No. 39567-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STEPHEN CHANDLER and KIM O'NEILL,
Plaintiffs/Respondents,
vs.
JOHN KUHLMAN and JANE DOE KUHLMAN, husband and wife; TIM SELFRIDGE and JANE DOE SELFRIDGE, husband and wife; and WINDERMERE REAL ESTATE/STELLAR GROUP, MORTGAGE ELECTRONIC REGISTRATION SYSTEM, INC., FIRST AMERICAN TITLE COMPANY, AND CHASE MANHATTAN BANK USA,
Defendants/Appellants.

JOHN KUHLMAN and JULIE KUHLMAN, husband and wife,
Third-Party Plaintiffs,
vs.
DAN I. CARLSON and PATRICIA J. CARLSON, husband and wife,
Third-Party Defendants.

RESPONDENTS' BRIEF

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I. STATEMENT OF THE CASE

Harry and Audrey Axtell were the common grantors of two adjoining parcels of land on the Kalama River in Kalama, Washington. The Axtells (Axtell) sold the southern parcel to Frank Bishop and his wife in 1974 and the northern parcel to DAN and PATRICIA CARLSON in 1980. The parcels are bounded to the west by the Kalama River.[1]

In 1974, Axtell sold the southern parcel to the Bishops. The boundary between what would become the Bishop property and the remaining Axtell property was surveyed in 1974 by Russ Bass. An iron pipe was set to mark where the northeast corner of the Bishop property intersects with the private road to the east. This road came to be called River Glen Terrace. Another iron pipe was set to mark the northwest corner of the Bishop property near the Kalama River. A cedar tree standing approximately in the middle of the boundary line was marked, or "blazed," by Mr. Bass with an ax.[2]

Both Axtell and Frank Bishop (Bishop) were present when Mr. Bass blazed the cedar tree and placed the iron pipe near the Kalama River. Bishop

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[1] The factual statements in the preceding paragraph are supported by the *Declaration of Frank Bishop*, CP at 26.

[2] The factual statements in the preceding paragraph are supported by the *Declaration of Frank Bishop*, CP at 27.

later confirmed the location of the iron pipe near the private road. In 1974, Axtell and Bishop understood that the boundary line established by Mr. Bass was the boundary between their properties. Unfortunately, the deed Axtell provided Bishop was sloppily done and did not accurately reflect the monuments on the ground. Bishop was aware of this problem, but did not worry about it because he and Axtell were on good terms and the boundary line was clearly marked on the ground.[3]

In 1980, Axtell sold the northern parcel to the CARLSONS. Axtell represented to DAN CARLSON (CARLSON) that the two iron pipes and the cedar tree were the boundary monuments. After CARLSON purchased the property, the northwest monument would occasionally be washed away by the Kalama River. When this would happen, Bishop and CARLSON would meet and replace the monument. When the monument was washed away in 1996, Bishop and CARLSON replaced it with a rock and concrete monument that remains to this day.[4]

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[3] The factual statements in the preceding paragraph are supported by the *Declaration of Frank Bishop*, CP at 27.

[4] The factual statements in the preceding paragraph are supported by the *Declaration of Frank Bishop*, CP at 28.

During the twenty-one (21) years the Bishops and CARLSONs were neighbors, they mutually recognized and accepted as the boundary between their properties as marked by Mr. Bass in 1974. Bishop and CARLSON acted in accordance with that belief, treating the land on their respective sides of the boundary line as their own. There was never a dispute over the boundary line and neither saw a need to fence the line between the properties.[5]

In 2001, Defendants JOHN and JULIE KUHLMAN purchased the CARLSONs' property. CARLSON pointed out the monumented boundary line to JOHN KUHLMAN (KUHLMAN) prior to the sale. KUHLMAN then built a fence very close to the boundary line CARLSON had pointed out. CARLSON returned to the property in March 2007 and noted that the fence was located approximately one foot north of the monumented boundary line (on the KUHLMAN side).[6] When KUHLMAN built the fence in 2004, Bishop did not believe a survey was necessary because the monumented

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[5] The factual statements in the preceding paragraph are supported by the *Declaration of Frank Bishop*, CP at 28, and the *Declaration of Dan Carlson*, CP at 43.

