

SEP 28 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 20799-3-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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LANCE G. PIERCE, et. al.,

Respondents

v.

ALBERT L. BELCHER, et. al.,

Appellants.

---

BRIEF OF RESPONDENTS'

---

Chris A. Montgomery  
Attorney for Respondents  
Lance G. and Janette Pierce  
Montgomery Law Firm  
344 East Birch Avenue  
PO Box 269  
Colville, Washington 99114  
(509) 684-2519  
FAX (509) 684-2188  
WSBA No. 12377

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## **ASSIGNMENTS OF ERROR**

Respondents do not assign error to the Trial Court's Findings of Fact Conclusions of Law, or Ruling.

### **ISSUES PERTAINING TO APPELLANTS' ASSIGNMENTS OF ERROR**

1. Whether substantial evidence supported the Trial Court's conclusion that Findings of Fact G, H, I, J, K, L, M, N, O and P were shown by clear, cogent and convincing evidence?
2. Whether the Trial Court properly entered Conclusions of Law A, B, C and D based on the Findings of Fact G, H, I, J, K, L, M, N, O and P?
3. Whether the Trial Court properly quieted title pursuant to mutual recognition and acquiescence?
4. Whether the Trial Court properly refused to quiet title in Appellants as Bona Fide Purchasers of 1801 Hutchison Road?
5. Whether the Trial Court properly refused to find the Respondents Pierce had trespassed on Belchers' property?
6. Whether the Trial Court properly quieted title in Respondents Pierce by modifying the parties' legal descriptions to establish the recognized common boundary?

## STATEMENT OF THE CASE

This case involves a boundary dispute. Respondents Lance G. and Janette Pierce, husband and wife, (Pierce) contend that the common boundary is the line, visibly marked by "T" posts, that has been in place and acquiesced in and recognized by all property owners from the time the parcels were severed to the date of this dispute, a period of approximately 26 years. That line, as marked, places the Pierces' access driveway entirely on their property.

Appellants Albert L. and Louise M. Belcher, husband and wife, assert the line is as established in a 2009 survey of their property, which comports to the aliquot description in their deed. This line cuts off a portion of the Pierce driveway and denies Pierces' access to their home site.

The property, originally a unified tract owed by Thomas L. Franco (Ex. 1), was divided by him without the benefit of a legal survey. On May 27, 1952, he conveyed by Statutory Warranty Deed a 33 acre parcel to George S. Voile, Jr. and Debra L. Voile, husband and wife, (Voile, Jr.). The legal description of the property was

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. 2.) This property is currently owned by Respondents Lance G. and Janette Pierce, husband and wife, and is also sometimes referred to as 1799 Hutchison Road (Ex. 14; RP 124).

On the same day Franco deeded to Voile, Jr., he conveyed by Statutory Warranty Deed 20 acres to George S. Voile, Sr. and Joanne C. Voile, Sr., husband and wife, (Voile, Sr.). The legal description was

The W 1/2 of the SW 1/4 of the SW 1/4 of Section 10, Township 33 North, Range 39 East, W.M., in Stevens County, Washington.

(Ex. 3). This property is currently owned by Appellants Albert L. and Louise M. Belcher, husband and wife, and is also sometimes referred to as 1801 Hutchison Road (Ex. 17, RP 253). Neither deed to Voile, Jr. or Voile, Sr., nor subsequent deeds in the Appellants' or Respondents' chains of title, set forth a metes and bounds or courses and distances descriptions of the boundaries. All contain aliquot descriptions (Exs. 1-4; 6-10; 14 & 17).

On July 29, 1991, Voile, Jr. conveyed the Pierce parcel to Marilyn F. Trimble (Ex. 4), and she in turn transferred her interest to her son, Michael Trimble, on February 29, 1992 (Ex. 7). Michael Trimble, on September 3, 1994, conveyed the property to himself and his mother as joint tenants (Ex.

8). Finally, on July 7, 1997, Maryln F. Trimble gifted her interest in the land to her son Michael W. Trimble (Ex. 9).

On September 1, 1992, Voiles, Sr. conveyed their interest in the Belcher land to Ronald L. and Alene M. Miller, husband and wife (Millers) (Ex. 6). The evidence is undisputed that during his ownership, Miller kept his property neatly mowed, and that he never mowed beyond the boundary markers or "T" posts (RP 103, lns. 1-24; RP 130 at lns. 3-9). That mowing pattern is illustrated in aerial photo Ex. 102 (RP 206). The exception to the clear boundary line cut pattern was when the adjoining landowners, either Miller and Trimble or Miller and Pierce in 2008 jointly allowed a third party to cut and keep the hay on both parcels. The cut pattern in the 2000 aerial photo, Ex. 101, is representative of the times of "joint farming" (RP RP 204, lns.11-22; RP 205, ln. 2 to RP 206, ln. 15). The boundary posts were set a sufficient distance apart so as to easily allow the farm machinery to pass between (RP 205-206).

Miller never expressed any concern regarding the location of the driveway or the boundary line to his neighbor Trimble (RP 20--21; 23), his neighbor Davis who purchased from Trimble (CP 80), or to Pierce who

purchased from Davis (RP 129, Ins. 13-18), from 1992 until right before he sold his property in 2008.

