient obtrusiveness to be unmistakable to an adversary, not carried out with such silent civility that no one will pay attention... Real property will be taken away from an original owner by adverse possession only when he was or should have been aware and informed that his interest was challenged.

86 Wn. App. at 212 (quoting *Hunt v. Matthews*, 8 Wn. App. 233, 236-37, 505 P.2d 819 (1973), *overruled on other grounds by Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984)).

Dr. Connor presented no evidence at trial that the trusts created by the Roberts Estate for the benefit of Homer Roberts' children (Janelle Roberts Privett and Douglas Roberts) which held title to the Hill Property from 1987 until 2003 had actual notice of her adverse use. In addition, as the plaintiff with the burden of proof, Dr. Connor failed to demonstrate that her use of the disputed area was of a nature that should have put the trusts on notice of her claim during the first eight years that she owned the Farm Property. For instance, both Mr. Pendergraft and Mr. King testified that on their visits to the Hill Property during 2003 and 2004 the barbed wire fence was obscured by blackberries and brush, knocked down in places by trees, and in other places buried underneath mud and leaves. RP 247:20-248-5; RP 264:23-25; RP 266:1-7; RP 267:1-18; RP 136:23-138:18; Ex. 30. Indeed, rather than the type of maintenance and care that

would put a true owner on notice, the evidence in the record shows Dr. Connor's maintenance and care of the fence left it in a condition that would lead a reasonable person to assume it was abandoned. *Id.*

Dr. Connor's testimony reflected her "leave no footprint" style of use. "(The trees) weren't just timber, and I would never have cut them. Anyone who knows me, I don't even trim shrubs. It kills me to cut the blackberries back every year. I'm not a tree cutter." RP 41:8-11. Dr. Connor testified she cut no trees and made no plantings near the disputed area. RP 38:22-40:5.

Dr. Connor also claims that she adversely possessed the disputed area because during the summer she would ride her horse or walk her dogs on the trail next to the barbed wire fence on almost a daily basis. (Appellant's Br. 15.) She also testified that during the winter she "would maybe collect cedar boughs and stuff to use to decorate." RP 18:4-5.

The problem for Dr. Connor is that on this particular hillside those uses are not of the nature that would put a reasonable person on notice that she is claiming dominion over the property. The hillside is heavily wooded and is located in a rural area. Exs. 30-34, 41-42. The barbed wire fence sits in the middle of the hillside some distance down-slope from Florence Acres Road and also some distance above Dr. Connor's own

pasture. Ex. 28. Dr. Connor did not even offer proof that anyone could see her use.

The quiet obscurity of Dr. Connor's use in this case is considerably different than the uses held to put true owners on notice in the cases cited by Dr. Connor. For instance, in *Lee v. Lozier*, 88 Wn. App. 176, 179-181, 945 P.2d 214 (1997), the disputed property was a dock on Lake Washington that sat directly in front of the true owner's lot. With an unhindered view of the claimants using the disputed dock, the true owner could not reasonably claim that he did not have or should have had notice of others using the dock for the statutorily prescribed time. In *Howard v. Kunto*, 3 Wn. App. 393, 477 P.2d 210 (1970), the disputed area was located on the shore of Hood Canal and the claimants had built substantial improvements in the disputed area putting the true owners on notice. Finally, in *810 Properties v. Jump*, 141 Wn. App. 688, 701, 170 P.3d 1209 (2007), the court held that continuous use of a road from 1942 until 1999 by multiple parties for multiple uses was sufficiently open and notorious to find a prescriptive easement.

