

63621-9

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CASE NO. 636219-I

**Court of Appeals
of the State of Washington
Division I**

PHILIP BITAR and MARIE BITAR,

Appellants/Defendants,

v.

CHRISTOPHER TOMPKINS and
LISA TOMPKINS,

Respondents/Plaintiffs.

Respondents' Brief

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I. ASSIGNMENT OF ERROR

Respondents Christopher and Lisa Tompkins do not assign any errors to the decision of the trial court.

II. STATEMENT OF THE CASE

Plaintiffs/Respondents Chris and Lisa Tompkins (Tompkins) reside at 29714 Heimer Road in Arlington, Washington. They purchased their property on December 27, 2002. It consists of 14.485 acres located in a largely rural area. (Finding of Fact 1 & 2.)

Defendants/Appellants Philip and Marie Bitar (Bitars) reside on a five acre lot they purchased in 1995. Its western boundary, which is in dispute here, abuts part of the Tompkins' lot. The disputed area consists of 8,145 square feet. (Finding of Fact 3.)

In 2007, the Tompkins wished to install fencing along part of the perimeter of their property. They also wished to avoid any disputes with their neighbors regarding the location of that fencing. So rather than just putting up fencing where they assumed the boundaries should be, they had their entire property surveyed so the fence could be placed as accurately as possible. (RP 48) As a site map the Tompkins obtained at the time of their purchase reflects, the boundary line at issue runs through a pond and/or wet land along its western edge. (Trial Exhibit 4.) Part of this pond is at times of wet weather located on the Tompkins' lot, though most of it

usually lies within the Bitars' boundaries, (RP 210-11) since the dimensions of the pond fluctuate with the wet and dry seasons. (Finding of Fact 10, Trial Exhibit 43.)

Shortly after their surveyor completed his work and installed survey stakes along the lot's boundaries, the Tompkins received a letter dated May 16, 2007 from the Bitars' attorney, Stephen Hanson, claiming ownership to a strip of land beyond the Bitars' western boundary where it abuts the Tompkins' lot. Mr. Hanson claimed in his letter that the Bitars maintained a fence along their west boundary for 12 years, from 1995 to 2007, and that they therefore acquired title to the area in dispute by way of adverse possession. (Trial Exhibit 5.)

However, the fence present near Bitars' west boundary when they moved in, an electrified horse fence, was deliberately installed by Bitars' predecessors, Adams, on firm, higher ground **west** of the boundary because the true boundary runs through a pond and/or marshy land along its western edge. (RP 188.) When Haggertys (Tompkins' predecessors) moved in next door to Adams in 1990, Mrs. Adams alerted the Haggertys of the encroachment and asked whether she should move the fence off Haggertys' property. In response, the Haggertys granted permission for the Adams fence to remain on Haggertys' lot. (RP 190-92.) Haggertys never rescinded that permission, so that it remained in effect when Adams sold their property to Bitars in 1995. (RP 192-93.)

In 1999, Bitar removed that fence and replaced it with a below-ground 'Invisible Dog Fence', which is apparently a brand name, but a rather descriptive one since there are no visible signs of its presence. (Finding of Fact 17, RP 150-52.) Although the Tompkins learned from the Bitars by a letter Philip Bitar wrote to them in 2002 that the Bitars had installed a below-ground dog fence (Trial Exhibit 7), Tompkins did not learn of its actual location in the disputed area until after the survey was complete in 2007. (RP 50.) The Tompkins had no opportunity to observe the digging to install the underground fence in 1999 since they did not purchase their lot until 2002. (Trial Exhibit 1.)

None of the parties involved made any improvements in relation to the fences, except of course for the fences themselves. Aside from the invisible dog fence, Bitars submitted no evidence at trial that they constructed any improvements in the disputed area.

A time line of the relevant events and dates is reprinted below for the Court's convenience.

1989	Adams (Bitars' predecessors) purchase (RP 184.)
1989-1990	Adams install encroaching horse fence west of pond and boundary (RP 188.)
1990	Haggertys (Tompkins' predecessors) purchase lot adjoining Adams' (CP 82.)

1990 Haggertys grant permission to Mrs. Adams for Adams' encroaching fence to remain on Haggertys' land (RP 190-92)

1995 Bitars purchase from Adams 1/95 (Trial Exhibit 11)

1995 - 2000 Haggertys install cattle fence, approximately 20 feet west of disputed boundary some time between 1995 and 2000 (CP 91, CP 96)

1999 Bitar removes Adams' fence (RP 150-52.)
Bitar installs 'Invisible Dog Fence' (RP 150-51.)

2002 Tompkins purchase from Haggertys (Trial Exhibit 1)

2004/05 Bitar repairs underground dog fence (RP 141)

2007 Tompkins survey (Trial Exhibit 2)

III. ARGUMENT

Tompkins filed a complaint in trespass based on the results of their survey, the accuracy of which was not disputed, and in ejectment. Bitars filed counterclaims based on adverse possession and mutual recognition and acquiescence.

