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No. 83700-7

**SUPREME COURT
OF THE STATE OF WASHINGTON**

SCOTT MERRIMAN and KIM MERRIMAN, husband and wife,

Underlying Appellants/Cross-Respondents,

v.

PAUL COKELEY and DIANNE COKELEY, husband and wife,

Petitioner/Underlying Respondents/Cross-Appellants

**MERRIMAN'S RESPONSE TO COKELEYS'
PETITION FOR REVIEW**

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I. INTRODUCTION

This case is straight forward, a rather classic dispute over a boundary line. The only issue here is whether or not survey monuments can constitute a "well-defined line" in applying the doctrine of mutual recognition and acquiescence. The Division Two correctly ruled in the affirmative. In this case all parties testified that they knew of the survey monuments set in 1993 and understood and acknowledged the line defined by those survey monuments as the boundary for the requisite ten years.

The Cokeleys seek review by arguing that a "split" exists between the courts, but this simply is not true. There is no debate as to the legal elements of mutual recognition and acquiescence, or the burden of proof standard. The Cokeleys are simply unhappy with the application of long-standing law to the facts in this case, consistent with a century's worth of case law. That is not basis for review, short of a suggestion that the law should be changed. No such suggestion is made, nor would it be appropriate.

II. ISSUES PRESENTED FOR REVIEW

Cokeleys state two issues for review. Neither pass muster.

Before addressing these issues, we first note misstatements of the law in the Cokeleys' presentation of the issues for review.

A. Correction of Misstatements regarding the Legal Issues Presented.

1. Mutual Recognition and Acquiescence is a Separate Legal Doctrine from Adverse Possession.

The Cokeleys present their first issue for review as follows:

Whether proof of a certain and well-defined boundary line is necessary to establish adverse possession of real property under the doctrine of mutual recognition and acquiescence.

However, as noted in *Green v. Hooper*, 149 Wn App. 627, 639-40, 205 P.3d 134 (2009), *rev. den'd*, __ Wn.2d __ (Sept. 29, 2009), mutual recognition and acquiescence is not a subset or "supplement" to adverse possession. Rather, the two doctrines are alternative theories. The only relevant legal standard before this Court is that of mutual recognition and acquiescence, the basis for the trial and Appellate court decisions.

2. No Split Exists Between the Burden of Proof Set Forth by Division Two and Division Three.

The Cokeleys also confuse the issues on their second issue for review:

Whether the holding by Division Two that two posts, not connected in any manner located in an overgrown and wooded area, can constitute a defined property line **or** whether the standard of proof used by the previous Supreme Court cases and Division Three that such line must be proven by clear, cogent and convincing evidence of a certain and well-defined boundary, should

be applied to the doctrine of mutual recognition and acquiescence?

This is not an "either-or" question. There is no dispute, either by the Merrimans or the majority or dissenting judge in the underlying appeal, that the standard of proof for a claim of mutual recognition and acquiescence requires "clear, cogent and convincing evidence" of a "certain, well-defined and in some fashion physically designated upon the ground" boundary line. *See, e.g., Lamm v. McTighe*, 72 Wn.2d 587, 593, 434 P.2d 565 (1967). This law is well-established in Washington, and is not disputed. There is no "split" between the courts – or the parties – on this issue.

The only dispute is whether or not the evidence in this case met the requisite burden. This is a case-by-case determination capably handled by Division Two, and not suitable for Supreme Court review.

B. There is no Valid Basis for Review.

The Cokeleys raise only one basis for review under RAP 13.4(b), arguing (incorrectly) that this case is in conflict with existing law and a Division Three decision, *Green*, 149 Wn. App. (2009), *rev. den'd*, __ Wn.2d __ (Sept. 29, 2009). But again, the only difference between *Green* and the present case is the application of the *same* law to *different* facts. This does not present a conflict of law between the courts, and does not form a basis for review. No other elements of RAP 13.4(b) are argued or met.

In short, the Cokeleys have not established any basis for Supreme Court review. Nor can they, as they simply do not exist.

III. STATEMENT OF THE CASE

The Cokeleys allege the issue as one regarding proof or elements of mutual recognition and acquiescence. It is unclear under which of the elements of RAP 13.4 this argument would fall under, but even as a legal argument it falls short.

