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## **I. INTRODUCTION**

The trial started on April 22, 2009, and finished five months later on September 17, 2009. The Findings of Fact were not entered until May 19, 2010, eight months after the end of the trial and eleven months after it began.

Respondents have utterly failed to show any facts, much less substantial facts, that support the findings of the trial court. Respondents barely discuss the facts of the case, the testimony of the numerous witnesses and, most glaringly, failed to advise this Court upon which facts the trial court could have relied on to base its findings.

The Respondents did not address the factual recitation provided by the Appellants and did not discuss why these facts were sufficient to support a judgment in their favor. Although it is not the Court of Appeals' job to weigh and evaluate conflicting evidence, it must find evidence in the record to support the trial court's decision. In this case, that evidence does not exist. *Burnside v. Simpson Paper Co.*, 66 Wash. 510, 832 P.2d 537 (1992). If there are not sufficient facts in the record to sustain the trial court's findings, the appellate court can and should reverse. *See, e.g., Faubion v. Elder*, 49 Wash.2d 300, 301 P.2d 153 (1956).

## **II. STATEMENT OF THE CASE**

The statements provided by Petitioners and Respondents are accurate but the Respondents ignore some important, uncontested facts. The following are important to this case.

**A. WHEN LORI TIPTON AND JACK JANUSKA WALKED THE UNDISPUTED AREA, MR. JANUSKA HAD COWS ON THE DISPUTED AREA (TIPTON DEPOSITION, P. 22, L. 11)**

The very first time Lori Tipton and Jack Januska visited the disputed area, Ms. Tipton was advised it was not for sale and Jack Januska had cows grazing on it. (Tipton Deposition, p. 22, l. 2-p. 23, l.1) After that visit, Lori Tipton always believed the disputed area was owned by the Januskas and acted accordingly. The Januskas continued using the disputed area as they had for years—to pasture cattle.

The well located in a disputed area was a hole in the ground with the lid on it and a pump inside of it a distance down. (Tipton Deposition, p. 23, ls. 15-17) This pump is located eight feet inside the property line she marked by building her fence after her visit to the disputed area with Mr. Januska. (Tipton Deposition, p. 23, l. 23-p. 24, l. 5) The grass on the disputed area was always kept short even though Ms. Tipton never saw anyone mow it. (Tipton Deposition, p. 46, ls. 10-15) If no one mowed the lawn yet the grass was kept short, it must have been due to the cattle grazing on it. When the Tiptons cut the 300 trees on their property, they cut them up to the fence they had installed because they believed that to be the property line. They also located their homesite a certain distance from the fence they built as the boundary to meet the County's setback requirements for a house from the boundary line. (Tipton Deposition, p. 52, l. 10-p. 54, l. 6) Lori Tipton did not remove any trees on the

disputed area because she believed the fence was the boundary line and those trees were not on her property. (Tipton Deposition, p. 92, ls. 16-21)

Also significantly, although she rarely saw Jack Januska on the disputed property, the house she lived in was about sixty feet lower in elevation than the disputed property (*see* Ex. 53) and her vision was blocked by the 300 trees she logged just before she sold the property to the Plummers. One would not expect much testimony from Lori Tipton on Jack Januska's actual use of the disputed property because, for the most part, she couldn't see it.

The best testimony regarding Jack Januska's use of the disputed property came from Mark Foster which is summarized at pages 8-9 of Appellants' Opening Brief. He noted that Jack Januska allowed his cattle to "roam freely" between his property and the Walker property through two permanent openings in the fence dividing those two properties. He stated unequivocally "They were just always there" meaning Januska's cattle were always on the disputed property. (RP 258) Not only that, but while Jack Januska owned the Walker property, he planned to build a barn or shop on it and hired Foster to grade it, which he did. (RP 261)

When the Januskas planned to sell the Walker property, they advertised it had a well, had the well tested for water quality and had it repaired. (Exs. 4, 5, 7-10, 12-17, 21, 22) The only well on the Walker property and disputed area was the one Lori Tipton saw the first time she visited the disputed area with Jack Januska.

When Jarrett Sutherland purchased Jack Januska's property in 1998, he continued to graze cattle on the disputed property again through the two permanent openings in the fence. Mr. Sutherland testified that his cattle were all over the Walker property and the disputed property and that "they were always there . . ." and that the cattle went back and forth "at will." (RP 182)

The testimony of Dennis Walker and Kelly Plummer included testimony that the Plummers watched Dennis Walker mow the disputed property, plant trees on it, dig an irrigation ditch from the well to his proposed homesite. In fact, Mr. Plummer asked Dennis Walker if he would put a gate in the fence, acknowledging Walkers' ownership of it and the disputed property. Mrs. Plummer's statements that she allowed Dennis Walker to plant trees on the disputed area because "I like trees" (RP 377-78) and allowed him to mow the grass on the disputed area because "[h]e can mow my property" (RP 381) are preposterous and should not be believed. She did, in fact, acknowledge Walkers' ownership of the disputed property by her actions.