The burden of proof lies on the one claiming ownership of property through adverse possession. *Miller v. Anderson*, 91 Wn. App. 822, 828; 964 P.2d 365, 367 (1998), citing *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757; 774 P.2d 6 (1989.) The trial court found that Bitars

failed to carry their burden of proving the requirements for adverse possession, and further found that Bitars failed to carry their enhanced burden of proving by the requisite clear, cogent and convincing evidence the elements of mutual recognition and acquiescence. *Lilly v. Lynch*, 88 Wn. App. 306; 945 P.2d 727 (1977.)

Consequently, although Bitars challenge many of the court's individual findings of fact as being unsupported by substantial evidence in the record, as well as the conclusions of law drawn from those fact findings, one should keep in mind that with respect to all of the trial court's findings or conclusions challenged by Bitars, the burden of establishing those propositions lies with the Bitars.

The Tompkins submit the following responses to Bitars'

Assignments of Error:

1. a. The Court properly found the Adams' use of the disputed area to be permissive by the Haggertys. (Finding of Fact 6.)

Bitars initially point to the trial testimony of Brian Adams to challenge the trial court's Finding of Fact 6 that the Haggertys granted the Adams permission for their encroaching fence at the west end of the Adams / Bitar lot to remain in place on Haggertys' lot. Unfortunately, Bitars rather blatantly mis-characterize that testimony. On page 13 of Bitars' brief, they state:

“Mr. Adams was not asked about this alleged permission in his direct examination. In cross examination, he was directed to his deposition, and inquiry followed:

Q. Sir, page 16 of your deposition, Lines 6 and 7. At Line7, isn't it correct that you answered: "Everybody agreed that's where the property line was."

A. **I would have to read the context.**

Q. I understand.

A. Yes." (RP 201, Emphasis added.)

From this exchange, the Bitars have the audacity to argue that, "In effect, Mr. Adams acknowledged his deposition testimony that there was an "agreement" as to the location of the "property line" not permission."

What the Bitars fail to mention, as demonstrated below, is that the "property line" being discussed with Mr. Adams **was the not the property line in question**, the one encroached by the Adams fence at the **west** end of their lot for which Haggertys gave permission to remain in place. Rather, the discussion involved the line at the **east** end of the lot. Permission was never discussed at trial in connection with the east end of the lot.

As Mr. Adams plainly stated in his answer to Mr. Graafstra, "I would have to read the context" of his deposition testimony about which he was questioned. Mr. Graafstra improperly declined to provide that requested context, so on redirect exam, Tompkins' counsel provided the context requested by the witness, as follows.

Q. Sir, I have my own copy of your deposition testimony that was just referred to by counsel, and I want to ask you a quick question about that.

You indicated– I think the first excerpt he showed you was on Page 16, Lines 6 and 7, where it says on Line 7: “Everybody agreed that’s where the property line was.”

Prior to that, though what was the question? I will read it: “That’s on the street side?” That immediately preceded your answer, is that correct?

A. Yes.

Q. What is the street side you are referring to? What is the street side?

A. That would be the front side.

Q. So the street side would be the **eastern** portion of the property rather than the western portion?

A. Right.

Q. When you told Mr. Graafstra at your deposition that everybody agreed that’s where the property line was, you were referring to on the street side, is that a fair statement?

A. Yes, that’s fair.

Mr. Stegena: That’s all.

The Court: Any recross?

Mr. Graafstra: No, your Honor. (RP 202-203, Emphasis added.)

Thus, the testimony of Mr. Adams, which Bitars assert proves an agreement and accordingly disproves permission, has absolutely nothing to do with the west end of the Adams / Bitar lot at issue.

Angela Adams did testify about obtaining the Haggertys’ permission for the Adams fence to remain in its position encroaching on

the Haggertys' lot beyond the west end of the Adams' lot. Contrary to Mr. Graafstra's characterization of her testimony, there was nothing ambiguous about it. She testified about a discussion with the Haggertys involving the fact ". . . that our fence was over, not exactly where the property line was . . . And John and Barb [Haggerty] thought that was okay not to mess with the fencing." (RP 191.)

Mrs. Adams was further questioned as follows:

Q. Okay. In your discussions, there was a discussion with them [Haggertys] about whether you should move it back into the line?

