

12/1/2012

No. 306631

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

JAMES P. THOMAS and DELORES I. THOMAS, husband
and wife,

Respondents.

v.

ANGELO BRUNETTO and LINA BRUNETTO, husband
and wife,

Appellants,

APPELLANTS' RESPONSE BRIEF

John F. Bury
Murphy, Bantz & Bury, PLLC
818 W. Riverside, Suite 631
Spokane, WA 99201
Attorneys for Appellants

TABLE OF CONTENTS

	Page
I. <u>Statement of the Case</u>	1
II. <u>Two Findings Are Basically Contradictory</u>	1
A. Issue No. 1	2
Projected Line Does Not Meet Burden of Proof	
B. Issue No. 2	2
The Lack of Monuments Does Not Meet Burden of Proof	
III. <u>Two Boundary Lines</u>	4
IV. <u>Conclusion</u>	7

TABLE OF AUTHORITIES

	Page
Cases	
<i>Green v. Hooper</i> , 149 Wn.App. 627, 205 P.3d 134 (2009)...	1, 2, 5, 7
<i>Lamm v. McTighe</i> , 72 Wash.2d 587, 593	5
<i>Lilly v. Lynch</i> , 88 Wash.App. 306, 316-317, 945 P.2d 727 (1997)	1, 2
<i>Merriman v. Cokely</i> , 152 Wn.App. 115, 128 (2009)	3, 7

I. STATEMENT OF THE CASE

Angelo and Lina Brunetto appeal from a Stevens County Superior Court decision quieting title and decreeing two imaginary boundary lines between their lake cabin and neighbor Thomases' cabin on the conflicting theories of mutual recognition and acquiescence ("MRAR") and adverse possession.

II. TWO FINDINGS ARE BASICALLY CONTRADICTORY

Plaintiff/Respondent Thomas' Reply Brief attempts to reconcile MRAR and Adverse Possession by the first sentence of its Section II (Respondents' Brief, p. 7). This Division's decision in *Green v. Hooper*, 149 Wn.App. 627, 205 P.3d 134 (2009), clarifies the *Lilly v. Lynch*, 88 Wash.App. 306, 316-317, 945 P.2d 727 (1997) decision that MRAR does not literally supplement the theory of adverse possession, but rather is an independent cause of action. *Green*, 149 Wn.App at 640.

The neighbors' Brief of Respondents fails to fairly meet the issue on appeal: The "imaginary" and "projected" versus an actual physical line of use on the ground.

A. Issue No. 1: Projected Line Does Not Meet the Burden of Proof

In *Green*, a “projected line” was defined as an uncertain line, not a certain, well defined line in some fashion physically designated on the ground. *Green*, supra at 642. The “imaginary line” urged by Respondent Thomas, is likewise a projection, that does not satisfy the mutual recognition and acquiescence standard.

Importantly, the *projected* line in *Green* was straight between improvements as is Thomas’ projected line claimed to be. *Green*, supra at 642.

“There is no evidence to show that the retaining wall was ‘recognized by the parties as a true boundary and not just a barrier.’”

Lilly v. Lynch, 88 Wash.App. 306, 316-317, 945 P.2d 727 (1997).

The projected line found by the court below is directly contrary to the *Green* holding, and the trial court’s decision should be reversed.

B. Issue No. 2: The Lack of Monuments Does Not Meet the Burden of Proof

The trial court’s holding, and the creation of the “projected line,” evidence that there required physically designated line under

mutual recognition and acquiescence is not present. *Merriman v. Cokely*, 152 Wn.App. 115, 128 (2009) (line must be “certain, well defined, and in some fashion physically designated upon the ground”). In *Merriman*, the appeals court overruled the trial court’s failure to quiet title in the plaintiffs to a triangle piece of land, stating that the survey markers, and posts on a survey line constituted “monuments,” and that the line was therefore “certain.” *Id.* at 128-29. The court found that in addition to plaintiff’s meeting the mutual recognition and acquiescence requirements, adverse possession had also been met in the same triangle and therefore quieted title in the plaintiffs. *Id.* at 131.

The *Merriman* courts finding, in total, evidence the requirement to not only have monuments, but also have a certain, well defined line to meet the mutual recognition and acquiescence and adverse possession requirements. The lack of a certain line in the instant case, along with the introduction of two contrary “imaginary” lines, evidences that the respondents cannot show the certainty required to meet either standard.

III. TWO BOUNDARY LINES – One Projected; One Imaginary

Defendants Brunetto conceded title by adverse possession as to the deck, the corner of the house and half of the slab. RP, p. 2, l. 25 – p. 3, l. 2.

So the area in dispute was the corner of the garden, all of the grass and one of the slabs. RP, p. 3, ll. 1-2.

“Under mutual recognition and acquiescence,” Thomas’ “conceded this triangle of our property to Brunettos.” referring to the northern most fenced area. RP, p. 3, ll. 5-7.

The Brunettos claimed two lines through the common grassy area between the cabins.

