

FILED

MAY 17 2011

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DIVISION III
STATE OF WASHINGTON
By _____

NO. 292690

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ELMER SEGRAVES,

Plaintiff/Respondent,

V.

CARL C. FULTON,

Defendant/Appellant.

RESPONDENT'S BRIEF

John G. Schultz, WSBA.#776
Attorney for Respondent
Leavy, Schultz, Davis & Fearing
2415 W. Falls
Kennewick, WA 99336

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TABLE OF CONTENTS

A. Appellant's Assignments of Error.....	1
B. Issues Pertaining to Assignments of Error.....	1
C. Statement of the Case.....	2
D. Standard of Review.....	21
E. Argument	23
I. Segraves presented sufficient evidence to satisfy the doctrine of mutual recognition and acquiescence justifying an order to have title to the disputed property quieted in his name.....	23
A. The trial court's finding of fact that there existed a boundary fence for at least 61 years is supported by substantial evidence.....	24
B. The trial court's finding of fact that the fence was the recognized boundary between the adjacent owners is supported by substantial evidence	26
C. The trial court's finding of fact that the fence was a recognized boundary for the necessary period of time to achieve adverse possession is supported by substantial evidence.....	30

II. Segraves presented substantial evidence of adverse possession in order to have title to the disputed property quieted in his name.....32

III. Mr. Fulton failed to prove evidence that would support a finding that he is entitled to an easement by implication, or “quasi-easement.”.....38

F. Conclusion.....45

TABLE OF AUTHORITIES

CASES

<i>Adams v. Cullen</i> , 44 Wash.2d 505, 268 P.2d 451 (1954).....	39,41
<i>American Nursery Prods., Inc. v. Indian Wells Orchards</i> , 115 Wash.2d 217, 797 P.2d 477 (1990).....	23
<i>Anderson v. Hudak</i> , 80 Wash.App. 398, 907 P.2d 305 (1995).....	33
<i>Berlin v. Robbins</i> , 180 Wash. 176, 38 P.2d 1047 (1934).....	43
<i>Chaplin v Sanders</i> , 100 Wash.2d 858, 676 P.2d 431 (1984).....	22,34
<i>Crescent Harbor Water company, Inc. v. Lyseng</i> , 51 Wash.App. 337, 753 P.2d 555 (1999).....	43
<i>Crites v. Koch</i> , 49 Wash.App. 171, 741 P.2d 1005 (1987).....	34
<i>Douglas Nw., Inc. v. Bill O'Brien & Sons Constr., Inc.</i> , 64 Wash.App. 661, 828 P.2d 565 (1992).....	24
<i>Ellenburg v. Larson Fruit Company, Inc.</i> , 66 Wn.App. 246, 835 P.2d 225, 229 (1992).....	22
<i>Heriot v. Lewis</i> , 35 Wash.App. 496, 668 P.2d 589 (1983).....	33
<i>Lamm v. McTighe</i> , 72 Wash.2d 587, 434 P.2d 565 (1967).....	22,24,25,26,28,29,30
<i>Lappenbush v. Florkow</i> , 175 Wash. 23, 26 P.2d 288 (1933).....	36,37

<i>Lilly v. Lynch</i> , 88 Wash.App. 306, 945 P.2d 727 (1997).....	24
<i>Lingvall v. Bartmess</i> , 97 Wash.App. 245, 982 P.2d 690 (1999).....	32,34
<i>Mavroudis v. Pittsburgh-Corning Corp.</i> 86 Wash.App. 22, 935 P.2d 684,693 (1997).....	23
<i>McPhaden v. Scott</i> , 95 Wash.App. 431, 975 P.2d 1033 (1999).....	42
<i>Merriman v. Cokeley</i> , 168 Wash.2d 627, 230 P.3d 162, 163. (2010).....	24,25
<i>Miller v. MCamish</i> , 78 Wash.2d 821, 479 P.2d 919, 924-45 (1971).....	22
<i>Riley v. Andres</i> , 107 Wash.App. 391, 27 P.3d 618 (2001).....	33,34
<i>Roy v. Cunningham</i> , 46 Wash.App. 409, 731 P.2d 526 (1986).....	24,32
<i>Sunnyside Valley Irr. Dist. V. Dickie</i> , 111 Wn.App. 209, 43 P.3d 1277 (2002).....	21

APPELLANT'S ASSIGNMENTS OF ERROR

1. Appellant claims the trial court's Findings of Fact III, IV, V, VI, and VII are not supported by the evidence adduced at trial.
2. Appellant claims the trial court's Conclusions of Law I and II are not supported by the Findings of Facts.
3. Appellant claims the trial court erroneously quieted title to the disputed property in Elmer Segraves.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Was there substantial evidence to support a finding that a long standing fence separating two properties was recognized by the adjacent land owners as the established boundary line so that quieting title in the plaintiff/respondent's name was proper based on the doctrine of mutual recognition and acquiescence? (Assignment of Error 1, 2 & 3)
2. Was there substantial evidence to support quieting title in a disputed portion of property based on adverse possession when the person seeking title, and the predecessors in interest, farmed portions of the land, maintained a boundary fence on the land, treated the land as if they were the true owner, and did so for a period of up to 61 years? (Assignment of Error 1, 2 & 3)
3. Does an individual have a right to an implied easement in the form of irrigation to another's property when there is disputed evidence that there was unity of title between the two properties, no evidence of continual and apparent use of an effective irrigation system, and easy access to irrigation from the dominate estate is readily available without the need to trespass onto another's property? (Assignment of Error 2)

STATEMENT OF THE CASE

This appeal arises from a claim of disputed property that is approximately one acre in size. To the south, property is owned by the Plaintiff/Respondent, Elmer Segraves ("Mr. Segraves") while to the north, the Defendant/Appellant, Carl Fulton ("Mr. Fulton") owns property. Dating back to 1941, a survey indicated the existence of a fence that separated the respective properties. (CP 68). Upon purchasing the property in 2001, Mr. Fulton discovered the fence was located on his property. Since that time, many heated disagreements have occurred over the ownership of the property that ripened into legal action. Both parties claimed right to the disputed property and after summary judgment proceedings with oral arguments and a bench trial, the Court quieted title in Mr. Segraves' name.

