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No. 677471

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

LEE WRIGHT and NINA WRIGHT, husband and wife,

Appellants

v.

THOMAS EGGLESTON and SHERRY EGGLESTON,
husband and wife,

Respondents

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BRIEF OF APPELLANTS

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I. INTRODUCTION

The parties in the underlying property dispute own contiguous parcels of real property in the area of Cultus Bay Road on South Whidbey Island, Washington. Plaintiffs/Respondents Thomas and Sherry Eggleston alleged claims of adverse possession and mutual recognition and acquiescence to quiet title to a portion of Defendants/Appellants Lee and Nina Wright's property. In support of their claims, the Egglestons contend that an old fence line between the parties' properties should be treated as the boundary line rather than the actual boundary line established by a survey. The Egglestons moved for summary judgment solely on their claim for "mutual recognition and acquiescence" to the fence as the boundary line.

The Wrights opposed the Egglestons' motion for summary judgment and filed a cross motion for summary judgment, asserting that the Egglestons could not establish the elements of mutual recognition and acquiescence or adverse possession as a matter of law; or at the very least there were disputes of material fact preventing judgment for the Egglestons.

The trial court, the Honorable Vicki I. Churchill presiding, granted the Egglestons' motion for summary judgment. In doing so, she ignored evidence presented by the Wrights that, at most, they acquiesced to the existence of the fence as a boundary, not as establishing the true property line.

The old fence line upon which the Egglestons rely was rebuilt by their predecessors in title for convenience to contain animals; it was never intended to or relied upon to establish the boundary line between the properties. The fence was falling down and in total disrepair when the Egglestons' predecessor in title, Rodger Clevisch, asked Lee Wright's permission to repair it to keep his dogs contained. Neither party used the disputed area contained by the fence or occupied their property with respect to the fence as a true boundary line.

To transfer property based on mutual recognition and acquiescence, there must be clear and convincing evidence that both parties acquiesced to the fence as a boundary line. Acquiescence cannot be unilateral, and mere acquiescence to the fence as a barrier is not sufficient.

The Egglestons did not and cannot prove by clear, cogent, and convincing evidence that the fence served any purpose other

than to contain pets nor that the fence line has been recognized and acquiesced to as a boundary for a period of 10 consecutive years. The Wrights at the very least presented sufficient evidence to create a dispute of material fact on that issue.

Further, the Egglestons put forth insufficient evidence at summary judgment to prove that they and their predecessors possessed and used the disputed area openly and notoriously as the true owner would for ten years or more. Therefore, the Wrights were also entitled to summary judgment dismissing the adverse possession claim.

II. ASSIGNMENTS OF ERROR

Appellants Wright assign error to the trial court's order and judgment *granting* the Egglestons' motion for summary judgment on their claim for mutual recognition and acquiescence; and the order *denying* the Wrights' motion for summary judgment for dismissal of the Egglestons' mutual recognition and acquiescence and adverse possession claims. See Clerk's Papers ("CP") at 1-2 (Judgment in Favor of Plaintiffs and Quieting Title); 6-8 (Order on Motion for Summary Judgment).

Appellants Wright raise the following issues in relation to those assignments of error:

1. Did the trial Court err in granting the Egglestons' motion for summary judgment because the Wrights presented sufficient factual allegations at summary judgment that, when viewed in the light most favorable to the Wrights, created a dispute of material fact as to whether the Wrights agreed or acquiesced to the fence as *the true boundary line* of their property and *not just a barrier* for ten years or more?

2. Should the trial court have granted the Wrights' motion for summary judgment to dismiss the Egglestons' claim for mutual recognition and acquiescence?

3. Did the trial court err when it failed to conclude, as a matter of law, that the Egglestons' could not establish that the Wrights agreed or acquiesced to the fence as *the true boundary line* and *not just a barrier* for ten years or more?

4. Should the trial court have granted the Wrights' motion for summary judgment to dismiss the Egglestons' adverse possession claim because, based on the undisputed evidence, the Egglestons could not, as a matter of law, establish use and possession of the disputed area sufficient to quiet title by adverse possession?

III. STATEMENT OF THE CASE

A. The Wrights Have Owned their Property for Over 30 Years.

The Wrights acquired their property on Cultus Bay Road near Clinton, Washington on April 25, 1975. CP at 204 (Declaration of Lee Wright (“Wright Decl.”) at 1). Their property includes a single family residence located on four acres. *Id.*

B. The Egglestons’ Acquired their Property Less than 10 Years Before Filing Suit for Quiet Title.

The Egglestons acquired their property, which is to the east of and adjacent to the Wrights’ property, from Rodger Clevish in January of 2002. CP at 205 (Wright Decl. at 2); 292 (Complaint ¶ 3.1). Mr. Clevish, the Egglestons’ predecessor in title, owned the property from 1995-2002. CP at 293 (Complaint ¶ 3.5).

The Egglestons have a single family residence on their property as well as several commercial buildings. CP at 205 (Wright Decl. at 2). The Egglestons’ property is zoned for commercial activity and they have operated a retail store on that property for several years. *Id.*

The Egglestons filed their complaint for quiet title on November 25, 2009. (CP at 291.)