Lastly, Dr. Connor claims that further evidence of her adverse possession claim was demonstrated when she discovered surveyors on her property and she verbally told them to leave and followed up with a letter. (Appellant's Br. 16.) And, that when they returned and put stakes down,

she pulled them. *Id.* However, the record clearly shows that when she confronted Jon Pendergraft, he was in her pasture. RP 20:18-20; RP 243:5-17. In addition, when she subsequently pulled the stakes, those stakes were in her pasture along the boundary line from Point A to Point B with Point B located 392 feet North of the Road. RP 21:16-20; RP 244:13-245:16. This means that she confronted him and pulled the stakes in the vicinity of the northern most possible property line and well below the barbed wire fence located on the hillside. Ex. 28. Consequently, this confrontation is not proof of her asserted ownership of the disputed area.

Given all of the above considerations, the trial court's determination that Dr. Connor's use of the disputed area was not sufficiently open and notorious was supported by substantial evidence.

2. *Dr. Connor's use was not sufficiently exclusive.*

Courts consider whether possession was exclusive by asking if it was of a type that would be expected of an owner under the circumstances. *See Crites v. Koch*, 49 Wn. App. 171, 174, 741 P.2d 1005 (1987). To meet this burden the claimant must "establish specific acts of use rising to the level of exclusive, legal possession." *ITT Rayonier*, 112 Wn.2d at 759. Significant use of the disputed property by the true owner prevents exclusive use by one claiming adverse possession. 17 William Stoebuck, *Washington Practice: Real Estate: Property Law*, § 8.19 (2010).

The evidence shows that Dr. Connor did not exclusively use the hillside for ten years. She purchased the Farm Property in September of 1995. Ex. 11. Mr. King began his preliminary work on his development of the Hill Property in 2004. RP 28:5-7. However, Dr. Connor testified that it was 2005 when Mr. King began the majority of the work in developing the Hill Property including the cutting of trees. *Id.* Indeed, before the fall of 2005, Mr. King had knocked over a portion of barbed wire fence and cut down trees located north of the fence just below Dr. Connor's house. RP 28:8-30:17. These significant and invasive actions were undertaken by Mr. King before Dr. Connor had owned the Farm Property for ten years (RP 28:5-6; RP 30:3-4; RP 30:15-17) and accordingly they cut off any exclusivity Dr. Connor may have had prior to the running of the prescribed statutory period for adverse possession.

Dr. Connor also testified that kids would enter the area and take down her no trespassing signs, come through the woods and across her pasture, and go to the creek at her farm. RP 111:3-9. *See also Pendergraft testimony*, RP 266:8-13 ("The Petersons' kids are all over the place."). She has not shown how her seasonal trail use was exclusive or different from neighborhood children simply hiking through the woods.

3. ***Dr. Connor's use was not sufficiently actual and uninterrupted.***

Not every possession will start the running of the adverse possession statute. *People's Savings Bank v. Bufford*, 90 Wash. 204, 206, 155 P. 1068 (1916). Adverse possession begins to run from the time the intruder exercises such dominion over the property as to put the true owner on notice of the hostile claim. *Id.*

For the above-stated reasons, Dr. Connor never exercised such dominion over the disputed area to put the true owner on notice. In addition, the trial court determined that Dr. Connor's activity on the disputed property did not begin until her house was completed in 1996. CP 15 (FOF 1.32). In her opening brief, Dr. Connor asserts that this was in error because at trial Dr. Connor testified that she created her pet cemetery on the property before the house was completed. (Appellant's Br. 17.)

However, as shown on the survey prepared by Dr. Connor's surveyor, Mr. Pawley, the pet cemetery is located well below the location of the barbed wire fence and, depending on which Point "B" is used for the straight line, it appears to be located on what is undisputedly the Farm Property. Ex. 28. This is consistent with Dr. Connor's testimony that the

pet cemetery and associated plantings are on her side of the property line regardless of the surveyed line used. RP 39:19-21.

Given that the location of the pet cemetery is outside of the disputed area, and its relative size compared to the size of the entire disputed parcel, its creation in 1995 is not evidence of actual use that would commence adverse possession by putting the true owner on notice of Dr. Connor's claim for the entire disputed area. *See Ex. 28.* As noted in Mr. King's testimony, the cemetery area could be mistaken for a long-abandoned party or picnic. RP 122.