The property owned by Mr. Segraves has been held in his family name since 1948. Prior to that, the property was owned by Russell Davidson. According to a survey that was completed on February 26, 1941 by the United States Department of Interior, Bonneville Power Administration, the disputed property in question was owned by Mr. Davidson.

(RP 7:8-13). The survey also evidenced the existence of the boundary fence between property in "section 11" owned by Mr. Davidson and one, Mr. Maynard. (CP 65: 3-9; CP 68). The property was sold to the Segraves family in 1948. (CP 65:8-9). Kurt Segraves was raised on the property with his parents. (CP 65:1-2). Kurt Segraves is the uncle of the current owner Mr. Segraves. (RP 67:14). The Segraves family raised cattle, grass, wheat and asparagus on the property. (RP 64:4-14). Kurt Segraves eventually inherited the property from his parents. Although he did not live on the property, he and his wife, Evanna, continued to farm the land every year, growing wheat, mustard, and alfalfa. (RP 90:2-16). In 2009, Mr. Segraves purchased the property from his uncle and has since maintained it and used the land for, among other things, raising bees. (RP 164: 9-12).

The northern property was once owned by the Maynard family. (Supp RP 16: 19-20). Sherman Maynard is a 70 year old retired cattle and wheat rancher who was born on the Fulton property. (Supp RP 3:17-19; Supp RP 4:20). Like Kurt Segraves, he was raised on the property with his parents and for most of the time, grew up as a neighbor to the Segraves (Supp. RP 4: 18-19;

Supp. RP 6: 20-21). He recalled the property being held in the Maynard name since his grandfather from sometime in the 1890's. (Supp RP 16:19-20). During Sherman's time on the property, the Segraves moved to the neighboring land in 1948. (Supp. RP 7: 1-3). Sherman Maynard lived on the property since birth until 1962; the year he was married. (Supp. RP 6:7; Supp. RP 18:11-15). The Maynard family sold the property to James Oakley Hughes in 1972 (Supp. RP 17:18-21). The Hughes owned the property until it was sold to Mr. Fulton in 2001. (Supp. RP 17: 2-5). The purchase between James Oakley Hughes and Carl Fulton marks the beginning of the dispute over the property in question.

During the purchase of the property between James Oakley Hughes and Carl Fulton, a survey conducted in November of 2001 evidenced the existence of the long existing fence and revealed that it was located on the Fulton property. (CP 65:10-32). Soon after the purchase was finalized, Mr. Fulton removed the fence from the property. In response, Mr. Segraves assisted his aunt in rebuilding the fence. (RP 145: 21-22; 146:1-5). After the fence was removed again in 2003, The Segraves had their attorney draft a letter requesting Mr. Fulton to stay off their property. (CP 154:10-12; CP 77). That same year, Mr. Fulton performed a Washington

Department of Fish and Wildlife Landowner Incentive Program (LIP), in stream and riparian enhancement project. (CP 10 1-5). In 2004, Mr. Fulton enrolled in the Conservation Reserve Enhancement Program (CREP). Mr. Fulton also requested permission to work on the disputed property from Kurt Segraves to install a CREP fence and riprap. (CP 34:1-2; CP 133:3-4;19-21). In 2006, Mr. Fulton removed parts of the fence and also installed an irrigation system on the disputed property. (CP: 66). In response Mr. Segraves removed the irrigation system and once again, erected the fence in 2009. (CP 94:21) During the proceeding of this case, Mr. Fulton has since removed the fence entirely. (CP 94:25).

Both Sherman Maynard and Kurt Segraves maintain the existence of the fence as the boundary between the properties. Sherman Maynard recalled the fence being in the same location as evidenced to the 2001 survey. (Supp. RP 8: 20-22; Supp. RP 1-14). In addition, he confirmed the location of the original fence as it was to the placement of the most recent fence removed by Mr. Fulton. (Supp. RP 25:18-21). In recalling the history of the fence, Sherman Maynard testified:

Q: Now, how long was that fence there?

A: It was there when I was born.

Q: And was it there your entire life,
as far as you know?

A: Yeah.

Q: Okay, What was the purpose of
that fence?

A: It's... I always assumed it was
the boundary between us and whoever
above us.

Q: Okay. So you, you always
assumed that it was the boundary fence
between your property and the
Segraves' property that was to the
south?

A: Right.

(Supp. RP 9:15-21; Supp. RP 10:1-4). Sherman remembered the fence between the properties being in the same location from the time he was a child until he left in 1962. (Supp. RP 18:11-16). After leaving, he returned on occasion to help his father farm hay and assisted in the clean up after the 1964 flood. He also returned

shortly before the property was sold to James Oakley Hughes.

(Supp. RP 25:5-11).

Kurt Segraves remembered the fence as the boundary line for over sixty years. According to Kurt Segraves, the fence had “been the boundary for [his] entire life” (CP 64: 28; CP 65: 1-3). Growing up, Kurt Segraves was often assigned to maintaining the fence. He recalled that both his family and their neighbors to the north cooperatively maintained the fence. (RP 76:6-22). “The fence in question was used as boundary of the properties between the parties. I took care of my property on my side of the fence and my neighbor James Oakley Hughes took care of his property on his side of the fence. The fence itself was used for two purposes; (a) to control livestock, and (b) to mark the boundary between the two properties.” (CR 65:23-27). Kurt Segraves testified the following:

Q: Now, let me ask you, during your lifetime, did you take care of the fence?

A: Oh, I'm sure at one time or another I got put to that chore, yes.

Q: And did your neighbors to the north take care of the fence?

A: Yes, they had cows.

Q: And your neighbors to the north were who?

A: Hughes.

Q: And before the Hughes, the Maynard's?

A: The Maynard's.

Q: Okay. Now, the Hughes and Maynard's also maintained that fence?

A: Correct.

Q: They took care of it?

A: Yes.

Q: You took care of it?

A: Correct.

Q: Did you have any understanding as to what that fence was for?

A: It was the property line.

(RP 76:5-22; RP 77: 1-6). Kurt's wife, Evanna, remembered seeing the fence from the road while riding the school bus as a child. (RP 105:14-22; RP 106:1). To the best of her knowledge, the original boundary fence was installed in the 1800's. (RP 110:16-22).

Evanna also helped rebuild of the fence after Mr. Fulton originally removed it. (107:9-21). No other witness testimony was offered that dated as far back as the former neighbors; Kurt and Evanna Segraves and Sherman Maynard.

