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MAR 28 2012

**IN THE WASHINGTON STATE COURT OF APPEALS,
DIVISION III**

COURT OF APPEALS NO. 303233

On Appeal From
STEVENS COUNTY SUPERIOR COURT
CAUSE NO. 2010-2-00371-0
The Honorable Allen C. Nielson

EDDIE A. ACORD and SHARON K. ACORD,
husband and wife,
Plaintiffs/Respondents,

v.

BRITTON K. PETTIT and LYNNETTE F. PETTIT,
husband and wife,
Defendants/Appellants.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION.

A. Overview of Errors.

The trial court made three errors that necessitate reversal by this court when the trial court awarded contested land to Respondents Eddie and Sharon Acord.

First, the evidence showed the Acords did not adversely possess the land because neither they nor their predecessors in interest possessed or used it for the requisite ten years.

Second, the only demarcation setting off the contested land was a dilapidated, partial fence that all living witnesses testified was not a boundary fence during the period before the Acords purchased their property in 1991. Nevertheless, the trial court improperly admitted the transcript of a dead witness' testimony from an unrelated case, which was the sole basis for finding that this drift fence was a boundary fence.

Finally, even if the evidence had supported adverse possession by the Acords, the Appellants, Britton and Lynnette Pettit, reacquired the contested property through their use and possession after their grantor, Leigh Robertson, drove the Acords off the contested area at gunpoint in 1995.

B. The “Contested Land.”

The “contested land” in this adverse possession case lies along the boundary line between Sections 6 and 7 of Township 30 North, Range 41 East, Stevens County. The line forms a portion of the south boundary of Section 6 which is the north boundary of Section 7. Appellants Britton and Lynnette Pettit own a portion of Section 7 to the south; they purchased it in August 2000. Respondents Eddie and Sharon Acord own a portion of Section 6 to the north; they purchased it on September 30, 1991. A partially fallen three-wire fence hangs from trees and posts and runs through underbrush just south of the true survey boundary line between the sections. The area between this partial fence and the true boundary is the contested land.

Most of Acords’ property is flat pastureland and irrigated farmland where their predecessors operated a dairy farm. The area between the Acords and the Pettits, by contrast, is on a westward-sloping hill filled with trees and thick underbrush. The contested land is a narrow strip entirely within Section 7, to which Pettits have record title. It is unsuitable as pasture for dairy cattle and has not been used as such by any of the owners since at least the 1960’s.

C. No Evidence of Respondents' Actual Possession or Use of Contested Land.

The Acords claim title to the contested land by adverse possession through their own use or by "tacking" onto the use of their predecessors in interest. The facts adduced at trial, however, do not support this contention. There was no evidence that the Acords or their predecessors in interest used the contested land for the statutory period of ten years. Acords' only use of the contested land from the time of their purchase, September 30, 1991, forward to the effectiveness of RCW 7.28.085 is insufficient to support an adverse possession claim. Effective on June 11, 1998, RCW 7.28.085 precludes any claim of title by adverse possession to Washington "forest" land such as the contested area unless the adverse claimant has made \$50,000 of improvements on the land. The Acords made no such improvements. As a result, Acords' use will not support the award for Pettits' property to Acords. Moreover, there is no evidence of prior use by Acords' predecessors and, in fact, the only evidence in the record is that the prior owner did not use the contested area. Without prior use to which they can tack, Acords only assert use between September 1991 and June 1998 (less than 10 years), and their claim of adverse possession must fail.

D. Prior Testimony From Unrelated Matters Wrongly Admitted.

Hearsay transcript testimony by Fred Chandler, a prior owner of the Acord property, in an unrelated matter against a different defendant involving a different boundary was admitted. The testimony should have been excluded because it did not involve a predecessor in interest to Pettits and no one had a motive to develop the testimony. ER 804(b)(1).

E. Pettits' Adverse Possession.

Even if the Acords' claim of adverse possession was valid, the evidence at trial and the trial court findings show that title to the contested land was reacquired by Pettits through their own adverse possession against the Acords.

- Pettits had record title and used the contested land, for more than the required seven years required for a user with color of title. Pettits' title is deducible from government records and they have title by adverse possession under RCW 7.28.050.

- Pettits and their predecessor, Robertson, paid all property taxes on the contested land to which they hold record title for over seven years; thus they achieved adverse possession under RCW 7.28.070.

- The statute requiring construction of improvements in order to take forest land does not apply to the Pettits because they are record title

holders and they have claims under RCW 7.28.050 and 7.28.070. Such claims are expressly exempted from the substantial improvement statute. Hence, Pettits' adverse possession claim displaces any claim by the Acords.

II. ASSIGNMENTS OF ERROR WITH ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR.

1. The trial court erred in admitting an incomplete, unsworn partial record of Fred Chandler's hearsay testimony from an unrelated matter. (Order Admitting Verbatim Transcript of Proceedings, CP 323-324).

2. The trial court erred in Finding of Fact C by finding no survey had been completed on the contested common boundary when, in fact the record in this case includes copies of four recorded surveys of the contested common boundary, monuments were put on the boundary and there is no evidence in the record that the common boundary was not surveyed.

3. The trial court erred in Finding of Fact D by finding that 12 trees were harvested in the contested area between 1971 and 1985 likely by Kenneth Rhodes when there is no evidence in the record to support such finding.

4. The trial court erred in Finding of Fact E by finding the Acords filed two Forest Practice Activity maps when the only evidence in the record is that one map was filed with the relevant state agency, the Acords illegally logged beyond the permitted area, and only offered a second altered map as a false exhibit in the trial.

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6. The trial court erred in entering Finding of Fact G when it based its finding on an incomplete record of unsworn hearsay testimony from an unrelated matter.

7. The trial court erred in Finding of Fact H when it found Brian Chandler was 6 or 7 years old when the fence was allegedly built because the only admissible evidence in the record is that Brian lived in the property until he was 18, the fence pre-existed and was not put in by the Chandlers.