On March 26, 2005, Michael W. Trimble and his now ex-wife Lenore J. Trimble, sold the Pierce property to Kelly J. Davis and Sheryl R. Davis, husband and wife (Davis) (Ex. 10). Kelly J. Davis's Declaration (CP 79-100) was admitted by stipulation of the parties (RP 2, Ins. 11-14). In it, he states that during his period of ownership he was very familiar with the corner markers of his property, and he identified the attached photo exhibits of PVC posts as the Northwest (CP 91-94) and Southwest corners (CP 95-96) of his land (CP 80). He identified the line of fence posts running between the two corners as they run past the Belcher house (CP 80; 97-98). He also confirmed that the distinct line in the Aerial Photographs depicts the common boundary between the Belcher and Pierce properties, and that the photo was totally consistent with his understanding of the property he and his wife purchased from Trimble (sic.) and later sold to Pierce (CP 80; 99-100). Kelly J. Davis also stated that his son rented his cabin on the property and

at no time did Ron Miller ever say anything about the access road not being on our property, or the fence post line that he maintained between our properties was not our common boundary with his East property line and our West property line, and he maintained his field up to that line. When we sold our property to Pierce, we paid Ron Miller to move the

Septic system and he made no mention whatsoever of any problems with the boundary line or the access road to the cabin we were selling to Pierce.

(CP 80.)

Respondents Pierce acquired title to their property from Davis on August 28, 2007 (Ex. 14). Tracing the title from the common grantor Franco, the Pierce parcel was owned by Voiles, Jr., the Trimbles and the Davises from May 27, 1982 to August 28, 2007, or 25 years.<sup>1</sup> (Exs. 2, 4, 7 8, 9, 10 & 14).

Appellants Belcher acquired title to their land from the Millers on July 18, 2008 (Ex. 17). Tracing title from the common grantor, Franco, the Belcher parcel was owned by Voiles, Sr. and the Millers from May 27, 1982 to July 18, 2008, a period of 26 years (Exs. 3, 6, & 17).

In 2009, Belcher had their land surveyed by Douglas W. Noyes of Columbia Land Surveying (Ex. 112). That survey showed the boundary to be different from the common boundary marked by the PVC posts and “T” posts, and, according to Noyes, establishes the boundary as described in the deeds (RP 234). Based on the deed description, the Pierces' driveway

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<sup>1</sup> The Trial Court erroneously noted the end date as July 18, 2008, not the August 28, 2007, date the Pierces purchased their land. The calculation is thus 25 years rather than the 26 years noted by the court in Finding of Fact G, CP 866. This is harmless error.

encroached 14.72 feet to the traveled edge (RP 228). Belcher began, on October 21, 2009, constructing a fence along a line that was different from the common boundary line located on the ground by the PVC posts and “T” posts as they existed in 1982. The fence posts were set in a manner so as to obstruct the Pierce driveway, completely cutting off Pierces' ability to reach their building site with their heavy equipment (RP 130-31 & 133; 130-40; Exs. 56-57, 59, 67-72). Belcher ran fence posts to the edge of the driveway, jumped the road, installed more fence posts on the inside curve of the driveway, jumped the road again, and installed fence posts on the immediate outside edge of the driveway (RP 298). She did not install any gate posts (RP 299).

Pierce filed a Complaint for Quiet Title and for Injunction on October 22, 2009 (CP 1-35 ), and on the same day sought and obtained an Immediate Temporary Restraining Order and Order to Show Cause (CP 36-45; CP 50-52) which prohibited Belcher and their agents from fencing across the access road. This Order was issued Ex-Parte and without prior notice pursuant to CR 65(b) & (c). (CP 50-52). On October 27, 2009, the Court entered an Order Authorizing Plaintiffs To Remove Gate/Fence Posts, allowing Pierce to remove the six gate/fence posts located on the North/South side of the

easement roadway (CP 56-57). Pierce so removed the posts and set them in Belcher's field, undamaged. (RP 137-38; Exs. 63-66). Belcher responded by obtaining a Protection Order in a separate action prohibiting Pierce from entering her property (except to travel on the access road) and prohibiting Pierce from removing any additional fence posts. Pierce's original Temporary Restraining Order remained in effect (CP 58-61).

After a hearing on November 3, 2009, Judge Allen C. Nielson entered an Order on December 23, 2009, granting Pierce a Preliminary Injunction prohibiting Belcher from installing fence, posts, or gating material of any kind on the access road or within 20' of that road.<sup>2</sup> As a condition, Pierce was required to post a \$10,000.00 bond. (CP 337-42).

This matter was heard in a two-day trial on January 3, 2011 and January 4, 2011. The Trial, Findings of Fact, Conclusions of Law and Ruling were filed March 22, 2011. Belchers filed a Notice of Appeal on March 24, 2011.

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<sup>2</sup> Although Belcher asserted she needed the fencing for her livestock, she did nothing to finish fencing her property in compliance with the court order so she could put her animals on her land (RP 303).

## ARGUMENT

### I. Standard of Review

An appellate court reviews a trial court's findings of fact for substantial evidence in support of the findings. *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010). (citing *In re Marriage of Schweitzer*, 132 Wn.2d 318, 329, 937 P.2d 1062 (1997)). Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the declared premise. *Merriman* at 631 (citing *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986)).