C. The Fence Line that Forms the Basis for the Egglestons' Quiet Title Action Was Rebuilt With the Wrights' Permission Solely to Contain Animals.

The parties' properties and the fence line at issue are depicted in a survey drawing attached to the Wright Declaration as Exhibit D. CP at 220. The fence exists to the west of the Egglestons' property in a heavily wooded area covered with dense brush and other undergrowth. CP at 207 (Wright Decl. at 4).

The fence existed before the Egglestons' predecessor, Rodger Clevish, purchased his property in 1995. At that time, it was a wire fence attached to trees and posts in a haphazard and erratic fashion. CP at 208 (Wright Decl. at 5:14-17). In his deposition, Mr. Clevish described the fence as "an old wire fence, broke down wire fence." CP at 180 (Clevish Dep. at 14:12).

Sometime after he purchased his property, Mr. Clevish asked Lee Wright if he could repair the old wire fence that was located in the densely vegetated buffer area between the Wright and Clevish properties. CP at 208-09 (Wright Decl. at 5-6). Mr. Clevish wanted to fix the fence because he had dogs that he wanted to contain on his property. CP at 181 (Clevish Dep. at 18:18-20).

In preparation for the fence repair, Mr. Clevish and Mr. Wright walked the area near the fence and talked about Clevish's plan to rebuild it. They discussed how the fence would look. CP at 25-26 (Clevish Dep. at 25:14-18; 26:1-7). Mr. Wright advised Mr. Clevish that he did not know where the property line was located. CP at 209 (Wright Decl. at 6). Mr. Clevish corroborated the fact that neither he nor Mr. Wright knew where the boundary line was at this point. CP at 183 (Clevish Dep. at 21:21-23).

Because the stated purpose of the repaired fence was to contain Mr. Clevish's dogs and it was a "neighborly circumstance," Mr. Wright gave Mr. Clevish his permission to repair the fence. CP at 209 (Wright Decl. at 6). Neither requested a survey nor did they make any attempt to ensure that the fence was placed on the actual property line. *Id.* Mr. Wright gave Mr. Clevish his permission to rebuild the fence even though he did not know where the property line was. *Id.* He was not agreeing or acquiescing to the fence establishing the property line; he was simply agreeing to the existence of the fence for the purpose stated. *Id.*

In response to the Eggleston's motion for summary judgment, Mr. Wright filed a declaration denying that he ever

agreed with Mr. Clevish that the fence established the boundary line. CP at 208 (Wright Decl. at 5). In that declaration, he provided the following evidence:

Again, I never suggested in any of these conversations that the fence line represented my boundary line with his property. The discussions about the fence were in the context of whether I had any objection to his repairing it [the fence] and I told him that I did not.

CP at 208 (Wright Decl. at 5:21-24).

That fence was never treated by me or anyone else as a boundary line. Instead, it was an old fence that was repaired by the plaintiff's predecessor in title (Roger Clevish) for the sole purpose of keeping his dogs from getting away."

CP at 207 (Wright Decl. at 4).

Mr. Clevish also corroborated the fact that the fence, once rebuilt, was never intended to be a boundary line between his property and the property owned by the Wrights. CP at 184 (Clevish Dep. at 22:3-7). Indeed, Mr. Clevish stated that he "wasn't trying to put up a keep-out fence." CP at 182 (Clevish Dep. at 20:18-19). Mr. Clevish even offered to put a gate in the fence. *Id.*

The fence was not in an area that could have been used or utilized by the parties or any of their predecessors in title for any particular purpose. CP at 207 (Wright Decl. at 4). It was simply too overgrown and inaccessible for any activity to occur. *Id.* Mr.

Clevish admitted that he did not use or occupy the area on his side of the fence; he left it densely vegetated as a buffer area. See CP at 184-85 (Clevish Dep. at 22:21-23:11).

The wire fence rebuilt by Mr. Clevish connects to a chain link fence that is located on the Eggleston's property. CP at 220. However, as the survey drawing attached to Mr. Wright's declaration depicts, the wire fence is not a continuation of the chain link fence but stood independently. See CP at 220. Instead, the wire fence goes west and then north from the chain link fence, creating a rectangular "disputed" area. *Id.*

D. Lack of Use and Occupation of the Disputed Area.

The Egglestons put forth no evidence in opposition to the Wrights' motion for summary judgment to establish that they *and* Mr. Clevish used and possessed the Wright property east of the fence in an open and notorious manner (or any manner) for ten, uninterrupted years. The absence of this evidence is undisputed.

During the time that Mr. Clevish owned the property, there was a buffer of standing timber and dense brush and undergrowth located between the wire fence and the true boundary line. CP at 207 & 209 (Wright Decl. at 4 & 6). According to his testimony, Mr. Clevish intentionally left this area densely vegetated as a buffer

area between the two properties. CP at 184-85, 189 (Clevish Dep. at 22:21-25; 23:1-19; 32:8-14). This buffer rendered the area around the fence and the “disputed area” relatively inaccessible and not subject to any particular use one might associate with a single family residence. *Id.*

Q. At the time that you sold the property to Mr. Eggleston it’s my understanding that the disputed area that’s shown here on Exhibit 1 which is outlined in the green highlighter was completely covered in Douglas fir and undergrowth and salal and that you were putting no use to it of any type; correct?