[6] The factual statements in the preceding paragraph are supported by the *Declaration of Dan Carlson*, CP at 43.

boundary line had been recognized by Axtell, CARLSON, and KUHLMAN for the previous thirty (30) years.[7]

After KUHLMAN built the fence, Bishop and KUHLMAN continued to respect the monumented boundary line until Bishop sold his property to the Plaintiffs, STEPHEN CHANDLER and KIM O'NEILL, in 2005. After purchasing the property, STEPHEN CHANDLER (CHANDLER) decided to plant some very expensive trees along the monumented boundary line. Prior to planting the trees, CHANDLER ordered a survey that revealed the discrepancy between the deed line and the monumented boundary line. Upon discovery of this discrepancy, KUHLMAN claimed, for the first time, that he owned the land on CHANDLER's side of the fence *himself* had built.

II. ARGUMENTS AND AUTHORITIES

A. CHANDLER HAS OBTAINED TITLE TO THE DISPUTED AREA THROUGH THE COMMON GRANTOR DOCTRINE

The location of a boundary line by a common grantor is binding on the grantees. "'A practical location made by the common grantor of the division line between the tracts granted is binding on the grantees who take with reference to that boundary. The line established in that manner is presumably the line mentioned in the deed . . . [based] on the fact that the true

[7] *Declaration of Frank Bishop*, CP at 29.

location was made, and the conveyance in reference to it.'" *Strom v. Arcorace*, 27 Wn.2d 478, 481, 178 P.2d 959 (1947) (quoting 11 C.J.S., Boundaries, § 77, page 651).

The undisputed evidence in the record establishes that Axtell was the common grantor of both the CHANDLER and KUHLMAN properties. The undisputed evidence further establishes that the monumented boundary line was set by Axtell and observed by Axtell and Bishop. Summary judgment was proper.

B. CHANDLER HAS OBTAINED TITLE TO THE DISPUTED AREA THROUGH THE DOCTRINE OF MUTUAL RECOGNITION AND ACQUIESCENCE

Boundaries between two neighbors may be adjusted to conform to a line on the ground to which they have "long acquiesced." *Lamm v. McTighe*, 72 Wn.2d 587, 593, 434 P.2d 565 (1967), sets out the rule for establishing a boundary line by mutual recognition and acquiescence:

> (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.

In this case, Bishop and CARLSON acquiesced to a boundary line that was different than that contained in their deeds. The boundary line was certain, well defined, and physically designated upon the ground: it was clearly marked by an iron pipe, a blazed cedar tree, and the rock and concrete monument that they installed together. CARLSON represented this boundary to KUHLMAN, who purchased the property and eventually built a fence very close to this boundary. The parties clearly manifested a mutual recognition and acceptance of the designated line as the true boundary line. This acquiescence went on for twenty-one (21) years. Axtell and Bishop acquiesced to the boundary line for six (6) years prior to that. Bishop represented this boundary to CHANDLER, and CHANDLER purchased the property and designed the construction of his home around this boundary. If there were ever a case in which the doctrine of mutual recognition and acquiescence applied, this is the case. Summary judgment was proper.

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C. THE EVIDENCE PRESENTED TO THE TRIAL COURT BY KUHLMAN FAILED TO CREATE GENUINE ISSUES OF MATERIAL FACT AS TO THE TIME PERIODS RELEVANT TO THIS ACTION

KUHLMAN focuses on the question of whether he personally had notice of the recognized boundary line between his property and the CHANDLER property. CARLSON stated in his first declaration that he showed KUHLMAN the agreed boundary line prior to KUHLMAN's purchase of the property. KUHLMAN denies this, stating that CARLSON only showed him the general area of the boundary line. The fence that KUHLMAN built between his property and the CHANDLER property somehow miraculously ended up almost exactly on the monumented boundary line. The rock and concrete monument that was adopted by Bishop and CARLSON just so happens to sit right next to the end of another fence that was in place when KUHLMAN purchased the property.[8] Nonetheless, CHANDLER concedes that the KUHLMANs' dubious testimony creates a question of fact *as to notice* to KUHLMAN.

