

No. 74707-0-1

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COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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AMY C. GARLING, a single person,

Appellant,

v.

MARK MULDAUR and DIANE A. SUTHERLAND,  
husband and wife,

Respondents.

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REPLY BRIEF OF APPELLANT

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## INTRODUCTION

Appellant Amy Garling's ("Garling") respectfully submits this Reply Brief in strict reply to the Brief of Respondents ("Resp. Br.") filed by Respondents Mark Muldaur and Diane Sutherland (collectively, the "Sutherlands").<sup>1</sup> In spite of the Sutherlands insistence to the contrary, this is not "essentially a factual appeal." Resp. Br. at 29. The primary issues concern whether, as a matter of law, the trial court erred by quieting title in favor of the Sutherlands as to the Disputed Areas under the doctrines of adverse possession and boundary by mutual recognition and acquiescence.

As discussed in Appellant's opening brief and below, the trial court erred by quieting title in favor of the Sutherlands based on adverse possession because its findings of fact and conclusions of law failed to establish the elements of actual possession and hostility. Likewise, the evidence and facts as found by the trial court were insufficient to establish the elements of boundary by mutual recognition and acquiescence. Consequently, the trial court's judgment should be reversed.

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<sup>1</sup> The Sutherlands property is referred to herein as "Lot 6." Garling's property is referred to as "Lot 7." and the "Disputed Area" refers to the 114-square foot strip of Lot 7 at issue in this case, as further described in Exhibits A and B to the trial court's Judgment. *See* CP 323-24.

## ARGUMENT

### (1) **Applicable standards of review.**

On appeal, this Court reviews whether the challenged findings of fact are supported by substantial evidence and, if so, whether the facts as found support its conclusions of law and judgment. *Ridgeview Prop. v. Starbuck*, 96 Wash.2d 716, 719, 638 P.2d 1231 (1982). In general, substantial evidence exists when the record contains evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wash.2d 641, 644, 870 P.2d 313 (1994).

Claims for adverse possession and mutual recognition and acquiescence present mixed questions of law and fact. *See, e.g., Miller v. Anderson*, 91 Wn. App. 822, 828, 964 P.2d 365 (1998) (adverse possession); *see also, Inwood Labs. v. Ives Labs.*, 456 U.S. 844, 855 n. 15 (1982) (“Of course, if the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard.”)

### (2) **FFCL 6, 8, 9, 12, 13, 14 and 16 are not supported by substantial evidence or are mixed questions of law and fact reviewable de novo.**

The Sutherlands argue that “*all* of the trial court’s findings must be considered verities” because in spite of Appellant’s assignments of error, “her opening brief contains *no* discussion or argument as to why those

findings are unsupported by substantial evidence, nor do they [sic] contain *any* citation to the record.” Resp. Br. at 12 (emphasis added). Although Appellant’s opening brief includes some assignments of error that are not discussed elsewhere in the brief, the Sutherlands assertion vastly overstates the extent to which this case and exaggerates the significance of the omissions. In any event, it is unclear whether Respondent is referring to *all* 26 of Appellant’s assignments of error, or only those specifically identified in their brief. *See* Resp. Br. at Assignments of Error 1 – 15 relate to matters of law, not fact. *See* App. Br. at 1 – 15.

Furthermore, Appellant’s brief does in fact include argument and citations to the record with respect to several of the assignments of error identified in the Respondents’ brief, as well as those for which the trial court did not enter an express finding. *See, e.g.,* App. Br. at 24-28 (discussing lack of evidence with respect to the actual possession and hostility elements of adverse possession, for which no express findings were entered); App. Br. at 38-40 (discussing the lack of evidence with respect to the existence of a certain, well-defined line, for which no express findings were entered); and App. Br. at 40-43 (discussing the lack of evidence supporting the trial court’s findings in FFCL ¶¶ 6, 8, 9, 12, and 13 that the parties mutually recognized and accepted the line

purportedly designated by the chain-link fence post, edge of the foundation, and driveway seam as the boundary).