James Hughes, son of James Oakley Hughes understood the fence was used for the purpose of keeping their livestock from entering a marshy area consisting of two springs and a disputed irrigation ditch that served the Fulton property. (RP 303:4-13). The use of the fence for purposes of containing livestock from the watery area was also proclaimed by Jeanne Hughes Whitefeather (RP 120: 5-13), who also proclaimed a second water source by the barn . Ms. Whitefeather is the granddaughter of James Oakley Hughes who sporadically lived on the property during the eighties and early nineties. She was there for about six to eight months in '81 to '82; six to eight months in '85 to '86; and lived there from '90 to '93. She additionally visited her grandparents multiple times. (CP 117: 1-5). Although she did not know the exact boundary, she believed the property line went beyond the existing fence. (RP 121:9-13). The use of the boundary fence to contain livestock was not disputed by the Segraves. (CR 65:23-27). Sherman Maynard's

testimony made no mention to the fence's purpose of containing livestock.

Paul Gibbons is a neighbor to Mr. Segraves. He currently lives on property that adjoins the Segraves' property on the north side at 204 Wolf Fork road. (Supp. RP 32: 10-20). He purchased the property in 1972 and moved onto it in 1973. (Supp. RP 34:15-17). Paul Gibbons knew Mr. Segraves' grandfather (Kurt Segraves' father) by working with him at Green Giant (Supp. RP 35:2-11). Mr. Gibbons grew wheat and hay on the Segraves' property from 1980-1985. (Supp. RP 35:14-16). He frequented the property quite a bit, moving hay for the Oakley's and farming the land for him as well. (Supp RP 38:5-13). He testified that the boundary of the properties was located at the fence.

Q: Do you – Were you familiar with the location of the boundary between the Segraves' property and the Oakley Hughes' property?

A: Yes

Q: And where was that boundary?

A: Where was it?

Q: Yeah.

A: It was a fence that came from the road clear to the hillside back there.

(Supp. RP 40:1-9). He also recalled many times where cattle would break through the fence and eat the Seagraves' crop. He would repair the fence with the assistance of Oakley and Anna Hughes. (Supp. RP 35: 14-21).

Many parties to this case recognize the use of the respective properties. James Hughes testified as to how the property was used on either side of the fence line. Specifically, James Hughes testified to the following:

Q: [The fence] was there, was it not?

A: The fence was there.

Q: And it kept the – kept livestock, kept all the Hughes' livestock on its side on the Hughes' side of the fence when you were there?

A: Most of the time. They broke through a couple times, but most the time it did.

Q: Okay, It was pretty clear that that was the boundary of the property, was it

not?

A: Well, I don't know that it was clear that it was a boundary. I was survey sticks way, way up there, 200 feet up near the road, so . . .

Q: Okay.

A: My assumption that was the boundary.

Q: Okay. But apparently the Segraves farmed the property to the right? If we look at the – as you look at the picture on Exhibit 6?

A: That was a real small section that they farmed, yeah.

Q: But they farmed that and took care –

A: That's correct.

(RP: 310:5-22; 311:1-2). Mr. Fulton also testified that the Segraves used the property on the other side of the fence. After the Court conducted an on-site visit of the disputed property and saw hay being farmed on the Segraves'

property, Mr. Fulton admitted there were times he saw the property farmed by Segraves.

(241:1-5). According to Kurt Segraves, a portion of hay produced from the disputed property was purchased by Carl Fulton in July of 2006. (CP 66: 18-22). Mr. Fulton does not dispute the purchase of hay from Kurt Segraves, but disputes the fact that the specific hay he purchased was grown in the disputed area. (CP 117:22-24; CP 118:1-5) Instead, he claimed that the only use of the disputed property by the Segraves since 2001 was as a turn-around point for their farm equipment. (CP 118: 14-21). Paul Gibbons testified that he was granted permission to farm portions of the Segraves' property and also leased nearby property from the Hughes. (Supp. RP 35 14-21; Supp. RP 46:17-19). Mr. Gibbons also worked on the fence while growing wheat on the Segraves' side of the property so that cattle would not come and destroy his crop. (Supp. RP 42:17-22; Supp. RP 43: 1-5).

Throughout the litigation, there was much discussion on the existence of some irrigation system stemming from the disputed property. Mr. Fulton maintains that there was a stream fueled by

two springs and a diversion point off Wolf Fork river that ran through the disputed property and eventually into the Fulton property on the north side of the boundary fence. (CP 42). From the stream, Mr. Fulton claims there was a ditch that ran water to his property that served to irrigate the lawn, pasture, and fruit tree orchard. (CP 31:9-15). The two springs as well as the diversion point from the Wolf Fork, are located on the disputed property. (CP 42). Mr. Fulton claimed the permissible diversion point and water use from the springs were authorized by an 1892 water right claim and 1974 water right claim respectively. (CP 31:9-15). James Hughes testified to the existence of the ditch as did Jeanne Hughes Whitefeather. (RP 302:18-22; 303: 1-5; RP 119: 1-3).

However, the 1892 water right claim did not locate the point of diversion on the disputed property. (RP 210:12-16) Additionally, the Department of Ecology determined that the 1892 priority date water right for domestic use was no longer valid because it had been abandoned. (RP 212:1-5; Ex. 24). According to the Department of Ecology investigator who inspected Mr. Fulton's property on July 12, 2004, there was no visible irrigation of the property and it appeared there had been no irrigation for some time. (RP 268:9-13). They concluded that well water became the

exclusive source of water for domestic purposes, domestic use and portion of the surface water right had not been used for five consecutive years. (247:8-15). Mr. Fulton appealed this decision but it was affirmed by a Pollution Control Hearing Board (RP 212:6-16).

Mr. Gibbons did not recall any irrigation system in place coming from Wolf Fork. Instead, he recalled a spring on the Segraves' property where water would flow down between the Oakley's house and barn. (Supp. RP 36: 10-19). He testified:

Q: Now, that little spring and that little creek that starts up in the Segraves' property and goes down through the Hughes' property, is there any kind of a ditch on the Segraves' property?

A: No, I never did see a ditch down through there.

Q: Was there any kind of ditch, then, did Oakley Hughes ever create a ditch on his property?

A: I never did see a ditch.

Q: I see. So it was just a little stream that ran down there?