A reviewing court may not disturb findings of fact supported by substantial evidence *even if there is conflicting evidence*. *Merriman* at 631; *Lamm v. McTighe*, 72 Wn.2d 587, 593, 434 P.2d 565 (1967).

Belchers contend that the Trial Court, in its Ruling (CP 872), arbitrarily quieted titled to the disputed strip of land based solely on the adoption of a boundary selected by Pierce and reduced to a legal description by a surveyor paid by Pierce (Appellant's Brief at 19). As the following discussion will illustrate, more than substantial evidence supports the Trial Court's Findings of Fact, Conclusions of Law and Decision holding that Pierces proved a common boundary had been established by mutual

acquiescence and recognition. The Trial Court's decision is correct and should be affirmed (CP 864-872).

**II. Substantial Evidence Supports The Trial Court's Findings of Fact And Conclusions of Law That Pierces Proved By Clear, Cogent And Convincing Evidence That A Common Boundary Had Been Established By Mutual Recognition And Acquiescence.**

To establish a boundary by acquiescence, the party claiming title to the land must prove by clear, cogent, and convincing evidence: (1) the line is certain, well defined, and in some fashion physically designated upon the ground; (2) the adjoining property owners, or their predecessors in interest, have manifested a mutual recognition and acceptance of the designated line as the true boundary line by their acts, occupancy, and improvements on their respective properties; and (3) mutual recognition and acquiescence continued for the period of time necessary to establish adverse possession (10 years). *Lamm v. McTighe*, 72 Wn.2d 587, 593, 434 P.2d 565 (1967); *see also Merriman v. Cokeley*, 168 Wn.2d 627, 630, 230 P.3d 162 (2010). Evidence is “clear, cogent, and convincing” if it shows the ultimate facts are “highly probable.” *Merriman*, 168 Wn.2d at 630-31.

In *Merriman*, the Washington Supreme Court ruled that three widely spaced survey markers set in a thicket of blackberry bushes, ivy and weeds did not constitute a clear and well defined boundary. Where the disputed area is overgrown, more than isolated markers are required to prove a clear and well-defined boundary. A fence, a pathway, or some other object or combination of objects clearly dividing the two parcels must exist. 168 Wn. 2d at 631.

Unlike the *Merriman* case, the open hayfields between the Pierce and Belcher parcels were not overgrown nor were the boundaries marked by survey markers that were hidden. Instead, the case is more akin to *Lamm v. McTighe*, 72 Wn.2d 587, 590, 434 P.2d 565 (1967), in which the Supreme Court held that property owners demonstrated mutual recognition and acquiescence by clearing portions of their property up to the disputed boundary line, erecting a fence, planting berry bushes, mowing the grass, and occasionally using the strip adjacent to the disputed fence line as a roadway for deliveries.

Similarly, in *Mullally v. Parks*, 29 Wn.2d 899, 902-03, 908, 190 P.2d 107 (1948), the Supreme Court held that property owners demonstrated mutual recognition and acquiescence by clearing 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. And, in *Lindley v. Johnston*, 42 Wash. 257, 84 P. 822 (1906), a boundary by acquiescence was affirmed where adjoining landowners established a line between their properties and erected a division fence, which for twenty-four (24) years served as the boundary line between their farms. Each of these original owners and their successors in interest occupied, cultivated, and exercised exclusive dominion over the land on their side of said fence until shortly before the commencement of the suit. *See also Rose v. Fletcher*, 83 Wash. 623, 628, 145 P. 989 (1915) (" An agreed boundary that has been good for 20 years ought, in the absence of some controlling equity, be good forever.")

In the present case, more than hidden survey markers defined the line. Fence posts, spaced 50 - 75 yards apart, ran the length of the boundary. Numerous witnesses and photographic evidence clearly showed that these fence posts were readily visible, formed a straight line, and remained in the same location for a period of 25 years. There was also a clear line of cultivation, as well as Miller's mowing line, that followed the common boundary between the Pierce and Belcher parcels. A ridge line formed in the earth along the boundary, created when the hay was cut on either side (RP

203-04). Moreover, the conduct of the various owners confirmed that the common boundary was the recognized line. The Trial Court properly concluded that a boundary by acquiescence had been established.

**III. Substantial Evidence Supports The Trial Court's Decision That The Pierces Proved By Clear, Cogent And Convincing Evidence That The Common Boundary Line Was Certain, Well Defined, And In Some Fashion Physically Designated Upon The Ground.**

The evidence as to the location and physical evidence of the common boundary line is voluminous. The property was divided by the original owner, Franco (Ex. 1) and sold in separate parcels to Voiles, Sr. and Voiles, Jr. on May 27, 1982 (Exs. 2 & 3). Nine years later, Voiles Jr. sold what is now the Pierce property to Marilyn F. Trimble (Ex. 4).

Michael W. Trimble, (Pierce's predecessor in title), testified that he was involved in the negotiations when his mother first purchased the property in 1991 (RP 14). Trimble met with Voile, Sr. (Appellant Belchers' predecessor) who showed Trimble his common boundary with son's property (later the Pierce property) (RP 15, Ins. 15-17). The North common boundary was marked by a T-post with PVC pipe and the South common boundary was marked by a post with something white wrapped around it (RP 16, Ins.1-8);

the boundary line was established by “T” posts in between these two corners (RP 16, Ins. 12-13) that lined up in a straight manner and could be seen if one stood at either end. He so identified the posts in the photograph exhibits (RP 17, Ins. 2-5; RP 28-32; Exs. 29-34; 37-38; 41-45). These are the same markers that were in place 18 years later, in the Spring of 2009, as identified and photographed by Kenneth Anderson (RP 85 & 90; Exs. 33 - 51; 54-55).