Although the argument section of Appellant's opening brief did not separately identify and analyze each and every of the assignments of error, Appellant believes that her brief, when considered in its entirety, identifies and discusses the challenged findings and pertinent evidence with sufficient clarity to permit the Court to determine whether the findings are support by substantial evidence without having to resort to an exhaustive, independent review of the record. In sum, Appellant respectfully submits the brief substantially complies with the requirements of RAP 10.3(a)(6) and (g).<sup>2</sup>

**(3) The trial court's findings with respect to the purported recognition and acceptance of the chain-link fence post, edge of the foundation, and the seam in the driveway as the boundary line are not supported by substantial evidence.**

In general, FFCL 6, 8, 9, 12 and a portion of 13 pertain to whether the owners of Lots 6 and 7 manifested their mutual recognition and acceptance of the chain-link fence post, the edge of the foundation, and the

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<sup>2</sup> Certain assignments of error were included "protectively" and were with the intention that they would be supported argument for other related assignments. In hindsight, however, it appears that approach may have been overly inclusive.

seam in the driveway as the true boundary line. As such, each of these findings must be supported by clear, cogent, and convincing evidence. *See, e.g., Merriman v. Cokeley*, 168 Wn.2d 627, 630–31, 230 P.3d 162 (2010). To satisfy this more rigorous standard of proof, the trial court’s findings of fact must be supported by evidence demonstrating that the ultimate facts are “highly probable.” *Id.* For the reasons set forth below, the trial court’s findings fail to meet this standard of proof and are therefore not supported by substantial evidence.

FFCL 6 states in relevant part that “[t]he chain link fence ends with a fence post on what was *commonly believed* to be the northeast corner of the Defendant’s property.” CP 241, ¶ 6 (emphasis added). Similarly, FFCL 8 states that “[s]ince at least 1993, Mr. Muldaur and Ms. Sutherland and their neighbors to the north ... have treated the chain link fence post, the northern edge of the concrete pad, and the driveway seam as the boundary marker for the division of the properties. This boundary has been further recognized by the manner in which the Defendants, the Plaintiff, and the Plaintiffs predecessors in interest have used their respective properties.” CP 242, ¶ 8. FFCL 9 states that “[Mark Huston] believed the chain link fence post was the corner boundary between Lot 6 and 7, and treated it as such. He believed the seam in the driveway also represented the boundary between Lot 6 and 7, and treated it as such.” CP

242, ¶ 9. Although related to the foregoing, FFCL ¶ 12 states that the parties have “treated the seam in the driveway pad [sic], the concrete pad under the Muldaur/Sutherland Shed, and the metal fence post as establishing the property line.”

Although Mark Muldaur and Diane Sutherland testified that they believed that the fence post represented the northeast corner of their property, Mark Huston stated that he merely “assumed” that to be the case. *See* RP 116. Lance King’s testimony was far more equivocal in this regard. *Compare* Resp. Br. at 13 *with* RP 72-86, App. A-1. King did not, as Respondents contend, simply testify “that he assumed the fence post was approximately the property line.” Resp. Br. at 13. Rather, in response to questions repeated questions by Respondents’ counsel regarding whether he thought the fence post represented the property line, he final responded by stating that he “wasn’t sure ...,” “No. Not necessarily ...,” and “I think the key word here is ‘approximately’ ... Not the property line but approximately.” RP 72, 73, and 81. Rather than evincing any recognition of the chain-link fence post as a boundary marker, King’s testimony simply reflects his uncertainty about location of the boundary line; in no way does it constitute clear, cogent, and convincing evidence of his recognition and acceptance of the chain-link fence post as marking the boundary.

Similarly, while Huston testified that he “assumed” the property line ran along the seam of the driveway, no evidence was presented to support the trial court’s finding that he objectively manifested his recognition and acceptance of the seam and the post as the true line. In fact, Huston testified that because he parked at rear of Lot 7 and used the alley for ingress and egress, he saw no need to use the driveway and was essentially indifferent to the location of boundary line. *See* RP 113, 120. Likewise, King testified that when he purchased the property, he “never saw any reason to believe that our property line was not somewhere in the middle of that driveway.” RP 84. King further testified that when he installed the wooden fence along the eastern third of the boundary line, he used the Sutherlands chain-link fence post as the starting point “partially because I figured I was erring on the side of caution and it wasn’t going to cause any issues with the neighbor.” RP 59. But he also testified when asked on cross-examination that he simply did not know whether this was or was not the corner of the Sutherlands’ property. RP 72, 75, and 76

Moreover, the record does not contain clear, cogent, and convincing evidence to support the proposition that it was “highly probable” that Huston, King, or any owner of Lot 7 manifested their recognition and acceptance of the purported line as the true boundary through their *actions, occupancy, or improvements* to the property.