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[8] CARLSON built a split-rail cedar fence that ran parallel to the Kalama River and stopped at the rock and concrete monument. This fence did not divide the properties in controversy. After KUHLMAN purchased the property, he built a split-rail cedar fence that is basically perpendicular to the Kalama River, running from the rock and concrete monument east almost exactly along the boundary line that had been used by Axtell, Bishop, and Carlson for thirty (30) years. *Declaration of Frank Bishop*, CP at 29.

The problem with KUHLMAN's argument, however, is that title to the disputed strip was divested from CARLSON (his predecessor in interest) *twenty-seven (27) years before* KUHLMAN purchased the property. Put another way, CARLSON did not have title to the disputed area at the time he sold to KUHLMAN and, therefore, KUHLMAN could not have taken title from CARLSON. It is a matter of legal title, not notice. KUHLMAN's knowledge of the monumented boundary line at the time he purchased is irrelevant. The following facts are undisputed:

1. Axtell subdivided his property and sold it to Bishop in 1974.

2. Axtell marked the boundary line between his property and Bishop's property *at the time of transfer* using commonly accepted survey monuments, i.e., iron pipes and tree blazing.

3. Bishop bought his property with reference to the monumented boundary line. Axtell and Bishop planted trees and other landscaping along the boundary line and on their respective sides of the line.

4. Axtell and Bishop abided by this boundary line for six (6) years, and during this time the boundary line was clearly monumented and clearly visible by Axtell's and Bishop's use of their respective properties.

5. CARLSON bought Axtell's property in 1980 with reference to the monumented boundary line.

6. Bishop and CARLSON abided by the boundary line as their boundary for twenty-one (21) years, several times replacing the iron pipe closest to the Kalama River after flooding.

7. Bishop and CARLSON last replaced the iron pipe with a rock and concrete monument after the flood of 1996.[9]

8. For twenty-seven (27) years, Axtell, Bishop, and CARLSON believed and mutually recognized that the monumented boundary line was the boundary between their respective properties.

9. In 2001, KUHLMAN purchased CARLSON's property and it is disputed whether the monumented boundary line was disclosed to KUHLMAN.

10. In 2008, CHANDLER purchased Bishop's property with reference to the monumented boundary line.

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[9] Bishop claims that the rock and concrete monument was used to re-mark the boundary. *Declaration of Frank Bishop*, CP at 28. CARLSON admits he replaced the iron pipe in 1996 but denies the rock and concrete monument was the replacement. *Declaration of Dan I. Carlson*, CP at 125. CARLSON fails to identify the monument that he and Bishop placed in 1996, but admits that it is consistent with the line created by KUHLMAN's fence, which ends at the rock and concrete monument. *Declaration of Dan Carlson*, CP at 43. Furthermore, CARLSON does not contradict Bishop's testimony with regard to the location of the boundary, only whether the rock and concrete monument was intended to mark that boundary. *Declaration of Dan I. Carlson*, CP at 125. Finally, CARLSON never denied that the rock and concrete monument was on the boundary line. He just denies that it was his intent to use this monument as a boundary marker. *Declaration of Dan I. Carlson*, CP at 125.

The question before the Court is not only *whether* title to the disputed area passed to Bishop, but also *when* it passed to Bishop. Pursuant to the undisputed facts in this case, title to the disputed area passed to Bishop either in 1980 under the common grantor doctrine, or in 1984 under the doctrine of mutual recognition and acquiescence.

1. Title to the disputed area passed to Bishop in 1980 under the common grantor doctrine.

The analysis under the common grantor doctrine involves two steps. When a common grantor establishes a line as a physical boundary, such line is binding as to the grantor and his grantee if (1) the land was purchased with reference to the line, and (2) there was a meeting of the minds as to the line's status as the boundary. *Winans v. Ross*, 35 Wn. App. 238, 240, 666 P.2d 908 (1983). The undisputed evidence in the record establishes that both elements are satisfied as to Axtell and Bishop.