A. The Parties Mutually Recognized and Acquiesced to the Boundary Line Defined by the Old Survey Monuments.

This is a straight forward case about an old survey that ultimately proved incorrect. From the time that the survey monuments were set until the Cokeleys discovered the error in a recent survey, both parties (and predecessors) affirmed at trial that they knew of the survey monuments; and recognized those monuments as establishing the boundary line for the ten years required to establish a boundary line under the doctrine of mutual recognition and acquiescence.

B. Survey Markers are Monuments that Define a Boundary Line.

The first element of mutual recognition and acquiescence - the one at issue in this petition - requires, as correctly noted by Cokeleys, that the line is “certain, well-defined, and in some fashion physically designated upon the ground, e.g., by *monuments*, roadways, fence lines, etc.” *Lamm v. McTighe*, 72 Wn. App. 587, 592-93, 434 P.2d 565 (1967)(emphasis

added). The Cokeleys - and the dissent on appeal - assert that there was no "certain or well-defined line upon the ground."

This is simply not the case. The primary dispute boils down to whether or not survey markers are sufficient "monuments," and whether such survey monuments suffice to create a "certain, well-defined line."

Again, it is important to emphasize in evaluating this decision that there is no "split" between the Appellate court majority or dissent, or any other Appellate or Supreme Court decision, as to the basic elements of a claim for mutual recognition and acquiescence. There is no dispute as to the general burden of clear, cogent and convincing proof. The only debate is whether the facts *in this case* met those elements under the requisite burden. This is not a dispute of law. This is about the application of the *unrefuted law* to the unique facts of this particular case.

On that point, the Cokeleys mischaracterize the testimony and evidence. So does (with all respect) the dissenting judge on the Appellate panel. This is more than a matter of poles and stakes. The majority held as it did, correctly, because of the *official survey monuments* in place.

As set forth in the Merrimans' briefing, there was *no* dispute that from the time of the original 1993 survey until the Cokeleys' new survey in 2006 the neighbors understood the straight and well-defined line marked by the 1993 survey monuments to be the boundary. All knew about the monuments marking that line. RP 86, ll. 9-18; RP 87, ll. 12-15;

RP 90, ll. 13-16; RP 99, ll. 5-11; and RP 111, l. 10 - 112, l. 6; RP 125, ll. 5-18; RP 138, ll. 6-23.

As shown in the underlying briefing, the testimony at trial and the Appellate decision, the "posts and stakes" referenced by Cokeleys and the dissent were set according to those survey monuments. But they were just part of the evidence that the neighbors recognized and acquiesced to those survey monuments as defining the boundary. The real issue is that there were *survey monuments* defining the line by way of monuments on the ground - precisely as contemplated by *Lamm* and a century of Washington law.

If survey markers are not "monuments" sufficient to designate a property line, or if surveys do not "clearly define" a line, then the entire industry and purpose of land surveys would be eviscerated. But, that is not the case. The Appellate court correctly found that survey monuments could constitute a well-defined line, especially where, as here, such monuments were acknowledged by placement of stakes and, critically, recognized as representing the boundary by both neighbors for the requisite period of time.

There is no basis for review in this case. Division Two's holding was completely in line with existing case law and common sense. The Supreme Court is not and should not be a venue for review simply because of dissatisfaction with the result. There is no conflict of law.

IV. ARGUMENT

The Cokeleys do not argue any dispute as to the *law*. The Cokeleys thus present no basis for review. There is no conflict between the courts, or the standards set out in Divisions Two and Three regarding mutual recognition and acquiescence. The Cokeleys simply did not like how the judges applied the law to their facts.

RAP 13.4(b) provides that the Supreme Court will accept a petition for review *only* if one of the following conditions are met:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

None of these conditions apply. This case is simply a dispute about application of existing and well-established law to the facts of this case. The Division Two decision is in harmony with prior case law with similar facts.

The dissenting Appellate judge disagreed whether or not the evidence met the requisite element of "well-defined" line. With respect, the dissenting judge glosses over the fact that there were more than just MERRIMAN RESPONSE TO PETITION FOR REVIEW

“two wooden poles and a stake,” as he references, but *survey monuments* in place. The survey markers constitute both “monuments on the ground” and a “well-defined line,” as required.

The Cokeleys' position would create chaos in the law. In contrast, the determination that survey monuments can create a well-defined line is entirely consistent with Washington law and policy. There is no split between the courts or change in the law for the Supreme Court to address, which would occur only if the Cokeleys had prevailed.