A. Not that particular area, no.

Q. No, you were not putting a use to it?

A. No.

CP at 167 (Clevish Dep. at 29:8-16).

The so called “uses” that the Egglestons asserted, such as installing a septic drain field, occurred only *after* the Egglestons obtained title to the property in 2002, i.e., seven years before they filed suit. In approximately 2006, the Egglestons clear cut and bulldozed the disputed area on the east side of the fence. CP at 209 (Wright Decl. at 6). This fact is not contradicted in any manner by the Egglestons. It is also undisputed that prior to that clear cutting, there had been no use made of the disputed area.

[U]ntil the underbrush and timber were clear cut away by the Egglestons in approximately 2006, it would have been impossible for anyone to have utilized the property in the “disputed area.”

CP 211 (Wright Decl. at 8:2-4).

The exception to this absence of use is found in an outbuilding that was constructed, in part, over the Wrights’ boundary line. The Wrights acknowledged that a portion of that building was located on their property and had been in existence for over ten years. CP at 211 & 220 (Wright Decl. at 8 and Exhibit D). The Wrights’ motion to dismiss the Egglestons’ adverse possession claim expressly excepted out the footprint of this building and acknowledged that the Egglestons have a prescriptive right to the area under the building.

Since this lawsuit was filed November 25, 2009, just seven years after the Egglestons acquired their property, their individual use of the disputed area cannot, under any circumstances, alter the ownership by adverse possession or mutual acquiescence because any such use falls far short of the applicable ten year time period required. Therefore, while the Wrights acknowledge that the Egglestons installed a septic drainfield in the corner of the disputed area on the Wrights’ property and clear cut the disputed area in

preparation for that installation, those acts as a matter of law cannot establish a basis to quiet title because they failed to take place for the requisite ten-year period.

E. Procedural History.

After the complaint and answer were filed, the parties attended a settlement conference in May of 2010 at the insistence of the Egglestons. CP at 205 (Wright Decl. at 2). The parties reached an agreement on all material issues. *Id.* The only matter that remained to be decided by the Egglestons, was how they were going to fund the settlement. CP at 206 (Wright Decl. at 3). The Egglestons subsequently abandoned settlement, filed a petition for relief in Chapter 13 of the US Bankruptcy Code, hired a new lawyer, and filed the underlying motion for summary judgment. The motion was based solely on their claim for mutual recognition and acquiescence. *See id.*

Mr. Clevis signed a declaration in conjunction with the Egglestons' motion for summary judgment that he signed on August 24, 2010. *See* CP at 242-51. That declaration was drafted by attorneys hired by the Egglestons, i.e., Fulle & Associates. *See* CP at 185 (Clevis Dep. at 23:20-23).

The Wrights moved to strike or continue the motion for summary judgment, which was granted. Following the continuance, the Wrights deposed Mr. Clevish on February 25, 2011. When questioned, Mr. Clevish contradicted many of the statements made in the declaration that the Egglestons' counsel drafted for him.

Defendants Wright cross moved for summary judgment to dismiss the Egglestons' claim for mutual recognition and acquiescence and their claim for adverse possession. See CP at 221-234. The Wrights submitted portions of the transcript of Mr. Clevish's deposition in support of their opposition to the Egglestons' motion for summary judgment and cross motion for summary judgment.

F. The Trial Court's Decision.

The trial court, the Honorable Vicki I. Churchill presiding, granted the Egglestons' motion for summary judgment without addressing the Wrights' motion for summary judgment, concluding that her decision on that one issue resolved the case completely. The trial court held that while Mr. Wright and Mr. Clevish did not agree that the fence would establish the boundary line, "they recognized that there was a boundary line about in that area." July 22, 2011 Verbatim Report of Proceedings ("RP") at 28:4-7; 29:19

(emphasis added). “But whether they agreed that that was the boundary line or not, they mutually agreed that ‘You stay on your side and you’ll keep your dogs enclosed, and I’ll stay on my side.’” RP at 29:20-23. As a matter of law, the statements and evidence referenced by Judge Churchill do not support summary judgment in favor of the Egglestons on their mutual recognition and acquiescence claim.

Because the trial court erred in concluding that the evidence established that the parties or their predecessors mutually acquiesced in the fence as the true boundary line, rather than merely acquiescing to the existence of the fence or the fence as a barrier (as the undisputed evidence demonstrates), the Wrights ask the Court of Appeals to reverse the trial court’s order granting the Egglestons’ motion for summary judgment.

Because the Egglestons put forth no evidence of possession and use sufficient to establish their alternative claim of adverse possession, the Wrights also ask the Court of Appeals to grant their cross motion for summary judgment to dismiss the adverse possession claim. Likewise, because the Egglestons cannot establish that Mr. Wright acquiesced to any more than the mere existence of the fence, the Wrights ask the Court of Appeals to

grant their cross motion for summary judgment to dismiss the mutual acquiescence claim.