Additionally, in her testimony Dr. Connor confirmed the nine year span between the time she built her home and the date of the restraining order. RP 111:13-20. Aside from the pet cemetery testimony, Dr. Connor made no specific offer of proof to show that any other of her "hostile" ownership activities were made before she moved to the property. Rather, she only spoke generally about occupying the property for the last fifteen years, and offered no specific testimony to describe her early use. RP 17-18:25. As the plaintiff with the burden of proving each element of adverse possession, she failed to sufficiently address the ten year factual issue at trial even though it was raised in cross examination.

4. Dr. Connor's use was not sufficiently hostile.

Hostility “requires only that the claimant treat the land as his own as against the world throughout the statutory period.” *Chaplin*, 100 Wn.2d at 860-61. The only relevant consideration is the claimant’s treatment of the land. *Id.* at 861. The subjective belief of the claimant is irrelevant. *Id.* “What constitutes possession or occupancy of property for purposes of adverse possession necessarily depends upon the nature, character, and locality of the property involved and the uses to which it is ordinarily adapted or applied.” *Anderson*, 80 Wn. App. at 403. “When a claimant does everything a person could do with particular property, it is evidence of the open hostility of the claim.” *Id.*

Far from showing that she did everything she could with the disputed area, the evidence shows that Dr. Connor did next to nothing. During the summer she rode her horse and she walked her dogs on the hillside. She claims to have maintained and mended the barbed wire fence, but as discussed above, the evidence shows otherwise. She asserts that she put up no trespass signs and monitored her property. (Appellant’s Br. 16 (citing RP 110:15-111:6).) But as the trial court noted, she failed to provide any photographic evidence or sufficient evidence to support this claim. CP 14-15 (FOF 1.30).

According to Dr. Connor, given the soil and steepness of the hillside, her minimal use was the best that any owner could do under the circumstances. (Appellant's Br. 13-14, 23.) However, substantial evidence in the record shows otherwise. For instance, Teyo Santana testified that when Mr. Roberts was still alive and owned both the Farm Property and the Hill Property, his father, Tex, bulldozed the bottom portion of the hillside. RP 200:20-202:11. In addition, as testified to by Dr Connor herself, Mr. King has undertaken substantial development within the disputed area despite the poor soil and the steepness of the slope. RP 28:8-30:17.

While the hostility element does not require Dr. Connor to raze the disputed area, it does require her to do something more affirmative than occasionally walking her dog or riding her horse. In successful claims for adverse possession "the parties furnished some evidence of usage" which "include[s] acts such as clearing land, mowing grass, and maintaining shrubs and plants." *Anderson*, 80 Wn. App. at 404 (emphasis omitted); *see also Maier v. Giske*, 154 Wn. App. 6, 20, 223 P.3d 1265 (2010) (holding that merely planting a tree and some vegetation in an area of wild vegetation insufficient to show hostility). In contrast, in this case Dr. Connor presented no evidence beyond her own self serving testimony that

she had put the disputed area to any use, i.e., no photographs or third party testimony of fence mending, clearing of brush or trees, a passable trail along the fence, or the posting of no trespassing signs on the property. When weighed against the considerable evidence regarding the poorly maintained condition of the disputed area and the fence in 2003 and 2004, the trial court properly concluded that Dr. Connor's use of the disputed area was not sufficiently hostile.

5. *Dr. Connor's predecessor in interest, Sam Roffe, did not adversely possess the disputed area so that Dr. Connor may tack.*

In the alternative, Dr. Connor asserts that her predecessor in interest to the Farm Property, Sam Roffe, adversely possessed the disputed area up to the barbed wire fence prior to her even assuming title to the Farm Property. (Appellant's Br. 26-27.) According to Dr. Connor, adverse possession was established during Sam Roffe's ownership of the Farm Property because animals from York Farms had access to the hillside and because Teyo Santana, as Mr. Roffe's employee, used the path to maintain the fence, kept an eye on Tex Roberts while he bulldozed the hillside, and meditated on the hillside. (*Id.* at 13-18, 26-27).