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area had not been used by Acords or their predecessors for 10 years prior to effectiveness of RCW 7.28.085. Moreover, the trial court erred in concluding that RCW 7.28.085 did apply to prevent vesting of title in the Pettits and that the Pettits did not hold record title.

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III. ISSUES PRESENTED FOR REVIEW.

1) **Did the trial court err in awarding title to the Respondents based on use of the disputed area for less than the required ten year period? Assignments of Error 3, 4, 6, 8, 9, 10, 12.**

2) **Did the trial court err in admitting hearsay testimony from an unrelated matter not involving the appellants or their predecessors in interest? Assignments of Error 1, 5, 7, 8, 11.**

3) **Did the trial court err in applying RCW 7.28.085 to the Pettits when they held record title to the disputed area, paid taxes on the disputed area and had title deductible of record from the United States? Assignments of Error 2, 11.**

IV. STATEMENT OF THE CASE

Appellants, Britton and Lynnette Pettit, purchased a home on twenty acres in Stevens County in 2000. RP 348, 1.5-15; 349, 1.19-24; Ex. 101. Prior to purchase, Mr. Pettit, a forester experienced in locating property boundaries, inspected the property and its boundaries. RP 349, 1.11-21. Along the north boundary, he found clear evidence of several surveys, flagging, monuments and markers. RP 350, 1.5-352, 1.15. He observed that prior logging had respected the survey boundary. RP 353, 1.11-354, 1.1; Ex. 14. Although there were remnants of an old fence south of the survey boundary in dense brush difficult to walk through, RP 354, 1.13-19, the fence had not been maintained, was not functional, the wires were down with logs over them with no evidence of use between the marked survey boundary and the fence remnants. RP 352, 1.18-RP 354, 1.23.

Satisfied with the boundaries and the property, the Pettits completed their purchase and moved onto their new property. RP 356, 1.17-20.

In 2005, the Pettits obtained a Forest Practices Act approval to selectively log their property up to the survey boundary. RP 386, 1.13-21; Ex. 107. The owners to the north, the Acords, learned of the logging permit and their son, Walter, a logger, offered to log the Pettits' property for the Pettits. RP 394, 1.4-15. Mr. Pettit rejected the offer and the problems began. RP 394, 1.16-23; RP 395, 1.7-25.

The Acords then obtained an approval to log their property north and west of the contested area. RP 394, 1.21-23. The area defined on their application did not include or even abut the Pettits' property. RP 99, 1.11-23; Ex. 108; RP 395, 1.4-12. When the Acords logged, however, they went beyond the area described in their application and illegally logged the area abutting the Pettit property to the north of the contested area and the contested area itself.¹ RP 99, 1.11-22; RP 100, 1.17-21; Ex. 108, RP 395, 1.4-398, 1.6; RP 216, 1.7-16; RP 209, 1.18-24. Mr. Pettit, realizing his timber had been cut by the Acords, painted a "P" on the end of the logs from the contested area and filed a timber lien on the logs. RP 398, 1.10-19; RP 402, 1.12-15.

¹ Later, at trial, the Acords produced a false copy of what they claimed was their cutting permit, with the cutting boundaries altered to show they claimed the right to log the contested area and logging was approved in the area they actually logged. This false exhibit was never submitted for approval by the Washington State Department of Natural Resources. RP 42, 1.11-13, 43, 1.19-22; RP 96, 1.13-97, 1.26; Ex. 9, Ex. 108, RP 99, 1.4-11.

The Pettits then commenced a small claim court action to recover the value of their logs. The Acords claimed ownership of the contested area and logs therefrom and moved this matter to Stevens County Superior Court. RP 1-54.

At trial, testimony centered on the old fence located south of the survey line. The only witness with knowledge testified the fence predated 1963 and was a containment fence constructed at a time when the Acord and Pettit properties were under common ownership. RP 316-323. All live witnesses who resided on the property before 1991 testified the fence was neither a boundary or a section line fence, nor was the disputed area used by Acords' recent predecessors. RP 316-323, RP 224-238, RP 323-331.

The witness with the earliest knowledge was Frank Sperber. Mr. Sperber moved onto the property in 1963 when he was 17 and lived there when all the land in question was in common ownership by his father. RP 317, 1.3-17. He lived there nine years before the land was divided. Ex. 103. He testified that at the time he moved onto the property, the gate and fence near the south line were already there. RP 317, 1.9-23. Mr. Sperber's father owned the land on both sides of the fence and did not consider the fence either a boundary or a section line fence. *Id.* He testified the fence was just to keep cattle in. *Id.* The land was in common

ownership until 1972 when a parcel in Section 7 containing what would become the Pettit property was sold. Ex. 103.

The Chandlers bought the remaining Sperber property, in Section 6, in 1972 and later the Acords bought from the Chandlers. Ex. 103. Brian Chandler lived on the property from 1971 until 1987 and testified the fence was on the property when the family moved there. RP 225, 1.14-16; RP 226, 1.17-RP 227, 1.5. They did not build the fence and did not maintain or use the fence. *Id.* Also, the family did not use the contested area for anything and he did not consider the fence a boundary. RP 226, 1.10-14; RP 227, 1.6-11; RP 237, 1.23-238, 1.4.

Brian Chandler's sister, Jill Metlow, was 14 when the Chandler family moved onto the ranch in 1971 and had knowledge of its use until 1988. RP 324, 1.24-25; 326, 1.14-18. She testified the old fence near the south line pre-existed her family and was not serviceable. RP 325, 1.15-19; RP 330, 1.16-19. She did not consider it a boundary fence and her family did not use the contested area for any purpose. RP 325, 1.20-22; 326, 1.19-20.

