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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

No 43137-8-II.

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PETER VANDERHOOF and JANE VANDERHOOF, husband and wife,

Appellants,

v.

BERNARD W. MILLS and HEDY L. MILLS, husband and wife,
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a
Delaware corporation; PENINSULA MORTGAGE, INC., a Washington
corporation, FLAGSTAR BANK, FSB; and all other persons or parties
unknown claiming any right, estate or interest in the real estate described
in the complaint herein,

Respondents.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable George L. Wood
Cause No. 10-2-00356-1

BRIEF OF APPELLANT

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I. INTRODUCTION

This case involves a property line dispute that arose after the respondents, the Mills, obtained a survey in 2007. The survey revealed that fence lines on the north, south and east of the Mills property did not follow the property lines as legally described in their deed.

The history of ownership of the properties involved reveals the properties were at one time owned in common by the Liljedahl family. In 1970, Liljedahl sold a portion of the property to Dana and Joyce Lothrop. In order to establish the line on the ground the parties set the corners by measuring 208 feet south from the northwest corner of the existing north fence and 208 feet south from the existing fence after going approximately 880 feet to the east (actually 850 feet because of the 30 feet of the county road right-of-way taken off at the west side of the property).

A short time thereafter, a fence was then constructed by the Lothrops and Liljedahls between the southwest and southeast corners as located by the parties and between the southeast and northeast corners. The fences both marked the property borders and kept the Liljedahls' cattle out of the Lothrops' new homesite.

The Liljedahls continued to maintain the area to the south and east of the new fences for over thirty years. Their cattle utilized all the area now in dispute. No one ever challenged the fence as the boundary or tried

to use the property south of the fence other than the Liljedahls during their ownership. The owners to the north included not only the original owners, the Lothrop's (1970), but later Mel Black (1976), Robert and Sally Abelson (2001) and Donna Nagy (2004). The fences were obvious throughout the time period which included these ownership changes of the original Lothrop parcel.

In 1999 the Liljedahls sold the remaining property to the Vanderhoofs. The Vanderhoofs were informed the fences were the boundaries on the south and east sides of what was then the Black property. The Liljedahls removed their cattle from the property shortly after selling to the Vanderhoofs.

In 2006, the Mills purchased their property from the Nagy's. The fences were obvious when that sale occurred. The Mills had a survey performed in 2007 which revealed the western end of both the north and south fences along Wasankari Road were approximately 43 feet too far to the north. The eastern corners were approximately in the correct location.

At this time the Mills requested the Vanderhoofs cut down some of the trees near the fence in the now disputed area. When the Vanderhoofs declined, the dispute over ownership of the area between the fence lines and the survey lines began. Subsequently, the Vanderhoofs filed a complaint to quiet title in the disputed area and following a bench trial, the

trial court dismissed the Vanderhoofs case pursuant to CR 41(b)(3) and granted the Mills' counterclaim to quiet title in the disputed area.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in its Findings of Fact and Conclusions of Law entered February 3, 2012 granting Defendants/Respondents Motion to Dismiss Plaintiff's claims against Defendants.

B. Issues Pertaining to Assignment of Error

1. Whether substantial evidence exists as to whether Plaintiff met the requisite elements of adverse possession for a continuous period of 10 years.

2. Whether substantial evidence exists as to whether Plaintiff has established the requisite factual elements to establish a boundary by mutual recognition and acquiescence for a period of 10 years.

III. STATEMENT OF THE CASE

The Vanderhoofs are the owners in fee simple in the property legally described as follows:

Parcel A:

Tracts 7 and 10 in Section 11, Township 30 North, Range 8 West, W.M. of Puget Sound Mill and Timber Company's Port Crescent Farm and Dairy Tracts, as per Plat thereof recorded in Volume 1 of Plats, page 96 ½ , records of Clallam County, Washington, EXCEPT that portion of said Tracts 7 and 10 described as follows: Beginning at a point in the West line of said Tract 10 a distance of 52 feet South of the Northwest corner thereof; Thence East parallel with the North line of said Tract 10 a distance of 210 feet; Thence North parallel with the North line of said Tract 10 a distance of 210 feet; Thence North parallel with the West line of Tracts 7 and 10 a distance of 98 feet, more or less, to the Southerly line of a private road now in use on said Tract 7; Thence Westerly along the Southerly line of said private road to the West line of said Tract 7; Thence South along the West line of Tracts 7 and 10 a distance of 119 feet, more or less, to the POINT OF BEGINNING. ALSO EXCEPT the West 30 feet of the South half of the Northwest quarter of the Northeast quarter conveyed to Clallam County for road purposes by Deed recorded January 3, 1969 under Auditor's File No. 386807, records of Clallam County, Washington.

