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WASHINGTON STATE
SUPREME COURT

by

SUPREME COURT OF WASHINGTON

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Docket No. 92324-8

LESLIE PENDERGRAST,

Plaintiff-Respondent,

v.

ROBERT MATICHUK and JANE DOE MATICHUK,
husband and wife, et al.,

Defendants-Petitioners.

PETITIONERS' SUPPLEMENTAL BRIEF

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ORIGINAL

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STATUTES

RCW 64.04.0101

Petitioners, Robert and Jane Doe Matichuk, husband and wife, and their company, Blaine Investments, LLC, respectfully submit this supplemental brief for the court's consideration pursuant to RAP 13.7(d).

For the reasons that follow, reversal of the Division One opinion in this case is necessary to fulfill this court's long established public policy of requiring the transfer of property by written deed. No evidence exists on this record which would prove the intention of the common grantor to establish a boundary other than that found in the property legal descriptions. Indeed, there is no evidence that either the conveyance from Conine to Matichuk, or the conveyance from Conine to Pendergrast, were made with any reference to a boundary established by the common grantor. Rather, both transactions were based on the legal descriptions of the respective parcels. This court should reverse the lower courts' application of the boundary by common grantor doctrine on this record. At the very least, the matter should be remanded for trial on that issue.

1. **The Court of Appeals Incorrectly Applied the Common Grantor Doctrine.**

Conveyances of real property usually must be accomplished by proper conveyance of a deed. RCW 64.04.010. A bona fide purchaser of real property generally is entitled to rely on record title. Levien v. Fiala, 79 Wn. App. 294, 299-300, 902 P.2d 170 (1995). If the law were otherwise, it would impose an almost impossible burden upon a party in that each and every conveyance would have to be investigated beyond the auditor's records for possible error to avoid a claim of inquiry notice. Public policy requires reliance upon recorded documents, and the warranties those documents contain.

This court has, in only very limited circumstances, carved exceptions to the statute of frauds to permit coterminous property owners to establish a common boundary other than by deed. The “boundary by common grantor” doctrine is one of those very limited exceptions.

The common grantor doctrine has been explained as follows:

A practical location made by the common grantor of the division line between the tracts granted is binding on the grantees who take with reference to that boundary. The line established in that manner is presumably the line mentioned in the deed, and no lapse of time is necessary to establish such location, which does not rest on acquiescence in an erroneous boundary, but on the fact that the true location was made, the conveyance in reference to it. However, for a boundary line established by common grantor to become binding and conclusive on grantees it must plainly appear that the land was sold and purchased with reference to such line, and that there was a meeting of minds as to the identical tract of land to be transferred by the sale. (Emphasis supplied)

Thompson v. Bain, 28 Wn.2d 590, 591-92, 183 P.2d 785 (1947).

Based on this principle, historically this Court has applied the boundary by common grantor doctrine only in cases in which there is evidence that the common grantor actively and purposefully changed the boundary of his or her property, and that change of boundary was made with full knowledge and recognition by the original grantee. For example, in Kay Corp. v. Anderson, 72 Wn.2d 879, 436 P.2d 459 (1967), the common grantor staked the boundary of a property on the ground and entered into an agreement with a purchaser that the staked line formed the boundary of the property. The common grantor was promoting the development of a real estate subdivision, and in that process carved out a tract of land to provide the purchaser with an optimal building site. The parties then respected the staked line and occupied their properties consistently with the staked boundary. In a subsequent action to quiet title, the court quieted title using the staked boundary, based on the agreement of the grantor and the buyer at the time the property was staked.

Similarly, in Atwell v. Olson, 30 Wn.2d 179, 190 P.2d 783 (1948), a common grantor and a purchaser entered into a real estate contract after the parties had staked off the common boundary between them. When the line was staked, the buyer was given the option of which parcel he wanted to buy. The buyer chose one of the parcels, and the parties agreed that the staked line was the boundary between their properties. Within a year, a hedge was planted along the boundary, which stretched about two-thirds of the boundary distance. The buyer then erected a house and garage, and cultivated and occupied the property up to the hedge line. In a subsequent dispute involving successors in interest, the court ruled that the line established by the common grantor and the original buyer was established by the parties, and binding on all successors in interest, especially because the subsequent purchasers had full knowledge of the hedge line and improvements respecting that line. *Id.*, 30 Wn.2d at 184.

