

FILED

AUG 01 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29799-3-III

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION III

LANCE G. PIERCE and JANETTE PIERCE, husband and wife,
Plaintiffs/Respondents,

v.

ALBERT L. BELCHER and LOUISE M. BELCHER, husband and wife,
Defendants/Appellants.

APPEALED FROM STEVENS COUNTY SUPERIOR COURT CAUSE
NO. 09-2-00552-2

APPELLANTS' BRIEF

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Attorneys for Appellants

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I. INTRODUCTION

This case involves approximately 53 acres consisting primarily of timber and hay divided into two parcels on 5/27/82, by then owner Thomas Franco. Ex. 120. The first divided parcel, 20 acres (1801 Hutchison Road), was sold to George and Joanne Voile, Sr., (“Voile Sr.”) who recorded their deed on 7/1/88. Id. The second parcel, 33 acres (1799 Hutchison Road), was sold to George and Debra Voile, Jr., (“Voile Jr.”) who recorded their deed on 11/25/92. Id. By Deed, the boundary shared by the parcels is 1,343.28 feet in length. Ex. 112.

In August 2007, Respondents Lance and Janette Pierce, residents of Las Vegas, Nevada and owners of a heavy equipment business, purchased the 33 acre (1799 Hutchison Road) property previously owned by Voiles, Jr. RP p. 124, ll. 17-22. In July 2008, Appellants Louise and Albert Belcher, bought the adjoining 20 acre (1801 Hutchison Road) parcel previously owned by Voiles, Sr. RP p. 253, ll. 17-19. In 2008, when Louise Belcher moved into her new home, the land owned by the Respondents Pierce remained as it is today, vacant. RP p. 160, ll. 17-24; p. 166, ll. 15-18, 22-23; p. 169, ll. 10-14; p. 170, ll. 10-14.

The dispute at issue arose when Appellants Belcher had a survey done to confirm the shared boundary and began constructing a stock fence between the two properties. RP p. 267, l. 22 - p. 268, l. 9. The newly

surveyed line comported with (1) what Appellants Belcher had been physically shown by their predecessor in title prior to purchasing, and (2) the legal descriptions set forth in the Deeds to both parcels. CP 375-404; RP p. 251, l. 17 - p. 253, l. 16. The Pierces claimed the Belcher's new fence was not on the "recognized" boundary line and, if constructed on the actual surveyed line, would interfere with a small portion of driveway curve serving their property. CP 046-047. The Pierces thereafter initiated legal action to quiet title to approximately 50 feet of property west of the actual surveyed boundary for a length of 1343.28 feet of the Belcher's property. RP p. 267, l. 22 -p. 268, l. 9.

A two-day bench trial was held before Stevens County Judge Allen C. Nielson on January 3 and 4, 2011. On March 22, 2011, he entered his ruling deciding against the Belchers, but in doing so erred by misapplying, or misconstruing, the wrong standard of proof, erroneously misconstruing facts, misapplying Washington boundary law, and arbitrarily deciding the legal description of the property to which he quieted title. CP 864-872. In deciding the boundary line dispute against the Belchers, the Trial Judge purportedly did so based upon the long standing legal theory of *mutual recognition and acquiescence*, which has 3 elements, one being that the acquiesced boundary exist for 10 uninterrupted years. Merriman v. Cokeley, 168 Wn.2d 627, 630 (2010). However, in making his purported

Findings of Fact and Conclusions of Law, the Trial Judge referred to “facts” that are simply unsupported anywhere in the record.

Inexplicably, the Trial Judge erroneously concluded that the boundary at issue had been established by a “*certain, well defined, physically designated line.*” CP 864-872. In his holding, Judge Nielson ruled that the purportedly *mutually recognized* boundary consisted of two t-posts periodically obscured from view by overgrown grass and weeds; a seasonal “mow” line that actually changed year to year based upon harvest patterns and “*years of different use*”; and the western edge of a driveway curve serving the Pierce’s property that partially encroached permissively upon the Belcher’s acreage by a few feet. CP 864-872.

The photographic evidence and testimony introduced at trial does not support the Judge’s findings and conclusions by required clear, cogent, and convincing evidence establishing a *mutually recognized and acquiesced* boundary line different from the legal boundary as surveyed. Thus, Judge Nielson committed reversible error in holding that under the theory of *mutual recognition and acquiescence*, a new boundary line, now 1,349.28 feet in length, had been established between the properties. CP 864-872.

The Trial court’s Ruling, CP 872, not only quieted title to a portion of land exceeding that described in Conclusion of Law A, but capriciously

granted the Respondents a boundary line consisting of six additional feet in length! Furthermore, the inconsistencies in the Judges' Findings of Fact A and "Ruling," are a direct result of an abuse of discretion in adopting a self-serving legal description created by a surveyor paid for by Respondents to define an arbitrarily selected portion of the Belchers' property.

Further, Judge Nielson committed reversible error in holding that there had been *mutual recognition and acquiescence* of the purported new boundary line for a period of ten years. CP 864-872. He did so despite the lack of any testimony establishing that fact, much less requisite evidence meeting a clear, cogent, and convincing standard.

Respondents Pierce failed to meet their initial, fundamental burden of proof, both factually and legally. The evidence at trial proved there was no well-defined, physically designated line upon the ground; the neighboring parties never manifested a *mutual recognition and acceptance* of a boundary line different from that recorded in the deed; and there is no evidence that the requisite *mutual recognition and acquiescence*, if any, continued for any discernable, uninterrupted 10-year period.

Accordingly, Appellants Belcher request that this Court reverse and vacate the Judgment entered by the Trial court. Additionally, the Belchers request that this Court quiet title to the disputed property to them

as Bona Fide Purchasers pursuant to the legal description contained within their deeded chain of title.

II. ASSIGNMENTS OF ERROR

A. Assignments Of Error.

Appellants assign error to the Trial court's entry of the Judgment dated March 22, 2011 and in part or total to its following Findings of Fact, Conclusions of Law, and Ruling: CP 864-872.

Finding of Fact G: "The Pierce parcel was owned by Voile, Jr., the Trimbles, and the Davises from May 27, 1982, to July 18, 2008, or for 26 years. The common boundary between the two parcels was established by the Voiles – father and son – so as to put the Pierce driveway entirely on the Pierce property¹." CP 866.

Finding of Fact H: "The Trimbles owned and one or both lived on the Pierce property for 13 years– for 13 years they were neighbors to the Millers. Michael Trimble was shown the common boundary by Voile, Sr. The north common boundary was marked by a t-post and the south common boundary was marked by a white PVC pipe, with at least two t-posts lined up between. They were about 25 to 50 yards apart. They all lined up when Mr. Trimble eyeballed them. In reference to the common boundary, "It was gospel." The driveway to the Trimble residence was located entirely on their property. The t-posts and PVC pipe separated the Pierce use of the land from the Belcher use – Mr. Pierce observed a visible line. Mr. Trimble visited the property one or two times a month from 1992 to 1998. While he didn't walk the boundaries of his 33-acre parcel, he did walk the common corner markers and eyeball the common boundary. The common boundary markers (PVC pipe and t-posts) were clearly evident when Mr. Trimble first entered his property in 1991 and were clearly evident when he sold out and departed in 2005. He used his garden tractor to mow along the

¹ The Belchers assign error due to the underlined portion of the finding.

established common boundary from time to time while he and his mother owned the property².” CP 866-867.

Finding of Fact I: “Ronald Miller and Michael Trimble had the same understanding of their common boundary. Mr. Miller plowed snow and graveled the Pierce driveway. They recognized that the “elbow” was on the Pierce property. The elbow was on the Pierce/Trimble property and is 2’ to 3’ higher than the surrounding fields. Accordingly, Mr. Miller obtained Mr. Trimble’s permission to put a power line along the elbow³.” CP 867.

Finding of Fact J: “In March, 2005, Kelly Davis met with Mr. Trimble to identify the boundaries and driveway on the Pierce property. Davis was told the common boundary – as shown by the posts and vegetation line – was the same as described by the Voiles, Sr. 23 years before. The corner markers, the intervening t-posts, and the vegetation lines were all observable.⁴” CP 867.

Finding of Fact K: “At the time the Pierces purchased from the Davises in August, 2007, the common boundary markers, or t-posts, all followed the same line of sight. This line was evident – easily observed – from the hill to the south as Mr. Pierce looked north. The markers could be observed in a line and a marker or post could be seen from the other markers, or posts. And, the Pierce alfalfa was 2’ to 3’, while the Miller alfalfa was about 6”. The intervening posts were spaced as to be visible, but not so close as to impede harvesting. They were about 50 to 75 yards apart. There was also, as of August 2007, a mowing ridge leading from post to post, again consistent with the aerial photos. The cut ridge is the result of years of different uses⁵.” CP 867-868.

Finding of Fact L: “Mr. Miller didn’t say anything about the location of the common boundary or the location of the Pierce driveway. Then, when Mr. Miller sold to the Belchers, he explained to the Belchers’ agent, Greg Olson in July, 2008, that the corners had to be changed due to a survey of adjoining property. ... Louise Belcher, at the time she purchased from Mr. Miller

² The Belchers assign error due to the underlined portions of the finding.

³ The Belchers assign error due to the underlined portions of the finding.

⁴ The Belchers assign error due to the underlined portions of the finding.