Although Huston and King did not use the driveway for parking or to access their property, both of them explained that they had no need to do so because they parked in the paved area situated behind the house on Lot 7, which is accessible from the alley that runs along the eastern margin of both properties. *See* RP 78, 112. At one point, King constructed a detached garage at the northeastern corner of Lot 7, which appears to be the only major improvement made to either property from 1988 to present. *See* RP 56.

Although King did construct the wooden fence that runs west from the chain-link fence post for approximately 33 feet (where it turns right at a 90-degree angle and terminates at the house on Lot 7), he constructed the fence to establish a security or barrier fence, not to designate the boundary. *See* RP 57 – 59. This is reflected by the trial court’s findings of fact, which state that King “set the fence without the intent to establish a precise property line.” CP 242, ¶ 11. That finding is amply supported by the record and was not challenged by Respondents, and as such, should be treated as a verity on appeal.

In sum, FFCL ¶¶ 6, 8, and 9, and 12 are not support by substantial evidence. For purposes of mutual recognition and acquiescence, it is not enough that the owners of Lot 7 may have mistakenly assumed that the boundary was located approximately along the chain-link fence post, the

edge of the foundation, and the seam in the driveway. Absent an express agreement, proof that they manifested their recognition and acceptance of the purported line by their actions, occupancy, and improvements is required, supported by clear, cogent and convincing evidence. *See Houplin v. Stoen*, 72 Wn.2d 131, 136, 431 P.2d 998 (1967) (“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.”); *Lilly v. Lynch*, 88 Wn. App. 306, 316–17, 945 P.2d 727 (1997) (recognizing that the burden of proof required to establish mutual recognition and acquiescence is clear, cogent and convincing evidence). Because the evidence presented at trial falls well short of satisfying that requirement, the trial court’s findings of fact pertaining to mutual acquiescence are not supported by substantial evidence. As discussed below, the facts as found by the trial court also do not support its conclusions of law with respect to mutual recognition and acquiescence.

**(4) The trial court erred as a matter of law by entering judgment in favor of the Sutherlands as to their claim of boundary by mutual recognition and acquiescence.**

A party claiming boundary by mutual recognition and acquiescence bears the burden of proving each of the following elements:  
(1) that the purported boundary line was certain, well-defined, and

physically designated upon the ground; (2) that, absent an express agreement as to the boundary, the adjoining land owners manifested a good faith, mutual recognition and acceptance of the designated line as the true boundary; and (3) that the mutual recognition and acceptance of the designated line continued beyond the 10-year period necessary to establish title by adverse possession. *Merriman v. Cokeley*, 168 Wn.2d 627, 630, 230 P.3d 162 (2010). Each of these elements must be proved by clear, cogent, and convincing evidence, which is evidence “showing the ultimate facts to be highly probable. *Id.* Notably, the trial court did not enter specific findings or conclusions with respect to the existence of a well-defined line physically designated on the ground, that should be deemed to have been decided against the Sutherlands.

**(a) The chain-link fence post, concrete foundation, and seam in the driveway do not constitute a well-defined line physically designated on the ground.**

This element requires clear, cogent and convincing evidence of a boundary line between the two properties that is “certain, well defined, and in some fashion physically designated upon the ground.” *Merriman*, 168 Wn.2d at 630. For this element, “[a] fence, a pathway, or some other object or combination of objects clearly dividing the two parcels must exist” in the area of the disputed border. *Id.* at 632. The existence of a certain, well-defined line is a conclusion of law subject to de novo review.

*See Green v. Hooper*, 149 Wn. App. 627, 642, 205 P.3d 134 (2009); *Lilly*, 88 Wn. App. at 316.

