

NO. 39667-0-II  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

SPENCER DICK and MARY DICK, husband and wife and their  
marital community; 88<sup>th</sup> STREET, LLC,

Appellants,

vs.

FRANCIS CHENETTE and JANE DOE CHENETTE,

Respondents,

APPEAL FROM THE SUPERIOR COURT

HONORABLE JOHN P. WULLE

REPLY BRIEF

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**Table of Contents**

I. Stumpage Is Not the Proper Measure of Damages. .... 1

II. Mr. Chenette Produced Insufficient Evidence to Support the Claim of a Boundary by Mutual Recognition and Acquiescence..... 4

    a. Introduction. .... 4

    b. The Ditch Is Not a Certain and Well-Defined Line..... 6

    c. No Party Has Made Improvement..... 8

    d. The Evidence is Insufficient to Show Acquiescence in the Ditch Being the Boundary..... 9

    e. Conclusion..... 10

III. Mr. Chenette Cannot Testify Concerning Actions and Interactions of the Dicks’ Predecessors. .... 11

    a. Introduction. .... 11

    b. Mr. Chenette’s Testimony Must Be Excluded Because It Represents a Transaction..... 12

IV. Conclusion..... 14

## Table of Authorities

### Cases

<i>Bremerton Central Lions Club, Inc. v. Manke Lumber Co.</i> , 25 Wn.App. 1, 604 P.2d 1225 (1979) .....	1
<i>Buchalski v. Universal Marine Corp.</i> , 393 F.Supp. 246 (W.D. Wa. 1975) ..	2
<i>Campbell v. Reed</i> , 134 Wn.App. 349, 363, 139 P.3d 419 (2006) .....	5
<i>Clark v. Casebier</i> , 92 Ark.App. 472, 215 S.W.3d 684 (2005) .....	6, 7
<i>Fuoco v. Williams</i> , 18 Utah2d 282, 421 P.2d 944 (1966) .....	6, 7
<i>Grimwood v. University of Puget Sound, Inc.</i> , 110 Wn.2d 355, 359, 753 P.2d 517 (1988) .....	9
<i>Hill v. Cox</i> , 110 Wn.App. 394, 41 P.3d 495 (2002) .....	3
<i>In re Detention of Bergen</i> , 146 Wn.App. 515, 524, <i>fn.</i> 8, 195 P.3d 529 (2008) .....	11
<i>In re LaBelle</i> , 107 Wn.2d 196, 209, 728 P.2d 138 (1986) .....	5
<i>Lamm v. McTighe</i> , 72 Wn.2d 587, 434 P.2d 565 (1967) .....	5
<i>Pearce v. G. R. Kirk Co.</i> , 92 Wn.2d 869, 874, 602 P.2d 357 (1979) .....	1
<i>Pinneo v. Stevens Pass, Inc.</i> , 14 Wn.App. 848, 545 P.2d 1207 (1976) .....	8
<i>Sherrell v. Selfors</i> , 73 Wn.App. 596, 871 P.2d 168 (1994) .....	1, 4
<i>Sigloch v. Iroquois Mining Co.</i> , 106 Wash 632, 636, 181 P. 51 (1919) .....	8
<i>Spencer v. Terrel</i> , 17 Wash. 514, 50 P. 468 (1897) .....	12
<i>Thomas v. Harlan</i> , 27 Wn.2d 512, 178 P.2d 965 (1947) .....	10
<i>Thor v. McDearmid</i> , 63 Wn.App. 193, 817 P.2d 1380 (1991) .....	13
<i>Vogt v. Hovander</i> , 27 Wn.App. 168, 615 P.2d 660 (1979) .....	13

*Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182  
(1989)..... 5

**Statutes**

Laws of Washington, 2004, Chapter 217 §1 ..... 3

RCW 5.60.030 ..... 12, 13

RCW 84.34.020(3)..... 3

I. Stumpage Is Not the Proper Measure of Damages.

Mr. Chenette relies on several incorrect factual and legal arguments to support his claim that the trees should be valued on the basis of stumpage. Each of these will be addressed in turn.