⁵ The Belchers assign error due to the underlined portions of the finding.

knew both the original location of the common boundary, and the location as Mr. Miller had come to understand it. He, in turn, indicated to Ms. Belcher that the surveyed northeast corner was to the east of the original corner. The surveyed corner did not line up with the other markers running to the south⁶.” CP 868..

Finding of Fact M: “Ms. Belcher, contrary to 26 years of use as agreed to by Voile, Sr. and Voile, Jr., father and son, started to cut the alfalfa to the east of the clearly observable common boundary. Mr. Miller had observed the long established common boundary while he was in possession. At no time over the years did he question the common boundary. Ms. Belcher was observing the common boundary later established by the September 21, 2009, survey by Douglas W. Noyes (Exhibit 112)⁷. The survey common boundary leaves a 14.72’ encroachment by the existing private drive. The existing private road was taken to be from edge of traveled width to edge of traveled width.” CP 868.

Finding of Fact N: “But she also knew of the historical common boundary which put the driveway wholly on the Pierce property. When she walked the Miller property, she was told by Greg Olson that the northeast corner post, or marker, had been moved the day before. She observed a number of posts on the Miller property, and stood where she would have seen four of the posts in line along the original common boundary. She was told by George Olson that the Voiles had put in the boundary but then a neighbor had surveyed his property, which would serve to change the Pierce-Belcher common boundary. She stated in the course of the walk-about that she might have to “blackmail her neighbor (Pierce)” for more pasture land. She hoped to expand her holdings to give her more pasture for her livestock.⁸” CP 869.

Finding of Fact O: “In 1995, four years after the Trimbles purchased from Voiles, Jr., and three years after the Millers purchased from Voiles, Sr., the common boundary is shown in GIS aerial photos (exhibits 18 and 19). They show the Trimble driveway on the Trimble property. The five years later, in 2000, a

⁶ The Belchers assign error due to the underlined portions of the finding.

⁷ The Belchers assign error due to the underlined portions of the finding.

⁸ The Belchers assign error due to the underlined portions of the finding.

DOT aerial photo shows the different agricultural uses, different hues, and the driveway barely within the Trimble property (Exhibit 23). Next, a 2005 DOT aerial photo and a GIS photo both show distinct uses of the open farm land, and the now Davis driveway well on the Davis property (Exhibits 20 and 25). Then two Google aerial photos, taken in 2007 and 2009, show only a slight indication of different uses (Exhibits 21 and 22)⁹. CP 869-870.

Finding of Fact P: “The metal posts marking the common boundary were photographed in the summer of 2007. They show the northwest corner of the Pierce property (Exhibit 32). The southwest corner (Exhibit 34); four or five metal posts looking south (Exhibits 35 and 40) and also looking north (Exhibit 30). The changed northwest corner – a change made by Mr. Miller – is shown along with the historical common boundary some 50’ to the west (Exhibit 37). There were also other metal posts, not located along the common boundary – not in any pattern. These served as two well-witching markers (Exhibit 115, pages 3 and 4); and a water line marker (Exhibit 115, page 2)¹⁰. CP 870.

Conclusion of Law A: “The plaintiffs have proved by clear, cogent, and convincing evidence that their common boundary has been certain, well defined, and physically designated upon the ground by corner posts and intervening marker posts – all clearly visible; together with the western edge of the Pierce driveway; the common boundary was also designated by the clearly visible, distinct agricultural uses on each side of the common boundary. *Lamm v. McTighe*, 72 Wn.2d 587, 593, 434 P.2d 565 (1967).” CP 871.

Conclusion of Law B: “Also, they have proved by clear, cogent, and convincing evidence that the predecessors in interest to the Pierces and Belchers, in good faith manifested 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, i.e., George Voile, Jr. and Debra Voile, Maryline Trimble and her son, Michael Trimble, Kelly Davis and Sheryl Davis, and finally Lance Pierce and Janette

⁹ The Belchers assign error due to the underlined portions of the finding.

¹⁰ The Belchers assign error due to the underlined portions of the finding.

Pierce as to the Pierce property; and George S. Voile, Sr. and Joanne Voile, Ronald Miller and Arlene Miller, as to the Belcher property, all made different uses of the respective fields, all observed and maintained the location of the Pierce driveway, or roadway. *Lamm*, at 593.” CP 871.

Conclusion of Law C: “Finally, they have proved by clear, cogent and convincing evidence the mutual recognition and acquiescence in the line continued for the period of time required to secure property by adverse possession, namely at least ten years; in fact, for a period of 26 years. *Lamm*, at 593.” CP 871.

Conclusion of Law D: “Neither the Belchers nor the Pierces trespassed on the other’s property in the aftermath of the Noyes survey. They each acted in good faith belief that they had a legal right to install or remove the stock fence posts. Hence (Belchers in reliance on the survey) and remove fence posts (Pierces pursuant to court order).” CP 871-872.

Ruling: “Beginning at the Northeast Corner of said West half of the Southwest Quarter of the Southwest Quarter; thence South 2°11’37” East, along the East line of said West half, 1349.28 feet, to the South line of said Section 10; thence South 87°58’29” West, along the South line, 20.74 feet; thence North 3°30’51” West, 1349.19 feet, to the North line of said West half; thence North 87°22’26” East, along said North line, 51.83 feet, to the Point of Beginning. Containing 1.12 Acres.” CP 872

B. Issues Presented.

1. Whether the Trial court erred in concluding that clear, cogent, and convincing evidence supported Findings of Fact **G,H,I,J,K,L,M,N,O** and **P**?
2. Whether the Trial court erred in making Conclusions of Law **A, B, C** and **D** without Findings of Fact supported by clear, cogent, and convincing evidence?
3. Whether the Trial court erred in failing to apply the appropriate clear, cogent, and convincing burden of proof in quieting title pursuant to *mutual recognition and acquiescence*?

4. Whether the Trial court erred in failing to quiet title in Appellants as Bona Fide Purchasers of 1801 Hutchison Road, as legally described in their chain of title?
5. Whether the Trial court abused its discretion entering a Ruling containing an arbitrary and capricious legal description establishing the parties' purported new shared boundary unsupported by Findings of Fact and Conclusions of Law?

III. STATEMENT OF THE CASE

In September 2009, a survey was done confirming that the boundary line for the two parcels at issue matches that legal description previously documented in the Deeds for these properties. Exs. 110, 112, 120. Yet, Respondents Pierce disavow the surveyed boundary, as well as the legal descriptions set forth in the Deeds, claiming instead that a "common boundary line" exists west of the survey line and the legal descriptions in the Deeds, to now include the entirety of a driveway curve as their property. CP 041-043. However, the Belchers maintain that the driveway curve, which is on their property only for a few feet, is a permissive encroachment solely due to rock conditions on the Pierce parcel. RP p. 23, ll. 18-22; p. 134, ll. 18-20; p. 279, ll. 9-14; p. 315, ll. 4-14.

The surveyed boundary is exactly where the Belchers understood it to be pursuant to their real estate Purchase and Sale Agreement, their transaction appraisal, the title report issued during their real estate

transaction, and the physical boundary shown to Louise Belcher along with a Stevens County Title Company Plat Map when she viewed the property prior to purchasing it. CP 375-404; RP p. 251, l. 17 - p. 253, l. 16.

In 1982, Thomas Franco owned the property at issue by Statutory Warranty Deed dated 11/14/80 and recorded 12/2/85 under Auditor's File No. 551270. Ex. 120. In 1982, Franco divided this property into two separate parcels - 1799 Hutchison Road (Pierce) and 1801 Hutchison Road (Belcher). Exs. 120 and 101 (**Appendix A**).

On 5/27/82, Franco conveyed both divided parcels at issue. Ex. 120. The parcel currently owned by the Pierces (1799 Hutchison Road) had been conveyed to George and Debra Voile Jr. by Statutory Warranty Deed dated 5/27/82. Ex. 120. The parcel currently owned by the Belchers (1801 Hutchison Road) had been conveyed to George S. and Joanne C. Voile, Sr. by Statutory Warranty Deed dated 5/27/82. Ex. 120. Neither Deed references the driveway curve in question nor any purported "common boundary" having been established by Thomas Franco. Ex. 120. Indeed, the 1799 Hutchison Road (Pierce) Deed succinctly describes the parcel as: *"That portion of the E 1/2 of the SW 1/4 of the SW 1/4 and that portion of the SE 1/4 of the SW 1/4 of Section 10, Township 33 North, Range 39 East, W.M, Lying South and West of Kerr County*

Road No. 423.” Ex. 120. The 1801 Hutchison Road (Belcher) Deed just as succinctly describes the parcel as: “*The W ½ of the SW ¼ of the SW ¼ of Section 10, Township 33 North, Range 39 East, W.M., in Stevens County, Washington.*” Ex. 120.

In July 1991, Voile’s Jr. sold what is now the Pierces’ parcel (1799 Hutchison Road) to Marylin Trimble by Statutory Warranty Deed dated 7/29/91 and recorded 7/22/97. Ex. 120. Again that Deed makes no reference beyond the legal description of the parcel being sold, to any purported “common boundary” much less to any agreement between the Voiles purportedly needing a new boundary in order to construct part of a driveway curve. Id. The court’s Finding of Fact **G** to that effect is erroneous and wholly unsupported by the record. Indeed, the Voiles never testified at trial.