Respondents apparently contend that the trial court's adoption of their survey somehow satisfies this requirement. *See* Resp. Brief, at 19-20 (“The trial court specifically adopted the Record of Survey (Tr. Ex. 101) and found that the disputed area consists of ‘114 square feet of the area to the south of the wooden fence and the concrete driveway seam ...’”). Respondents’ argument begs the question – the test is not whether the line is “well-defined” by a survey or the trial court’s post-hoc description of the purported line, but instead whether the purported line is “in some fashion physically designated upon the ground.” *Merriman*, 168 Wn.2d at 630. The fact that the trial court and Respondents have to resort to a survey in order to define the purported line belies their assertion that the post, edge of the foundation constitute an “object or combination of objects clearly dividing the two parcels.” *Id.* at 632. In order for the parties to recognize and acquiesce in the purported line as the boundary, it must be sufficiently designated to put the parties on notice as to its location. *See* Establishment of Boundary Line by Oral Agreement or Acquiescence, 69 A.L.R. 1430 (“A person cannot acquiesce in the correctness of a boundary line, so long as he does not know where the line is.”).

**(b) The trial court's findings of fact do not support its conclusion of law that the parties objectively manifest their mutual recognition and acceptance of the purported line.**

FFCL 16 states that the trial court “finds that the owners of Lot 6 and Lot 7 have, since at least 2003, mutually acquiesced in location of the boundary line as being along the concrete seam and along the wood fence to the metal fence post.” CP 244, ¶ 16.<sup>3</sup> As explained above, the findings of fact entered in support of the trial court’s conclusion are not supported by clear, cogent and convincing evidence. Nevertheless, even if some or all of the parties assumed or believed that the boundary was located along a line running from the chain-link fence post along the edge of the foundation and the seam in the driveway, their mistaken belief would not, as a matter of law, support the trial court’s conclusion that they mutually acquiesced to the post, foundation, and seam as the demarcating the boundary line.

No evidence was introduced that the Sutherlands and Garling’s predecessors in interest even discussed, much less reached an express

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<sup>3</sup> Although denominated as a “finding” by the trial court and Respondents, whether the parties “mutually acquiesced” to the purported line is a conclusion of law reviewed de novo. See *Para-Med. Leasing, Inc. v. Hagen*, 48 Wn. App. at 397.

agreement, as to the location of the boundary line. Accordingly, in order to sustain the Sutherlands' counterclaim for mutual recognition and acquiescence, there must be clear, cogent, and convincing evidence that the adjoining property owners "by their acts, occupancy, and improvements," mutually recognized and acquiesced the purported line as the true boundary line. *Lamm*, 72 Wn.2d at 593.

In this case, the trial court's findings of fact support, at most, the proposition that Garling's predecessors may have mistakenly assumed or believed that the true boundary line corresponded to the chain-link fence post and the seam in the driveway. But their mistaken belief is not tantamount to acquiescence. Neither its findings nor substantial evidence in the record supports its legal conclusion that "the owners of Lot 6 and Lot 7 have, since at least 2003, mutually *acquiesced* in location of the boundary line as being along the concrete seam and along the wood fence to the metal fence post." CP 244, ¶ 16 (emphasis added). The trial court's findings of fact and the evidence in the record fail to demonstrate that the owners of Lot 7 recognized and accepted the purported line as the true boundary line based on their actions, occupancy, or improvements. The chain-link fence post, the foundation, and the seam in the concrete were in existence prior to 1988. The only permanent improvements made in and around the Disputed Area after 1988 were the Sutherlands' shed, which

was built in 1993, and Lance King’s wooden fence, which was constructed “no later than 2003.” CP 242, ¶ 10. Although the trial court found that King “set his fence line immediately north of the line originating with the [chain-link fence post],” it did not enter an express finding that King set the fence line in recognition and acceptance of the chain-link fence post as a boundary marker. *See* CP 242, ¶ 11. The trial court did find, however, that King “set the fence *without the intent to establish a precise property line.*” CP 242, ¶ 11 (emphasis added). That finding is amply supported by the record, which reveals that King constructed the fence predominantly to establish a barrier, and he expressly testified that he did not construct the fence with the intention of designating or recognizing the boundary between the two properties. *See* RP 57 – 59.