A: Yeah, that little stream is all I know of.

(Supp. RP 37:1-11). Mr. Gibbons also testified that he never saw any irrigation system in place, specifically noting that he never saw any irrigation pumps. (Supp. RP 39:1-13). Instead, he recalled the Hughes' primary source of water used for irrigation came from well water. The Hughes would use a hose, moving it back and forth on the property for irrigation. (Supp. 39:1-20).

Kurt Segraves maintains that there was no irrigation ditch and further, no effective irrigation pulled from the springs on the disputed property. (RP 77; 9-13) In his entire lifetime, he never saw the Hughes or the Maynards use water from the spring to irrigate their property. (RP 86:2-9). Although the Segraves irrigated from Wolf Fork, they did not pull their irrigation from anywhere on the disputed property. He testified:

Q: Did, did anyone, Sherman Maynard or Oakley Hughes or anyone, remove, attempt to remove water in the disputed area?

A: No. Well, no. It all runs to their side

anyway,so...

Q: Well, the creek goes right past their property,
too, doesn't it?

A: (Inaudible over Counsel) It's all right there.

Q: The creek, the creek, If you go 30 or 40 feet,
you're on their property?

A: Correct.

Q: Huh? And did they ever have an irrigation ditch
from their property?

A: Not that I know of.

(RP 87: 2-15). Evanna Segraves described the springs as a low,
marshy area with water running down hill into Fulton's property.

(RP 113: 8-12). She also testified that no irrigation of any kind from
Wolf Fork served Oakley Hughes or the Fulton property. (RP 108:9-
11).

Sherman Maynard didn't recall any of the Fulton property
being irrigated during his long affiliation. (Supp. RP 7:19-21). He
recalled either a spring or seepage area from the Wolf Fork that
would run down through their property. This was the area that the
animals would drink from. (Supp. RP 12:8-15). He referred to it as

a little, tiny stream, three or four feet wide and eight to ten inches deep. (Supp. RP 13: 2-7). He testified:

Q: Okay. Was there any ditch over across the fence on the, on the Segraves' side of the fence?

A: No

Q: No ditch over on the Segraves' side of the fence?

A: No.

Q: It was just a little stream that ran down. Apparently you put it into a ditch?

A: Yeah.

Q: On your side of the fence?

A: Right.

(Supp. RP 13:12-21).

Elmer Segraves filed a complaint and amended complaint in September, 2009 requesting the Court to quiet title in Mr. Segraves' name and eject Mr. Fulton from the property. Fulton answered asserting affirmative defenses and counterclaims that included quieting title due to Fulton's adverse possession of the disputed property since 2001. (CP 1-13). Both parties filed motions for Summary Judgment. (CP 18; CP 99) In an order granting partial

Summary Judgment on March 9, 2010, the Court denied Fulton's claim that he had acquired an interest in the disputed property by adverse possession. (CP 136: 5-7). The Court held the activities of the parties since 2001 have not ripened to adverse possession, and the use of the property, removal of the fence, submission of the property in the CREP Program and the LIP Program are irrelevant and inadmissible at the time of trial. (CP 136: 11-15). Finally, the Court found the existence of a genuine issue of material fact of which was to be decided at trial.

“[T]he Court finds that there is a genuine issue of material fact as to the following, to wit:

- (a) the purpose of the fence evidenced on the 1941 survey by the Department of Interior and the 2001 survey at the time of the purchase by CARL C. FULTON, and
- (b) whether or not the fence that was in existence prior to 2001 can be found to be a “boundary fence.”

(CP 136:5-23). A motion for reconsideration was filed and denied on March 17th, 2010. (CP 141).

After the conclusion of a bench trial, which included an on-site visit of the disputed property, the Court entered its findings of fact and conclusions of law and quieted title to

Elmer Segraves. (RP 233-235; CP 155). In pertinent part, the Court found:

Fact III

“That there existed between the property owned by the plaintiff and the property owned by the defendants a fence, that has been in existence since at least 1937 until it was removed by Defendants in 2001. The Court finds plaintiff proved it was an actual boundary fence so recognized by the adjacent owners and not merely a fence to contain livestock.” (CP 154).

Fact IV

“[T]he defendant again moved the boundary fence in 2003, and was advised by the plaintiff that trespassing would not be permitted; that the actions by the defendant to reclaim the property was improper.” (CP 154)

Fact V

That the court granted partial summary judgment by written order dated March 9, 2010; that said order granting partial summary judgment is by this reference incorporated herein.

Fact VI

That on or about the 17th day of March 2010, the court denied a motion for reconsideration; that said order is by this reference incorporated herein.

Fact VII.

The Plaintiff is entitled to an order quieting title to the disputed property (CP 154).

The Court, as a matter of law concluded that (1) Mr. Segraves is owner in fee simple, free and clear of any claim of the defendant; and (2) a claim by the defendant for an easement or any right to use, cross, or utilize said property in any respect was denied. (CP 155).

STANDARD OF REVIEW

When findings of fact and conclusions of law are entered following a bench trial, appellate review is limited to determining whether the findings are supported by substantial evidence, and if so, whether the findings support the trial court's conclusions of law and judgment; evidence is substantial if it is sufficient to persuade a fair-minded person that the declared premise is true. *Sunnyside Valley Irr. Dist. V. Dickie*, 111 Wn.App. 209, 43 P.3d 1277 (2002)

(internal citations omitted). “Our review, upon the assignments of error as made, starts from the premise that when a cause is tried to the court sitting without a jury, the findings of fact made by the trial court cannot be disturbed by this court if there be substantial evidence to support such findings, even though as a trier of fact we might have made different findings.” *Lamm v. McTighe*, 72 Wn.2d 587, 589, 434 P.2d 565 (1967). Finally, questions of credibility are uniquely and exclusively within the province of the trial court, and will not be disturbed on appeal. *Miller v. MCamish*, 78 Wash.2d 821, 831, 479 P.2d 919, 924-45 (1971).