Trimble testified that the “T” posts marking the boundary were in place when he [his mother] purchased from Voile, Jr. in 1991, when Miller bought his property from Voile, Sr. in 1992, and when he (Trimble) sold his land to Kelly J. Davis. The posts never moved. (RP 28-29; 32-35; 52; Exs. 4, 6 & 10). While Trimble did not walk the entire boundary of his 33 acre parcel, he did walk far enough to see the Northwest and Southwest corners (RP 58. at Ins. 21-25) as identified by him during his testimony. The Trial Court expressly found this testimony as to the placement of posts to be credible (RP 358 at Ins. 3-4).

Trimble also marked his North and South corners on 1995 aerial photographs from the Stevens County Assessor's Office (Ex. 18 & 19; RP 37-38), a 2005 aerial photo from the same office (Ex. 20; RP 39), and a 2005 Washington State Department of Transportation aerial photograph (Ex. 25,

RP 41) to coincide with the boundary markers he had previously described. In each of these aerial photographs, the vegetation patterns form a distinct line coinciding with the boundary markers. (Id.) The Trial Court noted that while Trimble showed some confusion in marking the boundaries on the enlarged aerial map, Exhibit 102, he was consistent as to the driveway and markers on the ground (RP 355 at lns. 10-25; 358 at lns. 3-4).

Kelly J. Davis purchased the Pierce parcel from Trimble on March 26, 2005. Davis's Declaration (CP 79-100) was admitted by stipulation of the parties (RP 2, lns. 11-14). In it he states that during his period of ownership he was very familiar with the corner markers of his property, and he identified the attached photo exhibits of PVC posts as the Northwest (CP 91-94) and Southwest corners (CP 95-96) of his land (CP 80). He identified the line of fence posts running between the two corners as they ran past the Belcher house (CP 80; 97-98). He also confirmed that the distinct line in the attached Aerial Photographs depicted the common boundary between the Belcher and Pierce properties, and that the photo was totally consistent with his understanding of the property he and his wife purchased from Tremble (sic.) and later sold to Pierce (CP 80; 99-100).

Kenneth Anderson was the Realtor who represented the Pierces when they purchased their land from Kelly J. Davis. He testified that he contacted Davis who identified the boundary lines verbally over the phone. Davis "identified the West line -- that would be the Southwest corner had a PVC pipe up on the hill next to the timber. And it had flagging -- at that time it had flagging on it. And then the boundary line next to the road was also a PVC pipe and it was attached. I don't think it had too much flagging on it but it was attached to a "T" post there. And as you look up and down from the North to the South there was "T" posts in a sequence of a line between the two PVC pipes, white PVC pipe" (RP 84, Ins. 17 - 25). Anderson testified that "you could stand up on the hill . . . on the Southwest corner and look down to the road and you could just eyeball and line those pipe posts right up one after another. The "T" posts were right in sequence." (RP 85, Ins. 1-6; Exs. 29 - 32).

After the controversy arose in this case, Anderson returned to the Belcher/Pierce properties in the Spring of 2009 and took pictures of the line, moving from post to post, beginning at the road and up the hill, South (RP 85 & 90; Exs. 33 - 51; 54-55). Anderson testified there were no changes in the location of any of the posts observed (RP 91, Ins. 18-19), and there were

about 100 to 150 steps between each post (RP 114, lns. 4-6). However, when he took the photos in 2009 there was one additional post to the East of the Northwest corner which was not there when Pierce purchased the property (RP 94, lns. 24-2; RP 95, lns. 1-12.; Exs. 37 & 38), and that post did not line up with the other "T" posts (RP 113, ln. 22 to RP 114, ln. 3). [This is the pipe that was installed by Miller and Olson in 2008 (Ex. 133; RP 79-80)].

Anderson also noted that the spray paint on the road claimed by Belcher as the boundary was "quite a ways away from the post . . . the corners" (RP 101, lns. 6 - 25; Ex. 52 & 53).

Lance G. Pierce testified when he first visited the property, he assumed the property line was marked by the cut patterns in the hay field: Miller's side of the hay field was cut whereas the Davis side was tall. That pattern comported with a July 21, 2005 aerial photo depicting differing cut patterns along the common boundary (RP 119, lns. 9-23; Ex. 102). At that time, Pierce's Real Estate Agent, Kenneth Anderson, contacted Kelly J. Davis to confirm the West property line and he was told the boundary was from the post with the white PVC pipe on it to the wooden post with the flag on the top on the South side of the property. Davis also mentioned intermediate fence posts in the middle with orange tops. Pierce went to the property and

found the posts -- all of which ran along the edge of the cut line. (RP 120, ln. 17 to RP 121, ln. 17) Exhibits 26-27 are photographs taken at the time showing the cut line (RP 122-24). Pierce testified that the photographs taken by Anderson in 2009 (Exs. 33-35) show the same corners and fence posts on the boundary line that existed when he purchased the property (RP 126-128). The pipe that Miller put in before he sold to Belcher in 2008 was not there when Pierce bought his land in 2007 (RP 128; Ex. 38).