ALSO EXCEPT that portion thereof conveyed to Dana G. Lothrop and Joyce M. Lothrop, husband and wife, by Deed recorded August 27, 1971 under Auditor's File No. 405954, records of Clallam County, Washington, being more particularly described as follows: That portion of Tract 7 in Section 11, Township 30 North, Range 8 West, W.M. of Puget Sound Mill and Timber Company's Port Crescent Farm and Dairy Tracts, as per Plat thereof recorded in Volume 1 of Plats, page 96 ½ , records of Clallam County, Washington, described as follows:

Beginning at the Northwest corner of said Tract 7; Thence South along the West line thereof 208 feet; Thence East parallel with the North line of said Tract 7 a distance of 880 feet; Thence North 208 feet to the North line of said Tract 7; Thence West along said North line 880 feet to the POINT OF BEGINNING. EXCEPT the West 30 feet for County Road.

CP 69-70.

The Vanderhoofs acquired their interest in the property by Statutory Warranty deed from H. Richard Liljedahl and Jean Liljedahl dated September 17, 1999, and recorded October 1, 1999 under Clallam County Auditor's file no. 1999-1036950. *Id.* The interest of another co-purchaser at that time, Gerald W. Morris and Marilyn Davis, husband and wife, was subsequently conveyed to the Vanderhoofs who, at the time of trial, held the entire ownership thereof. CP 15.

Defendants, Bernard W. Mills and Hedy L. Mills, husband and wife, acquired real property located in Clallam County via Statutory Warranty Deed from Donna K. Nagy, dated July 6, 2006, recorded under Clallam County Auditor's file no. 2006-1183913. CP 58. Defendants' property is legally described as follows:

THAT PORTION OF TRACT 7, PORT CRESCENT FARM AND DAIRY TRACTS AS PER PLAT RECORDED IN VOLUME 1 OF PLATS, PAGE 96 ½ , RECORDS OF CLALLAM COUNTY, WASHINGTON, IN SECTION 11, TOWNSHIP 30 NORTH, RANGE 08 WEST, W.M., DESCRIBED AS FOLLOWS: BEGINNING AT THE NORTHWEST CORNER OF SAID TRACT 7; THENCE SOUTH ALONG THE WEST LINE THEREOF 208 FEET; THENCE EAST PARALLEL WITH THE NORTH LINE OF SAID TRACT 7 A DISTANCE OF 880 FEET; THENCE NORTH 208 FEET TO THE NORTH LINE OF SAID TRACT 7; THENCE WEST ALONG SAID NORTH LINE 880 FEET TO THE POINT OF BEGINNING; EXCEPT THE WEST 30 FEET

FOR COUNTY ROAD. SITUATE IN CLALLAM
COUNTY, STATE OF WASHINGTON.

CP 59.

The Vanderhoofs and Mills respective properties both derived from a common grantor, R. Richard Liljedahl and Jean Liljedahl. CP 16. The Liljedahl's owned a total of approximately 60 acres bordered on the west by Wasankari Road. CP 16-17.

In 1970 the Liljedahls sold a part of their property to Mrs. Liljedahl's sister and her husband, Dana and Joyce Lothrop. CP 39. In effectuating said conveyance, the parties carved out a parcel in the northwest corner of the Liljedahl property along Wasankari Road. *Id.* Specifically, the property the Liljedahls conveyed was a dimension of 208 feet by 880 feet. *Id.* To aid in establishing the dimensions, the parties set the corners by measuring 208 feet south from the northwest corner of the existing north fence and 208 feet south from the existing fence after going approximately 880 feet to the east (actually 850 feet because of the 30 feet of the county road right-of-way taken off at the west side of the property). *Id.* The existing fences had been in place since Jean Liljedahls childhood, who was raised on the property and resided there after acquiring the property from her parents. CP 186-187.

Shortly thereafter, a straight fence line was constructed by the Lothrop and Liljedahls between the southwest and southeast corners as located by the parties and between the southeast and northeast corners. CP 39. The Lothrop and Liljedahls built the south and east fences according to the dimensions in the deed and as staked out by the parties by starting at the northwest fence corner and measuring 208 feet to the south along Wasankari Road. CP 44. The Lothrop and Liljedahls came very close to the correct corners on the east side of the property; however, were off by 43.1 feet in the northwest corner, thus causing the existing parcel to be skewed to the north on its western boundary. *Id.* The new fences effectively marked the property borders and kept the Liljedahls' cattle out of the Lothrop's home site. CP 39.

Nearly contemporaneously, a driveway was constructed by the Lothrop immediately to the north of the fence that now defined the southern boundary of the new parcel. CP 40. The property to the north of that fence line has remained open ground along with a residence and several outbuildings. *Id.* The old fences on the north and west of the new portion remained in place. The property immediately south of the fence over time became mostly timbered except for a cleared area near Wasankari Road. CP 40.