Resolving an adverse possession claim involves mixed questions of law and fact. Whether the necessary facts have been proved is a question of fact. Whether those facts constitute adverse possession is an issue of law. *Chaplin v. Sanders*, 100 Wn.2d 853, 863, 676 P.2d 431 (1984). The same standard applies to the doctrine of boundary by acquiescence. *Lamm v. McTighe*, 72 Wn.2d 587, 591, 434 P.2d 565 (1967). Appellate review of a conclusion of law based on findings of fact is limited to determining whether the findings are supported by substantial evidence, and if so, whether those findings support the conclusion. *Ellenburg v. Larson Fruit Company, Inc.*, 66 Wn.App. 246, 250 835 P.2d 225,

229 (1992)(citing *American Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wash.2d 217, 222, 797 P.2d 477 (1990). An appellant who wishes to challenge the sufficiency of the evidence needs to outline the evidence in its brief, point to the deficiencies it contends exist, and cite to relevant authority. A bare conclusory allegation that the evidence is insufficient will not suffice, in that the appellate courts are not in the business of searching the record in an effort to determine the nature of any alleged deficiencies to which the challenger may be referring, and then to search the law for authority to support those same alleged deficiencies. *Mavroudis v. Pittsburgh-Corning Corp.* 86 Wash.App. 22, 39, 935 P.2d 684,693 (1997).

ARGUMENT

I. Segraves presented sufficient evidence to satisfy the doctrine of mutual recognition and acquiescence justifying an order to have title to the disputed property quieted in his name.

A party claiming title to land by mutual recognition and acquiescence must prove (1) that the boundary line between two properties was “certain, well defined, and in some fashion physically designated upon the ground, e.g., by monuments, roadways, fence lines, etc.”; (2) that the adjoining landowners, or

their predecessors in interest, in the absence of an express boundary line agreement, manifested in good faith a mutual recognition of the designated boundary line as the true line; and (3) that mutual recognition of the boundary line continued for the period of time necessary to establish adverse possession (10 years).

Lamm v. McTighe, 72 Wash.2d 587, 593, 434 P.2d 565 (1967).

“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 required 10-year period of adverse holding.” *Roy v. Cunningham*, 46 Wash.App. 409, 413, 731 P.2d 526 (1986). These elements must be proved by clear, cogent, and convincing evidence.

Merriman v. Cokeley, 168 Wash.2d 627, 630-31, 230 P.3d 162, 163. (2010) (citing *Lilly v. Lynch*, 88 Wash.App. 306, 316-17, 945 P.2d 727 (1997)). To meet this standard of proof, the evidence must show the ultimate facts to be highly probable. *Id.* (citing *Douglas Nw., Inc. v. Bill O'Brien & Sons Constr., Inc.*, 64 Wash.App. 661, 678, 828 P.2d 565 (1992)).

A. The trial court’s finding of fact that there existed a boundary fence for at least 61 years is supported by substantial evidence.

Segraves presented ample evidence to support the finding that “there had existed between the property owned by the [Segraves] and the property owned by [Fulton] a boundary a fence; that has been in existence since at least 1937 until it was removed by [Mr. Fulton] in 2001.” (CP 154:6-8). To establish a certain, well defined, physical designation upon the ground, the rule itself delineates a fence as a suitable example. “A fence, a pathway, or some other object or combination of objects clearly dividing the two parcels must exist.” *Merriman* at 631 (citing *Lamm v. McTighe*, 72 Wash.2d 587, 434 P.2d 565 (1967)).

In our current situation, all parties in this case testified as to the existence of the fence between the Segraves and Fulton property, including the defendant, Mr. Fulton. In addition, a 1941 Survey evidenced the existence of the fence as did the survey conducted in 2001. Both fences were in the same location. Furthermore, testimony from Sherman Maynard, the 70 year old retired cattle rancher and wheat farmer who had been born on the property, testified that the fence was there since he was born. He also affirmed that the fence last taken down by Mr. Fulton was in the same location as was the fence he recalled as a child. The existence of the fence was confirmed by Kurt Segraves, Evanna

Segraves, Elmer Segraves, James Hughes, Jeanne Hughes Whitefeather, Paul Gibbons, Carl Fulton and Sherman Maynard. It is undisputed that the long existing fence marked a physical separation between the properties.

B. The trial court's finding of fact that the fence was the recognized boundary between the adjacent owners is supported by substantial evidence.

It is equally clear that sufficient evidence was adduced that supported the finding of fact that the fence "was an actual boundary fence so recognized by the adjacent owners and not merely a fence to contain livestock." (CP 154:8-10). To satisfy this element of mutual recognition or acquiescence, evidence must show that the parties "for the requisite period of time, actually demonstrated, by their possessory actions with regard to their properties and the asserted line of division between them, [had] a genuine and mutual recognition and acquiescence in the given line as the mutually adopted boundary between their properties." *Lamm* at 593. Furthermore, the absence of an expressed agreement is not "an indispensable element in the application of [the] doctrine." *Id.* at 569.

In *Lamm*, two five (5) acre parcels of land that bordered each other on a north south line were purchased by separate parties in 1934. The western parcel was purchased by the

Pentecosts and the eastern parcel by the Vails. *Id.* at 566. The two predecessors of the present owners agreed to build a fence between their properties. *Id.* at 567. In 1945, the defendant purchased the Vail property on the east. *Id.* At this time, the original fence had fallen in disrepair and in 1946, the defendant erected a wire-mesh fence in a similar location. *Id.* In 1962, the plaintiffs purchased the Pentecost's parcel of land to the west and after conducting a survey, discovered the fence was 15.5 feet east of the surveyed boundary, located on the defendants land. *Id.* The defendant thus erected a new fence on the surveyed border and barricaded the disputed strip. *Id.* The trial court quieted title in favor of the plaintiffs based on mutual recognition and acquiescence. The court found that the "Pentecosts, during their occupancy between 1934 and 1962, and the plaintiffs thereafter, considered and treated the respective fences as the boundary between the tracts." *Id.* at 568. The Washington State Supreme Court affirmed, noting the evidenced showed "the Pentecosts and the plaintiffs by their acts of dominion up to the fence line patently acknowledged, recognized, and accepted the fence as the true division line between the respective tracts; and . . . the defendants, in turn, occupied their property up to the fence line, *passively observed*

their neighbors' acts of dominion in relation to the now disputed strip, and *made no overt claim* to any property lying westerly of the fence line until an exchange of words gave rise to a dispute and the 1963 survey." *Id.* at 569-70. (emphasis added).