After purchasing the 1799 Hutchison Road property from Voile’s Jr., Marylin Trimble subsequently entered into three additional transactions with her son, Michael Trimble, wherein the property was transferred to him -- then back to Marylin as a Joint Tenant in Common -- and then finally gifted to Michael Trimble in 1997. Ex. 120. These transactions are illustrated in CP 572, **Appendix B** hereto.

In September 1992, Voile’s Sr. sold their parcel (1801 Hutchison Road) to Ronald and Alene Miller by Statutory Warranty Deed dated

9/1/92 and recorded 9/3/92. Ex. 120. This Deed likewise makes no reference to any purported “common boundary” line being established. Instead, it includes the exact same legal description as described when it was originally divided by Thomas Franco in 1982. Ex. 120. That description in turn comports with what was later represented to the Belchers via their Real Estate Purchase Agreement and the Stevens County Title Company records. Exs. 120, 103-107.

In March 2005, the Trimbles in turn sold the 1799 Hutchison Road property to Kelly and Sheryl Davis by Statutory Warranty Deed dated 3/26/05, and recorded 3/28/05. Ex. 120. Again this Deed is silent as to any purported “common boundary” line and continued to only include the legal description originally crafted by Franco. Id. The court’s Finding of Fact **G** stating the Pierce property had been “*owned by Voile, Jr., the Trimbles, and the Davises from May 27, 1982, to July 18, 2008, or for 26 years*” is another indication of the extent to which the Judge erroneously misconstrued evidence. Here, the Judge used the date the Belchers purchased their property, 7/18/08, as the Pierces purchase date in order to arrive at “26 years” of ownership. The fact is, the Pierce property was owned by Voile, Jr., the Trimbles, and the Davises from 5/27/82, to 8/28/07 or a total of 25 years.

The Davises sold their parcel (1799 Hutchison Road) to the Pierces on 8/28/07 by Statutory Warranty Deed recorded 8/30/07, again with no reference to any “common boundary”. Ex. 120.

On 7/18/08 by Statutory Warranty Deed, the Millers sold their parcel (1801 Hutchison Road) to the Belchers. The Deed was recorded 7/22/08. Ex. 110.

The significance of the foregoing chain of title is that none of the Deeds over the years indicate the property boundaries are anything other than what has been duly recorded ever since 1982. Exs. 110, 120. Significantly, the Pierces’ chain of title even includes direct reference to a 10 foot wide **access easement** granted in March 1997 by prior owner Trimble to Washington Water Power Company (“WWP”) for the purpose of providing electrical service. Ex. 120. This access easement specifically references the Pierces’ western boundary line exactly the same as set forth in the legal descriptions contained in all of the preceding **and** subsequent Deeds for these parcels. Ex. 120. If there had actually been any purported “common boundary” as of 3/8/97 when the access easement was granted to WWP different from the legal description, it certainly was neither acknowledged nor recognized by Trimble. Indeed, the easement legal description he signed off on, tied the 10 foot easement directly to the legal boundary line. “[A]n easement for a 10 foot wide easement begins at a

junction box on lands of the Grantor and runs in a Westerly direction through said lands to the Westerly property line...” as opposed to some unidentified or unspecified “common” line which the Pierces are urging here. Ex. 120.

Undisputedly, when Miller showed his property to the Belchers, he advised them both orally and in writing, as to the location of the property boundary lines corresponding to the legal description in the Deed. CP 376, Ex. 110. The Belchers bought their parcel in reliance on these representations and understanding. *Id.*; RP p. 51, l. 17 - p. 253, l. 16.

Only after purchasing their parcel did the Belchers become aware of the Pierces’ claim that the entire driveway, including the curve, was purportedly situated wholly on Pierce’s parcel. CP 376. The Belchers disputed the Pierces’ claims of ownership to that few feet of property on which the driveway curve was situated. Additionally, the Pierces’ raised newly asserted claims to an additional 50 to 60 feet of the Belcher’s property running the **entire length** of the actual boundary described in the Deeds. CP 005 In their Complaint, the Pierces theorized as to how the shared boundary came to be when stating (“*he [Franco]... then staked and monumented on the ground the common boundary between the two (2) parcels he intended to create with PVC pipe on the corners and green “T” posts painted orange on top, spaced periodically in between the corners.*

This was done to keep the entirety of the developed access road ... on the Eastern Parcel currently owned by PIERCE.") CP 005. Of course their unsubstantiated averment made in their Complaint was never proven by Respondents Pierce at trial. In order to put the Pierces' claims to rest, the Belchers hired Columbia Land Surveying to conduct a survey. RP p. 264, ll. 8-13; CP 376-37; Ex. 112 - **Appendix C**.

On 9/21/09, Douglas Noyes, a licensed surveyor with Columbia Land Surveying, recorded the survey he conducted of 1801 Hutchison Road. RP p. 264, ll. 10-21. Thereafter, towards the end of October 2009, the Belchers began constructing a fence on the surveyed boundary line. RP p. 265, ll. 13-24.

At some point, Respondents Pierce called the Belchers' predecessor in title, Ronald Miller, to discuss the boundary line dispute. CP 193. During that phone call, Miller advised Respondents Pierce that the Pierces' belief as to where the boundary line existed, with respect to their driveway, was a mistake. Id. However, in an attempt to mediate the boundary line dispute between the Belchers and the Pierces, Miller offered to use his heavy machinery for free and to donate his time to excavate the Pierces' rock in order to adjust the driveway curve so that it would sit squarely upon the Pierces' property. Id. Respondents Pierce refused this offer and instead initiated litigation against the Belchers, seeking a

preliminary injunction and quiet title to a substantial strip of the Belcher's property west of the legal boundary described in the Belcher's Deed. Id.; RP p. 202, l. 11 – p. 203, l. 10; CP 001-010.

On 10/22/09, the same day Respondents Pierce filed their Complaint to Quiet Title, they filed a Motion for a Temporary Restraining Order. CP 001-037. Ex parte, on the same date and without any notice to the Belchers, the Trial court entered a Temporary Restraining Order mandating the Belchers "*immediately remove any and all fences and/or other obstructions situated upon, across or along the existing access road on the property in dispute...*" RP p. 300, ll: 16-25.

On 10/27/09, the Trial court, again without notice to the Belchers, entered an Order Authorizing Respondents Pierce to Remove Gate/Fence Posts stating "*Plaintiffs ... are hereby authorized to remove the six (6) Gate/Fence Posts from the North/South portion of the easement roadway.*" CP 056.

However on 10/29/09, and prior to having Appellants Belcher served with the October 27, 2009 Order, Respondents Pierce entered onto the Belchers' property and began removing posts with a backhoe. RP p. 268, ll. 11-23; p. 301, ll. 9-11. It was only after Mrs. Belcher contacted the local Sheriff's office that she was served with the 10/27/09 Order Authorizing Plaintiffs to Remove Gate/Fence Posts. Id.

In utilizing his backhoe to remove six wooden fence posts, Respondent Pierce also removed a t-post and its connected recorded survey marker which had been commissioned for placement at considerable cost to the Belchers. RP p. 269, ll. 9-22; p. 273, ll. 15-18. The use of the backhoe irreparably damaged the six wooden fence posts, the t-post and the survey marker. RP p. 270, ll. 18-24. The use of the backhoe and the illegal removal of the t-post and survey marker disturbed the Belchers' possessory right to their real property and caused actual and substantial damage. RP p. 270, ll. 18-24.

On 11/19/09, Appellants Belcher filed their Answer and counterclaimed to Quiet Title and for Trespass. CP 246-261.

IV. ARGUMENT

A. Standard Of Review.

A quiet title action is a claim for equitable relief. Kobza v. Tripp, 105 Wn. App. 90, 95 (2001). Trial courts have broad discretion to fashion equitable remedies. In re Foreclosure of King County Liens, 123 Wn.2d 197, 204 (1994). Whether a trial court erred in establishing a boundary line between adjoining properties is reviewed for abuse of discretion. Id. A trial court abuses its discretion when its ruling is based on untenable grounds or reasons. Wilcox v. Lexington Eye Inst., 130 Wn. App. 234, 241 (2005).

“A party claiming title to land by mutual recognition and acquiescence must prove” the requisite elements by *“clear, cogent, and convincing evidence.”* Merriman v. Cokeley, 168 Wn.2d 627, 630 (2010). Here, Respondents Pierce had the burden of proof under a clear, cogent, and convincing standard with respect to this boundary dispute. Id. Washington appellate courts review a trial court’s findings of fact for substantial evidence. Green v. Hooper, 149 Wn. App. 627, 641 (Div. III, 2009). *“Evidence is substantial if it is sufficient to persuade a fair-minded person that the declared premise is true.”* Id. A trial court’s conclusions of law are reviewed de novo. Id.

The trial court’s ruling, CP 872, and specifically the legal description of the land quiet titled to Respondents Pierce, does not comport with its Findings of Fact and Conclusion of Law **A**, but is instead based upon untenable grounds – namely the adoption of an arbitrary boundary selected and reduced to a legal description by a surveyor paid for by Respondents Pierce. As such, the Ruling constitutes an abuse of discretion and must be reversed. Furthermore, because the Trial court’s decision here to quiet title was based upon erroneous Finding of Facts **G, H, I, J, K, L, M, N, O, and P**, and a misapplication of Washington law, its grant of quiet title must be reversed. CP 864-872.