While the trial court found that the owners of Lot 7 did not make any substantial use of Disputed Area, there is nothing in the record to support the proposition that the relative lack of use of the Disputed Area by the owners of Lot 7 was a function of their recognition of the line purportedly established by the chain-link fence post, the edge of the foundation, or the seam in the driveway. To the contrary, Huston and King both testified that they did not regularly use the driveway for parking or ingress but instead parked in the paved area at the rear of Lot 7, which

is readily accessible from the alley that runs along the rear of the properties. *See* RP 77, 111, and 112.

Finally, King sold Lot 7 to the MacGregors in 2007, and neither the trial court's findings nor any of the evidence introduced at trial support the proposition that either the MacGregors or Garling ever recognized and accepted the post, the edge of the foundation, or the driveway seam as the true boundary.<sup>4</sup> Thus, even if King's construction of the fence might have otherwise constituted acquiescence, neither the trial court's findings of fact, nor any of the evidence introduced at trial, demonstrate any acquiescence by the owners of Lot 7 after 2009, which falls well short of the 10-year period required to establish a boundary by mutual recognition and acquiescence. (*Cf. Thomas v. Harlan*, 27 Wash.2d 512, 178 P.2d 965 (1947) (acquiescence not established by existence of a fence built by the true owner's predecessor, where fence existed for 14 years but disputed area was occupied for only 4 or 5 years before the discrepancy was disclosed by a survey)).

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<sup>4</sup> King and his wife sold Lot 7 to the MacGregors, and they were not designated by either party as witnesses and did not testify at trial.

In sum, neither the trial court's findings of fact nor the evidence in the record support the conclusion that the owners of Lot 7 mutually recognized and accepted the Sutherlands' purported line as the true boundary between Lot 6 and Lot 7 for more than ten years. Accordingly, the trial court erred as a matter of law by granting judgment in favor of the Respondents' on their mutual recognition and acquiescence claim.

**(5) The trial court erred as a matter of law by entering judgment quieting title in favor of the Sutherlands based on adverse possession because neither the evidence in the record, nor its findings of fact and conclusions of law, support the elements of actual possession and hostility.**

Whether adverse possession has been established by the facts as found by the trial court is a question of law that this Court reviews de novo. *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 210, 936 P.2d 1163 (1997). As discussed in Appellant's opening brief, the trial court entered no express finding that the Sutherlands' use of the Disputed area satisfied the element of actual possession. "Generally, the failure of the trial court to make an express finding on a material fact requires that the fact be deemed to have been found against the party having the burden of proof." *Crites v. Koch*, 49 Wn. App. 171, 176-77, 741 P.2d 1005 (1987).

The Sutherlands respond by citing by to FFCL¶ 13, in which the trial court found, *inter alia*, that the Sutherlands "used" and "openly and

notoriously exercised continuous dominion and control over the disputed area.” CP 243, ¶ 13. The also cite to authority that stands for the familiar proposition that when all of the elements of adverse possession are met, *hostile* possession may be presumed. *See Hovila v. Bartek*, 48 Wn.2d 238, 241, 292 P.2d 877 (1956). But that case does not permit the Sutherlands to substitute the trial court’s findings on other elements for the lack of any express finding on actual possession.

**(a) Even if the trial court had expressly entered a finding that the Sutherlands “use” of the Disputed Area constituted actual possession, such a finding would not be supported by substantial evidence.**

The absence of an express finding of actual possession highlights why the trial court erred as a matter of law by concluding that the Sutherlands adversely possessed the Disputed Area. Notwithstanding the trial court’s numerous findings regarding the trial court’s transient use of the portion of the driveway portion of the Disputed Area and the area between their shed and the wood fence on Lot 7, merely “using” of another’s property in the manner as found by the trial court – e.g., using the driveway for ingress and egress; stepping over the seam in the driveway when existing their vehicles, and the storage of a few miscellaneous items along the north side of the shed – simply does not involve the level of occupation required to establish actual possession.