The Liljedahls continued to maintain the area to the south and east of the new fences for over thirty years consistent with the nature of timber and pasture land property and their cattle grazed the entire area which now is in dispute. CP 40. During the Liljedahls' ownership, no one ever challenged the fence as the boundary or tried to use the property south of the fence other than the Liljedahls. *Id.* The owners to the north included not only the original owners, the Lothrop's (1970), but later Mel Black (1976), Robert and Sally Abelson (2001) and Donna Nagy (2004). *Id.* Despite the several changes in ownership, the fences remained obvious throughout the entire time period. *Id.*

In 1999, the Liljedahls sold the remaining property to the Vanderhoofs who were informed that the fences were the boundaries on the south and east sides of what was then the Black property. *Id.* The Liljedahls removed their cattle from the property shortly after selling to the Vanderhoofs. *Id.* While the Vanderhoofs have not raised livestock on the disputed area, they have continued to mow the open areas up to the fence and have removed wild rose brush on a regular basis in the area of dispute in addition to planting new fir trees and Chestnut trees in the disputed area in 2004 consistent with the nature of the now timbered area of their property. *Id.*

Since becoming owners of the former Liljedahl property, the Vanderhoofs have never had anyone challenge the fence or attempt to use the area on their side of the fence until after the Mills, who purchased from Nagy in 2006, became the owners of the adjoining property. CP 41. At the time the sale was consummated, the fences were obvious. *Id.* In 2007, the Mills had a survey performed which revealed the western end of both the north and south fences along Wasankari Road were approximately 43 feet too far to the north and the eastern corners were nearly in the right location, thus creating a parcel angling to the north along its western boundary and containing approximately the same area as described in their deed. CP 71. Said survey is recorded under Clallam County Auditor's File No. 2007-1207882. *Id.*

The Mills' property is fenced on its north, south, east and west lines. CP Ex. 11 and CP 65. The survey map revealed the fence in the northwest corner of the Mills' property was off by 43.1 feet, in addition to being off by 43.8 feet in the southwest corner and the west side off by only .7 feet from the 208 feet described in the Mills' deed. CP Ex. 11. The north fence line existed at the time of sale from the Liljedahls to the Lothroops. CP 44.

After the survey was performed, the Mills requested that the Vanderhoofs cut down certain trees near the fence located in the now

disputed area. CP 41. When the Vanderhoofs declined, a dispute began over ownership of the area between the fence lines and the survey lines. *Id.*

On November 14 and November 15, 2011, a two day trial was held. CP 13. At the closing of the Vanderhoofs' case in chief, Judge Wood granted the Mills' Motions to Dismiss and granted the Mills' counterclaim quieting title in favor of the Mills' in regards to the disputed area. CP 23-24. The Vanderhoofs now appeal this Order.

IV. ANALYSIS & ARGUMENT

A. Standard of Review

The appellate court reviews the trial court's decision following a bench trial to determine whether the findings of fact are supported by substantial evidence and whether those findings support the trial court's conclusions of law. *Zunino v. Rajewski*, 140 Wn.App. 215, 220, 165 P.3d 57 (2007), citing *Dorsey v. King County*, 51 Wn.App. 664, 668-69, 754 P.2d 1255 (1988). Conclusions of law are reviewed *de novo*. *Zunino, supra*, citing *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). Substantial evidence supports a finding of fact where the "record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *King County v. Washington State Boundary Review Bd.*, 122 Wn.2d 648,

675,860 P.2d 1024 (1993) (quoting *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 387, 816 P.2d 18 (1991), *cert. denied*, 503 U.S. 986 (1992)).

B. The trial court erred in its Findings of Fact and Conclusions of Law entered February 3, 2012 granting Defendants/Respondents Motion to Dismiss Plaintiff's claims against Defendants.

On November 15, 2011, the trial court entered its oral opinion from the bench granting Defendants' motion to dismiss the Vanderhoofs' case at the close of Vanderhoofs' evidence pursuant to CR 41(b)(3) which states:

Defendant's Motion After Plaintiff Rests. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subsection and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under rule 19, operates as an adjudication upon the merits.

Pursuant to CR 52(a), said oral opinion was memorialized in the courts' Findings of Fact and Conclusions of Law entered February 3,

2012. As the Findings of Fact and Conclusions of law are in no way supported by the substantial evidence, the judgment should be reversed and this case should be remanded for a new trial consistent with this Court's ruling.

1. Substantial evidence exists indicating the Vanderhoofs established the requisite elements of adverse possession.

In the state of Washington, to successfully establish an adverse possession claim, a party must show the possession was (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile for the statutory 10-year period. *Chaplin v. Sanders*, 100 Wash.2d 853, 857, 676 P.2d 431 (1984).

With regard to the elements of open and notorious and hostility¹, the trial court erroneously concluded that the activity performed on the premises was neither open nor notorious or done with sufficient obtrusiveness so as to give notice that an adverse claim of ownership was being made. CP 19-20. In addition, the court noted "the activity could be seen as random and convenient and not such as to cause alarm that one's title was being challenged." CP 20. Despite rendering such conclusions, the evidence undoubtedly suggests otherwise.

¹ In rendering the Findings of Fact and Conclusions of Law, the court did not address the adverse elements of actual and uninterrupted and exclusivity; therefore, such elements are deemed met and are not addressed herein.