A. Yes, that's correct.

Q. They said it was fine where it was?

A. Yes. (RP 191-192.)

Bitars astutely point out that the word "permission" does not appear in Mrs. Adams' testimony. Perhaps that is because the Haggertys themselves did not use that word, and what Mrs. Adams was asked to do was relay to the court her discussions with them.

The law is well settled, of course, that "Permission can be express or implied; an inference of permissive use arises when it is reasonable to assume 'that the use was permitted by sufferance and acquiescence.' *Miller v. Anderson*, 91 Wn. App. 822, 828; 964 P.2d 365, 369(1998), citing *Granston v. Callahan*, 52 Wn. App. 288, 294; 759 P.2d 462 (1988.) Here, the Haggertys' statements as relayed by Mrs. Adams that the

encroaching fence ‘need not be moved back to the line’ and “was fine where it was,” RP 191, 192, constitute an **express** grant of permission. Even if not deemed an express grant, the only inference that could reasonably be drawn from that testimony is one of permission, and as the verdict winner, Plaintiffs are entitled to the benefit of all inferences reasonably drawn from the evidence in any event. *Mason v. Turner*, 48 Wn.2d 145, 148; 291 P.2d 1023, 1024 (1956), citing *Arnold v. Sanstol*, 43 Wn.2d. 94; 260 P.2d. 327 (1953.)

The court correctly concluded from the **uncontradicted** testimony of Mrs. Adams that the Haggertys granted permission to the Adams to leave their admittedly encroaching fence in place on Haggertys’ lot.

- b. The Court properly found the Haggerty fence was completed in the mid-1990’s. (Finding of Fact 7.)

Bitars complain that the trial court improperly found from the evidence that Haggertys completed their cattle fence in the mid 1990’s, despite John Haggerty’s testimony that it could have been completed as late as 1997 or even 2000. (CP 91, CP 105.) Bitars complaint in this regard is based on Mr. Bitar’s testimony that by reviewing photographs he took, he could determine the Haggerty fence was completed by December 1996.

But Mr. Bitar also testified as follows:

- Q. First of all, do you know when Haggerty moved and relocated their fence?

A. I can pinpoint it based on photographs within about a year-and-a half's timeframe. (RP 116,117.)

Given the witness' conflicting testimony and the wide range of their time estimates, plus Mr. Bitar's acknowledgment that his photographs allow him to 'pinpoint' the time '**within about a year-and-a-half,**' it is difficult to quibble with the trial court's conclusion that the best that can be discerned from the evidence is that this fence was completed in the mid 1990's.

c. The Court properly found the Bitar's family activities in the disputed area to be minimal. (Finding of Fact 12.)

The trial court's finding that the Bitar family's activities in the disputed area were minimal was a fair conclusion reasonably drawn from the evidence. That evidence included the fact that aside from the **invisible** underground dog fence, Bitars constructed no improvements in the disputed area.

Their maintenance in the disputed area consisted of mowing "approximately every other year" (Finding of Fact 13), and removing blackberries "approximately every three years" (Finding of Fact 14.)

In the winter time the Bitar children sledged down the hill in the disputed area on a number of occasions that was neither established nor estimated. The Bitar children played hide-and-seek in the disputed area on a number of occasions that was neither established nor estimated. They also built forts to play in or with on a number of occasions that was

neither established nor estimated. There was no other evidence regarding the size, visibility or duration of these forts, including no photographs of any forts taken by Mr. Bitar, who the Bitars claim is a “copious photo taker.” (Appellants’ Brief, page 16.) Finally, on apparently a single occasion, Mr. Bitar removed alder trees growing along the marshy area at the pond’s western edge. (Finding of Fact 16.)

That brings us to the Bitar family’s activities involving the pond, which constitute by far the great bulk of the Bitar family activities Defendants relied on at trial to establish their claim of adverse possession.

The record establishes that the pond’s size expands in wet weather and shrinks in dry weather. (Finding of Fact 10.) When Tompkins’ surveyor inspected the area on December 4, 2008, well into western Washington’s rainy season, he determined the boundary line to be just about at the pond’s western edge and through the marshy area along its western edge. (Trial Exhibit 43.) At other times the pond’s water expands west beyond the boundary as surveyed. (RP 210-11.) From this evidence one can reasonably conclude that the pond lies entirely on Bitars’ property in dry weather months, and expands west of the boundary in the rainy months.

The Bitars introduced through the testimony of Mrs. Bitar many photographs taken by that “copious photo taker,” Phil Bitar. Clearly, the Bitars took many photographs of those activities in which the Bitar family

engaged - on, in or around the pond that were meaningful or special to them, or that were just plain fun. They selected many from what must be a large collection of family photographs to illustrate for the court their level of activity involving the pond.