The evidence produced in *Lamm* is similar to the evidence considered in this case. In *Lamm*, the court looked at the actions of the predecessors in interest in determining whether they mutually recognized the fence as a boundary. Just as the Pentecosts and subsequent plaintiffs recognized the fence as the boundary, so too did both neighboring landowners in our situation. Kurt Segraves always recognized the fence as the boundary line between the properties, just as his parents did before him. Additionally, Sherman Maynard testified as to the mutual recognition of the fence as the boundary between the properties when living as a neighbor to the Segraves. Mr. Maynard also remembered that the fence served as the boundary even before the Segraves moved onto the property in 1948. Although the Hughes claim they did not recognize the fence as the boundary after their purchase in 1972 from the Maynards, they did nothing but passively observe the Segraves' acts of dominion in relation to the now disputed strip. Furthermore, there was no evidence showing they made any overt

claim to the property while neighboring the Segraves. In *Lamm*, the defendants made no overt claim to any property lying west of the fence until a survey was taken in 1963. Similar to our case, nobody made any overt claim to the land beyond the fence until a survey was conducted in 2001; a survey that was conducted for the conveyance of property to Mr. Fulton. On the contrary, much of the evidence supports that all the parties including the Segraves, Maynards and Hughes recognized the fence as the boundary as evident from all parties taking steps to cooperatively maintain the fence. Finally, objective evidence was adduced in the testimony of Paul Gibbons. Mr. Gibbons, a neighbor who worked with both the Segraves and Hughes on their respective properties, testified that the fence served as the boundary between the properties. He too testified that he and the Hughes would collectively maintain the fence.

The recognition in the boundary, and passive observance of ownership was supported by overwhelming amount of evidence. Kurt Segraves testified that his parents raised cattle, grass, wheat and asparagus on the property. Upon inheriting the land, Kurt Segraves continued to farm the land every year, growing wheat, mustard and alfalfa. James Hughes testified that the Segraves

farmed and took care of the property beyond the fence. Even Carl Fulton admitted that alfalfa was grown on the property, of which he purchased some for his livestock in 2006. Finally, Paul Gibbons too farmed crops for both the Segraves and Hughes side of the boundary fence.

Therefore, the trial court's finding of fact that the fence was the recognized boundary between the adjacent land owners was supported by substantial evidence.

C. The trial court's finding of fact that the fence was a recognized boundary for the necessary period of time to achieve adverse possession is supported by substantial evidence.

Finally, the mutual recognition between the property owners of the existing fence as the boundary line was consistent and uninterrupted throughout the durational period required for mutual recognition and acquiescence. The "mutual recognition of the boundary line [must] continue . . . for the period of time necessary to establish adverse possession (10 years)." *Lamm at 593*. In our situation it is undisputed that the boundary fence was in existence from at least 1937 to 2001 as evident by the United State Department of Interior, Bonneville Power Administration survey, the survey conducted by Tomkins Land Surveying in 2001 and

Sherman Maynard's testimony. Sherman Maynard was 70 years old at the time of the trial (6/16/2010). Presumably he was born in 1940 and testified that the fence had been the boundary line his entire life until leaving in 1962. Even after he left, he returned to the property to help his father on occasion. The Maynard family sold to the Hughes in 1972. Thus, Sherman Maynard's experience with the property extends over a period of 32 years. The Segraves move onto the adjoining property in 1948, and they too recognized the fence as the boundary between the two properties. Taken together, there existed actual mutual recognition of the fence as the boundary between the Maynards and Segraves from 1948 to 1972. Collectively, that is a period of 24 years and does not account for the time the Hughes recognized the fence as the boundary based on their actions. Between the Segraves, Maynards and Hughes, the time of recognition extends to a period of 51 years (1948-2001). Adding the time of Mr. Fulton ownership, the time the fence has been recognized as the boundary extends to 61 years. Thus, as the evidence supports, the ten year period necessary to invoke the doctrine of mutual recognition and acquiescence has run many times over.

The trial courts finding of fact that there existed a fence that was recognized by the parties to be the boundary between their respective properties from at least 1937 to 2001 was supported substantial evidence. Furthermore, such findings of fact address each element of mutual recognition and acquiescence thereby supporting the trial courts conclusion of law that the plaintiff is the owner of the disputed property in fee simple, free and clear of any claim of the defendant.

II. Segraves presented substantial evidence of adverse possession in order to have title to the disputed property quieted in his name.

To establish adverse possession, the claimant must show possession that is: (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile for the 10 year statutory period. *Lingvall v. Bartmess*, 97 Wash.App. 245, 253, 982 P.2d 690 (1999). Again, the period may be tacked to each successive occupants holding continuously and adversely to the true title holder. *Roy v. Cunningham*, 46 Wash.App. 409, 413, 731 P.2d 526 (1986).

A claimant can satisfy the open and notorious element by showing either (1) that the title owner had actual notice of the

adverse use throughout the statutory period or (2) that the claimant used the land such that any reasonable person would have thought he owned it. *Riley v. Andres*, 107 Wash.App. 391, 396, 27 P.3d 618 (2001) (citing *Anderson v. Hudak*, 80 Wash.App. 398, 404-05, 907 P.2d 305 (1995)).

Actual use is also required by the claimant. Acts of actual possession serve two purposes. First, actual possession gives the claimant a stake in the property. Second, acts of possession raise the “flag of hostile possession,” putting the true owner on notice of the adverse claim. *Heriot v. Lewis*, 35 Wash.App. 496, 504, 668 P.2d 589 (1983). “[W]hat constitutes possession or occupancy of property for purposes of adverse possession necessarily depends to a great extent upon the nature, character, and locality of the property involved and the uses to which it is ordinarily adapted or applied. Accordingly, the claimant need only demonstrate use of the same character that a true owner might make of the property considering its nature and location.” *Id.* (internal citations omitted).

In order to be exclusive for purposes of adverse possession, the claimant's possession need not be absolutely exclusive. Rather, the possession must be of a type that would be expected of an

owner under the circumstances. *Crites v. Koch*, 49 Wash.App. 171, 174 741 P.2d 1005 (1987) (citation omitted).