First of all, and relying on *Bremerton Central Lions Club, Inc. v. Manke Lumber Co.*, 25 Wn.App. 1, 604 P.2d 1225 (1979), Mr. Chenette argues that stumpage value is the default method for valuing trees that are cut. The Court relied on *Pearce v. G. R. Kirk Co.*, 92 Wn.2d 869, 874, 602 P.2d 357 (1979) for that statement. However, the Court in *Pearce v. G.R. Kirk, supra*, did not state that stumpage was the default value. It merely observed that stumpage can and has been utilized to establish damages where trees are unlawfully cut. It went on to indicate stumpage is a proper measure where timber is intended to be sold as stumpage but not, as in that case, where the plaintiff intended to market the trees as Christmas trees. In such a situation, the Court stated, damages should be reckoned based on the plaintiffs' lost profits.

*Pearce v. G. R. Kirk Co., supra*, as well as the leading case of *Sherrell v. Selfors*, 73 Wn.App. 596, 871 P.2d 168 (1994), make it clear that the measure of damages is governed by the plaintiff's intended use of the trees. If the trees are intended as a visual buffer or if the property is

used for residential or recreational purposes, restoration is the proper value.

Without citing any authority, Mr. Chenette goes on to argue that stumpage is the only proper measure of damages if the trees do in fact have commercial value. (Brief of Respondent, p. 6) In making this argument, Mr. Chenette suggests that he can dictate to Mr. and Mrs. Dick how to utilize trees on their land. A tortfeasor such as Mr. Chenette has no right to do so. This conclusion is consistent with the well-accepted notion that a tortfeasor takes his victim as he finds him. *Buchalski v. Universal Marine Corp.*, 393 F.Supp. 246 (W.D.Wa. 1975).

Mr. Chenette goes on to argue that stumpage value should be applied because some portions of the Dicks' property are in current use. However, it is undisputed that the trees in question were on property that was not in current use. (CP 160) Mr. Chenette appears to acknowledge this by indicating that the property in question could not possibly be placed in current use.

Mr. Chenette appears to be arguing that if any portion of property that a person owns is in current use then the taking of trees on any part of the property that person owns — regardless of whether that property is in current use or not — must be valued as stumpage. That argument is at odds with the current use statute. A person who resides on “timber land”

can be the subject of a current use application. However, since 2004, the term does not include a residential home site. RCW 84.34.020(3); Laws of Washington, 2004, Chapter 217 §1. Therefore, a person who resides on forty (40) forested acres cannot secure current use status for his residential home site notwithstanding his or her leaving a number of tall Douglas firs on the home site to accentuate beauty and to preserve privacy. According to Mr. Chenette's argument, however, a tortfeasor who cut any of those trees would be liable only for stumpage because the person did obtain current use classification for the remainder of his or her forested land. The argument is obviously flawed.

Finally, Mr. Chenette attempts to distinguish *Hill v. Cox*, 110 Wn.App. 394, 41 P.3d 495 (2002), discussed at Brief of Appellants, pps. 11-12, on the basis that the trees that were cut were closer to the residence than the trees in our case. That is a distinction without a difference. To be sure, the distance of the trees from the residential cabin in *Hill v. Cox, supra*, did not matter to the Court deciding the case. Rather, the Court found that restoratoin value was the appropriate measure of damages because the plaintiff "purchased the property for recreational purposes and that the trees. . . preserved a visual buffer enhancing privacy and aesthetic value." 110 Wn.App. at 405

The Dicks purchased the property for recreational and residential purposes. The trees in question functioned as a visual buffer. Reasonable minds could not differ on this point, and Mr. Chenette has not contended otherwise. Therefore, the proper measure of damages is restoration value. *Sherrell v. Selfors, supra; Hill v. Cox, supra.* The trial court erred by ruling to the contrary.

II. Mr. Chenette Produced Insufficient Evidence to Support the Claim of a Boundary by Mutual Recognition and Acquiescence.

a. Introduction.