Over the Pettits' objection, CP 257-287, 293-299, the trial court admitted a transcript of testimony given by Fred Chandler, the father and stepfather of Brian and Jill, respectively. CP 323-24. The transcript was of testimony given by Fred Chandler in a prior matter unrelated to the

boundary in question when neither the Pettits nor a predecessor in interest was a party. CP 136-191, Ex. 113. The testimony was given at a time when Mr. Chandler was nearly deaf and easily confused. RP 331, 1.7-14, CP 192. The record does not show the testimony was given under oath, CP 138, 1.8-11, and exhibits used to explain the confusing testimony were not provided to the trial court. RP 302, 1.24. Nevertheless, the trial court disregarded all live testimony from every witness with knowledge of pre-1991 property use, and interpreted Fred Chandler's testimony from the unrelated matter as establishing that Mr. Chandler built the fence at issue as a boundary fence. RP 370-72; Findings of Fact F, G, H, I. Mr. Chandler did not, however, testify as to any use of the contested area. RP 136-191.

Eddie Acord testified he bought his property in 1991 from Fred Chandler, moved onto the property in October of 1991 and has lived there ever since. RP 20, 1.17-20, 23, 1.11. Mr. Acord testified he cut firewood in the disputed area until the late 1990's and he pastured horses about three months a year until late 1999 or early 2000. RP 24, 1.7-17. He did not testify to 10 years use in the contested area. At most, he testified to nine years intermittent use. Mr. Pettit offered uncontested testimony that by 2000 the fence was in really bad shape, would not hold animals, was not monitored and there was no use, or evidence of use by Acords in the

contested area until they illegally logged in 2006. RP 372, 1.5-373, 1.1. There was no wire on the fence posts between 2000 and the July 2011 trial. RP 374, 1.4-15, Ex. 118, 119.

Additionally, Mr. Acord admitted a prior owner of the Pettit property removed a portion of the old fence, claimed to the survey line and pulled fence posts out, bulldozed part of the fence, constructed a jeep trail and ran him off with a gun in 1995. RP 48, 1.11-49, 1.2; RP 50, 1.10-12, 21-24; RP 79, 1.2-RP 80, 1.24; RP 85, 1.9-12. He has never restored the old fence or used the eastern portion of the contested area. *Id.* Rather, his son clandestinely rerouted the fence to an area that could not be seen and did not enclose the eastern portion of the disputed area. RP 189, 1.19-22. Acords have not replaced the fence posts removed by Robertson for approximately 16 years. RP 79, 1.19-21.

The trial court found that the Pettits and their predecessors' use was adverse, that use of the east portion of the contested area met all the elements for adverse possession by the Pettits, RP 377, Conclusion of Law G, but refused to quiet title in the Pettits because the Court inexplicably found that the Pettits did not have record title and RCW 7.28.085 precluded their claim to the land. RP 378, Conclusion of Law H.

V. ARGUMENT.

1. The Trial Court Erred in Awarding Title to the Acords Based on Less Than Ten Years Use of the Disputed Area.

In Washington, an adverse possessor must possess the land claimed for a minimum of 10 years. RCW 4.16.020(1). Here, the Acords' own testimony shows they purchased their property in 1991, RP 20, l. 17-18, moved onto the property in October of 1991, RP 23, l. 11, and intermittently used the disputed area to cut firewood until the late 1990's and to pasture horses three months a year until late 1999 or 2000, RP 24, l. 7-17. Such use does not meet the required ten years.

Moreover, because the Acords had not used the disputed area for 10 years prior to effectiveness of RCW 7.28.085 on June 11, 1998, they would have to construct a "substantial improvement" before they could acquire title by adverse possession. RCW 7.28.085(1). To meet the definition of a substantial improvement, an improvement must cost at least \$50,000. There is no evidence anywhere in the record that the Acords constructed such an improvement. The Acords have the burden of proof on this issue by "clear and convincing evidence." RCW 7.28.085(1). Hence, the Acords cannot prove an adverse claim by their own use in the 6-2/3 years between their October 1991 move to the property and the June 1998 effectiveness of RCW 7.28.085.

To prove the continuous period of adverse use or possession, Acords need to rely on adverse use by their predecessors, Chandler and Rhodes, and as a result Acords' claim must fail. There is no evidence in this record of adverse use by Chandler or Rhodes. RP CP.

In general, findings of fact are reviewed to determine if they are supported by substantial evidence. Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 575, 343 P.2d 183 (1959). When reviewing documentary evidence where the trial court did not have an opportunity to review the demeanor and credibility of a witness, review of findings of fact is *de novo*. Jenkins v. Snohomish County Pub. Util. Dist. No. 1, 105 Wn.2d 199, 713 P.2d 79 (1986); II NANCY McMURRER, WASHINGTON APPELLATE PRACTICE DESKBOOK, (3d ed. Washington State Bar Association 2005) §18.7(10), p. 18-20.

Here, the trial court did not have an opportunity to evaluate the demeanor and credibility of Mr. Chandler, hence, any findings of fact based on his testimony are reviewed *de novo*. Fred Chandler, even if his testimony is considered, did not testify to any use in the disputed area, the forested southeastern portion of his property. CP 138-189. In fact, he only said he did not pasture any cattle, dairy or otherwise, in the evergreen trees. RP 156, l. 13-20. There is no evidence of use by Rhodes in the contested area. RP. Although Mr. Chandler testified that Mr. Rhodes had

logged, he admitted he did not go over the property and he did not testify to knowledge of logging in the contested area. CP 167, l.9-14, 176, l.17-20.

The only testimony in this record is that the contested area was not used by the prior owner. Both Brian Chandler and Jill Metlow were familiar with the operation of the Chandler ranch from 1971 until 1988. RP 225, l.14-16, p. 325, l.15-326, l.2, p. 330, l.16-19. Both testified the contested area was not used by the Chandlers. RP 227, l.9-11, p. 326, l.5-20.

Without evidence of prior adverse use by Chandler, Acord has nothing to “tack” to his deficient 6-2/3 years of use. As a result, his claim of adverse possession fails.

Actual adverse use for 10 years is necessary for Acords to perfect their claim. The elements for adverse possession are:

- 1) Exclusive;
- 2) Actual and uninterrupted;
- 3) Open and notorious;
- 4) Hostile and under claim of right for 10 years.

