

No. 34849-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

NORMA M. KINSMAN, a single woman,
Respondent.

v.

MICHAEL ENGLANDER and CAROLYN ENGLANDER, et. al.,
Appellants,

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OPENING BRIEF OF APPELLANTS

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ORIGINAL

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I.
ASSIGNMENTS OF ERROR

Appellants Michael Englander and Carolyn Englander assign error to the Trial Court's Findings of Fact and Conclusions of Law entered April 18, 2006 and the Order Quietening Title To Real Property entered on April 18, 2006 as follows:

1. The Trial Court erred in entering Findings of Fact 4, 5, 6, 7, 8, 10, 11, 12, 13, 16, 18, 19, 21, 22, 23 and 24.
2. The Trial Court erred in entering Conclusions of Law 1, 2, 3, 4, 5 and 6.
3. The Trial Court erred in entering the Order Quietening Title to Real Property.

II.
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Trial Court abuse its discretion in finding that Beverly Vergowe was unavailable and therefore admitting her videotape deposition when she resided within Pierce County and her appearance in Court would have been merely inconvenient?
2. Did the Trial Court abuse its discretion in finding the Beverly Vergowe was "available" and could testify several days after

the Court determined she was “unavailable” and admitted her video deposition?

3. Did the Trial Court err in allowing Beverly Vergowe to testify via telephone and not in open Court?
4. Did the Trial Court err in concluding that Kinsman acquired a part of the Englanders’ property by adverse possession when Kinsman admitted that the Englanders’ predecessor, Vergowe, gave her permission to use the property and the use was not exclusive?
5. Did the Trial Court err in concluding that Kinsman acquired a part of the Englanders’ property by acquiescence when Kinsman admitted that their predecessors knew where the property line was located and the improvements were constructed for the Englanders’ predecessor’s benefit and the convenience of the parties?

III. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY.

This is a real property case involving an adverse possession and prescriptive easement claim. The Plaintiff, Norma Kinsman (“Kinsman”), filed this action on September 23, 2004 to obtain

approximately two feet of property from the Defendants, Michael and Carolyn Englander (“Englander”) by adverse possession. CP 3-6. The Englanders denied the claim and filed a counterclaim for a prescriptive easement over a portion of the Kinsman property. CP 7-11.

This case went to trial commencing on March 1, 2006 before the Honorable Beverly G. Grant. RP 4. On the second day of trial, Kinsman moved to admit the videotape deposition of Beverly Vergowe, the Englanders’ predecessor in title, stating for the first time that she was “unavailable”. RP Volume 2b of 8 at 4-15.¹ The motion was predicated on counsel’s own declaration dated December 2005, almost four months before the trial, which was not provided to the Englanders until March 1, 2006, the day of trial. RP Volume 2b of 8 at 7, 14; CP 38-41. It was also predicated on counsel’s representation that Ms. Vergowe had emerged from surgery just the day before, stating as follows:

THE COURT: All right. Mr. Denomy what is ailing her, if at all and why can she not formally appear in person . . .

RP Volume 2b of 8 at 4-5.

¹ The Reported Proceedings are divided into several bound volumes. In Volume 2b, the Court Reporter restarted at number 1.

MR. DENOMY: . . . Basically she has a very severe case of diabetes. As a matter of fact, I talked to her this morning and she had just returned from the hospital last night from being in intensive care.

RP Volume 2b of 8 at 5.

When questioned on that point, counsel retracted the statement as follows:

THE COURT: All right. Now, I do have a question of you, Mr. Denomy, because your representation was that she recently like last evening was admitted into the hospital.

MR. DENOMY: No, your honor, at the time that we were attempting to conduct the deposition, she had been in and out of the hospital on several occasions.

RP Volume 2b of 8 at 8-9.

The Court then telephoned Ms. Vergowe and engaged in the following discussion:

BEVERLY VERGOWE, being first duly sworn on oath by the Court,

MS. VERGOWE: Yes, I do.

