

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; 88th STREET, LLC,**

Appellants,

vs.

FRANCIS CHENETTE and JANE DOE CHENETTE,

Respondents.

APPEAL FROM THE SUPERIOR COURT

HONORABLE JOHN P. WULLE

RESPONDENTS' BRIEF

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RESPONDENTS/CROSS-APPELLANTS' BRIEF

A. INTRODUCTION

Respondents/cross-appellants are Francis and Jane Doe [Joyce] Chenette (hereafter "Chenette"), defendants at the trial court. Appellants Spencer and Mary Dick (hereafter "Dick") and Chenette cross-moved for discretionary review of the trial court's order on cross-motions for summary judgment. This Court granted discretionary review on the following questions: (1) whether the trial court correctly found stumpage to be the measure of damage in this case, (2) whether there are material issues of fact as to the boundary between the subject parcels, and (3) whether the dead man's statute applies to certain testimony of defendant Francis Chenette.

B. RESPONDENTS/CROSS-APPELLANTS' ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO

Respondents/Cross-Appellants assign error to the trial court's rulings on the parties' cross-motions for summary judgment as follows:

1. The trial court failed to find as a matter of law that the boundary between the Dicks' and Chenettes' parcels was established by mutual recognition and acquiescence as a ditch in the median strip between the parcels' access roads. The un rebutted facts presented by

Chenette conclusively prove Chenette and Dick's predecessor's established the ditch as the boundary.

2. The trial court erred in finding the dead man's statute, RCW 5.60.030, prohibits Francis Chenette from testifying regarding his impressions as to Dick's predecessor's belief as to the boundary. Chenette is entitled to testify to his impression that the Dicks' predecessor in title, Playhaven, Inc., believed the ditch was the boundary between the parcels.

C. STATEMENT OF THE CASE

Chenette for the most part, concurs with Dick's recitation of the factual and procedural record. This is a timber trespass case involving two adjoining landowners. In 2004, Dick purchased a 20 acre parcel of land along the East Fork of the Lewis River near Battle Ground. Chenette owned property abutting the Dick's land to the east. Chenette later sold that parcel to Fischer. Fischer subsequently sold the former Chenette land to Dick and non-party Mattila as tenants in common. In the sale to Fischer, Chenette reserved rights to cut merchantable timber from the property. Chenette hired logger Doug Somero to cut and sell the timber. Somero cut the timber in the spring of 2005, selling it to a local mill. The timber trespass allegations arise from Somero's cutting of trees between Chenette's access road and a ditch to the west.

1. Facts regarding the boundary.

The Dick and the Chenette properties have separate access roads from Lucia Falls Road running south to serve primary parcels on the Lewis River. (CP 55-56). The properties each contain a 20' wide strip of land to allow access to their primary parcels. *Id.* Each access strip is approximately 1,200 feet long. At the area relevant to this appeal, the roads parallel each other and are separated by narrow strip of land (the "median strip"). A drainage ditch runs down the center of the median strip. (CP 154-157, CP 65-67). The ditch has been present since at least the early 1960s. (CP 65-67). There are remnants of barbed wire and cedar fence posts along the east bank of the ditch. (*Id.*, CP 154-157).

Chenette acquired his property in 1963 from Newquist. (CP 65-67). The neighboring parcel to the west (later acquired by Dick) was owned by Playhaven, Inc. (*Id.*, CP 59). Playhaven improved its access strip into a gravel road. (CP 65-67). The access strip on the Chenette parcel was not improved, but Chenette subsequently built and maintained his own road. *Id.* Chenette believed the ditch was the property line and acted accordingly in maintaining and improving the access road. *Id.*

Ron Aspaas, son of a Playhaven principal, recalls the ditch and the old barbed wire fence along the east bank of the ditch. (CP 63-64). Per Mr. Aspaas, Playhaven Inc. and Chenette always treated the ditch as the

boundary. *Id.* He recalls Mr. Chenette cleared brush and maintained his strip of land on the east side of the ditch, and the Playhaven owners maintained the west side. *Id.*, see also (CP 65-67).