B. The Findings Of Fact And Conclusions Of Law Finding That A Common Boundary Had Been Established By Mutual Recognition And Acquiescence, Were Not Supported By Substantial Evidence.

In order to prove a boundary has changed due to *mutual recognition and acquiescence*, the moving party must prove their case by clear, cogent, and convincing evidence. Merriman v. Cokeley, 168 Wn.2d 627, 630 (2010). In another recent boundary line case where Judge Nielson was reversed, the requisite elements needed to meet this standard of proof were addressed by this Court.

*“(1) The line must be certain, well defined, **and** in some fashion physically designated **upon the ground...**; (2) in the absence of an express agreement establishing the designated line as the boundary line, the adjoining landowners, or their predecessors in interest, must have in good faith manifested, by their acts, occupancy, and improvements with respect to their respective properties, a mutual recognition and acceptance of the designated line as the true boundary line; and (3) the requisite **mutual** recognition and acquiescence in the line must have continued for that period of time required to secure property by adverse possession.”*

Green, supra at 641, (Emphasis added). *“To meet this standard of proof, the evidence must show the ultimate facts to be **highly probable.**”*

Merriman v. Cokeley, supra 630-31 (emphasis added). The period of time required to secure property by adverse possession is ten years. Id.; RCW 4.16.020.

Here, the Pierces failed to provide any evidence that proved by a **clear, cogent, and convincing** standard that any of the three requisite factors were met. Further, there is no evidence in the record that establishes it is “highly probable” the recorded boundary line was altered for even a portion of the property line, much less for the arbitrary length of 1,349.28 feet of boundary described in the Court’s Ruling. CP 872. Nor is it **highly probable** based on the evidence presented at trial that the predecessors-in-interest **mutually** agreed to or acquiesced to an altered boundary line in part, much less for the entire length of the property as Ruled by the Trial court.

1. The Pierces Failed To Establish A Certain, Well-Defined, Physically Designated Boundary Different From The Legally Recorded Boundary.

Our Supreme Court has held that more is needed than isolated survey markers when an area is overgrown. Merriman v. Cokeley, *supra* at 632. *“In order to establish the first element of mutual acquiescence, the purported boundary line ‘must be certain, well defined, and in some fashion physically designated upon the ground.’”* Green, *supra* at 642, citing Lamm v. McTighe, 72 Wn.2d 587, 593 (1967). Here, as in Green, the survey (Ex. 112) prepared by Douglas Noyes, a surveyor hired and directed by the Pierces to survey an arbitrary line where they wanted a boundary to be recognized as the new boundary, disproves the claim that

any certain, well defined boundary line existed along “mow” lines or a series of t-posts. As shown by Noyes’ September 2009 survey, there are no monuments, driveway, or fence lines along any purported “mow” lines claimed by the Pierces to support the Court’s Ruling. CP 872.

There *was* evidence presented at trial about random t-posts, set on the Belchers’ property (1801 Hutchison Road) fifty to seventy-five yards apart. However, there was no evidence that these posts were ever placed as “boundary” markers. In fact, the Pierces presented no evidence from any witness as to who even set the posts, or when they were supposedly placed, or much less why they were placed.

The only undisputed evidence presented in that respect was by the Belchers who established that the t-posts were previously set by a well-witcher to designate sources of underlying witched water. RP p. 82 ll. 5-10; p. 248, ll. 13-23. Mrs. Belcher testified the previous owners of 1801 Hutchison Road, the Millers, had identified the randomly placed t-posts as well-witching posts, staked to identify potential underlying sources of water. *“I noticed there were random posts around the house and out back.... I came to understand that those were all for well witching.... it shows an underlying water source.”* RP p. 248, ll. 17-23. Realtor Greg Olson corroborated Mrs. Belcher’s testimony when he testified that the t-posts were installed by a well-witcher. *“There was several other steel*

posts that Ron [Miller] had put in for well sites when he got it – when Mr. Miller had it water witched or for a dowser.” RP p. 82, ll. 5-10. Additionally, Respondents’ surveyor Doug Noyes testified he never even saw the well-witching posts, because they were obscured from view by grass that was overgrown and “*close to head height.*” “*When I was there, the grass was quite tall and in bloom ... I did not see them from any position that I used.*” RP p. 218, ll. 13-15, p. 219, l.23. Even Respondent Pierce testified that on the first day he ever saw the property, the very day he made the offer to buy, he did not actually notice the t-posts because “*they were in the hay. The hay was up this high (to his belly button)*”. RP p. 119, 23-24; p. 150, ll. 19-23; p. 159, ll. 16-18. There was no evidence presented at trial allowing the court’s conclusion, as a matter of law, much less by a clear, cogent, and convincing standard, that two obscured well-witching posts somehow established a clear, well-defined boundary line on the ground.

Over the years, portions of the 53 acres once owned by Franco had been farmed for hay. RP p.39, ll. 18- p.40, ll.15. Hay farming continued on the two divided parcels; sometimes jointly, sometimes not. RP p. 15, ll.2-13; p.119, ll.14-24; p. 130, ll.3-13; p.144, ll.5-p. 145, ll.14; RP p.205, ll.2-p.207, ll.16. The farming and mowing was done at times by non-owners on a share-crop basis. RP p.206, ll1-12. Depending upon the year,

and who was actually doing the farming, the nature of the haying operations, including when and how hay mowing was conducted. Id.; RP p. 15, ll.2-13; p.119, ll.14-24; p. 130, ll.3-13; p.144, ll.5-p. 145, ll.14; RP p.205, ll.2-p.207, ll.16.

Mow lines likewise changed during different time periods based on the owner's arrangements made with the farmers or mowers involved. Exs. 18, 23, 25, 21, and 22. Michael Trimble, the previous owner of the Pierce's property, testified that more land had been harvested to the South in 2000 than in 2005. RP p. 60, ll. 5-24. Indeed, the mowing practice itself visibly differed as evidenced in the 1995, the 2000, and the 2005 aerial photographs. Exs. 18, 23, 25.

Finally, the mow lines at issue here are not and cannot be by fact or law, a "*well-defined*" boundary line, as they change by necessity during each year depending upon the growing season, rainfall, and personal harvest decisions of the crop owners, and not necessarily the property owners. "*The line must have certain physical properties such as visibility, permanence, stability, and definite location. There should be occupation or possession to a visible line marked definitely by monuments, fence lines, or buildings. For example, the edge of a hayfield is not considered a sufficiently visible line....*" (Emphasis added); see Proof of Boundary Established by Parol Agreement or by Acquiescence of Adjoining

Landowners, § 11 - Requirement of mutual acquiescence in boundary, 82 Am.Jur. Proof of Facts 3d 227, published 2005, updated June 2011.

In no way could a seasonal crop line (the alleged edge of the hayfields) as evidenced here, provide clear, cogent, and convincing evidence to the Belchers of a purported altered boundary line different from the legal description contained in the Deed. This fact is underscored by the holding in Skov v. MacKenzie-Richardson, Inc., 48 Wn.2d 710, 715 (1956), that “*occasional grazing*” is insufficient to establish boundary by acquiescence. If occasional grazing is insufficient, surely periodic and varied harvesting activity is insufficient as well. To find otherwise would create potential far reaching and serious boundary dispute implications for all adjoining properties farmed throughout the state.

At trial, the Pierces put great stock in the fact that periodic hayfield mow lines between the two properties as depicted in various photos, apparently served as the “well defined” line “upon the ground” requirement set forth in Green v. Hooper, supra. However, what the Pierces’ ignore in arguing that hay “mow” lines constitute a certain, well-defined, and physically designated boundary line, is the question of which “mow” line is to be used in this case since they varied year to year? The one from 1995, 2000, 2005, 2007, or 2009? Exs. 18, 19, 23, 25, 21, and 22. Each of these photos visually depicts different “mow” lines, if indeed

that is actually what is being depicted, as opposed to just different topographical colors and highlights. Id. After all, the sources of photo 18 and 19 specifically disclaim accuracy and state that the images “*do not represent a legal survey of the land and are for graphical purposes only.*” Id. As photos 21 and 22 are simply printouts from Google Earth, they do not purport to represent legal surveys. CP 502-505, RP p. 142, ll. 19- p. 144, ll.4. Further, these two Google aerial photos only illustrate the condition of the 1801 real property as it existed the day the photo was taken – partially harvested. These aerial photos do not prove anything regarding the establishment of a boundary line. Indeed, no witness with foundation was offered by Respondents Pierce to testify about what the photos actually depicted. RP p. 142, ll.19-p.144, ll.4; p.197, ll.14-25. The Trial court’s erroneous Findings of Fact **O** and **P** are contrary to and unsupported by this evidence.

The ‘mow line argument’ advanced at trial was simply a specious litigation stretch in an attempt to meet the rigid requirements of Lilly v. Lynch, 88 Wn. App. 306, 316 (Div. II, 1997). After all, this case started as a dispute over just a few feet of driveway curve that permissively encroached upon the Belchers’ property. However, in order to argue for a new boundary realignment for the entire length of the property, the Pierces had to invent a different theory to secure more than the driveway curve.

The fact is, the Pierces' needed to expand beyond the driveway curve in order to facilitate moving their oversized construction equipment onto their parcel at 1799 Hutchison Road. CP 199, RP p. 153, ll.7-14; p. 177, ll.7-179, ll.21.