When the controversy involves a subsequent purchaser, the court must also analyze the issue of notice. *Fralick v. Clark County*, 22 Wn. App. 156, 160, 589 P.2d 273 (1978), provides that a subsequent purchaser will only be bound if (a) the subsequent grantee was made aware of the boundary <u>or</u> (b) if visual examination of the property would indicate that the deed line was no longer functioning as the "true" boundary.

There is a question of fact as to whether CARLSON pointed out the monumented boundary line to KUHLMAN. There is also a question of fact as to whether inspection of the property in 2001 would have indicated to KUHLMAN the location of the monumented boundary line. Even if the blaze in the tree was no longer noticeable, the iron pipe at the eastern edge of the property, the rock and concrete monument at the Kalama River, and the fact that CARLSON's split-rail fence along the river stops at the rock and concrete monument would put KUHLMAN on inquiry notice that the monumented boundary line was the boundary between the properties. Nonetheless, the KUHLMANs' declarations create an issue of fact as to notice in 2001.

The legal question before the Court, however, is whether notice to KUHLMAN is even relevant. The *Fralick* case provides that for the common grantor doctrine to be binding on a subsequent purchaser, there must be actual or constructive notice of the boundary line. However, neither the *Fralick* case nor any other Washington case provides guidance as to *how many* subsequent purchasers must have notice of the boundary line.

Under KUHLMAN's reasoning, *every* subsequent purchaser from CARLSON to KUHLMAN and to any endless number of purchasers into

eternity would need to be on notice of the monumented boundary line for title to be vested in Bishop's successor. That is, even though the monumented boundary line was binding on Axtell and Bishop for six (6) years, and binding on Bishop and CARLSON for twenty-one (21) years, the monumented boundary line vanished when CARLSON (allegedly) forgot to point out the line to KUHLMAN. This reasoning begs the question, "Who had title to the property from 1974 to 2001?" Under KUHLMAN's reasoning, Bishop would have had title from 1974 to 1980 when Axtell was his neighbor, and he would have had title from 1980 to 2001 when CARLSON was his neighbor, but would be divested of title in 2001 when CARLSON transferred his property to KUHLMAN (allegedly) without pointing out the monumented boundary line.

Stranger still, if KUHLMAN were to transfer his property and, as part of his disclosure, point out the monumented boundary line, would title to the property then bounce back to Bishop or his successor? Odd as it may seem, both prongs of the rule from *Fralick* would be satisfied: (a) Axtell and Bishop established a common boundary, and (b) KUHLMAN's hypothetical subsequent purchaser had actual knowledge of the monumented boundary line.

This is a case of first impression and, therefore, the Court must fall back on public policy as its guide. To the knowledge of counsel for Plaintiffs, the rule from *Fralick* has never been applied to a factual scenario similar to this case. As demonstrated above, the application of *Fralick* to the facts of this case produces an absurd result that no Court of Appeals, nor the Supreme Court of Washington, could have intended. There are two public policy considerations that weigh strongly against KUHLMAN's proposed application of *Fralick*. First, blindly applying *Fralick* to these facts creates a patently unfair result to landowners in Bishop's situation. Bishop agreed with Axtell as to the boundary and used his property as such for six (6) years. Axtell's successor, CARLSON, took the property with knowledge of the monumented boundary line and consented in the use of the monumented boundary line for twenty-one (21) years. Had Bishop sued Axtell or CARLSON immediately, he would have succeeded in quieting title in his name. Having not done so, Bishop now stands to lose title to the disputed area because CARLSON allegedly forgot to point out the monumented boundary line to KUHLMAN. Through no fault of his own and without any notice, Bishop is divested of title to the property. With no knowledge that his title has been secretly divested, Bishop then sells the property to

CHANDLER, pointing to the monumented boundary line as the boundary. Not only has Bishop lost title to land that has been his for twenty-seven (27) years, he has unknowingly misrepresented his boundary to his purchaser.

The second policy argument against the application of *Fralick* to cases involving multiple subsequent purchasers is that it turns title into a bouncing ball that vests in one and divests another without notice and for no good reason. The Court cannot embrace a rule that produces such chaos.