Finally, the hostility element requires simply “that the claimant treat the land as his own against the world throughout the statutory period.” *Riley v. Andres*, 107 Wash.App. 391, 396, 27 P.3d 618 (2001) (citing *Chaplin v Sanders*, 100 Wash.2d 858, 860-61, 676 P.2d 431 (1984)). The element of hostility does not require that a person do everything an owner could do with the land. Instead, when a claimant does everything a person could do with a particular property, it is simply evidence of the open hostility of that claim. *Lingvall v. Bartmess*, 97 Wash.App. 245, 254, 982 P.2d 690 (1999) (citation omitted). The nature of possession is determined objectively by the manner in which the claimant treats the land. *Id.* (citing *Chaplin*, 100 Wash.2d at 860-61, 676 P.2d 431).

Mr. Segraves offered a tremendous amount of evidence meeting each of the aforementioned elements. Segraves’ family use of the land was open and notorious in part because the Hughes family claimed they knew the boundary fence encroached on their property. Mr. Fulton offered personal testimony as well as testimony from James Hughes and Jeanne Hughes Whitefeather, each indicating their understanding that the fence was not the

boundary line, and instead the boundary line was somewhere on the Segraves property. They also testified that the Segraves used the property as one would if they owned it. Even if the Hughes did not have actual notice, the Segraves used the land such that a reasonable person would have thought they owned it. These possessory acts consisted of actual and exclusive use by the Segraves for a period of 61 years since the family purchased the property in 1948. In treating the property as their own, in the face of the Hughes who claimed the property in use by the Segraves was their own, the "flag of hostility" is apparent through the time the Hughes took ownership in 1972; a total of 29 years until the conveyance to Mr. Fulton.

Kurt Segraves testified that his family raised cattle and crops on their side of the property since purchasing it in 1948. Additionally, he testified that he "took care of his property on his side of the fence," as would be expected of any owner under the circumstances. James Hughes, whose family purchased the adjoining property in 1972, admitted that the Segraves farmed a small section on the right side of the fence. During the trial, an on-site visit of the property revealed alfalfa being raised on the Segraves side of the fence. This was confirmed by the testimony of

Mr. Fulton, who even purchased hay that was harvested from Segraves property. Mr. Fulton also testified that he saw the Segraves use portions of the property as a turn-around for some of their farm equipment. Taken together, the weight of the evidence supports the notion that the property was appropriately used based on the nature, character, and locality of the property involved and the uses to which it is ordinarily adapted or applied; ordinary uses, such as farming, raising cattle, maintaining a boundary fence and permitting access for farm equipment.

Mr. Fulton claims Segraves failed to establish the elements of adverse possession and attempts to analogize our facts to the 1933 case of *Lappenbush v. Florkow*, 175 Wash. 23, 26 P.2d 288 (1933). In *Lappenbush*, there existed a fence between the boundaries that was built 32 years prior to the trial. On one side of the property grazed cattle while on the other, the owner did little to exert any ownership aside from maintaining the fence. The court held that the fence was not intended to be a boundary fence in part because no witness testified as to it being a boundary fence, and the “fence taken as a whole lacks every element of a deliberate attempt to define a boundary or locate the dividing line between the adjoining holdings.” *Lappenbush* at 27-28. The court held against

the respondent because he did not “indicate that he, *by act or word*, ever disclosed [ownership] to anyone.” *Id.* at 28 (emphasis added).

Lappenbush is distinguishable to the facts in this case in many respects. First, unlike in *Lappenbush*, there was plenty of testimony regarding the purpose of the fence as a boundary between the properties. In fact, two individuals who lived in the respective properties as children agreed that it was the understanding of both families, the Maynards and Segraves, that the fence served as the boundary line. Also, the structure of the fence in *Lappenbush* was “so irregular in its course as to practically negative any idea that it was ever intended to be a line fence in any part.” *Id.* at 27. The boundary fence on the Segraves property was more straight and also aligned with other property divisions beyond two sections of property. Finally, the court in *Lappenbush* found “nothing in the situation indicating an open and notorious hostile intent . . . to establish title.” *Id.* at 28. This is contrary to our case as there is an overwhelming amount of evidence that indicates the Segraves treated the property as their own by farming, raising cattle, maintaining the fence and providing access for their farm equipment.

The Segraves family claimed and treated the land as they would their own and did so against the world throughout the statutory period. The Hughes moved onto the Fulton property in 1972. Mr. Fulton claims the Hughes knew the fence was not the boundary line throughout the duration of their ownership yet the evidence shows they stood by and observed the Segraves' acts of dominion. Mr. Fulton claims that the Maynards and Hughes gave permission to the Segraves to use the land, however, absolutely no evidence, other than Mr. Fulton's speculative assertions, supports a finding of that fact. From 1972 until the purchase between the Hughes and Mr. Fulton in 2001, the Segraves' use of the land was open and notorious, actual and uninterrupted, exclusive and hostile. Thus, quiet title is appropriate to Elmer Segraves based on the doctrine of adverse possession.

III. Mr. Fulton failed to prove evidence that would support a finding that he is entitled to an easement by implication, or "quasi-easement."

The Trial court was correct in concluding as a matter of law that any claim by the defendant for an easement or any right to use, cross, or utilize the disputed property in any respect was denied. Mr. Fulton asserted a secondary claim to be considered if the court found for Mr. Segraves and quieted title in his name. Specifically,

Mr. Fulton asserted a claim for an implied easement, also known as a “quasi-easement.” Although the cause of action was not specifically outlined in Mr. Fulton’s answer, nor was it addressed in his appeal, we will address the issue for the purpose of bringing closure to this legal dispute.

To succeed in an implied easement claim, Mr. Fulton must prove (1) there has been unity of title and subsequent separation; (2) there has been an apparent and continuous quasi-easement existing for the benefit of one part of the estate to the detriment of the other during the unity of title; and (3) there is a certain degree of necessity that the quasi-easement exist after severance. *Adams v. Cullen*, 44 Wash.2d 505,505, 268 P.2d 451 (1954). “Unity of title and subsequent separation is an absolute requirement. The second and third characteristics are aids to construction in determining the cardinal consideration - the presumed intention of the parties as disclosed by the extent and character of the user, the nature of the property, and the relation of the separated parts to each other.” *Id.*

First, in order for Mr. Fulton’s argument to succeed, logic would follow that the disputed property in question must have been in unity of title with the Maynards, the Hughes or Mr. Fulton.