Respondents Pierce also came to argue that northern boundary markers existed to support their theory that a new boundary had been established. Yet, in reality that evidence did nothing of the sort. RP p. 249, ll. 13-20; p. 81, ll. 3-15; p. 217, ll. 11-12. Mrs. Belcher testified she had been advised by her predecessor in title, the Millers, that the farthest west metal marker, tied to white PVC pipe, was an indicator of an old water line leading to the well-head on the Pierces property. *"It's my understanding that there's an old water line here and that's marking the old water line that apparently is not used anymore."* RP p. 249, ll. 13-20. The farthest east marker, painted bright orange, was identified as the legal boundary marker. RP p. 81, ll. 3-15. Furthermore, Respondents' own surveyor Noyes testified he located both posts but was unable to determine which one was or had ever been relied upon as a boundary marker. RP p. 217, ll. 11-12.

Numerous reported cases support the conclusion that the Pierces failed to meet their legal and factual burden regarding a well-defined boundary line. See e.g., Merriman, 168 Wn.2d 631 (2010) (more than

isolated survey markers are required where the disputed area is overgrown); Waldorf v. Cole, 61 Wn.2d 251, 255 (1963) (disputed strip of land unused; only improvement was rockery built against a dirt bank); Scott v. Slater, 42 Wn.2d 366, 367-68 (1953) (only a row of pear trees; no fence or other mark to define line; cultivation of disputed strip varied), overruled on other grounds by Chaplin v. Sanders, 100 Wn.2d 853 (1984); Green v. Hooper, 149 Wn. App. 627, 642 (Div. III, 2009) (wall constructed of railway ties without other monuments, roadways, or fence lines); Lloyd v. Montecucco, 83 Wn. App. 846, 855 (1996) (concrete blocks moveable by tides, intermittent moorage, and the seeding of oysters and clams), review denied.

2. The Pierces Failed To Establish That The Predecessors In Interest To Both Properties Mutually Recognized And Acquiesced To An Altered Boundary.

The trial court's Conclusions of Law A and B are factually and legally unsupportable because the Pierces failed to prove by clear, cogent, and convincing evidence that the adjoining property owners "by their acts, occupancy, and improvements" ever mutually recognized and acquiesced to well-witching posts and/or "mow" lines as a new boundary line upon the ground.

In Green v. Hooper, supra, where this Court overturned the Trial court, it was held that there was no evidence to show that the purported

boundary line, a retaining wall comprised of railroad ties, was ever “*recognized by the parties as a true boundary and not just a barrier.*” Id. at 643-44. Here, just as in Green, reversible error occurred in holding the element of mutual recognition was met.

In fact, the Pierces only provided testimony from two prior owners of their property, Davis by declaration, and Michael Trimble. Of those two, only Trimble ever lived on the property, and even his testimony failed to support the Pierce’s theory. Tellingly, no prior owner of 1801 Hutchison Rd. (Belcher’s property) testified to an agreement, recognition or acquiescence of any mutually changed boundary between the parcels!

a. Prior Owner Michael Trimble’s Testimony Regarding The Property Boundary.

The Trial court’s Finding of Fact **H** and **I** are erroneous and not supported in the record by clear, cogent and convincing evidence. Michael Trimble testified he had never walked the boundaries, and more specifically, had never walked the west boundary! RP p. 58, ll. 11-14. He only visited the property twice a month, between 1991 and 1994. RP p. 20, ll. 5-12. He did not reside on the property until 1998 when he relocated from the Seattle. Id. Additionally, Trimble testified he never fenced what he believed to be a boundary line and only mowed the property directly around the cabin. RP p.3 9, l. 24 -p. 40, l. 2.

Furthermore, he testified he was the one who permitted his neighbor Miller in 1997, to have a power pedestal installed on his property, about ten feet from the outside edge of the driveway curve. RP p. 45, ll. 7-23. When the power pedestal was installed, WWP obtained an easement executed by Trimble granting an easement described as a “*ten foot wide easement begins at a junction box on lands of the grantor and runs in a westerly direction through said lands to the westerly property line for the purpose of providing electrical service.*” RP p. 36, ll.6-12; p. 49, ll. 9-19; Ex. 58. Trimble also testified there was never any issue between him and Miller regarding Trimble’s use of the driveway, and in fact, they had never had any discussions of ownership of the road whatsoever. RP p. 54, ll. 14-16, p. 59, ll. 19-21.

When instructed to use the photographic exhibits to identify the corner boundary markers, Trimble consistently identified the southwestern corner of the Pierce property as being at the very southern corner of the “mow” line, and the northwestern corner of the Pierce property as being the very northern corner of the “mow” line. RP p. 16, ll. 2-4; p. 37, l. 24 - p. 38, l. 11; see Ex. 18; RP p. 39, ll. 8-17, see Ex. 25. Only after Respondents’ counsel engaged in a series of leading questions did Trimble change his testimony regarding the location of the southern and northern boundary markers. RP p.30, ll.3-9; p.37, ll.12-24; p. 40, ll.20-p.42, ll.10.

Ultimately, Trimble admitted that the apparent “mow” line depicted in the 2005 aerial photo which he relied upon to testify about the Pierce’s theory of an allegedly certain, well-defined, and physically designated boundary line, was completely different than the “mow” line depicted in the 2000 aerial photo. RP p. 60, ll. 11-24; Exs. 13 and 25.

Notably, Trimble also failed to provide any evidence that the well-witching posts were ever relied upon as a supposedly altered boundary and even misidentified one of the posts located to the west of the Belchers’ home. RP p. 54, ll. 6-12.

b. Prior Owner Kelly Davis’ Declaration Testimony Regarding the Property Boundary.

The Trial Judge’s Findings of Fact **J** and **K** regarding prior owner Davis meeting with Trimble; viewing the boundary posts and vegetation line; and the state of the land and visibility of the intervening posts when Davis sold to the Pierces, are erroneous and not supported in the record by clear, cogent, or convincing evidence.

Trial testimony of prior owner Davis’ was solely through two previously executed Declarations obtained by Pierces’ counsel. Davis, a real estate Broker from Colville, Washington does business as Century 21, Kelly Davis, Inc. The Davis Declarations state “*During my ownership of Stevens County Assessor’s Tax Parcel No. 214800 I became very familiar*

with the corner markers located in the Northwest corner and Southwest corner of the real property.” CP 080; 408.

Yet, Davis utilized the Davis/Pierce Seller’s Disclosure Statement to disclaim any personal knowledge of the property he was selling to the Pierces. *“I purchased the property for rental investment. Have never lived in it nor have I spent much time in it. Purchaser is welcome to have inspections done at their expense to satisfy any concerns.”* Ex. 123. Trimble testified he could not recall describing well-witching posts as a boundary to Davis and affirmed he had never physically shown Davis any boundary as he *“only spoke to him by telephone.”* RP p. 28, l. 20 -p. 29, l. 11.

In turn, Miller, whose trial testimony consisted solely of a previously executed Declaration, stated that before Davis sold the property to the Pierces, he spoke with Davis by phone and notified him that he was mistaken as to where the western boundary of the Davis’ property was located. CP 193.

Kenneth Anderson, the Pierces’ real estate agent, testified at trial that Davis never physically showed him where the boundaries were, but instead only communicated the location of them to him over the phone. RP p. 107, ll. 11-17. Anderson further testified he did not walk the boundaries, even when discussing them with Davis, and the phone call

with Davis was the only action he took to confirm the location of the boundaries for his clients, the Pierces. RP p. 111, ll. 5-17.

Respondent Pierce himself testified he never met Davis, his direct predecessor in title, and never spoke to him before purchasing the property regarding the boundaries or otherwise. RP p. 180, l. 17 - p. 181, l. 10.

The Seller's Disclosure Statement executed by Davis specifically indicated there were no "*encroachments, boundary agreements, or boundary disputes.*" Ex. 123. The Davis/Pierce Seller's Disclosure Statement also indicated that Davis did not know if there were "*any rights of way, easements, or access limitations that may affect Buyer's use of the property.*" Ex. 123.

Contrary to the Trial court's erroneous findings and conclusions, the Davis declaration testimony does not establish that he physically walked the boundaries; or that his neighbor Miller or his predecessor in title Trimble had communicated to him in any form or fashion that the "fence line" represented a mutually recognized or agreed upon changed boundary; or that he had lived upon the property; or that he personally showed Pierce the western boundary; or indicated to Pierce that the well-witching posts were indicative of an agreed upon altered boundary.

c. Ronald Miller's Knowledge Regarding Location Of The Actual Property Boundary.

The Trial Judge's Findings of Fact **L**, **M**, and **N** and Conclusions of Law **A**, **B**, and **C** are erroneous and not supported in the record by clear, cogent, or convincing evidence.

Gregory Olson, a realtor working with Davis at Century 21, and Miller's real estate agent, testified regarding the intermediate t-posts between the northeastern and southeastern corner markers on the Belcher property. He stated the steel posts located **throughout** Miller's property had been put in by Miller "*for well sites when he got it – when Mr. Miller had it water witched or for a dowser.*" RP p. 75, ll. 16-20.