2. Facts regarding damages.

The parcels are located in rural northern Clark County. Much of the property in the area is managed for commercial timber production. (CP 47-48). Dick's predecessors in title obtained county classification of the larger tax lots comprising the parcel as "timber land" for taxation purposes. (CP 49-53). Dick continues to enjoy the benefits of that tax classification, which reduces the taxable value of the land from \$638,100 down to \$152,480, a 76% reduction. *Id.* Dick's partner in the purchase of the land formerly owned by Chenette, Mattila, logged land just east of Petitioners' in recent years. (CP 63-64). In fact, much of the property in the vicinity is managed for commercial timber production. (CP 47-48).

Other than removal of dead, diseased, or hazard trees, trees in the median strip were never fertilized, pruned, or otherwise cultivated. (CP 63-64 CP 46-47). In 2005, Chenette logged his property, including trees east of the ditch in the median strip. Chenette sold the trees logged from the contested portion of the median strip for stumpage value, i.e. net receipts after payment to the contract logger.

The trees at issue were along the median strip between the access roads. These trees were not visible from Dick's primary parcel of property, where the cabin is located and recreational use occurred. (CP 63-64).

D. ARGUMENT

Chenette asserts (1) this Court should affirm the Superior Court's order as to stumpage as the appropriate measure of damages, (2) this Court should reverse the Superior Court and find Chenette has proven the ditch is the boundary as a matter of law, and (3) the dead man's statute does not apply to Francis Chenette's testimony regarding (a) Playhaven, Inc.'s conduct on its property, and (b) his impression of Playhaven Inc.'s belief the ditch was the boundary between the access parcels.

1. The measure of damages under the timber trespass statute is stumpage value of the cut timber.

The Dicks' Amended Complaint seeks recovery under the timber trespass statute:

Whenever any person shall cut down, girdle or otherwise injure, or carry off any tree, timber or shrub on the land of another person, or on the street or highway in front of any person's house, village, town or city lot, or cultivated grounds, or on the commons or public grounds of any village, town or city, or on the street or highway in front thereof, without lawful authority, in an action by such person, village, town or city against the person committing such trespasses or any of them, if judgment be given for the

plaintiff, it shall be given for treble the amount of damages claimed or assessed therefore, as the case may be.

RCW 64.12.030. “The legislature, in RCW 64.12.030 and 64.12.040, has provided a statutory measure of damage for conversion of timber. These statutes have been construed to award the damaged party the **stumpage value** of the timber unless some other, greater, fair market value can be proven.” *Bremerton Central Lions Club, Inc. v. Manke Lumber Co.*, 25 Wn. App. 1, 8, 604 P.2d 1325 (1979) (bolding supplied).

Dick contends the measure of value depends on the use of the subject trees. The cases, however, are unequivocal that when the alleged trespass involves the taking of trees with a commercial value, stumpage is the default measure of damages. To recover any more, Dick must prove facts which establish some other measure of value is appropriate.

Dick seeks to recover restoration costs for the trees logged by Chenette. See *Allyn v. Boe*, 87 Wn. App. 722, 943 P.2d 364 (1997) (“For ornamental greenery on residential or recreational property, the landowner can recover restoration and replacement costs”). Thus Dick has the burden to show that the property was “residential or recreational.” Dick asserts he acquired the land as a recreational property and regards it as a family retreat. Dick contends his subjective intent is dispositive. Nevertheless,

the land was and continues to be classified as “timber land” for taxation and Dick reaps substantial tax benefits as a result.

For purposes of the property tax classification:

“Timber land” means any parcel of land that is five or more acres or multiple parcels of land that are contiguous and total five or more acres¹ which is or are **devoted primarily to the growth and harvest of timber for commercial purposes.**

RCW 84.34.020(3) (bolding supplied). In claiming and benefiting from the timber tax taxation, Dick admits to the fact the trees on their land are commercial timber.

Dick argues the instant action cannot be distinguished from *Hill v. Cox*, 110 Wn. App. 394, 41 P.3d 495 (2002). In *Hill*, the court found restoration cost the appropriate measure of value for “[t]rees functioning as a buffer from wind, noise and dust, and providing a visual screen for the residence . . .” The court drew this rule from *Sherell v. Selfors*, 73 Wn. App. 596, 871 P.2d 168 (1994). However, in *Sherell*, both sides agreed the cut trees were “not being grown for timber or other productive purposes.” *Id.* 73 Wn. App. at 601. Here, in distinction, the evidence on

¹ The tax parcel comprising the 20’ access road is less than five acres (CP 49-53), thus not eligible for timber taxation. RCW 84.34.020(3). Dick’s contention that the lack of use classification for the road access parcel is a material fact, therefore, is in error and should be disregarded by the Court.

this record shows that Dick did value trees on qualifying portions of the land as timber, at least for property tax valuation purposes.