In Windsor v. Bourcier, 21 Wn.2d 313, 316, 150 P.2d 717 (1944), this court affirmed a boundary established by a common grantor when the grantor surveyed and staked the land and the purchaser bought with reference to the staked boundary. A pole and a cedar tree stump remained along the boundary, although the initial stakes were gone. The common grantor and the initial purchaser treated the line depicted by the pole and the stump as the true line, and sold their parcels to subsequent purchasers with reference to the line so marked. Based on those actions of the grantor and the initial buyer, the line the parties respected formed the boundary under the common grantor doctrine.

In Angell v. Hadley, 33 Wn.2d 837, 207 P.2d 191 (1949), a boundary between two parcels was established by a survey and mutual agreement of the parties at the time. When that line was pointed out to a subsequent purchaser at the time they purchased the property, the subsequent purchaser was bound by the initial location made by the common grantor.

In all of these cases, the court considered evidence of an affirmative act of a common grantor, with knowledge of the establishment of the boundary by the initial buyer. With that evidence, the court could conclude that the common grantor intended to create a boundary and that the transaction was made with reference to that line. *See Thompson*, 28 Wn.2d at 591-92.

In contrast, when there is no evidence that proves the actions of the common grantor, this court has declined to adopt a boundary based on the common grantor doctrine. For example, in *Martin v. Hobbs*, 44 Wn.2d 787, 270 P.2d 1067 (1954), a proponent of application of the common grantor doctrine attempted to establish that a laurel hedge, fence and return wall from a bulkhead established a boundary fixed by the common grantor. The argument was based solely on the presence of those items, and without any testimony from the common grantor or the first grantee. Without any such testimonial evidence, the trial court concluded – and this court agreed on appeal – that the evidence was insufficient to establish a new boundary under the common grantor doctrine. This court noted that creation of a boundary based on the mere presence of those items would amount to “surmise and conjecture” which was insufficient to establish a boundary. *Id.*, 44 Wn.2d at 791.

Courts from other jurisdictions have also concluded that some communication between the common grantor and the initial purchaser occur at the time of sale for the common grantor doctrine to apply. *See, e.g., Arnold v. Robbins*, 209 Wisc.2d 428, 563 N.W.2d 178, 180 (1997) (reference to a boundary under the common grantor doctrine requires communication between the grantor and buyer at the time of conveyance); *DuRoche v. Winski*, 409 So.2d 41, 44 (Fla. App. 1982) (common grantor may establish boundary with the “knowledge and consent” of the owners of the respective parcels).

These authorities require reversal of the summary judgment order entered by the trial court, and affirmed by the court of appeals, in this case. In this case, as in Hobbs, there was no evidence in the record that *any* communication between Matichuk and his seller Conine ever occurred, much less that any such communication established a boundary that was different from that contained in the legal description. Matichuk and the seller never met, and the deed documents were based on the recorded legal description. There was nothing in the paperwork to suggest that the fence on the property – which was old and not even built in a straight line – was a manifestation of a boundary. In short, there is nothing to suggest, as required, that the Matichuk and Pendergrast purchases from Conine were made with any reference to a boundary line established by Conine.

Reversal is required and appropriate also because the underlying decisions were made on summary judgment, as a matter of law. The court of appeals relied heavily on the fact that Matichuk paced his property before purchase, and left the fence intact for a period of time. Opinion, p. 9. In reviewing an order granting summary judgment, however, the court of appeals was required to resolve all inferences in Matichuk's favor. Clearly, that did not happen. There were multiple explanations for Matichuk's actions that the court did not even consider. For one, it was clear from the chain of events that Matichuk waited until it was time for construction to move the fence to the deed boundary. His failure to do so at the time of purchase cannot be considered *conclusive* proof of his belief that the fence somehow formed a boundary. Thus, there is absolutely no actual evidence of conduct *at the time of sale* which would indicate to anyone that the fence formed the property line, such that the boundary by common grantor doctrine would be applicable. See Thompson, 28 Wn.2d at 591-92.