Chaplin v. Sanders, 100 Wash. 2d 853, 857, 676 P.2d 431 (1984).

Riley v. Andres, 107 Wash. App. 391, 395-96, 27 P.3d 391 (2001). The adverse possessor must prove each element. Id. Hostility is shown by

actual use. Chaplin at 861. Actual use shows the elements of open and notorious. Chaplin at 862. Use and occupancy are necessary. Chaplin at 863, quoting Krona v. Brett, 72 Wash. 2d 535, 539, 443 P.2d 858 (1967). To meet the open and notorious element, actual use by the claimant must be shown by notice to the title owner of adverse use for 10 years or use as an owner would use the property. Riley v. Andres at 396-97.

In Cartwright v. Hamilton, 111 Wash. 685, 191 Pac. 797 (1920) our Supreme Court dealt with an adverse possession claim to a line fence that had encroached on property to the east for more than 30 years. In denying the plaintiffs' claim, the court found that, without actual use for ten years, the plaintiffs' claim failed. Actual physical occupancy and use are required, a fence alone is not enough. 17 WILLIAM B. STOEBCUK & JOHN W. WEAVER, WASHINGTON PRACTICE REAL ESTATE PROPERTY LAW § 8.9, p. 517 (2d ed. 2004). Without evidence of use for the statutory period, the claim fails. Id.

Conclusions of law are reviewed *de novo*, State v. Williams, 96 Wn.2d 215, 220, 634 P.2d 868 (1981), as is a determination as to whether the findings of fact support the conclusions of law. American Nursery Products, Inc. v. Indian Wells Orchards, 115 Wn.2d 217, 797 P.2d 477 (1990). Based on the lack of evidence regarding an actual open and

notorious use, this court should conclude that neither Acord nor Chandler has adversely possessed the disputed area for the required 10 years.

In Conclusion of Law A, the trial court cites *Wood v. Nelson*, 57 Wn.2d 539, 540, 358 P.2d 312 (1961) for the proposition that use is not necessary if a fence is present. *Wood* is inapposite for several reasons. First, there was actual open and notorious use by the claimant up to the fence. In *Wood* much of the disputed area was actually the claimant's access road. The other portion was mowed by the claimant. In the present case, there was no use prior to 1991. Also in *Wood*, the property was in a populated area with residences on both sides for years. In the present case, the area is sparsely populated and the dispute is over land that is in a brushy area not visible to neighbors or even the Acords themselves. RP 71, 1.4-10.

Also, several findings of fact related to use of the contested area are not supported by substantial evidence. The findings are important because they relate to respect for survey line prior to the 2006 logging which precipitated this action.

In Finding D the court found that the 12 trees were removed from the contested area between 1971 and 1985. The trial judge recognized that the owner at the time did not testify to such logging and the trial judge attributed logging to Kenneth Rhodes who owned the property prior to the

Acords. Mr. Rhodes, however, did not own the property during the period of alleged logging but rather only owned the property for a short period between November 1988 and 1990. Ex. 3, 4, CP 142, 1.12-43, 1.8. The sole basis for the alleged logging in the contested area was speculation by an expert, Al Lang. RP 128 1.22-23, Ex. 14 & 15. This expert testimony aging stumps by comparison with stumps at his home in Idaho should have been excluded under the Frye test. Objection was properly made. RP 121, 1.3-8. Under the Frye test, a scientific theory or method must be generally accepted in the scientific community. Frye v. U.S., 293 F. 1013 (D.C. App. 1923). On *voir dire* the expert admitted he had not looked at the soil types at the subject property and his home. RP 122, 1.19-22. He did not know the pH of the soils. RP 123, 1.4-7. He did not look at weather records for cloud cover, humidity, length of snow cover or amount of precipitation, but instead used his cell phone. RP 123, 1.8-124, 1.10. He did not know why he should use climate records to compare climates. RP 124, 1.6-11. He admitted there might be a scientific manner with which to age stumps but he did not know what it was. RP 125, 1.25-126, 1.5. No peer-reviewed analysis of his method was offered. This Court should exclude such junk science as offered by Mr. Lang and reverse Finding of Fact D as it relates to logging in the contested area between 1971 and 1985.

The remainder of Finding of Fact D correctly shows that there was no logging in the contested area between 1989 and 2006. Finding of Fact E correctly finds that both the Acords' 1998 logging and their permit application respected the actual survey line. It also correctly finds that the Acords' actual 2005 logging permit application respected the survey line, Ex. 108, and did not claim a right to log in the contested portion of Section 6.

The trial court erred, however, when it found that Acords filed another map in 2006 which showed logging to be done in the contested area. There is no evidence in this record to support a finding that such a map was filed. First, Bernard Jones, a Department of Natural Resources Forester, RP 96, 1.6-10, testified that the Acords presented a false, altered copy of the cutting permit to the court as Exhibit 9. RP 97, 1.20-26, 99, 1.4-11. The actual map submitted to the state, which showed the correct boundary, was never amended. RP 99, 1.7-11. As a result, Acords' cutting in or even adjacent to the contested area in 2006 was illegal. RP 99, 1.19-23.

Second, Walter Acord, who submitted the permit application to the DNR, Ex. 108, testified the exhibit presented to the court as his cutting permit was different than the actual permit. RP 201, 1.1013. After he was caught by DNR he was going to change the map, RP 201, 1.15-21; RP 200,

1.21-22, but he did not submit the altered map to the DNR. RP 201, 1.26-
RP 202, 1.4. As a result, there is no evidence to support the finding that
two maps were filed. The undisputed evidence is only one map was filed
with the DNR, that a false exhibit was filed with the court, and the
plaintiffs' 2006 logging in the contested area was illegal. The evidence is
significant because it shows the plaintiffs were respecting the actual
survey line in their public filing of a written application for all the world to
see. This Court should reverse the unsupported portion of Finding of Fact
E.