The parties agree that there is a ditch in the wooded area between the two access roads where the improperly cut trees were located. Mr. Chenette has asserted that this ditch formed a boundary between the Dicks' land and his land based upon the doctrine of mutual recognition and acquiescence. The facts do not support his claim.

First of all, and unfortunately, Mr. Chenette has omitted certain portions of the elements of the doctrine of mutual recognition and acquiescence. (Brief of Respondent, p. 9) The proper statement of Washington's version of the doctrine will be set forth here, and the portions omitted by Mr. Chenette will be underlined.

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 the respective properties, mutual recognition and acceptance of the designated line as the true boundary line; and
3. The mutual recognition and acquiescence of the line must have continued for that period of time required to secure the property by adverse possession.

*Lamm v. McTighe*, 72 Wn.2d 587, 592-93, 434 P.2d 565 (1967);  
*Campbell v. Reed*, 134 Wn.App. 349, 363, 139 P.3d 419 (2006). As previously discussed, Mr. Chenette must prove each of these elements by clear, cogent and convincing evidence. Since he bears the burden of proof, he must submit evidence that makes each element of the claim high probable. *Lamm v. McTighe, supra*;  
*Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); *In re LaBelle*, 107 Wn.2d 196, 209, 728 P.2d 138 (1986). The arguments that Mr. Chenette raised in Respondents' Brief simply do not provide the necessary proof.

b. The Ditch Is Not a Certain and Well-Defined Line.

The argument in Respondents' Brief shows that Mr. Chenette has failed to present clear, cogent and convincing evidence of certain and well-defined line for the purposes of mutual recognition and acquiescence.

Mr. Chenette has brought the case of *Clark v. Casebier*, 92 Ark.App. 472, 215 S.W.3d 684 (2005), to the Court's attention. In that case, the Court affirmed the trial court's finding that an irrigation ditch could form a boundary for mutual recognition and acquiescence. The ditch in question was used to bring water from a river for the irrigation of crops. It was approximately eight (8) to nine (9) feet in width. The person digging the ditch had affixed a re-lift pump and underground pipe to take water from the ditch. The party digging the ditch had attempted to locate the true boundary line and to dig the ditch within his property. As it matters turned out, the ditch was some sixty (60) feet over a boundary line.

*Clark v. Casebier, supra*, must be contrasted with *Fuoco v. Williams*, 18 Utah2d 282, 421 P2d 944 (1966). In that case, the Court held that an irrigation ditch some two (2) feet wide and six (6) to eight (8) inches deep located in an area grown with weeds that had to be relocated by intermittent plowing was not sufficiently certain or well-defined to rise

to a sufficiently well-defined line for mutual recognition and acquiescence.

Our case should be governed by *Fuoco v. Williams, supra*. Our record contains a photograph of the ditch. (CP 61) It is approximately two (2) to three (3) feet in width and at most one (1) foot in depth. It is clearly overgrown and not used for much of anything. In contrast to *Clark v. Casebier, supra*, it is not accompanied by any sort of improvement such as pump or a pipe. There is nothing in the record to show precisely why anyone dug the ditch in the first place. It certainly has not been used for the irrigation of crops.

As discussed in Brief of Appellant, pps. 17-18, Washington requires more than what we have here to make out the certain, well-defined line for mutual recognition and acquiescence.

The presence of a fence line also negates the ditch being a boundary. Mr. Aspaas refers to this fence line in his declaration as being on the east side of the ditch. Mr. Chenette argues that “the presence of remnants of a barbed-wire fence on the ditch bank underscores historical use of the ditch as a boundary between the Chenette and Dick parcels.” He goes on to state that he does not allege that the fence itself set the boundary. He concedes, however, that it is some evidence that users of adjoining properties acquiesced to a boundary where the ditch lies now.