The only reasonable way to deal with this issue would be for the Court to limit the application of *Fralick's* notice requirement to the first subsequent purchaser. Such a ruling would strike a balance between the competing equitable concerns of the subsequent purchaser (CARLSON) and the prior purchaser (Bishop). This ruling would also prevent the intolerable situation where the title bounces willy-nilly back and forth over the agreed line.

2. Title to the disputed area passed to Bishop in 1984 under the doctrine of mutual recognition and acquiescence.

KUHLMAN attacks CHANDLER's doctrine of mutual recognition and acquiescence claim on the basis that, at the time KUHLMAN purchased the property, there was no "well-defined line" that would put third parties on

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notice of the agreed-upon monumented boundary line. This argument fails for two reasons.

(a) The record establishes an express agreement and, therefore, there is no need to demonstrate objective evidence of possession.

The doctrine of mutual recognition and acquiescence does not require "acts, occupancy, and improvement" along the agreed-upon boundary line in cases where the property owners have an express agreement. The Supreme Court of Washington, in *Lamm v. McTighe*, 72 Wn.2d 587, 593, 434 P.2d 565 (1967), set forth the elements of the doctrine:

> (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.

(Emphasis added.)

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It is only where there is no express agreement that recognition of the line must be physically manifested by use of the property. In the case at hand, the evidence is not in dispute: Axtell and Bishop adopted the monumented boundary line as the boundary because they thought that it was the boundary and abided thereby for six (6) years. Bishop and CARLSON did the same for twenty-one (21) years. As such, the second element listed above is satisfied by the express agreement regardless of whether either party modified the landscape to objectively demonstrate such agreement.

(b) The evidence in the record establishes that the parties manifested their recognition of the monumented boundary line through their use and improvements of their respective properties.

The second reason that this argument fails is that the unrebutted evidence in the record establishes that from 1974 to 1980 and from 1980 to 2001, Axtell, Bishop, and CARLSON maintained their properties on either side of the monumented boundary line in a fashion that was consistent with their respective ownership. The record also establishes that the line was clearly marked by a surveyor using two iron pipes and a blaze mark in a cedar tree, both of which were and still are acceptable survey monuments. For the Court to find that a line marked by a surveyor with iron pipes and a tree blaze is not "clearly marked" or "definitely marked" would be utterly absurd. Even

if the blaze in the tree had grown over and the iron pipe by the river had been replaced by a rock and concrete monument by 2001 when KUHLMAN purchased the property, the record establishes that this line was not only visible by reference to the monuments but also by reference to the parties' use of the land from 1974 through *at least* 1996. KUHLMAN can show the Court all the photographs from 1996 that can be found, but it still will not create a question of fact as to how the land looked in the 1970s, 1980s, or early 1990s.

The Court should keep in mind that the second element of *Lamm* does not require the kind of "open and notorious" use that is required for adverse possession. This makes sense because adverse possession is all about putting the world on objective notice that one claims ownership to the land in question. *Lamm* requires a lesser degree of use: the use must only be *consistent* with the mutually recognized boundary. The actions of Axtell, Bishop, and CARLSON over the course of twenty-seven (27) years demonstrated their mutual recognition and acquiescence of the monumented boundary line even in the absence of an express agreement.

There is one critical fact in the record that simply cannot be overcome by KUHLMAN. Over the course of twenty-one (21) years, Bishop and

CARLSON repeatedly replaced the monument by the river. *Lamm* requires, in the absence of an express agreement, that 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." 72 Wn.2d at 593, 434 P.2d 565 (emphasis added). The repeated replacement of the monument near the river is perhaps the ultimate manifestation of mutual recognition and acquiescence of a boundary. This act is unequivocal and, even standing alone, fully satisfies the second element of *Lamm*.

KUHLMAN takes the position that absent a fence or some other structure that screams, "Hey, boundary line, stupid!", there can be no transfer of title under mutual recognition and acquiescence. Not only is this position inconsistent with the second element of *Lamm*, but it also wholly ignores the first. The *Lamm* Court stated: "The line must be certain, well defined, and in some fashion physically designated upon the ground, e.g., ***by monuments***, roadways, fence lines, etc." 72 Wn.2d at 593, 434 P.2d 565 (emphasis added). A surveyor's monument may or may not notify casual observers of the location of a boundary. Similarly, there is nothing about a roadway,

standing by itself that is going to scream out, "This is our boundary!" The rule from *Lamm*, by its very terms, requires only a defined physical mark on the ground that memorializes the agreement. If it required "open and notorious use similar to adverse possession," the *Lamm* Court would have said so.