As to hostility, the trial erroneously concluded “the running of cattle was not “hostile” in the sense required by the law of adverse possession and did not put the Lothrop’s or their successors on notice that a claim of ownership was being made adverse to their interest.” CP 19. Neither conclusion should stand as substantial evidence was presented and suggests otherwise, specifically, that the Vanderhoofs established the requisite adverse possession elements.

In an adverse possession action, the element of open and notorious is satisfied where one’s use of the property is such that “any reasonable person would assume” the claimant was the owner. *Chaplin*, 100 Wash.2d 853, 862, 676 P.2d 431 (1984). On the other hand, the element of hostility “requires only that the claimant treat the land as his own as against the world throughout the statutory period.” *Chaplin*, 100 Wash.2d at 860-61, 676 P.2d 431. The only relevant consideration is the claimant’s treatment of the land, not his subjective belief about his true interest in the land. *Riley v. Andres*, 107 Wash. App. 391, 397, 27 P.3d 618 (2001).

The evidence as presented by the Vanderhoofs, in addition to case law precedence, submits that the grazing of cattle, the corresponding perimeter fencing, and the Liljedahl’s and Vanderhoofs continued maintenance of the disputed area is sufficient to satisfy the elements of hostility and open and notorious.

In *Taylor v. Talmadge*, 45 Wash.2d 144, 149, 273 P.2d 506 (1954), *overruled on other grounds in Chaplin v. Sanders, supra*, 100 Wash.2d at 861 n.2, the court ruled that the building of a pasture fence on disputed land ‘would not militate against adverse holding’ if the use of the land was incident to a claim of right. *Taylor* framed the question as ‘whether a property fence is maintained as a matter of convenience, or under a claim of ownership.’ The court noted that the nature of the actual use, rather than the original purpose for constructing the fence was controlling. The *Taylor* court reasoned that while the fence was originally built for holding cattle, it nevertheless, was recognized by everyone as the boundary between the properties. *Id.* at 150.

Further, in *Roy v. Cunningham*, 46 Wn. App. 409, 731 P.2d 526 (1986), a neighbor removed an old fence enclosing livestock that the Roys believed was their boundary and erected a new fence 47 to 52 feet away from the actual property boundary. The trial court granted ownership to the Roys based on adverse possession. The fence had been in existence for more than 20 years prior to its removal and was used “as a well-marked and defined boundary between the real property line west and east of said fence.” *Roy, supra*, at page 412.

No evidence whatsoever has been presented in this case suggesting actual permission being granted by the Lothropps to the Liljedahls allowing

their cattle to roam on the Lothrop's property as it is clear the parties believed the fence demarcated the property boundary lines, as trial testimony clearly suggested.² The purpose of the Liljedahl's fence is even clearer than in the *Roy* case.

A plethora of evidence was presented to the court supporting the Vanderhoofs' contention, as well as their predecessor in interest and the Mills' predecessor in interest, that the fence was in fact the boundary line between the properties. Mrs. Liljedahl testified the fence on the west side and the north side of the property had been in existence as long as she could remember and that the area had been that way for over 70 years. RP Day 2, pp. 36-37. Further, it was her belief the property within the fenced in boundary was her property and as such, she treated it that way. RP Day 2, pp. 37. Despite the property being owned by several families through the years, the fence separating the two properties was never challenged, including the north portion of the fence near the Lothrop property. RP Day 2, pp. 59. In addition, Mrs. Vanderhoof also testified that no one objected

² Even if there was proof of actual permission by the Lothrop's or a determination that permission was implied, such permission would have ended when the Lothrop's sold to Mel Black in 1976. *See Miller v. Anderson*, 91 Wn. App. 822, 825, 964 P.2d 365 (1998). "Use that is permissive at its inception is presumed to remain permissive unless proof exists of (1) a change in use beyond that permitted, providing notice of hostility to the true owner, or (2) sale of the servient of estate." The Lothrop's sold the servient estate in 1976 thereby eliminating any possible prior permission.

to or challenged the Vanderhoofs use of the property and no one else used it. RP Day 1, pp. 156.

Mrs. Liljedahl further testified that from the time they sold the property to Mr. Lothrop in 1970, until after they sold to the Vanderhoofs, they continuously grazed cattle within the fencing. RP Day 2, pp. 44-45. The cattle grazed the entire south side of the property all the way down to Salt Creek with no one else ever utilizing the property south of the fence other than Mrs. Liljedahl and her husband. RP Day 2, pp. 46.

The fence demarcating the boundary was installed when the Lothrop's began building their home, which was in approximately 1970. RP Day 2, pp. 46 and CP 18. The fence was maintained to prevent cattle from roaming free and Mrs. Liljedahl participated in such maintenance, including repairing the fence and replacing posts. RP Day 2, pp. 46 and pp. 50.