THE COURT: Okay. Thank you. You know is it your belief that you are not able to physically be present in Court and would prefer us using your deposition?

MS. VERGOWE: Yes.

THE COURT: And that is based upon your medical infirmities?²

MS. VERGOWE: Yes.

THE COURT: Are you okay?

MS. VERGOWE: Yes.

THE COURT: All right. Thank you ma'am. I appreciate your taking the time today. You will not have to formally appear.

RP Volume 2b of 8 at 17-18.

Based solely on Ms. Vergowe's conclusory opinion that she was not physically able to be present in Court and would prefer the parties use her deposition testimony only, and despite the Englanders repeated objections, the Court declared her "unavailable" and admitted the video deposition. RP Volume 2b of 8 at 18-19.

Several days later, on March 9, 2006, Kinsman asked the Court to declare Ms. Vergowe "available" and to permit her to testify by telephone. RP 810. Over the Englanders' objections, the Trial Court again telephoned Ms. Vergowe, who stated that nothing about her condition had changed since she had previously been

² Prior to being sworn in, Ms. Vergowe stated she had congestive heart failure, diabetes, and stenosis. RP Volume 2b of 8 at 16.

declared “unavailable”. RP 810-811, 818-819. Nevertheless, the Court reversed its earlier position and declared Ms. Vergowe “available” and allowed her to testify via telephone because she was going to provide “rebuttal” testimony (RP 813, 823) and pursuant to ER 804(a)(4).³ RP 819-821.

On April 18, 2006, the Court entered its Findings of Fact and Conclusions of Law (CP 75-81) and the Order Quieting Title To Real Property (CP 82-83) granting to Kinsman a portion of the Englander property by adverse possession and acquiescence. Almost all of the material findings of fact are expressly predicated on Ms. Vergowe’s testimony. See e.g. Findings of Fact 5, 6, 7, 8 and 10; RP 1022-1023.

On May 16, 2006, the Englanders filed their Notice of Appeal. CP 84-95.

2. STATEMENT OF FACTS.

Kinsman and the Englanders own adjoining waterfront lots located in Gig Harbor and on Puget Sound. Both lots had cabins

³ ER 804(a)(4) provides a list of hearsay exceptions and defines “unavailability” for that purpose. Specifically, it provides that ““Unavailability as a witness” includes situations in which the declarant: . . . (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity.”

constructed on them many years ago. RP 18-19. Ms. Kinsman and her predecessor, her father Bill Johnson, only used their cabin during the summer and even then primarily just on weekends. RP 201-203; 573. The Englanders and their predecessors, the Vergowes, have lived full time in their home since the 1960s. RP 227.

This dispute arises out of two encroachments on the east-west property line of the Englander property: The encroachment of a bulkhead corner on the west end of the properties and the encroachment of a retaining wall on the east end of the properties, approximately 110-120 feet from the bulkhead. The location and extent of the encroachments are depicted on the surveys admitted as Exhibits 19 and 20.

The original wood bulkhead is depicted in photographs admitted as Exhibits 15 and 16 and the design of the new bulkhead relative to the old wood bulkhead is depicted in Exhibit 18 at page 2. The new concrete bulkheads are depicted in photographs admitted as Exhibits 1-9, 25-27. The retaining wall is depicted in photographs admitted as Exhibits 10, 11, 23, 28, 32, 33 and 38.

A. The Bulkhead and Lookout.

Originally, the parties' lots had large horizontal timbers stacked vertically serving as a bulkhead between their down sloping property and Puget Sound. RP 20; Exhibits 15 and 16. Kinsman's predecessor, Johnson, had an extension protruding from the bulkhead to form what the parties characterized as a "lookout". RP 162-163; Exhibit 18 at page 2.

In 1971, a survey had been performed and the property line between Johnson and the Vergowes was staked. Exhibit 30, 32 and 33. In 1983, the Vergowes were the first to replace their timber bulkhead with a concrete bulkhead. RP 156-157. When the Vergowe bulkhead was constructed, it had a "return" or perpendicular wall at the end of the bulkhead. See Exhibits 6, 7 and 8. The parties knew that the northern corner and "return" on the Vergowe bulkhead was not precisely to the property line. Exhibit 8, RP 230, 414-418, 568, 874-875.