The facts in *Hill* are substantially different from those on the record before this Court. Hill purchased 20 acres with a cabin from Cox's decedent. Hill's land purchase contract specifically provided the vendor could conduct selective logging, so long as the loggers left the land "parked out" as much as possible and refrained from removing any trees in a 100 foot buffer around the cabin. Hill, however, found the loggers had removed 12 trees within his 100 foot buffer. The parties in *Hill* clearly understood the buffer would provide a zone of seclusion and undisturbed forest around the cabin. Given that the property outside that buffer would be logged, maintaining the buffer was important to the recreational value and enjoyment of the Hill cabin. Here, in contrast, the trees logged from the median strip were on an access road leading to the Dicks' main parcel. None of the alleged trespass trees were closer than 250 feet from the cabin or even visible from the cabin itself. (CP 63-64).

Conclusion

The Superior Court did not error in finding that stumpage is the appropriate measure of damages in this matter. This Court, therefore, should affirm the grant of Chenette's cross-motion for summary judgment.

2. The boundary between the parties' respective access parcels was established by recognition and acquiescence as the ditch in the median strip.

Judge Wulle of the Superior Court found there is a genuine issue of material fact whether the evidence established the ditch as the boundary between the properties under the doctrine of acquiescence and mutual recognition. This Court should reverse the Superior Court and find Chenette established mutual recognition of and acquiescence to the ditch as the boundary as a matter of law.

To prove the establishment of a boundary by mutual recognition and acquiescence the claimant must prove the following elements:

- (1) the line must be certain, well-defined and in some fashion physically designated upon the ground;
- (2) in the absence of an expressed agreement establishing the designated line as the boundary line, the adjoining landowners, or their predecessors in interest, must have in good faith manifested mutual recognition and acceptance of the designated line as the true boundary line, and
- (3) the requisite mutual recognition and acquiescence must have continued for that period of time required to secure property by adverse possession.

Campbell v. Reed, 134 Wn. App. 349, 363, 139 P.3d 419 (2006). “A claimant to title by mutual recognition and acquiescence makes out a prima facie case where the adjoining parties in interest have demonstrated by their possessory actions the asserted line of division between them.” *Id.*

a. The uncontradicted evidence shows the ditch is a well-defined line on the ground.

There is a long-established drainage ditch running parallel to the parties' access roads. Remnants of a barbed wire fence lie along the east bank of the ditch. A narrow ditch running parallel to access roads is sufficiently well defined on the ground to serve as a boundary, particularly when the evidence shows the line was historically demarcated by a fence, the ditch has been present for over 40 years, and the parties or their predecessors have improved their property on either side thereof by clearing brush.

The Dicks fail to cite any authority to support their contention that neighbors cannot mutually recognize and acquiesce to a ditch as the boundary between their properties. Indeed, the Supreme Court has found use of a strip of land up to a drainage ditch over the requisite period is sufficient to permit adverse possession of land up to the ditch. *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984) (evidence the landowner cleared and maintained property up to ditch was sufficient to establish adverse possession of that land up to the ditch bank). There is no principled distinction between finding adverse possession by one's use of land up to a ditch and finding acquiescence and mutual recognition of a boundary where the parties acted as if a ditch was a boundary line.

The doctrine of boundary by mutual recognition and acquiescence requires the line be somehow physically demarcated on the land. A ditch which has been present for over 40 years and remains obvious to this day is most certainly a physical demarcation of a line between the properties. *See Chaplin, supra, see also Clark v. Casebier*, 215 S.W.3d 684 (Ark. Ct. App. 2005). In *Clark*, the Arkansas court found a ditch is a sufficient physical demarcation on the ground to become a boundary by recognition and mutual acquiescence: “the irrigation ditch is a definite, physical separator. It creates a definitive physical boundary between the properties.” *Id.* at 688. The presence of remnants of a barbed wire fence² on the ditch bank underscores historical use of the ditch as a boundary between the Chenette and Dick parcels.

b. Chenette and Dick’s predecessor in title in good faith recognized and accepted the ditch as the true boundary line.