(Respondents' Brief, p. 11) In making that argument, Mr. Chenette is simply wrong. The presence of the fence line — as testified to by Mr. Aspaas — means that there is no clear, cogent and convincing evidence that the ditch itself was the boundary. Rather, it points to the parties' recognition of the fence line as the boundary.

c. No Party Has Made Improvement.

A party claiming mutual recognition and acquiescence must show that the parties manifested their acquiescence to the alleged boundary line by their acts, occupancy, and improvements. (Brief of Appellant, pps. 21-22) Mr. Chenette attempt to satisfy this requirement by referring to clearing of brush. (Respondents' Brief, pps. 11-12) Clearing of brush, however, does not amount to an improvement. The term "improvement" was first defined in this context in *Sigloch v. Iroquois Mining Co*, 106 Wash 632, 636, 181 P. 51 (1919), as follows:

. . . The term (improvements) must mean improvements of the realty; that is to say, such things that are placed thereon by the way of betterments which are of a permanent nature and which add to the value of the property as real property. This would include buildings and structures of every kind, and also such machinery that was placed thereon placed thereon of a permanent nature and which tended to increase the value of the property for the purposes for which it was used. . .

See also, *Pinneo v. Stevens Pass, Inc.*, 14 Wn.App. 848, 545 P.2d 1207 (1976). Neither Mr. Chenette nor the Dicks' predecessors added anything

permanent of value to the realty such as a building or other structure or had any reference to the ditch. The absence of these improvements is fatal to any claim of mutual recognition and acquiescence.

d. The Evidence is Insufficient to Show Acquiescence in the Ditch Being the Boundary.

Apart from his own self-serving statements, Brief of Appellants, p. 23, Mr. Chenette relies solely on the statement of Ron Aspaas to establish acquiescence. In particular, he relies on Mr. Aspaas' statement that "from my observation the ditch was considered to be the boundary line between the two parcels of property." This statement cannot be considered because it is an inadmissible conclusion.

The parties agree that affidavits or declarations submitted in a summary judgment proceeding must state facts and not conclusory statements or opinions. They also agree that "a fact is an event, an occurrence, or something that exists in realty. It is what took place, an act, an incident, a reality as distinguished from supposition or opinion." *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988). Under that definition, Mr. Aspaas' statement that the ditch was considered to be the boundary line is clearly a conclusion. Interestingly, Mr. Aspaas does not state which specific observations form the basis of his conclusion. Did he overhear some conversation? Did

someone place a sign with the legend “boundary” somewhere in the ditch? Mr. Aspaas does not tell us. Mr. Chenette bears the burden of showing sufficient facts to resist the granting of the Dicks’ summary judgment motion dismissing his claim. Since Mr. Aspaas’ statement is a mere conclusion, Mr. Chenette cannot use it to meet his burden.

To be sure, Mr. Aspaas also talks about the ditch itself and about its maintenance. These clearly are facts but they do not resolve the question as to whether Mr. Dicks’ predecessors considered the ditch a boundary line or merely a barrier. *Thomas v. Harlan*, 27 Wn.2d 512, 178 P.2d 965 (1947). Specifically, the Dicks’ predecessors may have welcomed the clearing of brush on the east side of the ditch as saving them the chore of doing so without any intention of acquiescing in the ditch as a boundary.

In any case, evidence of discussions between adjoining neighbors is necessary to show acquiescence. (Brief of Appellants, p. 22) Mr. Chenette has adduced no such evidence.

e. Conclusion.

Mr. Chenette has failed to present sufficient evidence to show a boundary by mutual recognition and acquiescence. The trial court erred by not so ruling.

III. Mr. Chenette Cannot Testify Concerning Actions and Interactions of the Dicks' Predecessors.

a. Introduction.

In the Brief of Appellant, the Dicks dealt with most of the arguments Mr. Chenette made on this issue in the Brief of Respondent. The Dicks will not repeat their contentions here.

First of all, and citing no authority, Mr. Chenette claims that RCW 5.60.030 does not apply because not all of the Play Haven Members are dead. As Mr. Chenette has cited no authority his argument, the Court should not consider it. *In re Detention of Bergen*, 146 Wn.App. 515, 524, *fn.* 8, 195 P.3d 529 (2008). Nonetheless, the Dicks addressed that argument in the Brief of Appellants, pps. 28-9.