Vergowe then ran drain lines around the "return" and the northern corner of the bulkhead. RP 414-418, 904-905. At trial, Kinsman drew the location of the Vergowe drain lines in red on Exhibit 8. Kinsman also drew the location of the drain lines exiting the side of the lookout. Exhibit 1 (holes labeled "A" and "B"); RP

905-907; Exhibit 8. The existence of the drain lines and the return on the bulkhead demonstrated the Vergowes' continued use of their property up to the surveyed line.

Shortly after the Vergowe bulkhead was completed, Kinsman's father and predecessor, Mr. Johnson, began construction of his bulkhead. RP 160. At trial, Kinsman admitted that Coy Vergowe (the Englanders' predecessor) gave Mr. Johnson permission⁴ to connect to the Vergowe bulkhead for a number of reasons: it would prevent water from flowing behind the bulkheads and "sucking" the sand and backfill out (RP 164, 171); It would reduce the cost of the Johnson bulkhead (RP 166); It would allow Mr. Johnson to leave the old timber bulkhead in place (RP 19, 162-163, 229-230, 409, 413, 415, 418, 452; See also depiction on Exhibit 18 at page 2); and it would preserve and protect the roots of Kinsman's large cedar tree. RP 418, 900-901, 907-908; see also Deposition of Beverly Vergowe at page 37.⁵

⁴ At one point, Kinsman called it "the easement that [Vergowe] gave us". RP 376.

⁵ Appellants reference the Deposition of Beverly Vergowe as it is part of the record. However, they do so without waiving their objections and argument regarding its inadmissibility based on Ms. Vergowe's availability.

Mr. Johnson did not pay the Vergowes for this accommodation. RP 422. Rather, as Kinsman admitted, her family had a good relationship with the Vergowe family. RP 394-395.

The Vergowes gave their permission based on the understanding that they would be allowed to use the lookout. Deposition of Beverly Vergowe at page 50. This agreement was never in writing. Nevertheless, several witnesses testified that afterwards, the Vergowes still maintained that they owned the property. RP 470, 513-514, 602-603, 708-709, 711, 734, 745, 751, 765, 776.

For many years after construction of the bulkheads, the lookout remained unimproved. RP 471. In 1994 or 1995, Kinsman's son-in-law, Mike Bourbonnie, put top soil and sod down on the lookout. RP 471, 504, 509, 706.

Since the bulkhead was constructed, the Vergowes, the Englanders and many of the other neighbors frequently used the lookout without permission or any objection from Kinsman. RP 389, 470, 472-473, 597, 707-708, 724, 739-740, 774. The lookout was used as a platform for entertaining, for fishing, for sunbathing, for swimming and as a golf ball driving range. Finding of Fact No.

23. The lookout was also maintained by the Englanders and other neighbors. RP 480-481, 510-511, 514, 595, 604-605, 707-708.

Prior to purchasing the property, Kinsman told the Englanders that the Vergowes owned part of the lookout. RP 749-752. Consequently, in 2002, the Englanders purchased their property from Beverly Vergowe and immediately began using the lookout. Exhibit 37; RP 511, 570-571, 744-745. In 2003, the Englanders commissioned a survey of the property lines. Exhibit 19.⁶ Afterwards, Kinsman agreed that the surveyed line was the actual property line.⁷ RP 779, 784-785. Shortly thereafter, Englanders constructed a chain link fence a “quarter foot” on their side (south) of the surveyed line. RP 114, 124; Exhibit 20.

A year later, in September 2004, Kinsman sued arguing that she had acquired approximately 18 inches on one end and several feet on the other end of the Englanders’ property by adverse possession. CP 3-6.