This is not a case where the Appellants are asking the Appellate Court to weigh and evaluate conflicting evidence. Here, there is no conflicting evidence. This is a case where the Appellants are asking the Court of Appeals to view the evidence, which is not in conflict, and determine whether there is substantial evidence to support the trial court's findings.

### **III. ARGUMENT**

And keep in mind when very practical observation: if one neighbor or his predecessors has made substantial use of a portion of the other neighbor's land for a long number of years, and the usage is not by a grant of permission that amounts to a license or leasing, then there is a high probability that, on one theory or another, the boundary has adjusted to conform to the usage. Courts do not like to disturb boundaries that have long been fixed by substantial acts on the ground.

17 Wash. Prac., *Real Estate*, § 8.21 (2d ed.)

Since “actual possession” is heavily a factual question, the best way to get a feel for what it is, is to read a lot of cases.” 17 Wash. Prac., *Real Estate*, § 8.10 (2d ed.). This section of Washington Practice warns that determinations of adverse possession have to rely on facts. Appellants’ Opening Brief and this one spend more time discussing the facts than discussing the applicable law. For this reason among others, it is surprising that the Respondents have almost completely ignored the facts of the case.

In *Faubion v. Elder*, 49 Wash.2d 300, 301 P.2d 153 (1956), the Court found that the fact that a fence was located where it was by mistake would not preclude an adverse possession claim if the one claiming it and his predecessors openly and notoriously evidenced the necessary intention to claim the land they were using up to the fence even if the prior owner signed a declaration that he did not intend to claim another’s land and that the fence was not intended to be the actual boundary line between the two properties. The Court held that it is the acts of the party that establish objective intent. In *Faubion*, two siblings owned adjoining properties

separated by a fence. One field was farmed from 1937 to 1952 by a person who then purchased that field and became the defendant in this case. Years after the actual use began, a dispute arose over the actual boundary line between the two properties. A survey revealed that the true boundary was 74 feet west of the fence. The Court held that the evidence clearly established that the disputed strip was lost by adverse possession by pasturing and farming to the fence for the necessary 10+ years. It reversed the trial court's determination that it had not.

In *Stokes v. Kummer*, 85 Wash.App. 682, 936 P.2d 4 (1997), the Court held that adverse possession occurred by the claimants' "use and occupancy" of land for wheat farming even though they harvested crops only every other year. When the property was not used for farming, it lay fallow. One issue the Court dealt with was whether the possession of the fields was permissive. The Court found it was not. The issue that is pertinent to this case is whether the use was continuous.

As noted in *Stokes* at 693,

The use and occupancy of the property need only be of the character that a true owner would assert in view of its nature and location. *Chaplin*, 100 Wash.2d at 863, 676 P.2d 431. That requirement is easily met by the Kummings' dry land farming of these fields in precisely the same manner they farm the rest of their acreage in the area. Ample evidence, including the aerial maps and the testimony of some of these tract owners, demonstrates just how visible is the Kummings' use of the property. As the surveyor put it, when asked if he had any difficulty discerning the difference between the fields and the surrounding property: "It's either field or sagebrush."

Tiptons knew how Mr. Januska used the disputed property because they saw his cows on it the very first day they visited the disputed area. Further, if they had looked or inquired of the neighbors, they would have been told that Januska had his cattle there all the time. Januska and Sutherlands' use of the property for pasturage was open, notorious, continuous, actual and hostile.

Likewise here, the use of the disputed property for pasturage could be seen by the neighbors. Jack Januska used the disputed property exactly the same way he used his own property as evidenced by the two permanent openings in the fence between the two properties and him freely allowing his cattle to pasture back and forth between the two properties. If Tiptons or Plummers had looked at the property, they would have seen this use continuing for 15 years.

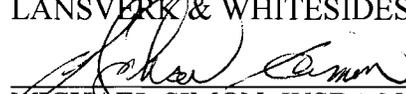
#### **IV. CONCLUSION**

The facts in this case are undisputed. There are no facts, much less substantial ones, that support the trial court's determination. Therefore, this Court should reverse the trial court and quiet title to the disputed area to the fence the Tiptons built in the Walkers.

DATED this 15<sup>th</sup> day of MARCH, 2011.

Respectfully Submitted,

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