The Sutherlands' most frequent use of the Disputed Area – for ingress and egress incidental to parking their cars on their own property, south of the driveway seam – does not, as a matter of law, establish the element of actual possession.

In sum, after reviewing the trial court's findings and conclusions, one is left with the impression that this looks a whole lot more like a case of prescriptive easement than adverse possession. *See* Stoebuck, 17 Wash. Prac., Real Estate § 2.7 (2d ed.) (observing that the “main difference between the [adverse possession and easement by prescription] is that prescription involves the *use* of another's land and gives easement rights, whereas adverse possession involves the *possession* of another's land and gives title.”) (emphasis added). Nevertheless, whether the facts are sufficient to establish a prescriptive easement is not an issue before the Court, because the Sutherlands chose not to pursue prescriptive easement as an alternative theory. What's more, the permissive nature of their use, which follows immediately below, would negate the hostility element of for prescriptive easement, just as it does in the case of adverse possession.

**(b) The trial court did not make an express finding as to the element of hostile possession, but even had it done so, the permissive nature of the Sutherlands use at inception negates the element of hostility.**

In general, the element of hostile possession requires proof that the adverse claimant occupied the disputed property in the manner that a true owner would, and in derogation of the true owner's title. *Miller v. Anderson*, 91 Wn. App. 822, 827, 964 P.2d 365 (1998) (citing *Chaplin v. Sanders*, 100 Wn.2d 853, 860-61, 676 P.2d 431 (1984)). As such, possession or use with the true owner's permission will entirely negate the element of hostility, even if such possession or use would otherwise satisfy the element. *Miller*, 91 Wn. App. at 828.

Huston's testimony constitutes uncontroverted evidence of an express grant of permission. Huston testified that when the Sutherlands moved in to Lot 6, they asked Mark Huston about the arrangements for using the driveway and he recounted telling them that

“[w]e don't use the driveway. You're welcome to use the driveway to park your car kind of on a regular basis. We don't need to use it. We'll use the alleyway.”

*See* RP 113. In his view, “it was just a neighborly accommodation.” *Id.*

Respondents' argue that the foregoing did not constitute permission, because Huston thought the Sutherlands owned the property south of the seam. Although it is true that the Sutherlands did not need

permission to park on their own property, the trial court found that the Sutherlands “used” the Disputed Area for parking. *See* CP 243, ¶ 13. Furthermore, the testimony introduced at trial demonstrates that the Sutherlands routinely used that area to enter and exit their vehicles and crossed over the boundary line when entering and exiting the driveway, and that no one objected to them doing so. *See* RP 35-36; RP 118; RP 230-31. Additionally, the Sutherlands’ and their predecessors’ deeds, which were introduced into evidence, establish that they acquired title to Lot 6 subject to a “community driveway on the north side.” Ex. 5 and Ex. 10, attached as Appendix A-2 and A-3. Finally, the Sutherlands’ argument proves too much – if they did not need the permission of the owners of Lot 7 use the driveway for parking, then how could they have possibly adversely possessed any portion of it? In sum, the Sutherlands did need – and were in fact granted – permission to use the Disputed Area incidental to parking next to the house.

Furthermore, the Sutherlands’ argument ignores the well-established rule that “[p]ermission can be express or implied; an inference of permissive use arises when it is reasonable to assume ‘that the use was permitted by sufferance and acquiescence.’” *Miller v. Anderson*, 91 Wn. App. 822, 827–29, 964 P.2d 365 (1998) (quoting *Granston v. Callahan*, 52 Wn. App. 288, 294, 759 P.2d 462 (1988)). “[U]se which is initially

permissive cannot ripen into a prescriptive right unless the claimant makes a distinct and positive assertion of a right hostile to the owner.” *Granston*, 52 Wn. App. 288, 294, 759 P.2d 462, 465, 1988 WL 86015 (1988) (citing *Roediger v. Cullen*, 26 Wash.2d 690, 175 P.2d 669 (1946) and *Crites v. Koch*, 49 Wash.App. 171, 177, 741 P.2d 1005 (1987)).