KUHLMAN makes much of the fact that both Bishop and CARLSON checked the box "no" on their real estate disclosure forms with regard to "boundary adjustments." The record establishes that Axtell, Bishop, and CARLSON mutually recognized the monumented boundary line because they believed it actually was the boundary line provided in their deed. Axtell and Bishop witnessed the surveyor placing the monuments on the line. CARLSON bought with reference to the boundary line as marked on the ground with the understanding that the monumented boundary line *was* the deed line. This is not a case where neighboring property owners got together and agreed that a line on the ground would apply *instead* of the deed line. The record establishes that Axtell, Bishop, and CARLSON thought the monumented boundary line *actually was* the deed line. Axtell, Bishop, and CARLSON recognized the monumented boundary line as the physical

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manifestation of the deed line and, therefore, there was no "boundary line adjustment" to disclose.

Even if the Court finds the disclosure statements create a question of fact as to an express agreement, the rule from *Lamm* provides that there can be mutual recognition and acquiescence without such agreement.

To summarize, to prove the second element, CHANDLER must show either an express agreement as to the monumented boundary line lasting more than ten (10) years ***or*** use by the respective property owners on either side of the monumented boundary line indicating ownership and lasting more than ten (10) years. The Plaintiffs have provided the Court with both and KUHLMAN has failed to provide any contradictory evidence as to the time period of 1974 through 1996.

With the tenth year having run in 1984, title to the disputed area passed to Bishop in 1984. ***"In the settlement of boundaries, the mutual recognition and acquiescence doctrine supplements adverse possession."*** *Lilly v. Lynch*, 88 Wn. App. 306, 316, 945 P.2d 727 (1997) (citing *Lloyd v. Montecucco*, 83 Wn. App. 846, 855, 924 P.2d 927 (1996) (citing 17 WILLIAM B. STOEBUCK, *Washington Practice Real Estate: Property Law* § 8.21 at 519 (1995))) (emphasis added). The Supreme Court of

Washington has held that "[w]hen real property has been held by adverse possession for ten years, such possession ripens into an original title. Title so acquired by the adverse possessor cannot be divested by acts other than those required where title was acquired by deed." *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 855, 376 P.2d 528 (1963) (citing *Mugaas v. Smith*, 33 Wn.2d 429, 206 P.2d 332 (1949); *McInnis v. Day Lumber Co.*, 102 Wn. 38, 172 P. 844 (1918)); *see also Halverson v. City of Bellevue*, 41 Wn. App. 457, 460, 704 P.2d 1232 (1985) ("The law is clear that title is acquired by adverse possession upon passage of the 10-year period."); *Todd v. Kitsap County*, 101 Wn.2d 245, 248, 676 P.2d 484 (1984) ("Once the applicable limitations period has expired, title passes either by prescription or by adverse possession.").

The quiet title action merely confirms that title had passed as of the passage of the 10-year period. *Halverson*, 41 Wn. App. at 459, 704 P.2d 1232. In the case at hand, title passed to Bishop in 1984 and nothing divested Bishop of this title between 1984 and the date of his transfer to CHANDLER. As such, KUHLMAN's knowledge or notice of the monumented boundary line at the time he purchased the property is irrelevant.