In Finding of Fact F, the court finds that Frank Sperber, who
moved to the property in 1963 and testified the fence was a preexisting
containment fence not intended as a boundary, was talking about a
different fence. There is no evidence in the record that Mr. Sperber was
talking about a different fence and this unsupported finding should be
reversed. The only evidence in the record is that Mr. Sperber was
testifying as to the fence in question, shown as an orange line near the
north quarter corner marked on Ex. 105A and relative to the gate across
the easement road. RP 317, 1.21-23, 318, 1.11-21, 319, 1.3-12.

This testimony is important because it shows the fence was built at
a time of common ownership, not built as, or considered, a boundary fence

and not built by Fred Chandler. The portion of Finding of Fact F which is not supported by evidence should be reversed.

Conclusions of Law A and B state the Chandlers and Acords had exclusive actual, uninterrupted possession for 21 years. This conclusion is erroneous because the record shows there was no use of the contested area by the Chandlers.

Additionally, Rhodes owned the property for a period between the Chandler ownership and there is no evidence of use by Rhodes. Absent evidence of use by Rhodes or even a claim to the disputed area, his intervening ownership breaks the requirement of continuous, uninterrupted use for adverse possession. Abandonment of the claimed property, or a break in possession before the statute runs, prevents a claim of adverse possession. 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE REAL ESTATE PROPERTY LAW § 8.17, p. 537-38 (2d ed. 2004). A break as short as five days defeats the required continuity. *George v. Columbia & Puget S.R. Co.*, 38 Wash. 480, 484, 80 P. 767 (1905).

Fred Chandler, if his testimony is considered, admits an abandonment or break in possession when he states he did not know the condition of the fence when he took the property back from Rhodes. CP 177, 1.21-25. He did not know its condition when he sold to Acord.

CP 178, 1.3-5. This testimony shows a period of nonuse and/or non-maintenance sufficient to break the required continuity of use. He also testified gates were “tore off and left open” so many times he was not sure of their condition and he did not always fix them. RP 158, 1.13-24. He testified that gates in the fence were not kept closed in the early 1980’s, RP 180, 1.24-181, 1.1. After Rhodes had the property in 1990 and 1991 Chandler did not check the gates, he had no reason to be there and he did not know if they were open or not. RP 181, 1.2-18.

Conclusions of Law A and B are not supported by the record. All the live, in-court testimony, that of Frank Sperber, Jill Metlow and Brian Chandler, is directly contrary to the court’s finding and conclusions regarding pre-1991 use and conditions. Even the testimony of Fred Chandler does not support either the findings or conclusions regarding actual possession, use or continuity pre-1991.

Contrary to the court’s express Conclusion B regarding dairy cow use, the only testimony is that cows were excluded from the contested area by Sperber, Chandler and Acord. Acord only testified about post-1991 occasional horse pasturage and firewood cutting. There is no evidence of other use in this record and the court’s contrary conclusions are not supported by the record or the findings that are supportable by the record. The unsupported portions of Conclusions A and B should be reversed.

Conclusions C and D are similarly flawed. Absent the hearsay testimony from the unrelated matter, every witness testified the fence was not maintained or considered a boundary. Fred Chandler himself testified that integrity of the fence, particularly the gates, was not maintained. There were no overt acts of use for the world to see, only a fence or remnants thereof in a brushy area hidden from view.

Conclusion E, that Acords' claim dates back to 1974, is erroneous. Acords' use only goes back to late 1991 and had not ripened into adverse title by the June 1998 effectiveness of RCW 7.28.085 or Robertson's and Pettits' entry onto the disputed area. There is no evidence of use by Chandler or Rhodes to tack and non-use of the contested area and lack of concern by Chandler after Rhodes occupancy would also defeat the continuity requirement for adverse possession. Conclusion E is without support in the record or by findings supported in the record and should be reversed.

Conclusions of law are reviewed *de novo*. *American Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 797 P.2d 477 (1990). This Court should reverse the trial court's Conclusions A, B, C, D and E and, when considering the uncontested evidence of both non-use prior to 1991 and after 1999 or 2000, conclude the plaintiffs' use was not actual, continuous, open and notorious for the required 10 year period and

reverse the trial court's judgment quieting title to the Acords in any portion of the contested area. Because Acords' claim to title of the disputed area fails, this court should quiet title in the Pettits as record title owner and remand this case to determine the award of damages to the Pettits for the Acords' illegal logging of Pettits' property and trespass.

2. The Trial Court Erred in Admitting the Hearsay Testimony of Fred Chandler From a Prior Unrelated Matter.

A. Standard of Review.

Decision interpreting the court rules, regarding identification of hearsay and exceptions to the hearsay rule are reviewed *de novo*. State v. Neal, 144 Wn.2d 600, 607, 30 F.3d 1255 (2001) (“The application of a court rule to the facts in a case is a question of law subject to *de novo* review on appeal.”); State v. Edwards, 131 Wa. App. 611, 614, 128 P.3d 631 (Div. 3, 2006)(citations omitted); Ruff v. Department of Labor & Industries, 107 Wa. App. 289, 28 P.3d 1 (Div. 1, 2001). Trial construction of the rules of evidence is reviewed *de novo*. U.S. v. Sanchez-Robles, 927 F.2d 1070, 1071 (9th Cir., 1991).

Here, the decision to admit the testimony of Fred Chandler should be reviewed *de novo*.

Nevertheless, even if the decision to admit the Fred Chandler transcript is reviewed on an abuse of discretion standard, the decision to

admit the hearsay should be reversed because it was an abuse of discretion. Admissibility of the evidence will be analyzed under both standards.

(1) De Novo Review.

The transcript of Fred Chandler's prior testimony is inarguably hearsay. (The Court's Order of Aug. 24, 2011, CP p. 323-324.)