Thomas’ reference to “monuments” is not proven. Commencing at the northerly common corner of the Thomas and Brunetto parcels, Thomas’ fence starts on Brunetto’s side of the line and as the fence line proceeds southerly, it crosses the platted boundary line. But Thomas *disclaims* this gore of Brunetto’s property. RP, p. 15, ll. 11-13.

This fence line then does not certainly define the boundary under *Lamm v. McTighe's* first element. *Lamm v. McTighe*, 72 Wash.2d 587, 593.

Further, the fence adjacent to Thomas' home is found to be only a "privacy" fence, not a boundary fence. "An acquiescence must consist in recognition of the fence as a true boundary line, and not mere acquiescence in the existence of a "fence as a barrier." *Green*, supra at 642.

Continuing to mischaracterize the improvements as monuments, the "retaining wall" at the lakeshore was for the self-described purpose of avoiding erosion and also as a support for a concrete slab as a stable surface. The wall near the barbecue was moved laterally when it was rebuilt, and was no more a monument than a wall to support and contain the flower bed from the lower grade.

Exhibit No. 9 says *Mutual Recognition and Acquiescence* and is a map prepared by Surveyor Van Jacobson showing the deeded line and existing structures and a hand drawn yellow line described

as the MRAR line or the “Thomas description” or “modified boundary.” RP, p. 11, ll. 1-23; p. 13, ll. 11-25; p. 14, ll. 7-23.

Exhibit No. 10 is a legal description of a small portion of land situated West of the deeded boundary between Brunetto and Thomas that the Thomases would acquiescence to Brunetto. RP, p. 15, ll. 11-13.

Exhibit No. 11 is a site plan drawn by Thomas’ surveyor that says “Adverse Possession.” RP, p. 17, ll. 2-4.

RP, p. 18, ll. 2-5

A. The basic difference is the boundary from the slab toward the end of the board fence. There is a deflection so that there are two segments to that line ending first at the keystone wall and then extending toward the board fence but stopping at the intersection with the deeded boundary line.

Thomas’ “main case today is mutual recognition and acquiescence of this line ... and a slight deviation for adverse possession ... right in the area of the rock work.” RP, p. 3, ll. 12-18.

Both the imaginary MRAR line and the “connect the dots” adverse possession line are drawn across the open grassy area between the cabins to the high water mark.

RP, p. 21, ll. 20-25

Q. Okay. And if we look at the area between the key wall and in the right hand slab on this drawing, what is in that area?

A. Lawn or grass.

Q. And is there from the key wall down here, any – in this grass area, any physical boundary indication?

A. I did not see any.

There is no boundary line physically designated on the ground. There is insufficiency of evidence of this integral element of the cause of action of mutual recognition and acquiescence. These differing legal descriptions emphasize the fact that there is no physically designated line, stated as required in *Merriman v. Cokely*, 152 Wn.App. 115, 128 (2009) (line must be “certain, well defined, and in some fashion physically designated upon the ground”).

Moreover, there is no clear, cogent and convincing evidence that both Brunetto and Thomas intended to recognized a line *projecting* (the Court’s italics in original decision, *Green*, supra at 644) from the fence across the wide open lawn to the waterline. *Green*, supra at 644.

The trial court’s decision should be reversed.

IV. CONCLUSIONS

Under the facts of this case, Thomas did not provide clear, cogent and convincing evidence of a non-projected, actual line physically located on the ground, particularly through the open lawn.

Under the law of this case, permissive use of acquiescence and consent vitiates the hostile element of adverse possession.

RESPECTFULLY SUBMITTED this 14th day of December, 2012.

MURPHY, BANTZ & BURY, PLLC

A handwritten signature in black ink, appearing to read "John F. Bury", is written over a horizontal line. To the right of the signature, the word "for" is written in a smaller, cursive hand.

John F. Bury, WSBA No. 4949
Attorney for Appellants
Angelo and Lina Brunetto

No. 306631

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

JAMES P. THOMAS and DELORES I. THOMAS, husband and
wife,

Respondents.

v.

ANGELO BRUNETTO and LINA BRUNETTO, husband and wife,

Appellants,

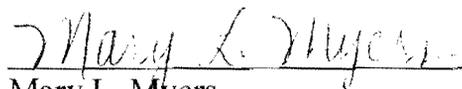
CERTIFICATE OF SERVICE

John F. Bury
Murphy, Bantz & Bury, P.L.L.C.
818 W. Riverside, Suite 631
Spokane, WA 99201
Attorneys for Appellants
ANGELO BRUNETTO and LINA BRUNETTO

I, Mary L. Myers, hereby declare under penalty of perjury under the laws of the State of Washington and the United States that: (i) I am a citizen of the United States of America and over the age of eighteen years and competent to be a witness; (ii) I make this declaration based upon my personal knowledge and am competent to be a witness; and (iii) I mailed a true and correct copy of the **Amended Response Brief**, overnight mail (FedEx) on the 14th day of December, 2012, to the person(s) listed below:

Chris Montgomery, Esq., 344 East Birch Avenue, Colville, WA 99114

SIGNED at Spokane, Washington, this 14th day of December, 2012.



Mary L. Myers