⁶ Then, in 2006, Kinsman also commissioned a survey. Exhibit 20. The 2003 and 2006 surveys were consistent with the 1971 survey. See Exhibits 19, 20 and 30; RP 538-541, 546-547, 714.

⁷ At Trial, Kinsman drew the location of the property line where it exists today at the north side of the Englander bulkhead return. RP 408; Exhibit 8 (the witness drew the location of the property line on the exhibit).

B. The Retaining Wall.

The evidence at trial clearly showed that the retaining wall (at approximately the middle of the surveyed line) was constructed for the benefit of the Englanders. Exhibit 20. The retaining wall is constructed of concrete cylinders and supports the original grade of the soil still maintained on the Kinsman property. Exhibits 10, 11, 32, 33 and 38. The retaining wall allowed the Vergowes, now the Englanders, to have level flower beds rather than follow the natural slope of the property. Exhibits 10, 11 and 12. The retaining wall was constructed by both Kinsman's predecessor and the Englanders' predecessor. RP 316- 318, 402, 403, 960; Finding of Fact No. 9. The north edge of the wall was constructed on the surveyed line and at the 1971 survey marker. RP 516-518; Exhibits 32 and 33. It only makes sense that the wall would be constructed at the property line but on the Vergowe side, since the wall was for the sole benefit of the Vergowes.

Use of the retaining wall was never exclusive. The Vergowes and then Englanders have wiring and an electrical fixture on the wall as well as vegetation. RP 520-521, 524-528, 616-619; Exhibit 34. The wall is mostly obscured by ivy growing from the Englander property up and over the wall. RP 109-110; 123, 234,

321, 520; Exhibit 19. In fact, in 2003, the surveyors could not see the wall at all. Id. Kinsman admitted at trial that she obtained Vergowe's permission prior to trimming the ivy. RP 426-427.

Kinsman stated at trial that she wanted the property line to be on the south side of the wall because "it's too hard to take care of with all that stuff [the ivy] coming through". RP 436.

C. Between the Bulkhead / Lookout and The Retaining Wall.

At trial, Kinsman maintained that there was an understanding between Johnson and Vergowe that the property line was moved by agreement so that it ran in a straight line from the south edge of the lookout to the south edge of the retaining wall. In between those two points, Kinsman referenced and the Trial Court found that a rose arbor and two stumps were markers for the line. RP 186, 218-219, 326; Finding of Fact No. 11. However, the photographs admitted as exhibits clearly demonstrated that the rose arbor and stumps⁸ are at or north of the surveyed line and were not encroachments. Exhibits 10, 11, 21 and 24.

⁸ Kinsman admitted that the agreed boundary line is in the middle of the stumps, which is the same location as the surveyed line. RP 404, 407; Exhibit 21.

Additionally, Kinsman admitted that Ms. Vergowe placed a flower pot on one of the stumps that remained there for many years, such that there was no exclusive use. RP 404-405, 543-544, 957. Kinsman also acknowledged the surveyed line as the true boundary when she instructed others to only mow to the center of the stumps. RP 473-474, 515.

Lastly, the Vergowes had an electrical line within the “disputed area” that ran adjacent to the surveyed line from their house to the tree by the bulkhead and up to outdoor lights. RP 643, 693.

D. The Fence.

After the 2003 survey was complete, the Englanders constructed a chain link fence between the properties. Exhibits 7-12; RP 553, 722. The fence is located a “quarter foot” on the Englanders’ side (south) of the surveyed line. RP 114, 124; Exhibit 20. Initially, Kinsman liked the fence. RP 553-554, 770. However, in 2004 she filed this action.

**IV.
ARGUMENT**

- 1. THE TRIAL COURT ERRED IN DETERMINING THAT BEVERLY VERGOWE WAS “UNAVAILABLE”.**

The videotape deposition⁹ should not have been admitted at trial. The admissibility of a deposition is governed by Civil Rule 32. Pursuant to that rule, when a witness is “unavailable”, a witnesses deposition may be admitted as a substitute for his or her testimony. See Hammond v. Braden, 16 Wn.App. 773, 775, 559 P.2d 1357 (1977). In order to determine if a witness is unavailable, the Court must apply the following test:

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness resides out of the county and more than 20 miles from the place of trial, unless it appears that the absence of the witness was procured by the party offering the deposition or unless the witness is an out-of-state expert subject to subsection (a)(5)(A) of this rule; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

CR 32 (a)(3).