The court of appeals also significantly deviated from the boundary by common grantor doctrine by consideration of actions *after* closing to find a “manifestation of ownership.” Through interpretation of its own opinion in Winans v. Ross, 35 Wn. App. 238, 666 P.2d 908 (1983), the court reasoned that *post-purchase* actions can establish a meeting of the minds such that the boundary by common grantor doctrine should apply. Of course, Winans has no precedential value to this court. Even if the court were to consider that opinion, however, in that case the trial court *found as fact* that the properties were purchased with reference to the fence line. *Id.* at 240. Moreover, the Winans court found “substantial evidence” that an agreement existed between the grantor and the original grantee, based on the rebuilding of a fence in the exact location, and a tenant asking permission to use a pond on the other side of the fence line for irrigation. The court then enforced the boundary agreement on Ross, a subsequent purchaser.

Again, even if actions of the parties after purchase are relevant to a finding of a boundary by common grantor, there is no evidence that when Matichuk and Pendergrast subsequently owned the parcels, they acted as if they agreed that the fence was the boundary. To the contrary, Matichuk informed Pendergrast of his intention to remove the fence and move it to the deeded property line. In response, Pendergrast wrote to Conine, and demanded financial compensation. [CP 339-40] Pendergrast was certainly not acting under a belief of an agreement concerning the fence when she wrote that letter. Even her letter to Matichuk claiming rights to the disputed property merely establishes a factual dispute between the parties, long after they purchased their properties. Moreover, all the evidence demonstrates that the Matichuk property was vacant during this time period, and Matichuk was working diligently on the planning and permitting for his condominium project, using the legal description of his parcel as the proper boundary. [Trial Exhibits 1-4]

Reduced to its essence, the ruling of the court of appeals contends that the mere existence of a fence, coupled with use of the fence line as the boundary for a short period (when one of the lots was undeveloped and vacant), is enough to create a boundary by the common grantor as a matter of law. This is error. Proof of a meeting of the minds – with no disputed facts – was required. Hobbs demonstrates that more than physical markings is required. Otherwise, the boundary would be established purely by conjecture. See Hobbs, 44 Wn.2d at 791.

At best, the facts in this case would suggest formation of a boundary by acquiescence. A fence line may be established as a boundary when there is “sufficient acquiescence” in it to create a boundary, not a barrier. See, e.g., Houplin v. Stoen, 72 Wn.2d 131, 135, 431 P.2d 998 (1967). However, plaintiff never pleaded acquiescence as a theory of recovery. She cannot maintain a claim based on acquiescence, because any such acquiescence must extend for the duration of the adverse possession period. The time the fence remained between the two properties did not last the required period.

This court should reverse the decision of the court of appeals, and confirm the court’s past holdings that require any conveyance under the common grantor doctrine be made with reference to the new line at the time of the transaction. At the very least, the Supreme Court should reverse the case under CR 56, and remand for a trial of those issues.

2. **Conclusion**

This court should reverse the decision of the court of appeals. The underlying published opinion of Division One improperly applies the boundary by common grantor doctrine, as it changes established precedent concerning what actions of the parties are to be considered. As articulated in this case, the boundary by common grantor doctrine no longer requires evidence of a meeting of the minds with the original grantor at the time of sale.

This court should clarify what evidence is necessary to establish a “meeting of the minds” between the common grantor seller and the buyer. Absent clear and convincing evidence of a meeting of the minds, the common grantor doctrine circumvents the basic elements of a real estate transaction: that there is an agreement of what is being bought and sold. Public policy requires adherence to established requirements of conveying property by deed, except in the most narrow of circumstances. This case does not present facts sufficient to dispense with the deed requirement. The decision of the court of appeals should be reversed.

Dated this 6th day of March, 2016.

Respectfully submitted,

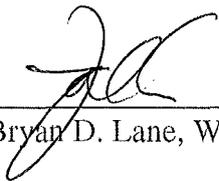


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 6, 2016, I caused a true and correct copy of the foregoing, to be served upon the following person by hand delivery to his office provided below:

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