In the instant case, there is ample evidence to support an inference of neighborly sufferance and acquiescence: As noted above, in order to park alongside their house, the Sutherlands had to use the portion of the driveway situated on Lot 7. *See* RP 35-36; RP 230-31. According to Mark Huston, he permitted them to do so because “[i]t was a neighborly accommodation to share the driveway,” and observing that “you really couldn’t use it without straddling that seam regardless of which side you were on.” RP 118.

“The inference of permissive use is applicable to any situation in which it is reasonable to infer that the use was permitted by sufferance and acquiescence.” *Granston*, 52 Wn. App. at 294-95. It is not necessary the permission be requested, and “[a] finding of permissive use is supported by evidence of a close, friendly relationship ... between the claimant and the property owner.” *Id.* (citing Stoebuck, *The Law of Adverse Possession in Washington*, 35 Wash.L.Rev. 53, 75 (1960)). In the instant case, there is ample evidence of a close, friendly relationship. Diane

Sutherland testified that “[w]e worked together to allow each other reasonable access and be able to perform maintenance activities on our houses as necessary. And we had a good neighborly relationship.” RP 232; *see also*, RP 65-66; RP 113, 118, 119, 120. The friendly relationship that existed between Garling’s predecessors and the Sutherlands is a “circumstance more suggestive of permissive use than adverse use.” *Miller v. Jarman*, 2 Wn. App. 994, 997, 471 P.2d 704 (1970).

**(c) The trial erred by establishing a “penumbra” around the Disputed Area.**

Appellant’s opening brief explains in detail why the trial court erred in establishing a “penumbra” around the disputed area. *See* App. Br. at 29-36. The only legal authority Respondents offer in support of the trial court’s decision to do so is *Lloyd v. Montecucco*, 83 Wn. App. 846, 924 P.2d 927 (1996) (projecting a straight line between the objects of actual occupation) and 17 Wash. Prac., Real Estate § 8.9, neither of which stand for the proposition that the trial court had the authority to convey title to indeterminate zone of convenience beyond the area of alleged actual possession. Furthermore, Respondents fail to address in the impropriety of the trial court *sua sponte* granting relief beyond what Respondents ever sought prior to trial.

**CONCLUSION**

For the reasons set forth above and in Appellant's opening brief, the trial court erred as a matter of by entering judgment quieting title in favor of the Sutherlands as to their claims of adverse possession and mutual recognition and acquiescence. Accordingly, the judgment should be reversed.

DATED: August 29, 2016.

Respectfully submitted,

**STOLL PETTEYS PLLC**

By:   
\_\_\_\_\_  
David A. Petteys, WSBA No. 33157  
Attorneys for Appellant, Amy Garling

# APPENDIX A-1

# **EXHIBIT 10**

*Garling v. Muldaur et al.*, KCSC No. 14-2-29734-3 SEA

Plaintiff's Exhibit List

Statutory Warranty Deed

THE GRANTOR **EMMA M. REINHOLDTSEN**, Individually and as ~~co-grantor~~  
~~with~~ **LEIP G. REINHOLDTSEN**, her husband

for and in consideration of Ten Dollars and other good and valuable consideration  
in hand paid, conveys and warrants to **DAVID C. FREESE** and **ELAINE C. FREESE**, his wife

the following described real estate, situated in the County of **King** State of  
Washington

Lot Six (6), Block Three (3), Loyal Heights Division  
No. 6, an addition to the City of Seattle, according  
to plat thereof recorded in Volume 19 of Plats, Page  
82, records of said County.

Subject to community driveway on the north side.



SALES TAX LIEN  
PAID

L 21396

Dated this 25th day of October 1951

*Emma M. ReinholdtSEN*  
Individually

*Leip G. ReinholdtSEN*  
Attorney in fact for  
Emma M. ReinholdtSEN and her husband

STATE OF WASHINGTON  
County of

On this day personally appeared **EMMA M. REINHOLDTSEN**  
to me known to be the individual described in the foregoing  
acknowledged that she signed the same for the purposes  
uses and purposes therein mentioned

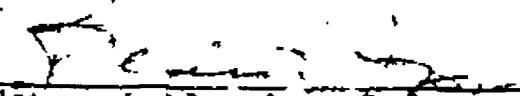
GIVEN under my hand and official seal this 25th

(Acknowledgment-Attorney in Fact)

STATE OF WASHINGTON, )  
COUNTY OF KING ) ss

On this 25th day of October, 1951, before me personally appeared Emma M. Reinholdtsen who executed the within instrument as Attorney in Fact for Leif G. Reinholdtsen and acknowledged to me that she signed and sealed the same as her free and voluntary act and deed as Attorney in Fact for Leif G. Reinholdtsen for the uses and purposes therein mentioned, and on oath stated that the Power of Attorney authorizing the execution of this instrument has not been revoked and that the said Leif G. Reinholdtsen is now living, and is not insane.