⁹ The notice for the videotape deposition specified it was taken pursuant to CR 30(b)(8) and not as a perpetuation deposition pursuant to CR 27. Consequently, the Englanders were never advised that the video would be used for perpetuation purposes.

This Court reviews the Trial Court's decision to admit the deposition pursuant to the abuse of discretion standard. Hammond, 16 Wn.App. at 776.

A party seeking to introduce the deposition of a witness is required to make a showing that due diligence was exercised in attempting to procure the attendance of the witness at trial. See Sutton v. Shufelberger, 31 Wn.App. 579, 585, 643 P.2d 920 (1982); Palfy v. Rice, 473 P.2d 606 (Alaska 1970); 8 C. Wright & A. Miller, Federal Practice § 2146 (1970). In this case, Kinsman made no effort to procure Ms. Vergowe's testimony at trial. To the contrary, Kinsman never issued a subpoena to Ms. Vergowe or made any effort to procure her attendance at trial. Then despite preparing a declaration regarding Ms. Vergowe's condition in December and four months before trial, Kinsman concealed that information and waited until the day of trial to raise the issue, preventing the Englanders from proving otherwise and effectively procuring the witness's absence.

Moreover, the Court based its decision that this witness was unavailable on the witness's "preference" not to be there. Mere inconvenience is not a sufficient basis for a witness to be

considered “unavailable”. Therefore, the Trial Court abused its discretion in admitting the deposition of Ms. Vergowe.

Since the most significant findings by the Court were attributed solely to Ms. Vergowe’s deposition, those findings now lack any evidence for support and on that basis alone this case must be reversed.

2. **THE TRIAL COURT ERRED IN DETERMINING THAT BEVERLY VERGOWE WAS “AVAILABLE” AFTER DETERMINING A FEW DAYS BEFORE THAT SHE WAS “UNAVAILABLE”.**

Several days after Kinsman maintained that Beverly Vergowe was “unavailable” for purposes of CR 32(a)(3) and thus requested that the court admit Ms. Vergowe’s videotape deposition at trial, she reversed her position and claimed Ms. Vergowe was now “available”, but by telephone only. The Court again contacted Ms. Vergowe by telephone, who stated that her condition had not changed. RP 810-811, 818-819. Nevertheless, the Court determined that Ms. Vergowe was now “available” and allowed her to testify by telephone. RP 813-823.

A party may not make witnesses “available” and “unavailable” for the purpose of trial strategy. Moreover, a party has a duty to act in good faith to procure that witness at trial.

Sutton, 31 Wn.App. at 585. Based on that authority, once a party claims a witness is “unavailable” and the court adopts that position, and nothing about that witnesses situation or condition has changed, that witness is unavailable for the entire trial, not just at the convenience of one party. Therefore, the Trial Court abused its discretion in characterizing Ms. Vergowe as “available” and allowing her to testify.

3. THE TRIAL COURT ERRED IN ALLOWING MS. VERGOWE TO TESTIFY TELEPHONICALLY.

The Trial Court allowed Ms. Vergowe to testify telephonically. There was no one present with Ms. Vergowe to administer the oath and no officer of the court to verify that the person speaking was Ms. Vergowe. No one could see the witness, confront her or place exhibits before her.

CR 43(a)(1) provides “In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise directed by the court or provided by rule or statute.” Nowhere in the Civil Rules does it permit or contemplate testimony by telephone. Interestingly, if this were a child custody case, RCW 26.27.111(2) allows telephonic testimony. Similarly, if this matter was in mandatory arbitration, MAR 5.3 allows telephonic testimony, but at the

arbitrator's discretion. Otherwise, a witness is required to physically appear in court when testifying.