It was the Liljedahl's intention to sell four acres to the Lothrop's in 1970 and those four acres were previously measured by Mrs. Liljedahl's father. RP Day 2, pp. 59 and pp. 66. After the Lothrop's purchased the four acre parcel from the Liljedahl's, the fence was erected on the property, including along the south side and east side of the Lothrop's property. CP 179.

Mr. Lothrop assisted his father-in-law in determining the boundary for the fence, erecting the fence and considered the fence to be the boundary of the properties and never made any use of the property outside of the fences.³ ⁴ CP 179, RP Day 2, pp. 14 and CP 188. During the Lothrop's ownership, the Liljedahls ran cattle on the south and east side of the fences, while the Lothrops maintained horses on their side of the fences. CP 179 and RP Day 2, pp. 18. During the trial, Mr. Lothrop testified that he never used the area south of the fence because "it wasn't my property." RP Day 2, pp. 25.

When Mr. Vanderhoof walked the property prior to closing the real estate transaction, he observed cattle pasturing up to the fence line. RP

³ In *Johnston v. Monahan*, 2 Wash.App. 452, 469 P.2d 930 (1970), the court noted the minimum requirements for establishment of boundary by parol agreement of adjoining landowners are: (1) bona fide dispute or mutual uncertainty as to true location; (2) express agreement permanently to resolve dispute or uncertainty by recognizing definite and specific line as true and unconditional location; (3) physical designation on ground; and (4) possession by such occupancy or improvement as would reasonably give constructive notice or purchase by bona fide purchasers for value with reference to such boundary. The court stated "an agreement as to a common boundary line, which is effectual, as between the parties thereto, also concludes their successors in title, subject to the proviso, it would seem, that a purchaser for value cannot be affected by his predecessor's agreement unless he took with actual or constructive notice thereof. *Id.* at 456. In this case, the parties, specifically the Liljedahls and Lothrops, were uncertain as to the true location of the property boundary since no survey was performed when the land was conveyed. They resolved the uncertainty by performing their own measurements based on an existent fence. This then specifically defined by the physical designation on the ground, i.e. the fence the Liljedahls and Lothrops collectively built, of which said improvement imparted notice to all subsequent purchasers.

⁴ An appellate court retains the discretion to consider an issue raised for the first time on appeal. *Karlberg v. Otten*, 167 Wash.App. 522 (2012), (citing *Smith v. Shannon*, 100 Wash.2d 26, 38, 666 P.2d 351 (1983)).

Day 1, pp. 59. Following the closing, the cattle remained on the Vanderhoofs' property and on several occasions were observed grazing in the area of dispute, including the wooded area to the east of Salt Creek. RP Day 1, pp. 59.

The Vanderhoofs purchased and moved onto the property in 1999. Due to moving to property in the fall of 1999, no maintenance was performed at that time. RP Day 1, pp. 60. However, the following year, in 2000, Mr. Vanderhoof mowed the entire area south of the fence separating his property from what is now the Mills' property, including mowing through the woods all the way up to Salt Creek using a rotary mower attached to the back of a John Deere tractor. RP Day 1, pp. 61 and pp. 96.

The Vanderhoofs, as did their predecessors in interest, treated the property as a true owner would. From 2001 forward, Mr. Vanderhoof planted saplings, continued mowing the property including the disputed area, moved rocks, trimmed fallen limbs, dug trenches and holes, installed an irrigation system, performed weed eating and removed a stump within the disputed area north of the survey line.⁵ RP Day 1, pp. 61-65 and pp. 106-107. In addition, Mrs. Vanderhoof watered, weeded and also planted trees within the area. RP Day 1, pp. 149-151.

⁵ In *Lingvall v. Bartness*, 97 Wn. App. 354, 982 P.2d 698 (1999), the act of clearing away brush and wild shrubbery was identified as one of the acts of open and notorious use supporting an adverse possession claim by the claimant.

Mr. Vanderhoof further testified that he and Mr. Mills had a conversation that occurred in the east field, when Mr. Mills asked for permission to remove a tree within the disputed area. RP Day 1, pp. 131. On a separate occasion, Mrs. Vanderhoof also had a conversation with Mr. Mills, who asked that the Vanderhoofs limb or remove trees within the disputed area, so Mrs. Mills could receive more sunlight on their home. RP Day 1, pp. 159. Ironically, such conversation clearly evidences Mr. Mills' belief that the land was in fact the Vanderhoofs, not his.

Despite the court's ruling, substantial evidence exists supporting the Vanderhoofs, and their predecessor in interests, use as being open and notorious, as well as hostile. As evidenced by the testimony of Mrs. Liljedahl, Mr. Lothrop and Mr. Vanderhoof, the Liljedahls' cattle had free access to all of the Liljedahl property within the perimeter fences. Adverse possession determination is based solely on an objective view of how the land is used by adjoining landowners. The Liljedahls' objective use alone for nearly thirty years vested title in the Liljedahls to the disputed strip which subsequently was passed via the conveyance in 1999 to the Vanderhoofs. There has been no adverse use by the Mills nor any of their predecessors in interest as the fence clearly provided the appropriate demarcation of the properties.