Hearsay is a statement "other than one made . . . at trial . . . offered to prove the truth of the matter asserted." ER 801. Hearsay, absent an exception, is not admissible. ER 802. Mr. Chandler was not present at the time of this trial (Pl. Ex. 17, 18), making the transcript of his prior statements hearsay.

Acords rely on a hearsay exception, ER 804(b)(1), in support of admissibility. The exception states:

"(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action

or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.”

Because there is a presumption against the admissibility of hearsay, the proponent has the burden of demonstrating application of the exception. R. ARONSON, *THE LAW OF EVIDENCE IN WASHINGTON* (2010) §802.03. In this case, the foundation for admissibility under ER 804(b)(1) was not met.

First, ER 804(b)(1) requires that the party against whom the testimony is offered, or a predecessor in interest, had an opportunity and similar motive to develop the testimony by cross-examination. The Court of Appeals recently applied this rule to observe that a prior transcript should be excluded inasmuch as it did not meet the standards of ER 804(b)(1). In *Allen v. Asbestos Corp. Ltd.*, 138 Wn. App. 564 (2007), an asbestos personal injury case, an issue arose concerning the use of a prior transcript against Uniroyal, the respondent on appeal. Appellant Allen argued that the trial court improperly excluded the transcript, which purportedly would have established exposure to Uniroyal’s asbestos-containing product. The court noted however, that there was no evidence Raymark attended the deposition, and, therefore, ER 804(b)(1) cannot apply. There must be a predecessor with an opportunity and motive to

examine the witness. Without such a predecessor, the trial court was correct in excluding the hearsay evidence. *Id.* at 578-579.

The required predecessor and motive are not present for admission of the Fred Chandler transcript in the present matter. The prior case in which Fred Chandler testified, *Acord v. Thomsen*, Stevens County Superior Court Case No. 95-2-00164-3, was a different case brought by Acords to claim adverse possession of property to the east of their property within Section 6. CP 265-287. A portion of Section 6 was the only property subject to Acords' complaint. In the present case, Acords seek a portion of property belonging to the Pettits south, not east, of Acords' property in Section 7, not Section 6. CP 1-54. Any statements that may have been made in that trial about the putative south boundary of Thomsens' land were of no moment or relevance in the prior case solely involving the eastern boundary of property in another section and should not be in the present case. Neither Pettits nor any predecessor in interest to their property was a party in the prior suit. As a result, neither the Pettits or their predecessor had an opportunity to develop or challenge the testimony of Fred Chandler. The Thomsens, defendants in the prior action, had no interest in property to the south of the Acords. As a result, the Thomsens had no interest or motive to develop, object, challenge, refute, explain, or clarify Fred Chandler's testimony in the prior matter.

The Thomsens never owned the Pettits' property in Section 7 or any of the property Acords are now claiming in Section 7. (Pl. Ex. 1-8, 103)

Thomsens and their attorney had no reason to care about any testimony with respect to property that had nothing to do with the Acords' adverse possession claim to property owned by Thomsen. Testimony regarding Acords' south boundary or land in Section 7 was simply foreign to the issues in the Thomsen case.

The trial court erred by interpreting ER 804(b) to apply in a situation where the prior parties had no interest in developing the prior testimony on an irrelevant point. The trial judge apparently felt the prior parties' opportunity to cross-examine was sufficient basis to apply the ER 804(b)(1) exception. By its terms ER 804(b) requires both a "predecessor in interest" and "similar motive." Neither was present here. This court should reverse the trial court's interpretation of ER 804(b)(1), and exclude the inadmissible hearsay.

(2) Abuse of Discretion.

Abuse of discretion is discretion exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn. 2d 12, 482 P.2d 775 (1971). An incorrect application of the law is an abuse of discretion. *State v. Lough*, 70 Wn. App. 302, 303 (note 5), 853 P.2d 920

(Div. 1, 1993). Here the trial court abused its discretion by both using untenable grounds and reasons as well as incorrect application of the law. The Court's order admitting the transcript listed the reasons used by the Court to justify admission of the hearsay. CP 323-24. None of the reasons is tenable or applicable to admission of the Chandler transcript.

The legal reasons expressly listed by the trial court are:

“RCW 5.44.010;

State v. Lunsford, 163 Wash. 199 (1931);

ER 803(4);

ER 804(a)(4);

CR 32(a)(3)(A); and,

CR 43(h).”

CP 323-24.

The listed reasons will be dealt with in order:

RCW 5.44.010 deals with attestation of the clerk for records and proceedings of other courts. It does not make general hearsay testimony admissible in a civil proceeding. This principle is borne out in Washington case law. For example, in State v. Connie, JC, 86 Wn. App. 453 (1997), the court held that RCW 5.44.040 provides for the genuineness of a certified court document containing a confession but not if its admissibility as a confession in another proceeding. Similarly, in

Kaye v. State Dept. of Licensing, 34 Wn. App. 132 (1983), a police officer's sworn report was not admissible in a later proceeding concerning whether the defendant had refused a breathalyzer test. Further in State v. Dibley, 38 Wn. App. 824, 828, 691 P.2d 209 (1985), the court noted RCW 5.44.040 is not sufficient basis, standing alone, to support admission. A document can be what it purports to be under the concept of authentication and still contain inadmissible hearsay. Id. Moreover, the transcript filed in this case does not have the required attestation of the officer having charge of the court's records nor the seal of the court. CP 136-190

State v. Lunsford deals with admissibility of prior testimony of a witness in the retrial of the same case between the same parties. State v. Lunsford does not deal with the issue here, admissibility of testimony from a different case, with different parties involving different issues. The case is inapposite.

ER 803(4) deals with admissibility of statements for medical diagnosis or treatment, neither of which are present in this case or the prior case.

ER 804(a)(4) simply defines unavailability. It does not, by itself, make any evidence admissible.

CR 32(a)(3)(A) deals with the use of depositions in court proceedings. No depositions were offered in this case. Even if a deposition were offered under CR 32, it is expressly subject to the rules of evidence. CR 32(a). Also, the testimony must be under oath. CR 30(c). In this case, there is no evidence that Fred Chandler's testimony was under oath. His response to the oath was "inaudible." CP 138, l. 8-11. Only speculation supports the oath.