GIVEN under my hand and official seal the day and year last above written.

  
\_\_\_\_\_  
Notary Public in and for the State  
of Washington, residing at Seattle.



# APPENDIX A-2

# **EXHIBIT 5**

*Garling v. Muldaur et al.*, KCSC No. 14-2-29734-3 SEA

Plaintiff's Exhibit List

PRECISION ESCROW SERVICES, INC.

320 NE 97th Street

Seattle, WA 98115

WHEN RECORDED, MAIL TO:

Mr. Muldaur & Ms. Sutherland

7522 28th Avenue NW

Seattle, WA 98117

9833662-1

9305210144

RECEIVED THIS DAY  
MAY 21 1993  
10:08 AM  
OFFICE OF  
COUNTY CLERK  
KING COUNTY

E1308861 05/29/1993 2937.00 165000.00

Space Above for Recorder's Use

### Statutory Warranty Deed

#### THE GRANTOR:

Carol A. Freese, Personal Representative for the Estate of David C. Freese, Deceased

for and in consideration of TEN DOLLARS AND NO/100 AND OTHER GOOD AND VALUABLE CONSIDERATIONS band paid, conveys and warrants to:

Mark N. Muldaur and Diane A. Sutherland, husband and wife,

the following described real estate in King County, State of Washington, to-wit:

Lot 6 in Block 3 of Loyal Heights Division No. 6, as per plat recorded in Volume 19 of Plats, page 82, records of King County, Situate in the City of Seattle, County of King, State of Washington.

SUBJECT TO: Easement, and the terms and conditions thereof, as disclosed by instrument recorded under Recording No. 4181089.

Dated this eleventh day of May, 1993

*Carol A. Freese P.R.*  
\_\_\_\_\_  
Carol A. Freese  
Personal Representative for the Estate of  
David C. Freese, Deceased

FILED FOR RECORD AT REQUEST OF  
TRANSAMERICA TITLE INSURANCE CO.  
820 168TH AVE. NE  
P.O. BOX 1493  
BELLEVUE, WA 98009

State of Washington )

) ss:

County of King )

On this day, personally appeared before me Carol A. Freese, Personal Representative for the Estate of David C. Freese, Deceased, to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that she signed the same as her free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 18th day of May, 1993.

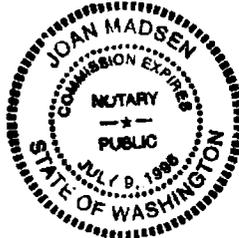
*Joan Madsen*  
\_\_\_\_\_  
Notary Public in and for the State of Washington

My appointment expires: 07-09-96

Residing at: Seattle

LPB #10  
LK 2396

Escrow Number: 93-1726



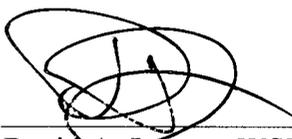
**CERTIFICATE OF SERVICE**

I, David A. Petteys, certify that on August 30, 2016, I caused a copy of the foregoing REPLY BRIEF OF APPELLANT to be served via U.S.

Mail, postage prepaid, on the following parties:

Joseph A. Grube, WSBA No. 26476  
Karen K. Orehoski, WSBA No. 35855  
Breneman Grube Orehoski, PLLC  
Attorneys for Respondents  
1200 Fifth Avenue, Suite 625  
Seattle, WA 98101  
*Attorneys for Respondents*

Signed this 29th day of August, 2016, in Seattle, Washington.

By: 

David A. Petteys, WSBA No. 33157  
Attorneys for Appellant, Amy Garling