A. Appellate Decision Consistent with the Law of Mutual Recognition and Acquiescence, and Appropriate to the Facts.

The first element of the Merrimans' mutual recognition and acquiescence claim requires, as correctly noted by Cokeleys, that the line is “certain, well-defined, and in some fashion physically designated upon the ground, e.g., by *monuments*, roadways, fence lines, etc.” Cokeleys' Brief at 19, quoting *Lamm v. McTighe*, 72 Wn. App. 587, 592-93 (1967). Cokeleys repeatedly profess no “certain or well-defined line upon the ground.” This is simply not the case.

1. Survey Markers, Monuments and Boundary Lines.

In this case, the parties disputed whether or not there was a well-defined line where official survey monuments defined a line that each neighbor recognized and acquiesced to as the boundary for the requisite ten years. The trial court made an error in applying the elements of mutual recognition and acquiescence that the Appellate court remedied.

The key issue was this: the trial court determined that “[p]rior to 2002, there had been no boundary line markers [or] structure” between the two lots at issue. This conclusion was directly contrary to the trial court’s findings of fact that the earlier surveyor had “clearly” placed survey markers along the asserted boundary in 1993. RP 187, ll. 16-17. So again, this case is merely a dispute as to whether or not *survey markers* (not just poles and stakes) constitute a well-defined line in this case. The Appellate court found, correctly, in the affirmative, consistent with well-established law.

The witnesses at trial offered no dispute that from the time of the survey until the Cokeleys' new survey in 2006, the neighbors understood the straight and well-defined line marked by the 1993 Swift survey monuments to be the boundary, and all knew about the monuments marking that line. RP 86, ll. 9-18; RP 87, ll. 12-15; RP 90, ll. 13-16; RP 99, ll. 5-11; and RP 111, l. 10 - 112, l. 6 (Mr. Willits’ testimony); RP 125, ll. 5-18 (Scott Merriman’s testimony); RP 138, ll. 6-23 (Mr. Cokeley’s testimony). The facts as presented at trial epitomize a classic case of mutual recognition and acquiescence.

2. If Survey Monuments Do Not Define a Line, What Good are They?

In their petition for review, the Cokeleys incorrectly assert that “[n]o other Washington case has held that mutual recognition and acquiescence can be established without such a defined boundary”

(Petitioners' Brief at 4). The Cokeleys also assert - again incorrectly - that the Division Two holding is "that no proof need be produced of a well-defined and certain boundary line," thus setting "a new and much lower standard of proof for claims involving mutual recognition and acquiescence or adverse possession," thus "revis[ing] prior real property law in Washington." *Id.* (Again, note that this decision is *not* based on adverse possession: Cokeleys persist in confusing the two doctrines).

For the Cokeleys' argument to work, there must have been a lack of proof of a well-defined boundary. But there *was* such proof: survey monuments set in the course of an official survey. The Cokeleys seem to argue that survey monuments are insufficient to define a boundary line. If that were true, that truly would set Washington law - and the entire survey industry - on its head.

There is no legal or logical reason to throw out survey monuments as a reliable definition of a boundary line. This is particularly true in a case such as this one, where such survey monuments are clearly set upon the ground and known to all parties involved. At trial, the Cokeleys offered no dispute to the fact that survey monuments are recognized both in practice and in law as official markers of boundary lines. *See, e.g.,* Powell on Real Property, Boundaries §68.05[5] [b] at 68-28 (1998). The Washington Supreme Court has recognized since 1925 that survey monuments are sufficient to mark a line *without* an accompanying fence.

Farrow v. Plancich, 134 Wash. 690, 691 (1925) (“Though the old fence is gone, one of the original [surveyor] line stakes still exists, and there ought to be no trouble in actually locating that line on the ground.”). Thus, the Appellate court's findings were fully consistent with existing law.

The Cokeley’s own surveyor testified as an expert that the bars and caps set during the 1993 Swift survey are commonly accepted markers for identifying surveyed boundaries. RP 14, ll. 1-10, 18-25; RP 17, l. 24 – 18, l. 3; and RP 21, ll. 20-23. The trial court recognized the survey markers as “clearly” placed. RP 187, ll. 16-17. Thus, by the Cokeleys' own testimony and the trial court's findings, the line was "well-defined. For this reason Division Two overturned the trial court decision.