The evidence establishes that Dick’s predecessor (Playhaven, Inc.) and Chenette always treated the ditch as the boundary between the properties and relied upon that boundary in improving their respective parcels. Playhaven and Chenette improved the property by clearing brush and otherwise maintaining their property on their respective sides of the

² Chenette does not allege the fence itself set the boundary. The fence is long gone and only remnants can be found. However, it is some evidence users of adjoining properties acquiesced to a boundary where the ditch lies now.

ditch. “[T]he acts and conduct of the parties, carried on over a long period of time, give rise to an implied agreement fixing the location of the common boundary between their properties.” *Lamm v. McTighe*, 72 Wn.2d 587, 593, 434 P.2d 565 (1967). There is no evidence Chenette dug the ditch or showed bad faith in treating the ditch as the property line.

Dick criticizes Chenette’s evidence as consisting only of a self-serving statement by Mr. Chenette and allegedly “conclusory” statements by Ron Aspaas. Dick, however, fails to present contradictory evidence. Obviously any statement by a party will have self-serving elements. That is not enough to keep it out of evidence. RCW 5.60.030 (“No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise.”) Mr. Chenette’s declaration is purely factual. Dick has presented no evidence to contradict Mr. Chenette or to impeach his credibility, nor any evidence at all to dispute the historical evidence establishing the ditch as the boundary.

Affidavits supporting or opposing a motion for summary judgment “shall set forth such facts as would be admissible in evidence.” CR 56(e). Mr. Aspaas testified to his observations, including (1) the existence of the ditch, (2) the maintenance of the ditch, (3) the existence of a fence on the ditch’s east bank, (4) Chenette’s maintenance of property east of the ditch,

(5) Playhaven's maintenance of property west of the ditch, and (6) that, from his observation, the ditch was considered the boundary. (CP 63-64). Mr. Aspaas's observations are not a series of conclusory allegations but facts. "A fact is an event, an occurrence, or something that exists in reality. 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). Mr. Aspaas's statement that the parties treated the ditch as a boundary was not supposition or opinion, but his observation as to specific conduct.

The uncontradicted evidence is clear, cogent, and convincing that the conduct of Chenette and Playhaven show they recognized the ditch as the boundary between their properties and acted accordingly. This Court, therefore, should find the ditch was the boundary as a matter of law, as such a finding is supported "by substantial evidence which the lower court could reasonably have found to be clear, cogent and convincing." *In Re LaBelle*, 107 Wn.2d 196, 209, 728 P.2d 138 (1986).

c. Recognition of the ditch as the property line continued for the period required to establish adverse possession.

The statute of limitations for adverse possession is 10 years. RCW 4.16.020(1). The Chenettes and Playhaven recognized the ditch as the boundary from the 1960s through the 1970s and the 1980s. No one

questioned whether the ditch was the boundary until Dick commissioned a survey following Chenette's logging in 2005.

Conclusion

The uncontradicted evidence on the record before the trial court establishes all the elements necessary to show Chenette and Dick's predecessor in title recognized and acquiesced to the ditch as the boundary between the road access parcels. This Court, therefore, should reverse the Superior Court's finding that there exists a genuine issue of material fact and hold Chenette established the ditch as the boundary as a matter of law.

- 3. The Court should find the dead man's statute is inapplicable to Mr. Chenette's testimony regarding his observations of Playhaven conduct on the property and his impressions as to Playhaven's belief as to the boundary.**

Superior Court Judge Wulle found RCW 5.60.030 (the "dead man's statute") prevents Mr. Chenette from testifying regarding his impressions regarding Playhaven's beliefs as to the boundary, but not his observations regarding Playhaven's conduct on and use of the land. The dead man's statute simply does not apply to Mr. Chenette's testimony because, (1) Dick has failed to prove all relevant individuals are deceased, (2) Playhaven was a corporation at relevant times and the statute only applies to individuals, (3) testimony regarding Playhaven's conduct on and use of the property is not evidence arising from any "transactions" with or

“statements” by Playhaven, and (4) Mr. Chenette’s impressions of Playhaven’s treatment of the ditch as the boundary are not “transactions” or “statements.”

The dead man’s statute provides:

[I]n an action or proceeding where the adverse party sues or defends as . . . deriving right or title by, through or from any deceased person . . . then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased . . . person[.]”

RCW 5.60.030. Basically, the statute precludes a party from testifying to statements by or transactions with a deceased person which would impact that party’s interest in the outcome of the case.