Belcher's claim that the only undisputed evidence about the origins of the posts, is that they were set by a well-witcher, strains the truth. By her own testimony, there were "random posts around the house and out back." (RP 248, lns. 17-23). This does not match the description by numerous witnesses, nor the photographic evidence, that the fence posts were in a straight line and spaced about 50-75 yards apart, along the common boundary. Moreover, supposedly Greg Olson confirmed her version when he testified that "There were 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 82, lns 5-10). Since the fence posts establishing the common boundary were erected long before Miller ever purchased his property, clearly, the "well-witching stakes" were not one and the same.

The Trial Court did not rely on testimony alone, but also considered aerial photographs illustrating the common boundary between the properties. Two 1995 GIS aerial photos (Exs. 18 & 19) clearly show the common boundary and the Trimble driveway is located wholly on the Trimble property. In 1995, Trimbles had owned their parcel for four years (Ex. 4), and Miller had owned his land for three years (Ex. 6). In 2000, a Department of Transportation aerial photo shows a different pattern of agricultural use and the driveway within the Trimble property (Ex. 23). Trimble testified that he allowed a neighbor, Ralph Guire, to cut hay off his property and keep whatever he took. (RP 40). A 2005 Department of Transportation photo again shows the distinct variations of hues along the common border, and the driveway within the Davis property (Ex. 20 & 25). Lance G. Pierce testified that he and Miller had their hay jointly cut by Mr. Les Schneider, the fire chief, and explained that the patterns shown in the 6/26/2000 aerial photos (Exs. 24 & 101) are similar to patterns of that kind of joint activity (RP 144, Ins. 5 - 14). It is undisputed that Miller kept his property neatly mowed, and that he never mowed beyond the boundary markers or “T” posts (RP 103, Ins. 1-24; RP 130 at Ins. 3-9; CP 80). That mowing pattern is illustrated in aerial photo Ex. 102 (RP 206).

The physical topography and location of the driveway is further evidence supporting the argument that the marked line is the common boundary. Michael W. Trimble testified that the road bows out because of the rock ridge. There is no other way to get to the home site (RP 23-24). Lance G. Pierce testified that the driveway could not be cut in any further because of rock ridge (RP 141). This fact was particularly significant to the Trial Court in its bench ruling as an explanation as to how the Voiles, father and son, made the accommodation to locate the boundary so as to allow the driveway to get around the ridge (RP 350, Ins. 7 - 14).

Belcher makes much of the varied harvest patterns of the hay or that on occasion, the hay temporarily obscured some posts, and in fact makes broad statements characterizing hay harvesting by Franco and others that are not supported by the record (Appellant's Brief at 23). Nonetheless, the fact remains that no matter what the pattern, the fence posts stood as a visible, consistent line for the length of the boundary for more than 25 years, and for that reason, the cases relied on by Belcher, *Green v. Hooper*, 149 Wn. App. 627, 205 P.3d 134 (2010) and *Merriman v. Cokeley*, *supra*, are readily distinguishable. In *Green* the purported boundary was a short retaining wall that did not extend the monuments the full length of the property. In

*Merriman*, the purported boundary consisted of three survey stakes overgrown by berry bushes, ivy and weeds. Here, the well-defined line extended the full length of the boundary, and it was readily visible.

The Trial Court did not rely solely on the hay harvesting patterns. Rather, the fence line itself, aerial photographs, the cultivation patterns, the ridge line, the necessity to loop the road around the ridge line, Miller's mowing line, and fence line, taken as a whole, provided substantial evidence to support the Trial Court's conclusion that a clear, well-defined line existed.

**IV. Substantial Evidence Supports The Trial Court's Conclusion That The Adjoining Property Owners, Or Their Predecessors In Interest, Have Manifested A Mutual Recognition And Acceptance Of The Designated Line As The True Boundary Line By Their Acts, Occupancy, And Improvements On Their Respective Properties For A Period Of Ten Years.**

The Washington Supreme Court, in *Lamm v. McTighe, supra*, recognized that an express agreement is not required to establish a boundary by acquiescence, and that conduct will suffice.

The existence of an express agreement between adjoining landowners resolving an uncertainty in or dispute about the location of the true boundary line -- the touchstone in the establishment of boundaries by parol agreement -- while often present in the establishment of boundaries by recognition and acquiescence, is not an indispensable element in the

application of that doctrine. It is sufficient to bring the doctrine into play if the adjoining parties in interest have, 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, a genuine and mutual recognition and acquiescence in the given line as the mutually adopted boundary between their properties.

72 Wn. 2d at 593. In this case, there is no evidence of an express agreement between the parties creating the boundary. Nonetheless, the conduct of the various landowners over the years provided substantial evidence to support the Trial Court's conclusion that the parties manifested a mutual recognition and acceptance of the designated line.

The mutual recognition and acceptance of the common boundary line can be traced back to Voiles, Sr. (Belchers' predecessor in interest) and Voiles, Jr. (Pierces' predecessor in interest) when they owned the adjoining properties. Both acquired their land on the same day, May 27, 1982 (Exs. 2 & 3) when Franco divided and sold his tract of land. The Trial Court noted that it made sense that the Voiles, father and son, would have located the boundary as it is because the driveway to the son's property had to curve onto the father's property to bypass the rock ridge (RP 359, lns 7 - 14).