The Miller/Belcher Seller's Disclosure Statement, executed by Miller, advised that there were no "*encroachments, boundary agreements, or boundary disputes.*" RP p. 251, l. 17 - p. 253, l. 5; Ex. 107. The Miller/Belcher Seller's Disclosure Statement also asserted there were no "*rights-of-way, easements, or access limitations that may affect Buyer's use of the property.*" Id. Denise Rogers, the real estate agent for Davis', testified that Miller never spoke with her about the boundaries. RP p. 70, l. 6.

Kimberly Merritt, the Belchers' real estate agent, testified she contacted Olson, the Miller's listing agent for 1801 Hutchison Road and

asked that the boundaries be marked so that Mrs. Belcher would know exactly where they were located. RP p. 308, ll. 2-10. Merritt testified that prior to Mrs. Belcher's second visit to the property, the corner boundary markers had been marked with orange paint. Id. Mrs. Belcher testified that during her second visit to the Miller property she inquired as to the purpose and/or reason behind the numerous posts randomly placed throughout the property. RP p. 248, ll. 16-23. She came to understand that the posts had been placed by a well-witcher to identify potential underlying sources of water. Id.

Realtor Olson testified he only showed Mrs. Belcher one boundary marker at the northeastern corner of the Belcher's property. RP p. 74, ll. 17-19. The marker he identified as the northeastern corner marker was orange and situated in front of a large bush next to the roadway. RP p. 80, l. 25 - p. 81, l. 15.

All of the foregoing evidence is quite telling when viewed against Washington law.

"In the absence of an agreement to the effect that a fence between the properties shall be taken as a true boundary line, mere acquiescence in its existence is not sufficient to establish a claim of title to a disputed strip of ground.... Rather, an acquiescence must consist in recognition of the fence as a true boundary line, and not mere acquiescence in the existence of a fence as a barrier."

Green v. Hooper, supra at 641-642, (emphasis added).

The Pierces could not and did not provide any evidence that any 1799 Hutchison Road residents or owners ever acquiesced to either well-witching posts or mow lines being a new or altered boundary line. The mere existence of ever-changing mow lines, a few well-witching posts, and a few feet of driveway curve, all of which are unconnected, is not enough factually or legally to establish that there was ever any mutual acquiescence to a changed boundary.

Furthermore, the Pierces failed to establish that any of the adjoining 1801 Hutchison Road landowners made sufficient use of the land in dispute to demonstrate mutual recognition of and acquiescence to well-witching posts and/or mow lines being a new “true” boundary line.

The Trial court’s findings and conclusions demonstrate a continuing misunderstanding of the necessary burden regarding *mutual recognition of and acquiescence* to a changed boundary under Washington law. Lamm v. McTighe, *supra* and Green v. Hooper. In Lamm, unlike the facts here, it was held that the property owners there had demonstrated mutual recognition and acquiescence through their acts, occupancy, and improvements by having cleared portions of their property up to the disputed boundary line, erected a fence, planted berry bushes, mowed the grass, and occasionally used the strip adjacent to the fence as a roadway. Supra at 590.

In Mullally v. Parks, 29 Wn.2d 899, 902-03 (1948), the Court held **mutual** recognition and acquiescence was demonstrated by and through the property owners' acts in clearing the property up to the disputed boundary line, planting ornamental trees, ferns, and flowers, building a fence and using the disputed strip as a play area for their children. However, in Waldorf v. Cole, 61 Wn.2d 251, 255-56 (1963), the Supreme Court held there was a "*complete lack of proof*" of mutual recognition and acquiescence because the disputed area "*was apparently not used and was essentially in its original condition.*"

The facts here closely mirror those in Waldorf. Here, the evidence concerning occupation or improvements illustrate that although the predecessors in interest did periodically grow hay and harvest over **parts** of the disputed area by themselves or others, the property owners never made any improvements, never planted any ornamental trees, flowers, or shrubs, never fenced, and never put the area to any other uses.

The evidence of mutual occupation and improvement at issue was required to be clear, cogent, and convincing. That burden was not even remotely met by Respondents Pierce. The Trial court committed error in concluding as a matter of law that the property owners preceding the Belchers and the Pierces, demonstrated mutual recognition of and acquiescence to periodic and changing mow lines, well-witching posts, or

a portion of a driveway curve becoming a new boundary line 1,349.28 feet in length.

3. The Pierces Failed To Establish Mutual Recognition And Acquiescence To Any Changed Boundary Occurring For Ten Consecutive Years.

The Trial court erred in making Conclusion of Law C, holding the Pierces had proved “*by clear, cogent and convincing evidence the mutual recognition and acquiescence in the line continued for the period of time required to secure property by adverse possession, namely at least ten years; in fact, for a period of 26 years.*” CP 871.

It appears that the same type of reversible error as made in Green, supra, holding that clear, cogent, and convincing evidence supported the mutual acquiescence element, has been repeated here as well. In Green, the Trial court was reversed because “*the Greens failed to sustain their burden of proving that ‘both parties acquiesced in the line for the period required to establish adverse possession – 10 years.’*” Green, supra at 644. Here, as in Green, Respondents Pierce failed to produce any evidence supporting the allegation that an altered boundary and especially for the entire length of the property (1349.28’), was recognized and acquiesced to for any discernable, uninterrupted 10-year period mutually by the parties.

Prior owner Trimble occupied 1799 Hutchison Road from 1998 to 2005, a period of seven years, before he sold the property to Real Estate Broker Davis. Ex. 120. Davis never lived on the property and disclaimed any knowledge of the property. Ex. 123. He owned the property for two years, from 2005 until 2007, when he sold to the Pierces. Id. Arguendo, the element of mutuality aside, even if Trimble had been able to positively identify any altered boundary manifested by the driveway curve sited on the Belchers' property, or well-witching posts, or periodic and changing mow lines, he could only do so for seven years, not ten. Davis himself could not and did not identify an altered boundary. Thus the requisite discernable 10-year period of time did not exist and certainly was not proven.

Miller, the prior owner of 1801 Hutchison Road, testified he had put Davis on notice that the boundary did not exist as Davis thought prior to selling in 2007. "*Prior to Mr. Davis selling the 1799 Hutchison Road property to the Pierces in 2007, I notified him the boundary between 1801 and 1799 was not what he thought it was....*" CP 193. This unrebutted evidence confirms that there was no mutual acquiescence to a new boundary and certainly no 10-year period.

The Trial court's strained conclusion that an altered boundary line existed in a certain, well-defined, physically demarked fashion is simply

not supported by any evidence much less clear, cogent, and convincing evidence. Respondents Pierce did not and could not prove the alleged new line was acquiesced to for the requisite, discernable 10-year period of time by even one of the parties, much less by **both**. The Trial court committed reversible error in finding that a common boundary was established by *mutual recognition and acquiescence*.

C. The Trial Court's Ruling Is Not Supported By The Findings Of Fact And Conclusion Of Law A .

Here, the Trial court abused its discretion in establishing the boundary line between the Belchers' and Pierces' property. A trial court abuses its discretion when its ruling is based upon untenable grounds or reasons. Wilcox v. Lexington Eye Inst., supra.

Prior to trial, Respondents Pierce arbitrarily and capriciously chose a post located on the northern edge of the Belchers' property and hired surveyor Noyes to "tie" that post in with the southeastern boundary post on the Belchers' property, and thereby create a new shared boundary. RP p.185, ll:1-2; RP p.214, ll.17- p. 215, ll6, p.217, ll.10-12. Respondent Lance Pierce testified he hired Noyes to define and depict from his perspective where 'he believed' the boundary line was located "*versus where the boundary line is with respect to the legal description.*" RP p.185, ll:1-21. Thereafter, Respondents Pierce instructed surveyor Noyes

to draft a legal description of that line. RP p. 212, ll.23-p.213, ll.11. Noyes testified that on his survey, the two circles with the + symbol in the middle represented the “*two posts that [he] tied at [Pierces’] request*” on the north end of the Belchers’ property. RP p.214, ll:17-22. These posts had nothing to do with the deed line. RP p. 214, ll:23-24.

As is clear from Exhibit 75, the west line stemming from either of the two randomly picked north posts to the south post is some distance from the western edge of the driveway. Ex. 75. That line also has no relation to any of the mow lines at issue. Exs. 75, 101, 102. Finally, the well-witching posts are not designated on the Noyes survey, thus there is no evidence that this new west line has any relation to the well-witching posts either. Ex. 75.

Yet, in Conclusion of Law A, the Trial court describes the certain, well defined, and physically designated common boundary as being clearly visible due to its location on the “*western edge of the Pierce driveway*”; the placement of the corner posts and intervening marker posts; and the distinct agricultural uses on each of its sides. CP 871. However, the Trial court’s Ruling, CP 872, simply adopted carte blanche surveyor Noyes’ definition of the new boundary as commissioned by Respondents Pierce when they hired him to create an arbitrary boundary that comported with their theory of the case.

Inexplicably when entering its Findings of Fact and Conclusions of Law, the Trial court entered a Ruling quieting title in the portion of the Belchers' property as described and depicted in the Noyes survey. CP 878; Exs. 73, 75. This is the very same strip of property Respondents Pierce arbitrarily selected and then commissioned Noyes to define and depict. Clearly, this description has absolutely no connection to the underlying Findings of Fact or Conclusion of Law A. The Trial court's Ruling, CP 872, was an abuse of discretion in adopting Respondents Pierces' commissioned legal description of the strip of land they sought to obtain by quiet title.