- a. **The dead man’s statute does not apply because Dick has failed to show that all relevant persons are indeed dead.**

Dick, as the party asserting the dead man’s statute, has the burden to prove its applicability. The record does not support a finding that all the former Playhaven shareholders have passed away. Although Chenette does not dispute that many of the former Playhaven shareholders are indeed deceased, Dick fails to not establish that all of Playhaven members have died. The statute, therefore, does not apply.

* * * *

b. The dead man's statute does not apply because Playhaven was a corporation at times relevant to the creation of the boundary.

The Dick parcel, at times relevant to the establishment of the ditch as the boundary, was owned by a corporation, Playhaven, Inc. The dead man's statute, however, only applies to transactions with or statements by individual persons which would impact an individual's interests. "It makes no reference to corporations, or to agents of corporations." *Beaston v. Portland Trust & Savings Bank*, 89 Wn. 627, 631, 155 P. 162 (1916) (dead man's statute does not preclude witness from testifying as to the statements of the deceased president and shareholder of corporation, despite the fact the individual would indirectly benefit).

The individual Playhaven shareholders' interests were derived from ownership of stock in the Playhaven corporation. To the extent the shareholders gave Chenette the impression Playhaven regarded the ditch as the boundary, such conduct or statements impacted the interests of the corporate entity. Individual shareholders would be only indirectly affected. The evidence that Playhaven corporate owners deeded their property to the subsequent purchaser, Hennessee, individually rather than through the corporation is simply irrelevant to what transpired prior to this property transfer, particularly since the record shows the property was owned by the corporate entity at relevant times.

c. The dead man's statute does not apply to Chenette's evidence of Playhaven's conduct on and use of their property, as such evidence does not describe any transaction with Chenette.

Dick asserts the dead man's statute precludes any testimony which might be contradicted by a dead person if the adverse party giving the testimony stands to benefit from such evidence. Dick overreads the statute and cases interpreting the statute. "[T]he test of a transaction with decedent is whether the decedent, if living, could contradict the witness of his own knowledge." *In re Shaughnessy's Estate*, 97 Wn.2d 652, 656, 648 P.2d 427 (1982). However, that test does not detract from the definition of transaction as "doing or performing of some business . . . or the management of any affair." *Id.* To be a transaction, there must be some exchange, some interpersonal business. A witness's observations of another's conduct on and use of land is simply not the sort of interpersonal business exchange which would constitute a transaction.

The dead man's statute is intended to prevent one from advancing his own interests by presenting testimony supporting that interest based upon words said or some exchange with a dead person. The dead man's statute simply does not extend so far as to preclude testimony regarding observations of historical conduct that does not amount to some sort of exchange. Similarly, the statute does not exclude Chenette's testimony

regarding his own conduct. *See Thor v. McDearmid*, 63 Wn.App. 193, 817 P.2d 1380, (1991) (“testimony which relates solely to the conduct of the witness is admissible”).

d. The dead man’s statute does not apply to Francis Chenette’s testimony as to his impression that Playhaven believed the ditch was the boundary.

Mr. Chenette’s testimony on Playhaven’s belief regarding the boundary line is not based upon an express agreement with or statement made by Playhaven. Rather, it is based upon his impressions and understanding from the historical treatment of the ditch as the boundary. The dead man’s statute does not apply to “feelings or impressions,” only to actual statements or transaction. *Jacobs v. Brock*, 73 Wn. 2d 234, 238 (1968). Chenette testified as to his impression that Playhaven regarded the ditch as the boundary. Chenette’s impression is based upon observation of Playhaven’s conduct and not any transaction or statement by Playhaven, therefore it is not within the scope of the dead man’s statute.

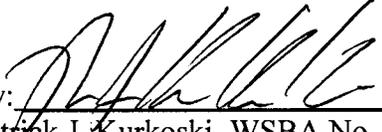
E. CONCLUSION

As set forth above, the Court should (1) affirm the trial court’s finding that stumpage is the proper measure of damages, (2) reverse the trial court’s finding that an issue of fact exists as to whether the ditch is the boundary and find that the ditch is established as the boundary

between the road parcels as a matter of law, (3) affirm the court's finding that Mr. Chenette may testify to his observations of Playhaven's conduct on their property, and (4) reverse the trial court's finding that Mr. Chenette may not testify as to his impression regarding Playhaven's belief that the ditch was the boundary.

DATED this 29th day of January, 2010.

RESPECTFULLY SUBMITTED

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