Further, the use of fences as boundaries is both common and quite compelling in adverse possession cases in this state. In the case of *Danner v. Bartel*, 21 Wn. App. 213, 216, 585 P.2d 463 (1978), the court quoted favorably from the trial court findings as follows:

It is apparent from the facts that Carl Bartleheimer, and his successors in interest, have been in actual and uninterrupted possession of the property for some 25 years. While it is true that the nature of the possession by Carl Bartleheimer and the (Danners) was not intensive, the possession was consistent with the property owned by them immediately to the east of the disputed strip, and the erection and continuance of the barbed wire fence was a clear assertion of possession and dominion. It is not, of course, necessary for one claiming adverse possession to have possession of property in any particular manner. It is sufficient if the character of possession was consistent with the nature of the land and the use of adjacent land. In the instant case, although Carl Bartleheimer made virtually no use of the land, nonetheless, the fence was his standard in his field, and it effectively prevented the (Bartels) from challenging his possession.

In this case, the evidence substantially supports the conclusion that the land use on both sides of the fence was consistent with the nature of the property and more specifically, consistent with an individual using the disputed area as their own as both the Vanderhoofs and the Mills, as well as their successors in interest, believed their respective properties were clearly defined by the fencing. The Liljedahls, openly and notoriously, pastured cattle up to the fence on their side and maintained the fence sufficiently to keep the cattle on their own property, thus adversely

possessing the disputed area, of which ownership appropriately transferred to the Vanderhoofs in 1999. The Lothrop's built a driveway, garage and house on their side of the fence and never made any use of the property south of the fence.

Not only did the court error in determining that the Vanderhoofs did not establish all applicable elements for adverse possession, the court also erred in analyzing the Vanderhoofs "tacking" argument. Prior to rendering its Findings of Fact and Conclusions of Law the court, quite interestingly, drafted a letter to the parties indicating that because the Vanderhoofs purchased the property knowing that the legal description of the Mills' property was not included in their purchase, they were effectively precluded from attempting to tack on the use of the Liljedahls. CP 33. Such assertion is both erroneous and clearly not supported by well-established Washington case law.

In a typical adverse possession case, the party seeking to establish title by adverse possession always claims more land than what was described within their deed. *Howard v. Kunto*, 3 Wash.App. 393, 398, 477 P.2d 210 (1970). In such cases it is clear that tacking is permitted. *Id.*

The adverse possession theory allows the current owner to tack onto the previous owner's adverse use of the neighboring property. The ten-year period may be computed by tacking on a predecessor's adverse

use if privity exists between them, and they have held continuously and adversely to the title holder. *Roy v. Cunningham*, 46 Wash.App. 409, 413-14, 731 P.2d 526 (1986).

In *Roy v. Cunningham, supra.*, the court allowed tacking by the Roys without requiring the disputed property be described in their deed.

The court stated as follows on pages 413-414:

The next issue is whether the Roys may tack adverse use of the property by their predecessors in interest, Agnew and Mondor, in order to satisfy the element of 10 years' adverse possession. Where there is privity between successive occupants holding continuously and adversely to the true title holder, the successive periods of occupation may be tacked to each other to compute the 10 year period of adverse holding. RCW 4.16.020; *El Cerrito, Inc. v. Ryndak*, 60 Wash.2d 847, 856, 376 P.2d 528 (1962) (citing *Buchanan v. Cassell*, 53 Wash.2d 611, 335 P.2d 600 (1959)).

Further, in *Buchanan v. Cassell*, 53 Wash.2d 611, 335 P.2d 600 (1959), the court eloquently stated:

This state follows the rule that a purchaser may tack the adverse use of its predecessor in interest to that of his own where the land *was intended to be included* in the deed between them, but was mistakenly omitted from the description.

The doctrine of privity has been broadly construed to be the “judicial recognition of the need for some reasonable connection between successive occupants of real property so as to raise their claim of right above the status of the wrongdoer or the trespasser.” *Howard v. Junto*, 3

Wash.App. 393, 400, 477 P.2d 210 (1970), *overruled on other grounds in Chaplin v. Sanders, supra*, 100 Wash.2d at 861 n. 2.

As noted above, the intent of an adverse possessor is irrelevant to the determination of the element of hostility and likewise, it does not bar the application of privity to successors through documentary conveyances. Such conclusion is particularly true in light of the rule allowing tacking when an adversely possessed strip is physically “turned over” in connection with the conveyance of adjoining land the possessor owns. *See* R. Cunningham, W. Stoebuck, D. Whitman, *Property* § 11.7 (1984).

Once a person adversely possesses real property for the requisite ten-year period, such possession ripens into original title. *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 855, 376 P.2d 528 (1963). Such divestment of title does not occur any different than acquiring title by a deed. *Id.* Once title is acquired by adverse possession, an owner cannot divest his property by abandonment, relinquishment, verbal declarations or any other act short of what would be required had he acquired his title by deed. *Nickell v. Homeowners Ass’n*, 167 Wn.App. 42, 271 P.3d 973 (2012).