CR 43(h) deals with certification of transcripts "admissible in evidence at a later trial." CR 43(h) does not itself make transcripts admissible, it merely states that otherwise admissible testimony may be proved by a transcript.

Finally, exclusion of the offered transcript is consistent with the purpose for the rules of evidence. The transcript does not have general indicia of reliability.

First, the transcript is unclear. It contains only 51 pages of testimony but has 179 inaudible portions, CP 138-189, starting with the actual oath, CP 3, and including significant portions describing preexisting fences, e.g. CP 18; location of fences, CP 21; gate location, condition and maintenance, CP 23, 45-46, etc.; his property configuration, CP 162-64; location and nature of fences and gates, CP 167-68, etc.

The transcript is also incomplete. The multi-colored exhibit used to explain testimony and show fence locations, CP 47, was not included with the transcript. The trial judge himself recognized the need for the exhibit regarding fence locations when he observed, the discussion “. . . doesn’t mean anything unless we have a diagram or exhibit to refer to.” RP 303, l. 13.

Fred Chandler’s testimony that he built the south fence was directly contradicted by every live witness with knowledge. Frank Sperber, son of a prior owner, testified the fence was already there in 1963 and was not a boundary fence. RP 317, l.7-23. Brian Chandler, who lived on the property with his father, Fred, testified the fence was there when the family moved there in 1971 and his family did not build it, use it, monitor it or consider it a boundary. CP p. 226, l. 17 – p. 229, l. 2-5; p. 234, 237, l. 15-238, l. 4.

Jill Metlow, Fred Chandler’s stepdaughter, lived on the ranch and testified the fence preexisted her family, they did not build it, it was not serviceable and it was not considered a boundary. RP p. 325, l. 6-22; p. 330, l. 9-19; p. 33, l. 15-16. While testifying he was honest, Ms. Metlow also testified that at the time of his testimony Fred Chandler was ill, easily confused and practically deaf. RP 331, l. 9-15.

Last, any reference in the Chandler transcript to the boundary line between Sections 6 and 7 or fences nearby was irrelevant to the issues in the prior matter. No one, the plaintiff, the defendant nor the court, had a reason to make sure the testimony was clear.

For the above reasons, the trial court's decision to admit the hearsay testimony of Fred Chandler from an unrelated matter should be reversed and the transcript excluded. Absent Fred Chandler's testimony there is no support for any finding of fact or conclusion related to the fence purpose.

3. The Trial Court Erred by Misapplying RCW 7.28.085 and Failing to Quiet Title in the Pettits to the Entire Disputed Area or at a Minimum the Eastern Portion of the Disputed Area.

Even if the Acords had, at some point in the past, acquired title to the disputed property, Pettits regained title to the property through their use, color of title, payment of taxes and Acords' abandonment for more than seven years. Eddie Acord admitted he made no use of the contested area after the late 1990's or 2000. RP 24, l.7-17. Although he cut firewood in the disputed area some years, he quit by the late 1990's. RP p.24, l.7-10; p.73, l.10-12. He never kept cattle in the area but he did keep horses in the area about three months a year until the late 1990's or early 2000. RP 24, l.9-15; RP 73, l.13-21. The area had not been used for

pasture in the 10 years before trial. RP 74, 1.5-8. Prior to a pretrial judicial view, Mr. Acord cut brush out of the way to make the fence area passable and removed deadfall from the fence. RP 55, 1.12-55, RP 8, 1.25-9, 1.6. Even with his efforts, the fence was not functional at the time of trial. RP 83, 1.7-13. The trial court correctly found, in Finding of Fact N and Conclusion of Law G, that the Pettits have adversely possessed the entire contested area since August 2000. CP 374-75, 378.

Also, the undisputed evidence in this case, proved by Eddie Acord's own testimony, is that the Pettits' predecessor removed portions of the fence, bulldozed part and ran the Acords off at gunpoint in 1995. RP 48, 1. 11-p. 49, 1. 2; p. 50, 1. 10-12, 21-24; p.79, 1.2-p.80, 1.24.

After being run off, the Acords knew Ms. Robertson claimed the property, and they did not rebuild that fence despite the passage of 16 years. RP 79, 1.13-21. Rather, Walter Acord abandoned the eastern portion of the disputed area and built a hurry-up cross fence out of sight at a different location underneath the break of the hill. RP p. 189, 1.20-p.190, 1.21; p.191, 1.3-7.

The trial court correctly found that Acords had been excluded from the eastern portion of the contested area by Robertson and had not returned. Finding of Fact L, CP 373.

The trial court also correctly found and concluded that use by Mrs. Robertson and the Pettits met the elements for adverse possession of the eastern portion of the disputed area with use from 1995; and, the Pettits met the elements for adverse possession of the entire disputed area by use since 2000. Conclusion of Law G, CP 377-78.

The trial court inexplicably erred in Conclusion of Law H when it misapplied a non-applicable statute and concluded that RCW 7.28.085 prevented the Pettits' claim because the Pettits had not made substantial improvements and did not hold record title.

The court's misapplication of RCW 7.28.085 to the Pettits' adverse use is wrong for multiple reasons, and its citation to RCW 7.28.090 is erroneous as there is no such statute.² By its terms, RCW 7.28.085 only applies to "adverse claimants." RCW 7.28.085(1). Claims under RCW 7.28.050 and 7.28.070 are expressly excluded from application of RCW 7.28.085. These reasons will be dealt with individually.

The statute does not apply to the Pettits because they hold record title and by definition are not adverse claimants.³ "Adverse claimant"

² Appellants assume the court meant to refer to RCW 7.28.085(3)d.