However, Washington courts have traditionally held that a fence erected merely to control pasturage or livestock rather than as a boundary

does not establish adverse possession. *Lappenbusch v. Florkow*, 175 Wash. 23, 28, 26 P.2d 388 (1933); *Hawk v. Walthew*, 184 Wash. 673, 675-676, 52 P.2d 1258 (1935). For instance, in *Lappenbusch*, the Washington Supreme Court held that an erratic fence, irregular in course and built in an area covered in timber and brush for purposes of turning cattle was not sufficiently open, notorious and hostile to constitute adverse possession some thirty-two years after the fence was originally built. *Lappenbusch*, 175 Wash. at 27-28.

Teyo Santana testified that he did not use the barbed wire fence except if animals escaped from the Farm Property and it was for that reason only that he ever “replaced the fence, not fancy, but just enough.” RP 222:21-223:3. According to Mr. Santana, he did not have to repair the fence too much over his twenty years working for Mr. Roffe because the animals hardly went up the hill and “the blackberry bushes take over” and then “old trees came.” RP 222:8-223:3; RP 217:11-18. Indeed, Mr. Santana had such faith in the natural barrier of blackberry bushes that he would put old brood mares in the pasture below the Hill Property, even absent a fence, because for the most part they would not go into the brush located on the hillside. RP 222:8-20. This is consistent with the testimony of Dr. Connor, a veterinarian, who testified that “no animal in

their right mind is going to go up the hill” and that the hillside “wouldn’t have been suitable for grazing.” RP 16:11-20; RP 19:1-9. Therefore, just like in *Lappenbusch*, Mr. Santana’s use of the barbed wire fence was not sufficiently open, notorious and hostile to constitute adverse possession because he used it to turn back livestock and not to mark the property line.

Lastly, Teyo Santana’s supposed meditation on the hillside is also poor evidence of adverse possession because by its very nature meditation alone amongst the trees on a hillside is not the type of open, notorious, hostile, and exclusive use that can deprive a true owner of property of title via adverse possession. In addition, the testimony of Teyo Santana’s meditation on the hillside was provided at trial by Dr. Connor, not Teyo Santana. (Appellant’s Br. 16 (citing RP 13:17-25).)

Additionally, during Roffe’s ownership, from 1980 to 1990, the Roberts Estate maintained an undivided half interest in the property. *See* Exs. 6, 9. A party cannot hold adversely to itself, so any use until 1990 could not be deemed adverse.

F. There is No Timber Trespass Claim Without Trespass.

Mr. King did cut timber in the disputed area before it became clear that Dr. Connor was claiming all the way to the barbed wire fence as her boundary. However, the cutting all occurred within King’s legal

description (within the 300 foot straight line boundary). Because Dr. Connor did not prevail in the location of the boundary line, and the cutting occurred outside her property and all within King's property, the trial court properly dismissed her timber trespass claim.

V. CONCLUSION

For the reasons stated above, Respondent Richard King respectfully requests that the Court affirm the trial court's decision.

RESPECTFULLY SUBMITTED this 17th day of May, 2011.

MARSH MUNDORF PRATT SULLIVAN
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CERTIFICATE OF SERVICE

I, Diana S. Foss, hereby certify that on the 17th day of May, 2011, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

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- Overnight Courier

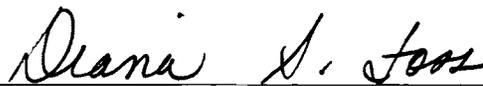
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I certify under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct.

EXECUTED this 17th day of May, 2011, at Mill Creek, Washington.



Diana S. Foss, Legal Assistant