IV. ARGUMENT

A. Standard of Review.

The Court of Appeals reviews a summary judgment decision de novo, performing the same inquiry as the trial court. *Renner v. City of Marysville*, 145 Wn. App. 443, 448, 187 P.3d 283 (2008). When ruling on a summary judgment motion, the Court of Appeals, like the trial court, is to view all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Id.* The court may affirm or grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party was entitled to judgment as a matter of law. *Id.*

B. The Trial Court Erred in Awarding the Egglestons Summary Judgment on their Claim for Mutual Recognition and Acquiescence.

The trial court improperly granted the Egglestons' motion for summary judgment. Based on the undisputed evidence, the Wrights were entitled to an order on summary judgment *dismissing* the Egglestons' mutual recognition and acquiescence claim. At the very least, the Wrights established a dispute of material fact with

respect to the Egglestons' claim for mutual recognition and acquiescence of the fence as a true boundary line between the parties' properties.

"It is a rule long since established that if adjoining property owners occupy their respective holdings, to a certain line for a long period of time, they are precluded from claiming that the line is not the true one, the theory being that the recognition and acquiescence affords a conclusive presumption that the used line is the true boundary." *Thomas v. Harlan*, 27 Wn.2d 512, 518-19, 178 P.2d 965 (1947). A claimant seeking to quiet title to property through the doctrine of mutual recognition and acquiescence must establish by *clear, cogent and convincing* evidence that both parties to the action recognized a physical boundary as a true boundary line, not just a barrier, for ten years. *Muench v. Oxley*, 90 Wn.2d 637, 641, 584 P.2d 939 (1978) *overruled on other grounds by*, *Chaplin v. Sander*, 100 Wn.2d 853, 861, n.2, 676 P.2d 431 (1984).

"Title to real property will not be disturbed by estoppel unless the evidence is clear and cogent." *Houplin v. Stoen*, 72 Wn.2d 131, 135, 431 P.2d 998 (1967). To establish mutual recognition and acquiescence by clear and convincing evidence, the evidence

presented must “show the ultimate facts to be highly probable.”

Merriman, 168 Wn.2d at 630.

The claimant must establish the following elements:

(1) The line must be certain, well defined, and in some fashion physically designated upon the ground, e.g., by monuments, roadways, fence lines, etc.; (2) in the absence of an express agreement establishing the designated line as the boundary line, the adjoining landowners, or their predecessors in interest, must have in good faith manifested, by their acts, occupancy, and improvements with respect to their respective properties, a mutual recognition and acceptance of the designated line as the true boundary line; and (3) the requisite mutual recognition and acquiescence in the line must have continued for that period of time required to secure property by adverse possession.

Draszt v. Narccarato, 146 Wn. App. 536, 543, 192 P.3d 921 (2008) (emphasis added); see also *Merriman v. Cokeley*, 168 Wn.2d 627, 630, 230 P.3d 162 (2010).

“Acquiescence in a property line cannot be a unilateral act.

It must be bilateral. Both parties must agree or acquiesce, either expressly or by implication.” *Houplin v. Stoen*, 72 Wn.2d 131, 136, 431 P.2d 998 (1967) (emphasis added) (citing *Skov v. MacKenzie-Richardson*, 48 Wn.2d 710, 716, 296 P.2d 521 (1956); 69 ALR at 1506; 113 ALR at 436).

In the case of a fence allegedly establishing the boundary line, the plaintiffs must establish acquiescence in the fence as establishing the true boundary line. Mere acquiescence in the *existence of the fence* or acquiescence in the fence *establishing a barrier* is not enough.

In the absence of an agreement to the effect that a fence between the properties shall be taken as a true boundary line, mere acquiescence in its existence is not sufficient to establish a claim of title to a disputed strip of ground.

...

In all cases, it is necessary that acquiescence must consist in recognition of the fence as a boundary line, and not mere acquiescence in the existence of a fence as a barrier.

Thomas v. Harlan, 27 Wn.2d 512, 519, 178 P.2d 965 (1947)
(internal citations omitted).

The Washington Supreme Court in *Houplin* defined the issue before the Court to be the same issue that the Court of Appeals is faced with here. Specifically: “is there evidence of ‘sufficient acquiescence in the fence line to constitute it as the true boundary line of the property.’” *Houplin*, 72 Wn.2d at 135.

To answer that question, the Court in *Houplin* first analyzed “acquiescence.” The Court concluded that acquiescence and waiver “are always questions of fact.” *Id.* at 136. Further,

acquiescence requires knowledge of that which is being acquiesced to:

There can be neither without knowledge. The terms import this foundation for such action. One cannot waive or acquiesce in a wrong while ignorant that it has been committed. There must be knowledge of facts which will enable the party to take effectual action.

Id. (Emphasis added).