The only Washington case specifically discussing telephonic testimony in a civil trial appears to be Esparza v. Skyreach Equipment, Inc., 103 Wn. App. 916 (2000). In that case, the Court noted that pursuant to CR 43(f)(1), a subpoena to a managing agent of a corporation may be issued to compel attendance at trial. Id. at 922. Where requiring that person to attend trial is either unnecessary or overly burdensome, the Court noted that CR 43(f)(1) allows the trial court to protect that party witness pursuant to CR 30(b), which may include telephonic testimony. However, the rule only applies to parties and managing agents, not other witnesses such as Ms. Vergowe. Furthermore, allowing a witness to testify by telephone, without any notice to counsel, deprives that party of any opportunity to confront the witness, to use exhibits, to insure that the witness who is testifying is not an imposter and to make sure that the witness is not reading from a pre-prepared statement or other notes. For those reasons, the Trial Court abused its discretion in allowing Ms. Vergowe to testify telephonically.

4. **EVEN IF BEVERLY VERGOWE'S TESTIMONY IS NOT STRICKEN, IT IS NOT SUFFICIENT TO ESTABLISH ANY OF THE ELEMENTS FOR EITHER ADVERSE POSSESSION OR ACQUIESCENCE.**

A. **An Oral Agreement Is Not Sufficient To Convey Property.**

Even if the testimony of Beverly Vergowe is not stricken, her testimony does not establish Kinsman's right to the disputed property. Ms. Vergowe testified that her husband Coy "gave" the disputed property to Johnson. Despite what they may have intended, the Vergowes never gave a deed for the property to Johnson or Kinsman and all conveyances of land must be accomplished by a deed. RCW 64.04.010. Moreover, an oral agreement to convey or "gift" the property is not effective against the Englanders as their successors in interest to the property.

In Johnston v. Monahan, 2 Wn.App. 452, 457, 469 P.2d 930 (1970), the Court articulated the minimum requirements for an oral agreement to convey property and such agreement to be valid against a subsequent purchaser as follows:

the minimum requirements for valid agreements and minimum requirements for proper execution thereof: (1) There must be either a bona fide dispute between two coterminal property owners as to where their common boundary lies upon the ground or else both parties must be uncertain as to the true location of such boundary; (2) the owners must arrive at an express meeting of the minds to

permanently resolve the dispute or uncertainty by recognizing a definite and specific line as the true and unconditional location of the boundary; (3) they must in some fashion physically designate that permanent boundary determination on the ground; and (4) they must take possession of their property by such occupancy or improvements as would reasonably give constructive notice of the location of such boundary to their successors in interest; or (as an alternative to (4) above), (4a) bona fide purchasers for value must take with reference to such boundary.

Id. at 457.

In this case, the Johnsons and the Vergowes knew exactly where the property line was located and for that reason Johnson requested permission from Vergowe to attach to the Vergowes' bulkhead. There was no definite and specific line created and additionally, neither Johnson nor Kinsman took possession of the property in a manner that would reasonably give constructive notice of the location of such boundary to the Englanders. Consequently, despite whatever may have been the Vergowes' intentions, no property was transferred or conveyed to Johnson or Kinsman.

B. The Trial Court Erred in Concluding That Kinsman Had Acquired A Portion of the Englander Property by Adverse Possession and/or Acquiescence.

The Trial Court erred in making the following significant findings of fact:

18. In March 2004, defendants constructed a metal chain link fence along or just inside (south) of what they believed to be the survey line. The fence and/or survey line used by the defendants differs from the boundary line established by the plaintiff and by both party's predecessors, through their respective maintenance and use of the properties. The fence and/or survey line used by the defendants is also contrary to and not in keeping with the location of the line formed by the pre-existing landmarks and monuments between the respective properties.