However, there is little evidence that the disputed property belonged to any of the parties except for Mr. Fulton as indicated in the survey conducted in 2001. On the contrary, there is evidence supporting the fact that the disputed property was originally titled to the Segraves. According to the 1941 survey, which evidenced the fence standing in the same place as it did in the 2001 survey, the owner of the disputed property was Russell R. Davidson, predecessor in interest to the Segraves family. The Segraves, of course, purchased the property in 1948, seven years after the survey was completed by the Department of Interior. From there, interest in the property was passed to Kurt Segraves and finally to Mr. Segraves. That same 1941 survey indicates a portion of section 11 owned by Maynard. This is located on the document immediately to the right where the disputed property's ownership indicates Russell R. Davidson. The Maynard family did not convey their interest in title until selling to the Hughes in 1972. No evidence was adduced showing the surveyed parcel of that purchase. Instead, the evidence is heavily disputed and Mr. Fulton failed to meet his burden to establish the first element.

Assuming Mr. Fulton did establish the first element of unity of title, there is no evidence of an apparent and continuous quasi

easement existing for the benefit of one part of the estate to the detriment of the other. "A quasi easement refers to the situation where one portion of property is burdened for the benefit of another." *Adams* at 504.

On the disputed property, a stream runs from a spring and eventually through the Fulton property. Mr. Maynard recalled using the spring for purposes of watering livestock. Mr. Fulton claims that a "quasi easement" in the form of a ditch running from the disputed property to his property was established long ago for the purpose of irrigating the lawn, pasture and fruit tree orchard. However, the facts presented at trial indicate otherwise. First, Mr. Maynard never recalled a ditch running across the fence into the Segraves property. Mr. Maynard testified that the only ditch that ran from the stream during his tenure on the property was created after the stream crossed the boundary fence onto their property. Paul Gibbons did not recall any irrigation system in place coming from Wolf Fork or from the Segraves property. He remembered a stream coming from the Segraves' property into the then Hughes property, but he never saw any ditch. Kurt Segraves maintains there was no irrigation ditch and further, no effective irrigation pulled from the springs on the disputed property. Moreover, the

Department of Ecology investigator who inspected Mr. Fulton's property on July 12, 2004 and claimed there was no visible irrigation of the property and it appeared there had been no irrigation for some time. The Department concluded that well water was the exclusive source of water for domestic purposes.

In the case of *McPhaden v. Scott*, 95 Wash.App. 431, 975 P.2d 1033 (1999), the Court affirmed the trial court's decision, finding there was insufficient evidence to support the apparent and continuous use of an access road for purposed of an implied easement. In *McPhaden*, an access road was installed running through neighboring parcels that lead to a major street. The Court held the plaintiff failed to establish apparent and continuous use due to multiple witness testimony claiming lack of knowledge as to the last time the access road was used. Only one witness recalled the use of the road and it dated back to the 1960s. In our case, the majority of the testimony completely disputes the existence of any irrigation ditch at all. This includes the testimony of Sherman Maynard who has the most affiliation with the Fulton property.

Mr. Fulton offers water right claims from 1892 and 1974 in which he asserts provides him a claim of right to the property. In an

argument for establishing an easement, his argument and application of the water right claims are extremely misguided.

There is a distinct difference “between a determination of easement and a determination of a claim for water rights. The former, as applied to this case, concerns a well, pipes, pumping apparatus and access thereto. The latter concerns the water that flows within the well and pipes. The two subjects are physically distinct. The two subjects are also legally distinct. An easement is a privilege to use the land of another. It is a private legal interest in another’s property. Water rights claims are limited to a determination by the Department of Ecology as to whether a water use permit should be granted and to whom. Water rights claims do not and cannot involve property interest questions, as the Department of Ecology has no authority to adjudicate private rights in land.

Crescent Harbor Water company, Inc. v. Lyseng, 51 Wash.App. 337,340 753 P.2d 555 (1999) (internal citations omitted).

Finally, Mr. Fulton cannot support a claim that it is reasonably necessary for him to gain access from the disputed property. “The test of necessity is whether the party claiming the right can, at a reasonable cost, on his own estate and without trespassing on his neighbors, create a substitute.” *Berlin v.*

Robbins, 180 Wash. 176, 189 38 P.2d 1047 (1934). Mr. Fulton has testified that it is possible for him to move the point of diversion from Wolf Fork to his own property. Additionally, he can continue to use the water that naturally flows into his property and the well water in which the Department of Ecology concluded has become his exclusive source of water for domestic purposes. In the case of *McPhaden supra*, the Court upheld the trial courts finding that it was not reasonably necessary for the plaintiff to have use of the access road that led to the major street due to his testimony that he could install an alternative route that would not trespass on the adjoining parcels of land. “[The plaintiff] testified that a culvert and a driveway could be installed to allow access from [his lot] to Rhododendron Drive without crossing the [adjoining parcels]. Thus, [the plaintiff’s] testimony alone established that the access road was not reasonably necessary to the use of his property.” *McPhaden* at 438 Again, Mr. Fulton testified that it is possible for him to move the point of diversion from Wolf Fork without trespassing on Mr. Segraves property.

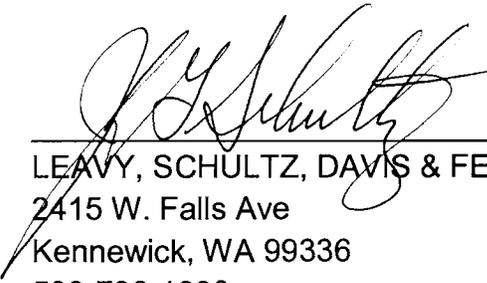
There are no facts sufficient to support a finding that Mr. Fulton should be permitted an implied easement and his argument, if presented should fail.

CONCLUSION

In this case, the trial court's findings of fact were supported by substantial evidence. The court found the existence of a long standing fence that was recognized by the adjacent property owners for the requisite period of time to properly conclude that title to the disputed property should be quieted to Mr. Segraves based on the doctrine of mutual recognition and acquiescence. In the alternative, the trial court was correct in finding that all the elements existed to satisfy the doctrine of adverse possession and was further correct in quieting title in Mr. Segraves name. Finally, the trial court found insufficient evidence supporting Mr. Fulton's claim for an implied easement and correctly denied him any claim of right to the disputed property. Therefore, Mr. Segraves respectfully asks this Court to affirm the trial court's decision.

DATED this 16 day of May, 2011.

Respectfully Submitted:



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