Michael W. Trimble, (Pierce's predecessor in interest), testified that he was involved in the negotiations when his mother, Marilyn F. Trimble,

first purchased the property in 1991 from Voiles, Jr. (RP 14). Trimble met with Voile, Sr. who showed him the common boundary with his son's property (later the Pierce property) (RP 15, lns. 15-17). As discussed *supra*, Trimble identified the corner posts with PVC pipe and the "T" post in a line between the corner posts as the common boundary markers shown to him by Voiles, Sr. It is significant that it was not in Voiles, Sr.'s interest to gratuitously point out a boundary that diminished the size of his property. Therefore it is highly probable that the boundary he identified was one agreed upon by himself and his son, as found by the Trial Court (CP 866; FF G).

The Trimble family ownership lasted for a period of 14 years, from 1991 to 2005 (Exs. 4, 7, 8 & 10), and substantial evidence supports the Court's conclusion that the landowners during that time period acquiesced and recognized the common boundary. Trimble's mother put in a pad and mobile home, septic, water and power to the property (RP 17; Ex. 5). Trimble testified that his ex-wife and two step-daughters lived on the property from 1991 - 1994 and he visited them twice a month (RP 20, lns. 5-12). He personally moved onto the property in 1998 and lived there until 2005 (RP 55, lns. 10-16).

During the time from his family's purchase in July, 1991 to September, 1992, when Voile, Sr. sold his adjoining property to Ronald L.

Miller (Ex. 6), Trimble testified there was *never* any dispute with Voile, Sr. about the common boundary line (RP 20, lns. 17-20). The line was consistent with the PVC posts and "T" posts in between, and, as to that, Trimble testified, "What I was showed was gospel. That was it." (RP 20, lns. 21-23). He believed the existing driveway, which bowed out to get around a rock ridge (RP 23-24), was entirely on his property. Voile, Sr. *never* disputed that (RP 20, ln. 24 - p. 21, ln. 4).

Denise Rogers, a Realtor for Century21/Kelly Davis [Realty], represented Mr. Trimble when he listed his property for sale in 2005. As part of that transaction Mr. Trimble prepared a map of his property which shows a line marked "fence" as the west border of his property and the driveway located entirely within the borders of his property (RP 65, ln. to RP 66, ln. 1; Ex. 5). This is further evidence confirming his continued belief that the driveway was entirely on his property and that a "fence" marked the boundary.

Ronald L. Miller's conduct during his ownership beginning September 1, 1992, was also consistent with his recognition of the common boundary. Evidence of that recognition and acquiescence was unwavering until July of 2008 when Miller decided to relocate the corner. Trimble testified that during his family's ownership, Ronald L. Miller *never* disputed the location

of the driveway or boundary as marked. In fact, Miller even plowed snow from and graveled Trimble's driveway for him (RP 21, Ins. 5-21; RP 23, ln. 15). The time frame of this evidence is from September 1, 1992 (Ex. 6) until Trimble sold his land to Davis on March 26, 2005 (Ex. 10). This is a thirteen-year span.

Likewise, Lance G. Pierce testified that he introduced himself to Miller at the time he was making an offer on the property, and that Miller did not indicate any concerns about the driveway or boundary (RP 129). From August 2007 until Miller sold his land, Pierce had no problems or disagreements with Miller (RP 130).

Belcher places significance on the access easement Trimble granted to Washington Power Company (Appellants Brief at 14-15). That easement is described: *"This ten (10) feet wide easement being at a junction box on the lands of the Grantor and runs in a Westerly direction through said lands to the Westerly property line for the purpose of providing electric service"* and is included in both the Davis and Pierce deeds (Exs. 10 & 14). On its face, the easement merely states that it runs to the "property line." It does not set forth the distance to that property line, and therefore provides no illumination as to the location of the boundary.

The grant of the easement does, nonetheless, comport with Trimble's testimony that he gave Miller permission, *after being approached by Miller*, to put the power pedestal on his property in the driveway curve (RP 24, Ins. 15-17). Such conduct by Miller indicates that he recognized the road was on Trimble's land. This conduct directly contradicts Miller's Declaration in which he later claimed the property line "was 50'-60' farther over and encompassed the curve of the ingress/egress road," (CP 193; Ex. 58 & 60; RP 27, Ins. 22 to RP 28, Ins. 1-17).

Additional undisputed evidence that Miller acquiesced in and recognized the common boundary includes testimony by Kenneth Anderson and Lance G. Pierce that Miller kept his property neatly mowed, and that he never mowed beyond the common boundary markers or "T" posts (RP 103, Ins. 1-24; RP 130 at Ins. 3-9). That mowing pattern is illustrated in aerial photo Ex. 102 (RP 206).

Denise Rogers testified that when Kelly J. Davis sold the property to Pierce, she arranged to hire and pay Miller to uncover the septic tank on the Pierce property, which he did. At no time during this transaction did Miller indicate to Rogers that he thought the driveway was part of his property (RP 67-68; Ex. 5).