D. Belchers, As Bona Fide Purchasers, Are The Legal Owners Of The Disputed Portion Of Property.

The bona fide purchaser doctrine bars the Pierces' attempt to quiet title against the real property at issue. "*Under the bona fide purchaser doctrine, a person has a superior interest in property that he or she purchases (1) for value, (2) in good faith, and (3) without actual or constructive notice of another's interest in the property.*" Robin L. Miller Const. Co., Inc. v. Coltran, 110 Wn. App. 883, 892 (Div. I., 2002). Here, the Trial Court committed reversible error when it refused to quiet title in the disputed portion of property to the legal owners, the Belchers.

Substantial evidence supports a conclusion of law that the Belchers had a superior interest in the disputed portion of land.

“The law recognizes the importance of determining which of two purchasers has the superior interest. In discussing the bona fide purchaser doctrine, 8 G. Thompson, Real Property § 4290, at 222-23 (1963 repl.), states the purpose of the doctrine as follows:

*The land law has seen its years of progress marked by a continual struggle between one who had legal title to, or an equity or interest in or claim against real estate and one who in good faith parts with consideration in the honest belief that he is acquiring title from another. The law has long recognized that the massive public policy in favor of stimulation of commerce demands the fullest possible protection to a good faith purchaser for value. **The bona fide purchaser for value without notice is the favored creature of the law.**”*

Tomlinson v. Clarke, 118 Wn.2d 498, 508, (1992).

In the case of Friends of Columbia Gorge, Inc. v. U.S. Forest Service, 546 F.Supp.2d 1088, 1106 (D.Or., 2008), a federal court was requested to address issues concerning a closed roadway on federal land located in Skamania County, Washington. The road was needed to access private land for logging. The Court was required to address Washington State law concerning “boundary line acquiescence,” as well as “bona fide purchasers.”

“In general, a bona fide purchaser who acquires property without actual or constructive notice of an easement takes title without the encumbrance of the easement. Wilhelm v. Beyersdorf, 100 Wn. App. 836, 845-46, 999 P.2d 54, 60 (2000). A purchaser has inquiry notice, however, when the

purchaser is aware of facts that would be sufficient to “put an ordinarily prudent [person] upon inquiry” and, if the purchaser performed an inquiry into those facts, it would lead to discovery of a title defect or third-party interests in the property. Kirk v. Tomulty, 66 Wn. App. 231, 239-40, 831 P.2d 792, 797 (1992) (internal quotations and citations omitted). The issue is what easement Sirrah possessed that put the USFS on inquiry notice.”

Here, it is undisputed that the purported altered boundary line supposedly supported by t- posts (well-witching), a portion of a driveway curve, or ever-changing and periodic “mow” lines, is unrecorded. Thus, the central issue becomes whether the Belchers had either actual or constructive notice of the Pierces’ alleged interest in the disputed portion of land legally located within the 1801 Hutchison Road acreage. Where a successor-in-interest does not receive or have actual notice of the location of a claimed boundary, the occupancy or improvements should be reasonably sufficient to give the successor constructive notice of the location. See Johnston v. Monahan, 2 Wn. App. 452, 457 (1970).

“Notice need not be actual, nor amount to full knowledge, but it should be such information, from whatever source derived, which would excite apprehension in an ordinary mind and prompt a person of average prudence to make inquiry. ...It follows, then, that it is not enough to say that diligent inquiry would have led to a discovery, but it must be shown that the purchaser had, or should have had, knowledge of some fact or circumstance which would raise a duty to inquire.”

Levien v. Fiala, 79 Wn. App. 294, 299 (Div. I, 1995) (internal citations omitted).

First, the legal chains of title here contain no indication of any purported altered boundary. Second, as Mrs. Belcher testified, she understood the t-posts staked throughout the property were placed by a well-witcher as a means of identifying an underlying water source. RP p. 248, ll. 13-23. Accordingly, these posts were not notice to the Belchers of some purported altered boundary line. Third, the photographic evidence illustrates that the “mow” lines visibly differ from 1995, 2000, 2005, 2007, and 2009. Exs. 18, 23, 25, 21, and 22 respectively. Accordingly, the ever-changing “mow” lines could not have been notice of any purported altered boundary line.

.... *“Whether a person is a bona fide purchaser is a mixed question of law and fact.”* Id. *“A bona fide purchaser of an interest in real property is entitled to rely on record title; the protection afforded him by the real property statute, RCW 65.08.070, is unaffected by the vendor’s lack of good faith or by matters of which the vendor has notice.”*

Id. at 299-300.

Accordingly, the Belchers lacked any notice that they were supposedly receiving less than the property actually described in their Statutory Warranty Deed. All of the documents the Belchers relied upon when entering into the Miller/Belcher real estate contract, including, the Seller’s Disclosure Statement, affirmatively represented that 1801 Hutchison Road was not encumbered by any encroachments, boundary

agreements or boundary disputes and that there were no rights-of-way, easements or access limitations that would affect the Buyer's use of the property. RP p. 251, l. 17 - p. 253, l. 16; Ex. 107. Both the Millers and the Millers' real estate agent, Gregory Olson, personally confirmed the location of the property boundary when touring the property with Louise Belcher and her agent Kimberly Merritt. RP p. 74, ll. 17-19; p. 312, ll. 21-22; p. 308, ll. 7-10. All the documentation the Belchers received and relied upon in contemplating the purchase of 1801 Hutchison Road confirmed the boundary line comported with the visual tour given to Louise Belcher. RP p. 251, l. 17- p. 253, l. 16; Ex. 104-108. There were no physical demarcations that provided the Belchers with actual or constructive notice that the legal boundary was allegedly no longer functioning as the true boundary. Exs. 18, 23, 25, 21, and 22. Respondent Pierce admitted that Louise Belcher was not aware that the legal boundary was allegedly not operating as the true boundary when the Belchers purchased the real property at 1801 Hutchison Road. RP p. 184, ll. 1-25. Mrs. Belcher testified she was told and shown boundary markers that comport with the legal description contained in her chain of title, a boundary that wholly comports with the survey she had conducted. RP p.273, l.19 – p.274, ll.23.

Lastly, the Belchers' own real estate agent, Kimberly Merritt, stated both she and Mrs. Belcher were shown a boundary line and boundary marker by Gregory Olson. RP p. 308, ll. 7-10; p. 312, ll. 21-22. This boundary line comports with the legal description contained in the chain of title for both 1799 Hutchison Road **and** 1801 Hutchison Road, as well as the legal survey conducted by Columbia Land Survey. Exs. 109, 110, 112, 120.

The Belchers, factually and legally have proven that they are bona fide purchasers of the real property located at 1801 Hutchison Road, Addy, Washington, and that they own exactly what was represented to them, exactly what comports with the chains of title, the recorded Deeds and the Columbia Land Surveying survey. The Pierces have no legal or factual basis to claim ownership to any portion of the Belchers' real property and this Court should quiet title in 1801 Hutchison Road to the Belchers.

E. Finding Of Fact And Conclusion Of Law D Finding The Pierces Did Not Trespass Upon The Belchers' Property, Is Not Supported By Substantial Evidence.

An action for trespass is the "*intentional or negligent intrusion onto or into the property of another.*" Mielke v. Yellowstone Pipeline Co., 73 Wn. App. 621, 624 (1994) (citing Restatement (Second) of Torts). A claim of trespass does not require a permanent or recurring invasion.

Hoover v. Pierce County, 79 Wn. App. 427, 431-32 (1995). An intentional act occurs when the actor desires to cause the consequence of his act or where he believes that the consequences of his act will have the same results. Bradley v. American Smelting and Refining Co., 104 Wn.2d 677 (1985).

On 10/22/09, Respondent Pierce filed their Complaint and filed a motion for a Temporary Restraining Order. CP 001-037. Ex parte, on the same date and without any notice to the Belchers, the Trial court entered a Temporary Restraining Order mandating the Belchers “*immediately remove any and all fences and/or other obstructions situated upon, across or along the existing access road on the property in dispute...*” RP p.300, ll: 16-25. On 10/27/09, the Trial court, again without notice to the Belchers, entered an Order Authorizing Plaintiffs to Remove Gate/Fence Posts stating “*Plaintiffs ... are hereby authorized to remove the six (6) Gate/Fence Posts from the North/South portion of the easement roadway.*” However on 10/29/09, prior to having Appellants Belcher served with the 10/27/09 Order, Respondents Pierce entered onto the Belchers’ property and began removing posts with a backhoe. RP p.268, ll. 11-23; p.301, ll. 9-11. It was only after Mrs. Belcher contacted the local Sheriff’s office that she was served with the 10/27/09 Order Authorizing Plaintiffs to Remove Gate/Fence Posts. Id.