Mr. Chenette also argues that RCW 5.60.030 does not apply because Play Haven, Inc. may have been a corporation. The Dicks addressed that contention at pps. 27-28 of the Brief of Appellants.

Finally, Mr. Chenette wishes to admit his testimony as “feelings and impressions.” The Dicks refuted that argument at pps. 30-31 of the Brief of Appellants. As the Dicks have already sufficiently addressed these issues, they will not present any further argument here. Rather, they will limit themselves to one other contention that Mr. Chenette has raised.

b. Mr. Chenette's Testimony Must Be Excluded Because It Represents a Transaction.

Mr. Chenette claims that he can testify concerning his actions regarding the boundary as well as actions of Play Haven Members because these are not transactions. His argument is simply incorrect.

A transaction means "dealing or performing some business or the management of any affair." The test for transaction is whether a deceased could have contradicted the interested person's testimony, not whether the deceased would have contradicted the interested person's testimony. (Brief of Appellants, pps. 25-26)

Mr. Chenette seeks to limit the scope of what a transaction might be to "some exchange, some interpersonal business" and not what the deceased person could deny if living. This argument is wrong. (Respondents' Brief, p. 17)

First of all, a person may not escape the limitation of RCW 5.60.030 by claiming that the testimony concerns his own conduct if that conduct relates to a transaction with a deceased person. For example in *Spencer v. Terrel*, 17 Wash. 514, 50 P. 468 (1897), the Court held that a widower could not testify where purchase money for a deed came from, why the deed was taken in his spouse's name, and why he included it as community property in the administration of his wife's estate because it

did in fact relate to a transaction with his wife. Similarly, in *Thor v. McDearmid*, 63 Wn.App. 193, 817 P.2d 1380 (1991), the party was precluded from testifying concerning her acts in withdrawing money and paying for certain land so as to make out a claim for that land.

In this case, Mr. Chenette seeks to testify concerning his own conduct in clearing brush on the east side of the ditch. That testimony relates to what he is trying to prove — the establishment of a boundary by mutual recognition and acquiescence. The testimony necessarily relates to a transaction with deceased Play Haven Members since any of them could contradict Mr. Chenette's testimony if alive. Therefore, Mr. Chenette's testimony on that score is therefore inadmissible.

For the same reason, Mr. Chenette can also not testify as to conduct of Play Haven Members. Such conduct amounts to a transaction. For example, in *Vogt v. Hovander*, 27 Wn.App. 168, 615 P.2d 660 (1979), the plaintiff sued on a promissory note made by defendant's decedent. The plaintiff sought to admit his own testimony that he had received payments from the decedent that would have had the effect of extending the statute of limitations. The Court held that the plaintiff was not competent to give such testimony under RCW 5.60.030 because it related to a transaction with the decedent notwithstanding the fact that the

plaintiff was describing the decedent's conduct. The Court noted that the plaintiff's testimony was inadmissible because the decedent could have contradicted that testimony if the decedent were alive.

Lloyd Aspaas, Albin Hanning, William Shefchek, and Lyle French could contradict Mr. Chenette's testimony concerning how they managed the property. And, those actions clearly relate to a transaction between the parties — the establishment of a boundary line by mutual recognition and acquiescence. Therefore, Mr. Chenette's testimony is inadmissible.

IV. Conclusion.

Mr. Chenette's arguments are unavailing. The Court should reverse the trial court's summary judgment order. It should remand the matter for trial with directions to dismiss any claim Mr. Chenette might make to establish a boundary on the basis of mutual recognition and acquiescence and with directions to instruct the jury to the effect that damages will be computed on the basis of restoration value. Finally, it

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should direct the trial court to preclude any testimony concerning any method of damage computation other than restoration.

RESPECTFULLY SUBMITTED this 2 day of MARCH,  
2010.



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