The *Houplin* Court concluded that acquiescence had not been proven. The Court held that there was “no evidence in the record to support a conclusion that defendant Myers acquiesced to anything, either express or implied, except a weak self-serving statement.” *Houplin*, 72 Wn.2d at 137. The evidence merely established that a fence existed between the parties’ respective properties, which was several feet off of the surveyed boundary line. The predecessor who built the fence testified that it was based on a prior, incorrect survey, but that his primary purpose in building the fence was to *keep in cattle, pigs and horses*. *Id.* at 132. The land between the fence and the actual boundary line was wild and unoccupied and was not cultivated by more than a few trees being cut and a few cattle being pastured there. *Id.* at 133. There was no evidence that the parties or their predecessors ever

discussed the location of the fence prior to the purchase by the defendant to the proceeding. *Id.* Therefore, the trial court held that there was no evidence that the fence was accepted as the true boundary line for ten years or more. *Id.* at 133-34.

In so concluding, the Court relied upon the rationale of the Court's decision in *Thomas v. Harlan*, 27 Wn.2d 512, 519, 178 P.2d 965 (1947), which held that "[i]n the absence of an agreement to the effect that a fence between the properties shall be taken as a true boundary line, mere acquiescence in its existence is not sufficient to establish a claim of title to a disputed strip of ground."

In *Thomas*, there was a wire fence that extended between the parties' properties. The evidence at trial demonstrated that the fence was approximately 20 feet south of the true boundary line between the parties' properties. *Id.* at 513. The trial court quieted title to the disputed area in the plaintiffs, but the Washington Supreme Court reversed that decision. The strip in controversy was not occupied until less than ten years prior to the subject lawsuit. *Id.* at 514. The evidence demonstrated that plaintiffs' and defendants' predecessors in interest had discussed the fence after it was built, that defendant's predecessor had explained how they had measured the location of the fence and that plaintiffs'

predecessor stated only that it “was right as far as he was concerned.” *Id.* at 515, 519. The Washington Supreme Court held this was insufficient to establish acquiescence in the fence as the true boundary line. *Id.* at 518-19.

The court in *Thomas v. Harlan, supra*, relied on a California case in which a defendant allowed a fence to stand for more than twenty-five years, but was not estopped from claiming an area three feet wide on the other side of the fence because the evidence indicated merely that the defendant had acquiesced to the *existence of the fence, not that he agreed to accept its location as the true boundary line.* *Id.* (discussing *Ibirt v. Bopp*, 4 Cal. App. 2d 541, 41 P.2d 174). The *Thomas* Court agreed, holding that the parties had not occupied their properties with respect to the line as the true boundary line and that there was insufficient evidence of acquiescence in the fence as the true boundary line. *Id.* at 519; *see also Muench*, 90 Wn.2d at 641-42 (where the Washington Supreme Court reversed the trial court’s ruling to quiet title based on mutual recognition and acquiescence because the only evidence that defendants’ predecessors acquiesced to a fence as a true boundary line was testimony that a prior tenant was unaware of any controversy regarding the boundary line; that testimony did

not constitute clear and convincing evidence that a fence in an unoccupied, vegetated area was acquiesced to as the true boundary line).

Washington Courts have applied the same principles of acquiescence more recently, requiring acquiescence in a fence as a boundary line, rather than acquiescence to its mere existence. In *Heriot v. Lewis*, 35 Wn. App. 496, 501, 668 P.2d 589 (1983), the Court of Appeals affirmed a trial court's conclusion that an old fence did not establish the boundary line between two properties by acquiescence. In so concluding, the Court of Appeals relied heavily upon the trial court's findings that the land on each side of the fence was "bushy" and was not used by either party or their predecessor in interest. *Id.* at 500. In addition, the evidence showed that the plaintiffs' and defendants' predecessors in interest *did not agree* that the fence was to be the mutual boundary line between their properties. *Id.* The trial court found the defendants' predecessors' conduct with respect to the fence inconclusive to establish acquiescence where the property on each side of the fence was brushy and where there was no evidence of any agreement or knowledge by him that the fence was the boundary line. *Id.* at 501. Because mutual acquiescence cannot be established unilaterally by

acts of one party, the Court of Appeals affirmed denial of the mutual acquiescence claim to the disputed area because there was no “mutual recognition” that the fence was the true boundary line. *Id.*

In contrast, the Washington Supreme Court in *Lamm v. McTighe*, 72 Wn.2d 587, 592-93, 434 P.2d 565 (1967), held that the requisite elements of mutual recognition and acquiescence were established because the trial court found that the fence at issue ran between staked corners and was erected originally as a boundary line fence and that the adjoining property owners recognized and acknowledged it as a boundary line fence, occupying their respective properties accordingly. The Court held that the evidence supported the conclusion that the parties treated the fence as a boundary line rather than just a barrier because it included that: (1) the fence started and ended at corner markers; (2) the fence was erected concurrently with the construction of defendants’ other boundary fence; (3) the plaintiffs and their predecessors by “acts of dominion up to the fence” acknowledged, accepted, and recognized the fence as the division line between their properties; (4) the defendants also occupied their property up to the fence line; and (5) the defendants observed plaintiffs’ acts of

dominion in the disputed area and made no claim to the area. *Id.* at 594.

As the cases discussed make clear, the mere fact that a fence has existed without objection is not sufficient; the plaintiffs must establish by clear and convincing evidence that the defendants or their predecessors for ten years or more acquiesced to the fence as establishing the true boundary line.