19. The area lying south of the 2003 survey line (also south of defendants' present fence line) and to north of the line formed by and between the southern points of the lookout wall and the garden wall, as also evidenced by the existence of other referenced landmarks and monuments maintained by plaintiff and the party's predecessors, is the "disputed property". The present chain link fence installed by the defendants lies within the disputed property.

CP 78-79.

The Court of Appeals reviews findings of fact to determine if they are supported by substantial evidence. See Doe v. Boeing Co., 121 Wn.2d 8, 846 P.2d 531 (1993) and Henry v. Bitar, 102 Wn.App. 137, 142, 5 P.3d 1277 (2000).

In this case, there is no evidence to support those findings. On the contrary, the evidence contradicts those findings. For example, beginning from the east end of the line and traveling west:

- The north edge of the cylinder wall is at the surveyed line. The wall was built in part by the Vergowes for the benefit of the Vergowes. It would only make sense that the wall would be

located on the Vergowe's property as they have an obligation to provide lateral support to Kinsman if they cut the slope down. Kinsman sought Vergowes permission to cut ivy growing over the wall. RP 426-427.

- The stumps do not serve as any type of marker. Even if they did, Beverly Vergowe maintained a flower pot on the stump demonstrating her belief that the stump was on her property. RP 404, 957. Furthermore, Kinsman admitted that she thought the property line was through the middle of the stumps, which is the same location as the surveyed line. RP 404, 407; Exhibit 21.
- The rose arbor is clearly located north of the surveyed line as depicted in Exhibit 24.
- Kinsman knew the Vergowes maintained their drain lines around the north corner of their bulkhead and through the lookout. RP 414-418, 904-905; Exhibits 1 and 8. The Vergowes bulkhead "return" is north of the lookout wall. Exhibits 6, 7 and 8.

The Trial Court then made the following Conclusions of Law:

1. Plaintiff has established by clear, cogent and convincing evidence, that she is [sic] has provided open, continuous, uninterrupted and exclusive care, repair and

maintenance of the disputed property through mutual acquiescence, and in a manner and character that a true owner would assert as against the world, and in view of the property's nature and location, for a period in excess of the statutory minimum.

2. Plaintiff is entitled to all right, title and interest to the "disputed property" . . .

CP 80.

This Conclusion of Law mixes two different legal principals together: adverse possession and acquiescence. The law of adverse possession and acquiescence are discussed separately below.

i. Adverse Possession.

In ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 774 P.2d 6 (1989), the Washington Supreme Court expressed the elements for demonstrating adverse possession and Plaintiff's burden of proof as follows:

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. *Chaplin v. Sanders*, 100 Wash.2d 853, 857, 676 P.2d 431 (1984). Possession of the property with each of the necessary concurrent elements must exist for the statutorily prescribed period of 10 years. RCW 4.16.020. As the presumption of possession is in the holder of legal title, *Peeples v. Port of Bellingham*, 93 Wash.2d 766, 773, 613 P.2d 1128 (1980), *overruled on other grounds, Chaplin v. Sanders, supra*, the party claiming to have adversely possessed the property has the burden of establishing the

existence of each element. *Skansi v. Novak*, 84 Wash. 39, 44, 146 P. 160 (1915), *overruled on other grounds*, *Chaplin v. Sanders*, *supra*

Id. at 757-8.

Kinsman failed to establish at least two critical elements of adverse possession: hostile and exclusive use.

a. Lack of Hostility.

Permission to occupy the land, given by the true title owner to the claimant or his predecessors in interest, will operate to negate the element of hostility and will defeat a claim of title by adverse possession. Chaplin v. Sanders, 100 Wn.2d at 861-862; Roediger v. Cullen, 26 Wn.2d 690 175, 707-709, P.2d 669 (1946). A use acquired merely by consent, permission, or indulgence of the owner of the servient estate can never ripen into a prescriptive right, unless the user of the dominant estate expressly abandons and denies his right under license or permission, and openly declares his right to be adverse to the owner of the servient estate. Roediger v. Cullen, 26 Wn.2d at 709 (quoting Hurt v. Adams, 86 Mo. App. 73).