In utilizing a backhoe to remove six wooden fence posts, Respondents Pierce intentionally and illegally exceeded the Court's Order and removed a t-post and its connected recorded survey marker which had been commissioned at considerable cost to the Belchers. RP p. 269, ll 9-22; p. 273, ll. 15-18. The use of the backhoe irreparably damaged the six wooden fence posts, the t-post and the survey marker. RP p. 270, ll. 18-24. Although, the 10/27/09 Court Order allowed Respondent Pierce to remove fence posts, it did not allow him to irreparably damage the Belchers' property or remove and destroy a recorded survey marker. The use of the backhoe on the Belchers' property and the illegal removal of the t-post and survey marker disturbed the Belchers' possessory right to their real property and caused actual and substantial damage. RP p. 270, ll. 18-24. The Belchers filed a counterclaim for trespass which the Court by its Conclusion of Law **D**, erroneously dismissed. The evidence presented at trial clearly supports the claim that Respondents Pierce exceeded the Court's order by committing trespass. The Belchers request this Court reverse the Trial court, and find Respondents Pierce responsible for the damage inflicted by Respondent Pierce's trespass.

V. RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS

Based on RAP 18.1, RCW 48.30.015 and Olympic S.S. Co. v. Centennial Ins. Co., 117 Wn.2d 37 (1991), Appellants Belcher respectfully

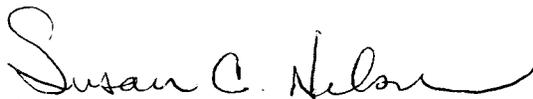
request an award of reasonable attorney fees and costs incurred below and on Appeal.

VI. CONCLUSION

The Belchers respectfully request that the Court reverse and vacate the Trial court's Judgment in its entirety, along with the corresponding Findings of Fact and Conclusions of Law which do not and cannot support the Court's arbitrary ruling. A significant portion of the Trial court's Findings of Fact are not supported by clear, cogent, or convincing evidence, leading in turn to erroneous Conclusions of Law and a Judgment providing for attorney fees, costs and an arbitrary boundary line adjustment set forth in the Court's Ruling that must be reversed. Additionally, the Belchers respectfully request that the Court quiet title in the disputed portion of land to them as bona fide purchases and legal owners. Finally, the Belchers respectfully request that the Trial court's Conclusion of Law **D**, with respect to the Respondents trespass, be reversed.

DATED this 1 day of August, 2011.

DUNN & BLACK, P.S.

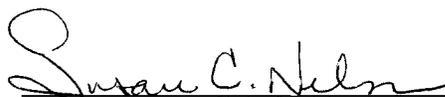


ROBERT A. DUNN, WSBA #12089
SUSAN C. NELSON, WSBA #35637
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the / day of August, 2011, I caused to be served a true and correct copy of the foregoing document to the following:

- | | | |
|-------------------------------------|------------------|-------------------------|
| <input type="checkbox"/> | HAND DELIVERY | Chris A. Montgomery |
| <input checked="" type="checkbox"/> | U.S. MAIL | Montgomery Law Firm |
| <input type="checkbox"/> | OVERNIGHT MAIL | 344 East Birch Avenue |
| <input type="checkbox"/> | FAX TRANSMISSION | P.O. Box 269 |
| <input type="checkbox"/> | EMAIL | Colville, WA 99114-0269 |


SUSAN C. NELSON



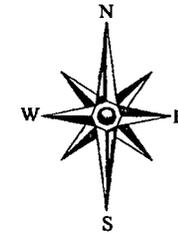
APPENDIX A

APPENDIX B

Thomas Franco					
<u>1799 Hutchison Road</u>			<u>1801 Hutchison Road</u>		
Purchase Date	Recording Date	Grantee	Purchase Date	Recording Date	
5/27/1982	11/25/1992	George Voile, Jr. & Debra L.	5/27/1982	7/1/1988	George S. Voile, Sr. & Joanne C.
7/29/1991	7/22/1997	Marylin Trimble			
2/29/1992	4/20/1992	Michael Trimble	9/1/1992	9/3/1992	Ronald & Alene Miller
9/3/1994	9/19/1994	Michael Trimble & Marylin Trimble			
7/17/1997	7/17/1997	Michael Trimble			
3/26/2005	3/28/2005	Kelly Davis			
8/28/2007	8/30/2007	Lance & Janette Pierce	7/18/2008	7/22/2008	Louise & Albert Belcher

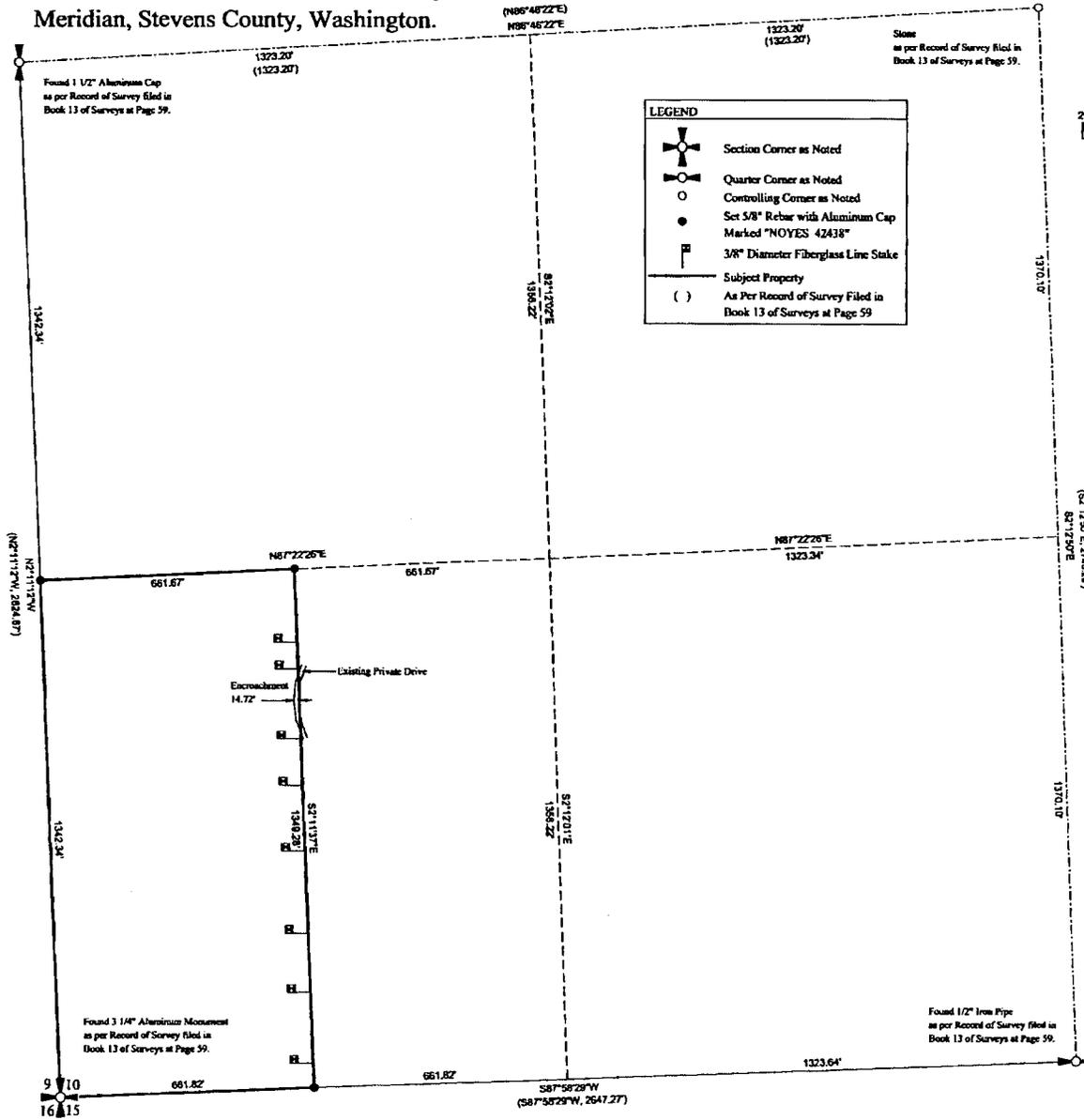
Record of Survey

of the West Half of the Southwest Quarter of the Southwest Quarter
of Section 10, Township 33 North, Range 39 East, Willamette
Meridian, Stevens County, Washington.



Basis of Bearing:

As per Record of Survey filed in Book 13 of Surveys at Page 59 (AFN 9309973).



LEGEND

- Section Corner as Noted
- Quarter Corner as Noted
- Controlling Corner as Noted
- Set 5/8" Rebar with Aluminum Cap Marked "NOYES 42438"
- 3/8" Diameter Fiberglass Line Stake
- Subject Property
- As Per Record of Survey Filed in Book 13 of Surveys at Page 59

Method of Survey:
This Survey was performed with a Nikon DTM-352 Total Station using forced centering field traverse techniques. Closure meets or exceeds the requirements of the State of Washington.

Auditors Certificate:
Filed for record this 21st day of September 2009 at 15:11 P.M.,
in Book 29 of Surveys, at Page 154, at the request of
Columbia Land Surveying.
Document No. 20090008411 ss Tim Gray
County Auditor
Fee 128.00 By: F. Clinton
Deputy

Surveyors Certificate:
This map correctly represents a survey made by me or under my direction in conformance with the requirements of the "Survey Recording Act" at the request of Louise Belcher.

Douglas W. Noyes, PLS 42438 Date 9-21-09



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Columbia Land Surveying

1867 Northport-Flat Creek Rd.
Kettle Falls, WA 99141
Phone (509) 675-3798
Fax (509) 738-3000
Email columbia.l.s@hotmail.com

Field Crew	DN / AC
Draftsman	DN
Revision	
Sheet	1 of 1

APPENDIX C

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