The Egglestons did not demonstrate at summary judgment, clear, cogent and convincing evidence that the Wrights recognized and acquiesced the fence at issue as the true boundary line for a period of ten years. The facts presented here on summary judgment closely resemble the aforementioned appellate cases finding acquiescence in the existence of a fence rather than acquiescence in a fence establishing a true boundary line and do not demonstrate the occupation with respect to a fence and other evidence of acquiescence present in *Lamm*.

Mr. Clevish's deposition testimony is unequivocal about the purpose of the old fence – even after he repaired it – which was to keep his dogs contained, not to establish a boundary line. According to Mr. Clevish:

Q. Well, what -- what was the fence there for, and why did you feel like you wanted to --

A. Well, somebody else had built the fence --

Q. Okay. Well, what did you --

A. -- and I'm just going to replace the fence because I had a couple dogs and I wanted to keep them in my property.

Q. That was the purpose of the fence.

A. Yes.

CP at 156 (Clevish Dep. at 18:14-22).

Q. The disputed area has been outlined in yellow. The survey shows the boundary lines on the map. What I'm interested in knowing from you is whether you and Mr. Wright attempted to legally establish your boundary line, or if you were just trying to find a fair location for the fence that didn't bother either one of you?

A. We didn't really try to establish a legal boundary line. We were just -- like I say, I was replacing the old fence line that was there.

CP at 163 (Clevish Dep. at 25:23- 26:6) (Emphasis added).

Further, neither Mr. Clevish nor the Wrights occupied their properties up to the fence in recognition of the fence as a boundary line. Indeed, like each of the three cases discussed above where mutual acquiescence in a fence was rejected, the area on either

side of the fence was wild and unoccupied until less than ten years before the Egglestons brought suit.

Mr. Clevish never used or occupied the area east of the fence. CP at 207 & 209 (Wright Decl. at 4 & 6); CP at 167 (Clevish Dep. at 29:8-16). The area on each side of the fence was densely vegetated, inaccessible and not subject to any particular use one might associate with a single family residence. *Id.* CP at 185 (Clevish Dep. at 23:8-19). Mr. Clevish did not use the property east of the old fence for any purpose because he expressly intended it to serve as a buffer zone between the two properties. CP at 189 (Clevish Dep. at 32:8-14).

In addition, the Wrights deny that they recognized the fence as the property line or discussed with Mr. Clevish that it would establish the boundary line. Mr. Wright advised Mr. Clevish that he did not know where the property line was. CP at 209 (Wright Decl. at 6). "That fence was never treated by me or anyone else as a boundary line. Instead, it was an old fence that was repaired by the plaintiff's predecessor in title (Roger Clevish) for the sole purpose of keeping his dogs from getting away." CP at 207 (Wright Decl. at 4).

Mr. Clevish's testimony, rather than supporting the

Egglestons' claim, strongly corroborates the Wrights' position. Mr. Clevish corroborated that Mr. Wright did not know where the line was and state that he also did not know where the boundary line was. CP at 183 (Clevish Dep. at 21:21-23). Further, Mr. Clevish stated that he "wasn't trying to put up a keep-out fence." CP at 182 (Clevish Dep. at 20:18-19). Mr. Clevish offered to put a gate in the fence. *Id.*

Mr. Clevish asked for and Mr. Wright gave him *permission* to rebuild the fence even though neither knew where the property line was. Mr. Clevish would not have asked him permission if he believed the fence established the boundary line or was on his property. Further, Mr. Wright was not agreeing or acquiescing to the fence establishing the property line; he was simply agreeing to the existence of the fence.

The undisputed evidence established, *at most*, that the Wrights and Clevish had acquiesced to the existence of the fence as a barrier. There was no evidence presented that the Wrights and Clevish acquiesced to the fence as the true boundary line. Therefore, the trial court erred in granting the Egglestons' motion for summary judgment. Instead, the trial court should have granted the Wrights' cross motion for summary judgment to dismiss the

Egglestons' claim for mutual recognition and acquiescence. The Wrights therefore ask the Court of Appeals to reverse the trial court's order granting the Egglestons' motion for summary judgment and to remand to the trial court with instructions to enter an order granting the Wrights' cross motion for summary judgment.

At the very least, the Wrights demonstrated disputes of fact that required denial of both motions for summary judgment. Even if the Court of Appeals does not grant the Wrights' motion, the case should be remanded to the trial court for a trial on the factual issues related to the use of the parties' properties with respect to the fence; and whether the parties and their predecessors acquiesced to the fence as a boundary line.

C. The Egglestons Could Not Establish Adverse Possession as a Matter of Law.

To establish adverse possession, one must prove actual possession of the subject property that satisfies the following elements for ten consecutive years:

- (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).

"As the presumption of possession is in the holder of legal title, the party claiming to have adversely possessed the property

has the burden of establishing the existence of each element. *Id.* (citing *Peeples v. Port of Bellingham*, 93 Wn.2d 766, 773, 613 P.2d 1128 (1980), overruled on other grounds, *Chaplin v. Sanders*) (emphasis added). “The presumption is in the holder of the legal title. He need not maintain a constant patrol to protect his ownership.” *Hunt v. Matthews*, 8 Wn. App. 233, 238, 505 P.2d 819 (1973), overruled on other grounds by *Chaplin*, 100 Wn.2d 853, 676 P.2d 431 (1984).