There was also contradictory evidence that Miller, in 2008, after honoring the boundary markers for 16 years, decided to place a pipe approximately 50 - 60 west of the Northwest corner post of the property (RP 207, Ins. 20 to RP 208, In. 2). Miller decided to place a new corner because a non-party neighbor had surveyed their land and he believed that survey showed his line to be in a different location (RP 73, Ins. 8-18). This pipe was placed by Miller and his Real Estate Agent, Greg Olson, the day before Belcher walked the boundaries and videotaped the tour (Ex. 133; RP 79-80). However, Miller did not use or provide a survey when he set the pipe, nor was Miller's property ever surveyed (RP 73), nor did Miller remove any of the existing boundary markers (RP 207, Ins. 23-24).

Miller, in his Declaration, claimed to have informed Kelly J. Davis of the boundary discrepancy before Davis sold to Pierce (CP 193). The is rebutted by Kelly J. Davis, who asserted that at no time did Miller indicate that the access road was not on Davis's property, nor did Miller indicate the fence line he maintained was not the common boundary. He also noted that Miller maintained his field up to that line (CP 80).

The foregoing evidence is precisely the kind of conduct envisioned by the Supreme Court in *Lamm v. McTighe*: the adjoining parties in interest have, 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, a genuine and mutual recognition and acquiescence in the given line as the mutually adopted boundary between their properties. Substantial evidence supports the Trial Court's Findings of Fact, Conclusions of Law, and Ruling that the parties, in good faith manifested by their acts, occupancy and improvements with respect to their respective properties, a mutual recognition and acceptance of the true boundary line, and this occurred for a period of more than ten (10) years.

**V. Belcher Is Not A Bona Fide Purchaser.**

The bona fide purchaser doctrine provides that a good faith purchaser for value who is without actual, constructive, or inquiry notice of another's interest in real property has a superior interest in the property. *Tomlinson v. Clarke*, 118 Wn.2d 498, 500, 825 P.2d 706 (1992); *see also Miebach v. Colasurdo*, 102 Wn.2d 170, 175, 685 P.2d 1074 (1984). "A bona fide purchaser for value is one who without notice of another's claim of right to, or equity in, the property prior to his acquisition of title, has paid the vendor a valuable consideration." *Steward v. Good*, 51 Wn. App. 512-13, 754 P.2d 150 (1988) (quoting *Glaser v. Holdorf*, 56 Wn.2d 204, 209, 352 P.2d 212 (1960)).

"It is a well-settled rule that where a purchaser has knowledge or information of facts which are sufficient to put an ordinarily prudent man upon inquiry, and the inquiry, if followed with reasonable diligence, would lead to the discovery of defects in the title or of equitable rights of others affecting the property in question, the purchaser will be held chargeable with knowledge thereof and will not be heard to say that he did not actually know of them. In other words, knowledge of facts sufficient to excite inquiry is constructive notice of all that the inquiry would have disclosed." (Citation omitted)

*Steward v. Good*, 51 Wn. App. at 513. "Good faith" "means [a subsequent purchaser] shall not have knowledge or notice of the other party's interest in some way outside the recording of the instrument that creates that interest."

William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate Transactions* § 14.10, at 150 (2d ed. 2004).

As part of evidence at trial, Belcher introduced into evidence a videotape record of her second visit to the Miller property which took place *prior* to her purchase (Ex. 133). That tape clearly shows that Belcher was expressly told the pipe, purporting to be Millers "new" corner, had been placed the previous day by Miller and his Real Estate Agent, Greg Olson (RP 278). This is confirmed by Olson (RP 79). According to the testimony of Kenneth Anderson and Lance G. Pierce, the new pipe installed by Miller in

2008 did not line up with the other existing posts marking the common boundary RP 113, ln. 22 to 114, ln. 2; RP 128, lns.16-23; RP 208, lns. 19-28).

Olson also testified that when Miller showed Belcher the boundaries, the common boundary Northeastern corner fence post was still in its original location (RP 74). Miller had not removed any of the existing boundary markers (RP 207, lns. 23-24). Miller did not, however, walk the boundary with Belcher (278). Belcher testified that she noticed "random posts" around the house and out back and explained she had been told they were markers from well-witching (RP 248). Again, this does not match the description by numerous witness, nor the photographic evidence, that the fence posts were in a straight line and spaced about 50-75 yards apart, along the common boundary. Moreover, supposedly Greg Olson confirmed her version when he testified that "There were several other steel posts that Ronald L. [Miller] had put in for well sites when he got it -- when Mr. Miller had it water witched or for a dowser." (RP 82, lns 5-10). Since the fence posts establishing the common boundary were erected long before Miller ever purchased his property, clearly, the "well-witching stakes" were not one and the same.

Belcher did not offer any plausible explanation for the obvious fence posts running in a straight line across the hayfield, nor did she take any steps

to inquire about them. In fact, the video showed that Mr. Olson told Belcher that Mr. Voile had put in the boundary between the properties. She claimed she "didn't understand" (RP 281). And, tellingly, the video showed a conversation between Belcher and her Real Estate Agent, Kimberly Merritt, during which the subject of blackmail came up in the context of a what she could do to get more pasture from her neighbor (Ex. 133; RP 282-83).