3. The Cokeleys would Change the Law to Require a Line to be Fenced and Mowed to be Valid.

The Cokeleys' application of the law would require a fence or some hardscape before a line can be considered "well-defined." Again, such a conclusion truly would throw Washington property into chaos, particularly in the vast majority of the state where survey monuments define for property owners their boundaries in rural, agricultural, forested, undeveloped, or otherwise un-fenced areas. To take the Cokeleys' argument to its ultimate conclusion, every property owner must go out and build something along the boundary lines before they or a court can consider it "well-defined" enough to rely upon.

Per the Cokeleys' argument, a property owner must also mow or weed-eat the entire boundary line in order to preserve a "well-defined" line. Again, if the Cokeleys' argument is taken to its logical conclusion, mere overgrowth would be enough to obfuscate a boundary line *even if* all parties acknowledge that they all knew of the survey monuments, had no trouble finding them (overgrowth notwithstanding), neighbors (the Cokeleys' predecessor) erected their own above-ground markers to more easily locate the survey monuments, and all parties *knew* of the survey monuments and *recognized* them as defining their boundary line. According to the Cokeleys, so long as brush is allowed to grow, none of this is relevant and there is no more "well-defined" line.

This is not the law.

4. There is no Disharmony Between the Courts or Existing Law: The Cokeleys' Position Would Go Against the Grain.

In short, it is not the Appellate decision that goes against the grain: it is the Cokeleys' attempt to ignore official survey monuments as sufficiently defining a line, despite existing case law to the contrary. In *Frolund v. Frankland*, 71 Wn.2d 812, 816-20, 431 P.2d 188 (1967), *overruled on other grounds*, *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984), for example, the Supreme Court has already affirmed that the existence of ascertainable survey monuments are sufficient to establish a "clear and definitive line" notwithstanding vegetation overgrowth over the years.

The Cokeleys attempt to use the appeal process to overhaul existing Washington boundary law for their own purposes, *creating* a departure from existing law that does not currently exist. The Cokeleys would establish an entirely new - and much, much higher - bar for any property owners to lay claim to land previously defined and relied upon as their own. Survey markers would be rendered obsolete, useless and worthless. The Cokeleys do not provide sound basis for such a radical change in the law - and do not provide sufficient basis for Supreme Court review of this case.

B. No Split Exists Between the Appellate Courts.

Cokeleys cite the recent decision in *Green v. Hooper*, 149 Wn. App. 627, 605 P.3d 134 (2009), *rev. den'd* __ Wn.2d __ (Sept. 29, 2009) as "contrary" to the Appellate decision in this case. That simply is not true.

1. The *Green* Evaluation of the Mutual Recognition and Acquiescence Claim is Dicta.

The *Green* court's discussion regarding whether or not the elements of mutual recognition and acquiescence were met in that case is dicta, and thus does not constitute a holding that might pose a discrepancy.

In *Green* the trial court dismissed the eleventh hour attempt to insert a claim for mutual recognition and acquiescence mid-way through trial into a case that had been litigated, and largely tried, based on an adverse possession theory. In its ruling, however, the trial court asserted

its equitable powers and allowed a remedy under the theory of mutual recognition, despite its previous dismissal of that claim. The trial court based its decision on the misguided premise that mutual recognition and acquiescence was a "supplementary" theory to the doctrine of adverse possession.

However, as Division Three affirmed, adverse possession and mutual recognition and acquiescence are two separate and alternative theories. 149 Wn. App. at 639-40. Thus, the trial court's award on the basis of mutual recognition and acquiescence was in error. The *Green* court found that asserting a new legal theory too late constituted undue surprise and prejudice to the opposing party, particularly where the trial court had already rejected the claimant's attempt to amend the pleadings to include this claim mid-way through trial.

And so, any further determination by the Appellate court on whether there *could* have been mutual recognition and acquiescence is dicta, as Division Three determined that the trial court erred in applying this theory to begin with.

2. The *Green* Court Applied the Same Law Affirmed by Division Two in This Case – Just to Different Facts.

But the fact is, even taking Division Three's discussion of mutual recognition and acquiescence as it applied to that case at face value, *Green* does not provide any division in the law. There is no substantive

difference in how the law was applied in *Green* and in Division Two's decision in the case at bar.