The Egglestons did not allege sufficient facts in opposition to the Wrights’ cross motion for summary judgment to establish adverse possession of the disputed area as a matter of law or even to create a dispute of material fact on that claim. Because the Egglestons only owned the property they acquired from Mr. Clevish for a period of seven years before filing suit, nothing they did or could have done would be sufficient alone to establish adverse possession. Without actions by Mr. Clevish to use and possess the disputed area, the Egglestons’ adverse possession claim necessary fails. Only by “tacking” the actions of Mr. Clevish to their claim of an adverse use could the Egglestons reach the ten year mark. But there was nothing in Mr. Clevish’s testimony that would support the conclusion that he used and possessed the disputed

area in a manner sufficient to establish adverse possession for the three years before he sold to the Egglestons (or any other period).

1. The Egglestons Cannot Show that They Have Had Actual Possession of the Disputed Area.

Possession, not use of property, is required to establish adverse possession. *ITT Rayonier, Inc.*, 112 Wn.2d at 758-59.

“Evidence of *use* is admissible because it is ordinarily an indication of *possession*. It is possession that is the ultimate fact to be ascertained. Exclusive dominion over land is the essence of possession, and it can exist in unused land if others have been excluded therefrom. A fence is the usual means relied upon to exclude strangers and establish the dominion and control characteristic of ownership.”

Id. at 758 (quoting *Wood v. Nelson*, 57 Wn.2d 539, 540, 358 P.2d 312 (1961)) (emphasis added in underlining).

The claimant must have some type of physical occupation of the land. *Id.* “The ultimate test is the exercise of dominion over the land in a manner consistent with the actions that a true owner would take.” *Id.* at 759. Washington case law requires that “[t]he adverse possessor must at all events have some sort of physical occupation of the land, either by personally staying on the land, having it occupied by those claiming under him, or by putting on it objects of a kind that an owner would put on such land.” William B. Stoebuck, *The Law of Adverse Possession*, 36 Wash. L. Rev. 53,

67 (Spring 1960) (citing *Cartright v. Hamilton*, 111 Wash. 685, 191 Pac. 797 (1920) for the proposition that there was no “possession” for the purposes of adverse possession when the claimant had not “used” the land up to the neighbor’s fence, which was on the neighbor’s side of the true boundary line.).

One’s subjective belief about the location of a property line or ownership of property is wholly irrelevant; adverse possession requires actual possession. *ITT Rayonier, Inc.*, 112 Wn.2d at 760-62. Bringing a lawsuit to contest another’s ownership of land or even showing that the community generally understands the claimant to be the owner also are not enough to establish possession of the property. *McInemey v. Beck*, 10 Wash. 515, 39 Pac. 130 (1895); *Ferry v. Hodson*, 22 Wn.2d 613, 156 P.2d 913 (1945).

Here, the Egglestons’ asserted “uses” by Mr. Clevish of the Wrights’ property were insufficient as a matter of law. There was no evidence to suggest that Mr. Clevish ever exercised “actual” possession of the disputed area. In fact the evidence was to the contrary. Mr. Clevish testified that he did not *use* the disputed area at all, but rather left it wild as a “buffer” area:

Q. Did you make any use of this area here in any

particular way, the area --

A. The yellow area?

Q. The yellow area.

A. No. That was all in trees, and I left it that way.

Q. And was that the condition at the time you sold it to Mr. Wright -- I'm sorry, Mr. Eggleston?

A. The trees that were there?

Q. The trees and stuff.

A. Yes. They were there.

Q. Anything else?

A. I just left the trees up there as a -- kind of a greenbelt between us.

Q. A buffer.

A. Yeah.

CP at 160-61 (Clevish Dep. at 22:21-23:11).

Likewise, Mr. Clevish testified as follows:

Q. At the time that you sold the property to Mr. Eggleston it's my understanding that the disputed area that's shown here on Exhibit 1 which is outlined in the green highlighter was completely covered in Douglas fir and undergrowth and salal and that you were putting no use to it of any type; correct?

A. Not that particular area, no.

Q. No, you were not putting a use to it?

A. No.

CP at 167 (Clevish Dep. at 29:8-16).

In addition, neither the Egglestons' subjective beliefs as to where they understood the property line to be, nor the beliefs of anyone else, can establish title by adverse possession. See *ITT Rayonier, Inc.*, 112 Wn.2d at 760-62; see also *McInerney v. Beck*, 10 Wash. 515, 39 Pac. 130 (1895) (holding that the fact the community generally understood a certain ownership is not sufficient).

The "uses" the Egglestons put forth are immaterial and need not be debated because, at most, they could have only spanned the seven years that the Egglestons owned the property prior to filing suit.

Therefore, it is beyond dispute that neither the plaintiffs nor their predecessor in interest made sufficient use and possession of the disputed area to establish title to it by adverse possession.

2. Even if Mr. Clevish Used the Disputed Area between the Fence and the Actual Boundary, Any Use Was Not Open and Notorious.