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D. CARLSON'S SECOND DECLARATION DOES NOT CREATE A GENUINE ISSUE OF MATERIAL FACT

In March 2007, DAN CARLSON met with counsel for CHANDLER at the disputed boundary line. CARLSON inspected the property and the fence that was constructed by KUHLMAN. Counsel for CHANDLER presented CARLSON a draft declaration. CARLSON reviewed the declaration, made a few alterations, and signed it on June 9, 2007. This declaration contained the following testimony:

> 1. The boundary line between the properties was memorialized by an iron pipe near the roadway to the east and an iron pipe near the Kalama River to the west.
>
> 2. During the twenty (20) years he lived next to Bishop, he and Bishop never had any disputes about the location of the boundary.
>
> 3. From time to time, the Kalama River would flood and wash away the western monument. Bishop and CARLSON would replace the monument after each flood.
>
> 4. The boundary between the two properties was "marked by the monuments near the road and near the river the entire [2 years]."
>
> 5. When CARLSON sold his property to KUHLMAN, he showed him the boundary prior to closing.
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> 6. When he inspected the property in March 2007, CARLSON saw that KUHLMAN built his fence

along the boundary that CARLSON pointed out, approximately one foot to the north of the boundary that "[Bishop] and I had recognized for over twenty years."

7. When he inspected the property in March 2007, he found the rock and concrete monument that he and Bishop had placed near the Kalama River after the flood of 1996.[10]

On July 30, 2008, KUHLMAN amended his answer to include a third-party claim against CARLSON as Third-Party Defendant. KUHLMAN brought this new claim pursuant to the statutory warranty deed that CARLSON signed when he transferred the property to KUHLMAN. Being sued by KUHLMAN for defense and indemnity evidently caused CARLSON to have a change of heart. On January 27, 2009, CARLSON signed a declaration that was drafted by KUHLMAN's attorney, which provided the following testimony:

1. CARLSON had never seen the original iron pipe that was near the Kalama River. ***(CARLSON did not deny that he and Bishop placed a replacement iron pipe near the Kalama River after each flood, nor did he deny that the 1996 rock and concrete monument was present in March 2007.)***

2. The rock and concrete monument near the Kalama River was not placed by him to mark the property boundary. ***(CARLSON did not deny that the rock***

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[10] *Declaration of Dan Carlson*, CP at 43.

> ***and concrete monument was in fact on the boundary line, nor did he deny his prior testimony that the fence KUHLMAN built was very close to the boundary line.)***[11]

Under the *Marshall* rule, CARLSON cannot create a question of fact sufficient to avoid summary judgment simply by changing this testimony. In *Marshall v. AC & S Inc.,* 56 Wn. App. 181, 185, 782 P.2d 1107 (1989), the Court of Appeals stated:

> When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.

(quoting *Van T. Junkins & Assocs., Inc. v. United States Indus., Inc.,* 736 F.2d 656, 657 (11th Cir. 1984); citing *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271 (9th Cir. 1988); *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540 (9th Cir. 1975)).

To the extent this Court finds that CARLSON's second declaration created a factual controversy by controverting the first declaration, summary judgment must nonetheless be affirmed absent some explanation for the change in testimony. CARLSON has never provided any such explanation.

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[11] *Declaration of Dan I. Carlson*, CP at 125.

Even if the Court is not inclined to apply the *Marshall* rule, CARLSON's second declaration does not contradict the key facts contained in the first. In his second declaration he denies that the rock and concrete monument was intended to be a monument. He does not deny that the rock and concrete monument is located on the boundary line. CARLSON denies seeing the original iron pipe near the Kalama River, but he does not deny that he saw Bishop repeatedly replace the original iron pipe and that the 1996 rock and concrete monument was still present in 2007. CARLSON does not deny that the property was marked by the two iron pipes for over twenty (20) years. There is no denial that the fence KUHLMAN built is approximately one foot on the KUHLMAN side of the monumented boundary line and runs parallel to said line. There is no denial that CARLSON showed KUHLMAN this boundary line prior to selling the property and, most importantly, there is no description of where the boundary line actually was located. CARLSON described the boundary line in his first declaration and, with the help of counsel for KUHLMAN, did his best to cast aspersions on his own prior testimony. However, the second declaration falls far short of disclaiming the boundary line described in the first.

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III. CONCLUSION

The Court of Appeals should affirm the trial court's granting of Plaintiffs' Motion for Summary Judgment under the common grantor doctrine and the doctrine of mutual recognition and acquiescence.

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Of Attorneys for Plaintiffs/Respondents

CERTIFICATE

I certify that on this day I caused a copy of the foregoing Respondents' Brief to be mailed, postage prepaid, to the following attorneys, addressed as follows:

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