Belcher testified that she knew the Miller property had not been surveyed when she purchased it (RP 275) and that she knew the driveway encroached on the Miller land (RP 276). The Stevens County Township Map (Ex. 106) which she had in her possession prior to purchase (RP 292, ln.23 - RP 293, ln.16) indicated a possible encroachment. She admitted the Appraisal Report map (Ex. 104) shows a road encroaching on her property (RP 296, lns. 10-12), as did the map with Policy of Title Insurance (Ex. 109), both of which had disclaimers for liability for inaccuracies (RP 297).

Taken together, these facts clearly show that Belcher was put on both actual notice and inquiry notice that the boundaries might not be as represented by Miller and that the driveway encroached on the property she was about to purchase. The Trial Court did not err declining to find she was a bona fide purchaser.

**VI. The Trial Court Properly Concluded that There Was No Trespass By Pierce.**

Finding of Fact Q provided:

*In October 2009, the Belchers had a stock fence partially installed along the east boundary of their property as located by the Noyes September 21, 2009 survey (Exhibit 57). Then, the Pierces, on October 22, 2009, obtained an Immediate Temporary Restraining Order and Order to Show Cause which ordered the Belchers to stop installation and to remove any fencing installed along the access road. This was followed on October 27, 2009, with an Order Authorizing Plaintiffs to Remove Gate/Fence Posts which authorized the Pierces to remove six fence posts from along the easement road. Mr. Pierce then removed the six posts (Exhibits 63 and 66). Both Belchers and Pierces acted in good faith belief that they had lawful authority to install (Belchers) and remove (Pierces) the stock fence. There was no trespass.*

(CP 869). Belchers did not challenge this Finding of Fact. Unchallenged findings of fact are verities on appeal. *Merriman v. Cokeley, supra*, 168 Wn.2d at 631 (citing *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002)). Accordingly, the Trial Court's legal conclusion stands.

“A person ‘is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally . . . enters land in the possession of the other, or causes . . . a third person to do so.’ Restatement (Second) Of Torts § 158 (1965); see *Bradley v. American Smelting & Ref. Co.*, 104 Wn.2d 677, 681, 709 P.2d 782 (1985).” *Peters v. Vinatieri*, 102 Wn. App. 641, 655, 9 P.3d

909 (2000). The Trial Court did not find that Pierce intentionally entered onto Belchers' land. Belcher has not challenged the finding. Absent such finding, there is no grounds for a trespass claim. In fact, in light of the Trial Court's determination that the PVC and "T" post property line was the common boundary between the parties, Pierce was on his own property when he removed the fence posts from the edge of his roadway (Exs. 63-66). And, as the Trial Court found, Pierce acted in good faith when he removed Belchers' fence posts pursuant to a court order (CP 869). Pierce did not damage Belcher's property (RP 137-38). Belchers' claim for trespass was properly dismissed.

**VII. Substantial Evidence Supports the Trial Court's Ruling Quietening Title To The Disputed Strip Of Land To Pierce.**

The essence of the Belchers' argument is that the Trial Court entered a Ruling that did not conform with the September 2009 survey of their deeded property description (Ex. 112). It seems that anything other than Belchers' deed line has no foundation in fact, and is characterized as nothing more than an arbitrary and capricious selection by Pierce. This is not true. What the Trial Court did was adopt the legal description that placed the property line at the established common boundary (Ex. 73 & 75). Contrary to Belchers' assertions, Pierce did not request a survey of the line between

two randomly picked posts, but rather of the boundary line as testified to at trial (RP 185 - 86). As the foregoing facts and arguments illustrated, substantial evidence supported the Trial Court's determination that a common boundary had been established by mutual acquiescence. Pierce hired Douglas W. Noyes, PLS also Belchers' surveyor, (RP 211) to draft a legal description of the disputed area between the deed line and the common boundary (RP 186-87). Noyes located the two end posts at the North and South end of the line (RP 216; Ex. 48 & Ex. 33) and then used right angle trigonometry technique and using a zig zag pattern from hill to hill to set the line and or project the line (RP 218- 219). The legal description entitled Pierce-Belcher Disputed Area Description (Ex. 73) was the result. That description was adopted by the Court in its Ruling.

Quiet title suits are actions in equity, *see Haueter v. Rancich*, 39 Wn. App. 328, 331, 693 P.2d 168 (1984) and therefore Courts are free to fashion appropriate remedies. In this case, the remedy chosen by the Trial Court was to revise the legal descriptions of the parties' properties to comport with the common boundary line. The Court adopted the legal descriptions prepared by Douglas W. Noyes, PLS. No abuse of discretion has been shown.

### ATTORNEYS FEES AND COSTS

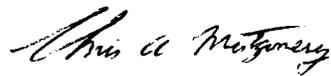
Respondents Pierce respectfully request an award of reasonable attorney fees and costs incurred below and on Appeal, based on RAP 18.1, RCW 48.30.015 and *Olympic S.S. Co v. Centennial Ins. Co.*, 117 Wn. 2d 37, 811 P.2d 673 (1991).

### CONCLUSION

Respondents Pierce respectfully request this Court to affirm the Trial Court's Judgment in its entirety as substantial evidence supports the Trial Court's Findings of Fact, Conclusions of Law and Ruling. Accordingly, the Appellants appeal be denied.

**DATED** this 27<sup>th</sup> day of September, 2011.

Respectfully submitted,



Chris A. Montgomery  
WSBA #12377  
Attorney for Respondents  
Lance G. and Janette Pierce