The ultimate test for adverse possession is whether the adverse possessor exercises such dominion over the land that the legal owner should recognize that the adverse possessor is treating

the land as an owner. *Bell*, 112 Wn.2d at 759. The purpose of the open and notorious requirement is to ensure that the true owner has actual or constructive notice— “to ensure that the user makes such use of the land that any reasonable person would assume he is the owner.” *Chaplin*, 100 Wn.2d at 862.

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.

Hunt, 8 Wn. App. at 236-37 (emphasis added). The character of the land must be considered in determining what acts are sufficiently open and notorious to demonstrate a claim to land. *Chaplin*, 100 Wn.2d at 863. “The property must be used beyond the use it would receive because it was handy and convenient and, instead, must be utilized and exploited as by an owner answerable to no one.” *Hunt*, 8 Wn. App. at 238 (citing *Fadden v. Purvis*, 77 Wn.2d 23, 459 P.2d 385 (1969); *Butler v. Anderson*, 71 Wn.2d 60, 426 P.2d 467 (1967); *Mesher v. Connolly*, 63 Wn.2d 552, 388 P.2d 144 (1964)).

It is true that generally, the element of “open and notorious” is satisfied if the legal title holder has actual notice of the adverse use throughout the ten-year statutory period. See *Chaplin*, 100 Wn.2d at 862. But the Egglestons have not put forth admissible evidence that establishes that the Wrights had actual notice of anything being done by Mr. Clevisch other than the repair of the old fence to keep his dogs in. Any other use by Mr. Clevisch in the densely vegetated area could not establish open and notorious use sufficient to establish title by adverse possession.

3. The Egglestons Cannot Show That any Adverse Use and Possession Has Been Hostile.

“When one enters into the possession of another's property there is a presumption that he does so with the true owner's permission and in subordination to the latter's title.” *Granston v. Callahan*, 52 Wn. App. 288, 294, 759 P.2d 462, 465 (1988) (quoting *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 84, 123 P.2d 771 (1942)). “A use which is permissive in its inception cannot ripen into a prescriptive right, no matter how long it may continue, unless there has been a distinct and positive assertion by the dominant owner of a right hostile to the owner of

the servient estate.” *Id.* Permissive use can be express or implied. *Id.*

The minimal “uses” that Mr. Clevish made of the disputed area asserted by the Eggelstons were not hostile, but were permissive. It is undisputed that Mr. Clevish *asked Mr. Wright for his permission to rebuild the fence at issue*. Mr. Wright and Mr. Clevish agreed that the fence could be repaired so that Mr. Clevish could contain his dogs. Any use that Mr. Clevish made of the Wrights’ property was with their permission. The Eggelstons cannot establish the necessary hostile element of adverse possession.

Therefore, the Wrights ask the Court of Appeals to remand the case to the trial court and to direct the trial court to enter an order granting the Wrights’ cross motion for summary judgment on the Eglestons’ adverse possession claim and dismissing that claim.

V. CONCLUSION

To transfer property based on mutual recognition and acquiescence of a fence as a boundary line, there must be clear, cogent and convincing evidence that both parties acquiesced to the fence as establishing the true boundary line. Acquiescence cannot

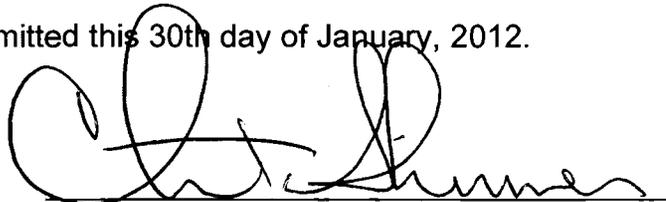
be unilateral, and mere acquiescence to the existence of the fence is not sufficient. The Egelstons did not and cannot prove by clear, cogent, and convincing evidence that the fence served any purpose other than to contain pets nor that the fence line has been recognized and acquiesced to as the true boundary line for a period of 10 consecutive years. This is particularly true when considering the fact that the evidence presented should have been considered in a light most favorable to the Wrights.

The Wrights were entitled to summary judgment dismissing the Egglestons' claim on this theory. But at the very least, the Wrights presented sufficient evidence to create a dispute of material fact as to whether the Wrights had acquiesced to the fence as the *true boundary line* rather than acquiescing to the *existence* of the fence as a *barrier*. The Egelston's motion for summary judgment should have been denied.

Further, the Egglestons could not prove as a matter of law that they and their predecessors used and possessed the disputed area open and notoriously as the true owner would for ten years or more. Therefore, the Wrights were entitled to summary judgment dismissing the adverse possession claim.

The Wrights ask the Court of Appeals to reverse the trial court's order and judgment granting the Egglestons' motion for summary judgment and denying the Wrights' motion for summary judgment and to remand for entry of an order granting the Wrights' motion for summary judgment.

Respectfully submitted this 30th day of January, 2012.

A handwritten signature in black ink, appearing to read "Christon C. Skinner", written over a horizontal line.

CHRISTON C. SKINNER, WSBA # 9515
KATHRYN C. LORING, WSBA # 37662