Further, a person acquiring title by adverse possession can convey it to another party without having had title quieted in him prior to the conveyance. *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 855, 376 P.2d 528 (1963). The court in *El Cerrito* went on to say:

Once a person has title (which was acquired by him or his predecessor by adverse possession), the ten-year statute of limitations does not require that the property be continuously held in an adverse manner up to the time his title is quieted in a lawsuit. He may bring his action at any time after possession has been held adversely for ten years.

El Cerrito, Inc. v. Ryndak, 60 Wn.2d 847, 855, 376 P.2d 528 (1963).

In the case at bar, Mrs. Liljedahl testified the fence on the west side and the north side of the property had been in existence as long as she could remember and she believed the property within the fenced in boundary was her property and that the area had been that way for over 70 years. RP Day 2, pp. 36-37. Further, Mrs. Liljedahl assumed the property that was transferred to the Vanderhoofs was in fact the property between the fences, as it had been treated that way during her entire ownership. RP Day 2, pp. 36. The fence demarcating the boundary was installed when the Lothrop's began building their home, which was in approximately 1970, over forty years ago. RP Day 2, pp. 46 and CP 18. Further, Mr. Lothrop assisted his father-in-law in determining the boundary line.

Despite the Lothrop property being owned by several families through the years, the fence separating the properties never changed and its placement was never challenged, particularly the north portion of the fence near the Lothrop property. RP Day 2, pp. 59. Again, Mrs. Liljedahl intended to sell four acres to the Lothrop's, specifically those four acres

previously measured by Mrs. Liljedahls father. RP Day 2, pp. 59 and pp. 66.

The Vanderhoofs have adversely possessed the disputed area for eleven years (1999-2010), which easily meets the ten year minimum; however, such minimum need not be met as the Liljedahls had already adversely possessed the property and upon selling the land to the Vanderhoofs, the Vanderhoofs thus became owners of the disputed area and have not been dispossessed of the area since.

The court's Findings of Fact and Conclusions of Law are clearly contrary to well established case law precedent in this state. In reviewing the evidence presented by the Vanderhoofs, the trial court undoubtedly reached an erroneous conclusion, both factually and legally, and as such, the Vanderhoofs respectfully request the judgment be reversed and this case be remanded for a new trial consistent with this Court's ruling.

2. Substantial evidence exists indicating the Vanderhoofs have established the requisite factual elements to establish a boundary by mutual recognition and acquiescence.

The court erred in concluding that there was insufficient evidence that the fence was recognized and acquiesced to as the boundary by the property owners on both sides. CP 18. The doctrine of mutual recognition and acquiescence is very similar to adverse possession. The legal theory

has been described in *Lamm v. McTighe*, 72 Wash.2d 587, 593, 434 P.2d 565 (1967) as follows:

A plaintiff claiming ownership under the doctrine of mutual recognition and acquiescence must prove each of the following elements by clear, cogent, and convincing evidence: (1) a line 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 that the adjoining landowners or their predecessors in interest manifested in good faith 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 not mere acquiescence in the existence of a fence as a barrier; and (3) the requisite mutual recognition and acquiescence in the line continued for 10 years.⁶

In this case, the acts of the adjoining owners for over 40 years have treated the fences as a boundary on their respective properties. Substantial evidence was presented as to each applicable element and the fences have for many years been well defined as supported by the testimony and the photographs entered during trial. Further, the testimony clearly supports the notion that the original grantor (Liljedahls) and the original grantee

⁶ "Evidence is clear, cogent, and convincing 'when the ultimate fact in issue is shown by the evidence to be highly probable.'" *In re Dep. of K.R.*, 128 Wash.2d 129, 141, 904 P.2d 1132 (1995).

(Lothrops) agreed to the boundary upon erecting the fence, as both parties participated in the location and erection of the fence in the 1970s.⁷

At the time Mr. Lothrop purchased the property, there were fences along the north side of the property and on the west side of the property along Wasankari Road, both of which clearly defined the boundaries. CP 179. Shortly thereafter, corner posts were placed on the south side of Mr. Lothrop's property, one near Wasankari Road and the other to the east near Salt Creek, effectively enclosing the property. CP 179.

Mr. Lothrop helped his father in law build the fence and believed the fences were the boundary to his property, thus both acquiescing and agreeing to the boundary. RP Day 2, pp. 14-15. Both Mrs. Liljedahl and the Vanderhoofs also testified they too believed the fences were the boundaries to the properties. RP Day 2, pp. 36. In addition, the fence line was clearly and quite easily found by the surveyor in 2007 and depicted on

⁷ In *Winans v. Ross*, 35 Wn. App. 238, 240, 666 P.2d 908 (1983), although based upon a common grantor theory, it was eloquently stated that it is not necessary that every grantee, from the time the boundary is determined, should himself agree that that was the boundary line. *Atwell v. Olson*, 30 Wash.2d 179, 190 P.2d 783 (1948). Once an agreed boundary is established between the common grantor and the original grantee, it is binding on subsequent purchasers if a visual examination of the property indicates the deed line is no longer functioning as the true boundary. *Fralick v. Clark Cy.*, *supra*. The issue, then, is whether substantial evidence supports the conclusion that the fence provided notice to subsequent purchasers that it was the boundary and it is clear that such substantial evidence exists in this case.

the Mills' survey, as well as all pictures presented at trial. CP Ex. 11 and CP Exs. 2, 3, 5, 8-10.