³ The statute does apply to the Acords. Acords are "adverse claimants" under RCW 7.28.085 because they have never held record title to the disputed area. Their record title is only to land in Section 6 and includes no land in Section 7 where the disputed property lies. Ex. 4, 5, 7, 103.

means any person, other than holder of record title . . . ,
RCW 7.28.085(3)(a) (emphasis added). The trial court even found that the
Pettits had a properly recorded deed, Finding of Fact B, CP 366, and
record title: “The Pettits moved onto the property on September 1, 2000.
Their record title includes the contested area.” Findings of Fact N, CP 374
(emphasis added). As a result, the trial court’s Conclusion of Law H, that
Pettits did not hold record title, is not supported by its own findings or the
evidence. RCW 7.28.085(3)(a).

There is no doubt the Pettits have record title. The Acords’ very
complaint admits record title is held by Pettit and includes a copy of
Pettits’ recorded deed. CP 30. Their deed is a statutory warranty deed to
the property in Section 7 and was recorded with the Stevens County
Auditor August 30, 2000 under auditor’s file number 20000008336 at
Volume 250, page 2528. The same deed was admitted into evidence as
Plaintiffs’ Exhibit 8 and Defendants’ Exhibit 101, and is part of Exhibit
103. There is no evidence in the entire record that Pettits were not the
record title holder. All the evidence, even going back to the Acords’
complaint, shows the Pettits held record title.

The trial court’s conclusion H, that Pettits did not have record title
because the boundaries had not been established by a registered land

surveyor, is also wrong because there were surveys and, more importantly, surveys are not a requirement for record title.

The boundary between the properties was established by at least four recorded surveys, copies of the recorded surveys, with the auditor's file numbers, are included as Exhibits 10, 11 and 104. All show the common boundary. The court's very finding is inconsistent. After finding there was no survey of the common boundary in Finding of Fact C, the trial court cited the surveys and went on to actually describe the surveys and even the monuments set. CP 367-68. Given this record, there is only evidence that the common boundary was surveyed multiple times and no evidence anywhere in the record the boundary was not surveyed by a licensed surveyor with the maps recorded in Stevens County.

More importantly, the trial court's conclusion that Pettits were not record title holders absent a survey makes no sense. Record title is based on recording a deed with the county auditor and it is effective against subsequent interest holders the minute it is filed for record.

RCW 65.08.070. Recording means the process used by the auditor to store a document after filing with the auditor. RCW 65.04.015(3). The court actually found that both the Pettits and their predecessors' deeds were properly filed with the auditor. Finding of Fact B, CP 366. Nowhere is a survey required to create record title.

The trial court's apparent reference to RCW 7.28.085(2) as authority for the notion that "record title" requires a survey also makes no sense. RCW 7.28.085(2) is not implicated in this case because Pettits are not adverse claimants, both Pettits and their predecessor, Robertson, had record title. Ex. 8, 103. Because the Pettits had record title, the court misapplied RCW 7.28.085 to wrongly deny their title.

Additionally, express exceptions to application of RCW 7.28.085 make the statute inapplicable to Pettits. "Claim of Adverse Possession" does not include a claim asserted under RCW 7.28.050, RCW 7.28.070, or RCW 7.28.080." RCW 7.28.085(3)(b) (emphasis added). RCW 7.28.085 does not apply to the Pettits because Pettits have claims under RCW 7.28.050 and 7.28.070 which are not subject to RCW 7.28.085.

RCW 7.28.050 deals with claims where the claimant has title deducible of record from the United States. The required adverse possession period for such cases is only seven years. The unrefuted evidence in this file is that Pettits had title deducible of record from the United States. RP p.348, l.19-24. There is no other evidence.

RCW 7.28.070 also takes Pettits' claim out of RCW 7.28.085. RCW 7.28.070 deals with claims based on color of title and payment of taxes. Again, only seven years adverse use is required. RCW 7.28.070. Color of title is the appearance of title in an instrument purporting to

convey described land. *Scranlin v. Warner*, 69 Wn.2d 6, 9-10, 416 P.2d 699 (1966). Here, Pettits had a recorded statutory warranty deed describing their property, including the disputed area, and constituting color of title. Ex. 8, 101, 103. The unrefuted evidence is also that Pettits paid taxes on the property from August of 2000 to the time of trial, June 2, 2011. RP 349, 1.4-10, ii, and their predecessor paid before that. RP 349, 1.7-11. The court so found. Finding of Fact N, CP 375, 1.4-5.

VI. CONCLUSION

Given this unrefuted evidence and applicability of RCW 7.28.050 and 7.28.070, this court should reverse the trial court and remand the case to the trial court with directive to quiet title to the disputed area in Pettits.

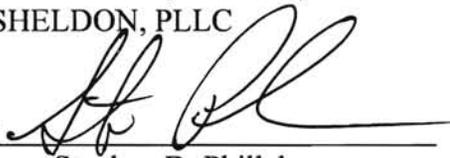
Attorney's Fees

Because the Acords wrongfully damaged Pettits' property by crossing established survey lines to illegally cut timber Acords knew to be claimed by Pettits and subject to Pettits' forest practices permit, Acords violated RCW 4.24.640 and are liable to Pettits for investigation and litigation costs as well as reasonable attorneys' fees. This Court should so order.

DATED this 27 day of March, 2012.

Respectfully submitted,

PHILLABAUM, LEDLIN, MATTHEWS
& SHELDON, PLLC

By 

Stephen D. Phillabaum

WSBA No. 11268

Attorneys for Appellants

CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that on this date, true and correct copies of the document to which this declaration is attached were served by the method(s) indicated below, addressed to the following:

Chris A. Montgomery	[<input checked="" type="checkbox"/>]	U.S. Mail
Montgomery Law Firm	[<input type="checkbox"/>]	Hand Delivered
P.O. Box 269	[<input type="checkbox"/>]	Overnight Mail
Colville, WA 99114-0269	[<input type="checkbox"/>]	Facsimile: (509)684-2188
	[<input checked="" type="checkbox"/>]	Email: mlf@cmlf.org

DATED March 28, 2012.