The Cokeleys correctly state that Division Three in *Green* set forth the necessary elements of mutual recognition and acquiescence. The Cokeleys assert a "split" because the *Green* court found that an established railroad-tie retaining wall *that was built entirely within one neighbors' property* (i.e., not on the line) did not create a certain, well-defined boundary. *Green*, 149 Wn. App. at 643-44. But the *Green* application of the law is entirely consistent with Division Two in this case. It is simply an application of the same law to fundamentally different facts.

In *Green*, the retaining wall was not even on a line: it was *entirely* situated within the one neighbor's property under either of the boundary lines asserted. 149 Wn. App. at 643. The trial court heard no evidence to show that the parties recognized this retaining wall as a true boundary, versus just a barrier. *Id.* There parties presented no evidence of intent to recognize any boundary projected out from this wall that ran along only a small part of the overall boundary. *Id.* Thus, the claimant in *Green* failed to meet the requisite elements of mutual recognition and acquiescence under *Lamm*. Furthermore, the claimant offered no evidence of any "monuments" or any other structures *other* than the retaining wall, or any physical designations, improvements or encroachments. *Id.* at 642-43.

The *Green* ruling is not inconsistent with Division Two's ruling in the instant case. The holding in *Green* is simply the application of the same law to different facts. The instant case is entirely different. Here, unlike in *Green*, there *were* physical designations and monuments in the form of official survey markers. It was undisputed in the case at bar that the 1993 survey monuments existed, that they were readily ascertainable, that the two neighbors had actual knowledge of them, and that they both (either themselves or their predecessors) recognized the line demarcated by the survey monuments as the true boundary for the necessary ten years period.

Unlike *Green*, this case falls squarely within *Lamm*. The presence of survey monuments marking a certain boundary recognized by the parties is a fundamental distinction between the two cases. The *Green* case was the correct application of the recognized law to the facts in that case; and the Division Two decision was the correct application of the recognized law to the facts in this one. The Division Two holding does not modify the accepted standard in *Lamm* (as alleged in Petitioner's Brief at 5). Division Two merely applied the *Lamm* elements to the facts at hand, which were fundamentally different than the ones in *Green*.

3. Division Two Followed *Lamm*'s Standard of Proof, Recognizing Survey Monuments as Defining a Line.

Nor do the Cokeleys fairly characterize the Division Two holding when they allege that it set a "standard of proof that two markers, set

90.19 feet apart with no fence, structure or other observable marking or use connecting them through a wooded and overgrown area" created a certain and well-defined boundary line. Petitioner's Brief at 5. This statement does *not* accurately reflect the standard of proof set out by Division Two.

Division Two affirmed the standards set by *Lamm* and a long history of case law. The survey monuments in this case met those standards. The monuments at issue in the case at bar are not "just" markers (as implied by Cokeleys), or poles and a stake (as referenced by the dissenting judge). The markers at issue were official *survey* monuments.

Survey monuments are by their nature *intended* to be connected by shooting a line between them. To suggest it is necessary that a fence or other physical structure must connect the survey monuments to validate a defined line is to turn Washington law on its head. Division Two properly rejected this approach, and affirmed long-standing case law and the *Lamm* and *Frolund* requirements that survey monuments meet the requirements of a certain and well-defined line marked in some fashion on the ground.

V. CONCLUSION

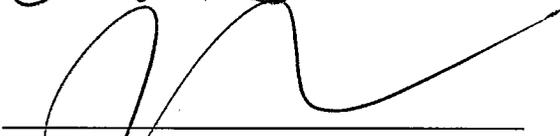
The Cokeleys fail to establish any basis for review. The Cokeleys may wish for the Supreme Court to reject the validity of survey monuments as sufficiently reliable to establish a boundary line, but they

do not make that argument. Nor should they. There is no sound policy or legal basis to argue for such a fundamental change in Washington law, nor to undermine the ability of property owners to rely on existing survey stakes defining a boundary line. The very purpose of survey monuments is to define the corners of a property, and thus, by extension, the connecting boundaries. Absent some compelling showing that Washington should change this standard, the Cokeleys offer no basis for review of this case.

Nor is there any conflict between the Courts on what is Washington law regarding mutual recognition and acquiescence. Division Two in this case and Division Three in *Green* are entirely consistent as to the law. They are two cases with differing facts, and thus the two differing results are perfectly normal. It is certainly no basis for a Supreme Court review.

RESPECTFULLY SUBMITTED this 23 day of October, 2009.

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I certify under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED at Olympia, Washington, this ___ day of October, 2009.



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