During the Mills ownership, the Mills' property immediately north of the disputed fence has been used as a driveway and open land, as well as residentially used. Mr. Vanderhoof testified that the Mills' maintain this specific piece of property up to the fence line on the north side of the Mills' property, thus evidencing their belief as to the clearly defined boundary as well even though the fence line encroached the same 43 feet onto the neighbor's property to the north of the Mills' property RP Day 1, pp. 56. No one has ever challenged the Vanderhoofs or their predecessors' uses of the property south of the fence separating their properties until after the Mills obtained their survey in 2007. RP Day 2, pp. 56 and RP Day 1, pp. 156.

As previously noted, Mr. Vanderhoof testified that he and Mr. Mills had a conversation that occurred in the east field, when Mr. Mills sought permission to remove a tree within the disputed area. RP Day 1, pp. 131. In addition, Mrs. Vanderhoof had a similar conversation with Mr. Mills. RP Day 1, pp. 159. Clearly the Mills acquiesced to the previously and currently well-defined and mutually agreed upon boundary as logically, one does not seek permission to maintain their own property.

As detailed in the Vanderhoofs adverse possession argument, such acquiescence and mutual agreement to the line certain fence has endured for much longer than the requisite ten years. Throughout all the previous ownerships, no owners of the Lothrop property ever challenged the fence line or sought to use the property to the south of the line.

The findings at trial that the Vanderhoofs evidence was insufficient to meet the requisite elements is not supported by the substantial evidence, as the testimony and evidence introduced at trial undeniably establishes a well-defined, line certain marker, i.e. the fence, as well as mutual recognition and acceptance of the designated line as the true boundary line of the properties by both the Vanderhoofs and the Mills, as well as their successors in interest.⁸ As such, the Vanderhoofs respectfully request the judgment be reversed and this case be remanded for a new trial consistent with this Court's ruling.

⁸ Pursuant to the common grantor theory, a grantor who owns land on both sides of a line he or she has established as the common boundary is bound by that line. *Fralick v. Clark Cy.*, 22 Wash. App. 156, 589 P.2d 273 (1978). The line will also be binding on grantees if the land was sold and purchased with reference to the line, and there was a meeting of the minds as to the identical tract of land to be transferred by the sale. *Kronawetter v. Tamoshan*, 14 Wash.App. 820, 545 P.2d 1230 (1976). A formal, or specific, or separate contract as to the boundary line between the parties is not necessary. *Thompson v. Bain*, 28 Wash.2d 590, 183 P.2d 785 (1947). An agreement or meeting of the minds between the common grantor and original grantee may be shown by the parties' manifestations of ownership after the sale. See *Thompson v. Bain, supra*. In this matter, the Vanderhoofs are not challenging the trial court's common grantor finding as the fencing separating the properties was not in place at the time of the first conveyance to the Lothrop's; however, the Liljedahls and Lothrop's later agreed upon the boundary location and jointly installed the fence which existed when both the Vanderhoofs and the Mills purchased their respective properties, thus effectively establishing a boundary by agreement, as previously mentioned in Footnote 3.

V. CONCLUSION

In reviewing this matter, it is strikingly clear that the court did not fully, fairly, or carefully consider the evidence presented during the trial. Despite the court's opinion, neither the evidence nor testimony supports the court's decision to grant the Mills' Motion to Dismiss. Substantial evidence in no way supports the trial court's findings nor do the findings support the courts conclusions of law. The judgment should be reversed, and this case should be remanded for a new trial consistent with this Court's ruling.

DATED this day 17 of July, at Port Angeles, Washington.

Respectfully submitted,



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No. 43137-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PETER VANDERHOOF and)
JANE VANDERHOOF,)

Appellants,)

v.)

BERNARD MILLS and)
HEDY MILLS, et al.,)

Respondents.)

CERTIFICATE OF MAILING

I am a resident of the state of Washington and over the age of 18 years.
On the 17th day of July, 2012, I deposited in the United States Mail a properly
stamped and addressed envelope containing a copy of BRIEF OF APPELLANT
and this CERTIFICATE OF MAILING to the following:

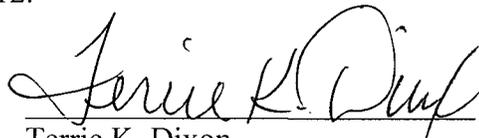
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DATED this 17th day of July, 2012.


Terrie K. Dixon