Johnson, now Kinsman, asked the Vergowes for permission to construct a portion of the lookout on the Vergowes' property, which was given. At no time did Johnson or Kinsman take any

steps to change the expressly permissive nature of their use of a portion of the Englander' property.

Likewise, the Vergowes and Johnson constructed the concrete cylinder retaining wall together and for the benefit of the Vergowes (later the Englanders) to provide lateral support to the slope and to allow for the construction of Vergowes' level flower beds. Vergowes' ivy grew up and over the retaining wall and Kinsman admitting seeking and obtaining permission from Ms. Vergowe before cutting the ivy.

Since the use of the property has always been permissive, Kinsman cannot establish a material element of adverse possession and her claim must fail.

b. No Exclusive Use.

Kinsman did not use either the lookout or the retaining wall exclusively.

The lookout was used by the Vergowes and later the Englanders, as well as many neighbors. The Vergowes drain lines run through the lookout.

The Vergowes and Englanders have used the retaining wall for landscaping, growing ivy and use of electrical fixtures.

Therefore, Kinsman cannot demonstrate exclusive use of the lookout or retaining wall, again defeating any adverse possession claim.

ii. **Acquiescence.**

The theory of acquiescence supplements the concept of adverse possession. For the same reasons that the elements of adverse possession were not met, neither are the elements for acquiescence. The elements for acquiescence, at a minimum, are as follows:

(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.

Lamm v. McTigue, 72 Wn.2d 587, 591 (1967).

The Court in Lamm also pointed out that an agreement **“resolving an uncertainty in or dispute about the location of the true boundary line”** is often present in the establishment of

boundaries by recognition and acquiescence, albeit not indispensable. Id. at 593.

“The burden of proof is on the plaintiff to show, by clear, cogent and convincing evidence, that both parties acquiesced in the line for the period required to establish adverse possession--10 years.” Lilly v. Lynch, 88 Wn.App. 306, 317, 945 P.2d 727 (1997).

a. No Dispute Over The Location Of The True Boundary.

The parties always knew where the original boundary line was located. There was no dispute or uncertainty for which there would be any acquiescence.

b. No Well Defined Line.

The existence of the bulkhead and retaining wall along a small part of a common boundary and 110-120 feet apart with a steep slope in between does not create or constitute a well defined line.

c. No Mutual Acceptance And Recognition Of The New Line.

Kinsman still asked for permission to cut the ivy over the wall; Vergowe put flower pots on the stump; Vergowes' bulkhead corner and their drain lines extend north of the lookout and the Vergowes used the lookout.

The attachment of the Johnson bulkhead was a matter of convenience. The Vergowes still maintained their drain lines around the north corner with Johnson's knowledge. The retaining wall supported the natural grade for the benefit of Vergowe. Vergowes grew ivy up and over the wall. Kinsman sought permission before cutting the ivy. Moreover, none of these things would objectively indicate a new boundary had been established.

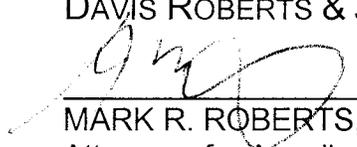
Where a successor in interest does not receive actual notice of the location of the claimed boundary, the occupancy or improvements must be reasonably sufficient to give the successor constructive notice of the location. See Johnston v. Monahan, 2 Wn.App. 452, 457, 469 P.2d 930 (1970).

V.
CONCLUSION

Appellants respectfully request that this Court reverse and remand this case back to the Trial Court with instructions to dismiss the plaintiff's claims.

Respectfully submitted this 12th day January, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of January, 2007,
I caused to be served the foregoing OPENING BRIEF OF
APPELLANTS on the following individual in the manner
indicated:

Robert M. Denomy
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The Rust Building
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(X) Via Hand Delivery (ABC Legal Messengers)

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07 JAN 12 PM 2:03
STATE OF WASHINGTON
BY 

SIGNED this 12th day of January, 2007, at Gig Harbor, Washington.


KRISTINE R. PYLE