On cross examination of Mrs. Bitar,(RP 91-98) Tompkins' counsel discussed those photographs, 54 in total, with her. That discussion of the Bitars' selected photographs can be summarized as follows:

- | | |
|-----------|---|
| 40 | do not depict any part of the disputed area; |
| 2 | depict the disputed area with no activities of the Bitars occurring in it; |
| 5 | depict activities of the Bitar children either in the pond or on the ice of the pond, but Mrs. Bitar was uncertain whether any of them are actually within the disputed area; |
| 7 | depict activities of the Bitar children in the disputed area, all either in the pond or on the ice of the pond. |
| <u>54</u> | Total |

These photographs clearly demonstrate that their pond is an important and fun place for the Bitar family. But because only a small sliver of this pond at most, and only in the wet winter months, extends into the disputed area (Trial Exhibit 43 & RP 210-11), the pond is clearly not the proper focus of Bitars' adverse possession claim.

Of course these 54 photographs may not be a truly representative sampling of the Bitars' level of activity in or around the pond. Indeed,

since they were chosen by the Bitars themselves to establish their adverse possession claim, one might suspect that they are concentrated disproportionately towards the disputed area itself. The fact that only 13% ($7/54 = .129$) of the Bitars' chosen photographs actually depict activities within the disputed area certainly suggests, consistent with the small portion of the pond that actually lies (sometimes) within the disputed area, that the trial court correctly concluded that the Bitar family's activities within the disputed area itself were indeed minimal.

Furthermore, John Haggerty testified that during the time he and the Bitars were neighbors, from the beginning of 1995 through the end of 2002, he never observed the Bitars doing any maintenance work in the disputed area (CP 108-09), and that what he did observe was that the Bitars “. . . poked around the edge of the pond on probably no more than a half dozen occasions during the time we were there.” (CP 130.)

- d. The Court properly found that childrens' forts did not put anyone on notice that adults intended to, or in fact did, occupy the disputed area. (Finding of Fact 13.)

Bitars misconstrue the role of 'notice' in an adverse possession analysis. On page 18 of their brief, they incorrectly cite *Miller v. Anderson*, 91 Wn. App. 822, 827; 964 P.2d 365(1998) for the proposition that:

“Notice is not an element of adverse possession, but proof that ‘possession’ is open and notorious, is an element.”

What the court in *Miller* actually stated at page 827 is this:

“But courts will not permit ‘theft’ of property by adverse possession unless the owner had **notice** and an opportunity to assert his or her right.” (Emphasis added.)

Likewise, in the seminal case of *Chaplin v. Sanders*, 100 Wn. 853, 862, 676 P.2d 431 (1984) our Supreme Court stated:

“ . . . the requirement of open and notorious is satisfied if the title holder has actual **notice** of the adverse use throughout the statutory period.” (Emphasis added.)

Thus, notice, or lack thereof, is an appropriate factor in determining whether the ‘open and notorious’ element is established.

Evidence of use by children as a play area is not a strong determinative factor to begin with, since such use is often tolerated by landowners as a neighborly accommodation, and childrens’ recognition of and respect for others’ property rights is often seen by us adults as coming rather late, often quite late, in the maturation process.

Furthermore, as referenced above, no evidence was introduced regarding the number (actual or estimated), duration or degree of visibility of these childrens’ forts. No photographs depicting them were introduced into evidence. However the trial court characterized it, Bitars’ testimony

regarding childrens' forts was properly found to add no support to their claim.

Finally, Bitars' citation on page 19 of their brief to the activities found to constitute sufficient evidence of open and notorious use by the court in *Chaplin v. Sanders* at 864 is worth repeating here for purposes of comparison, since those activities represent a far greater degree of use than that present here.

“The residents of the trailer park mowed the grass in Parcel B and put the parcel to various uses: guest parking, garbage disposal, gardening and picnicking. Some residents used portions of Parcel B as their backyard.”

- e. The Court properly found a lack of evidence of the precise location of the Adams fence. (Finding of Fact 17.)

Bitars correctly point out on page 19 of their brief:

“An element of proof of a boundary by ‘mutual recognition and acquiescence’ is **a line well defined**, and in some fashion **physically** designated upon the ground, e.g. by monuments, roadways, fence lines, etc.” *Lamn v. McTighe*, 72 Wn.2d 587, 592-93; 434 P.2d 565 (1967.) (Emphasis added.)

Bitars might have also mentioned that the well established burden of persuasion for mutual recognition and acquiescence is by **clear, cogent and convincing evidence**. *Lilly v. Lynch*, 88 Wn. App. 306, 945 P.2d 727 (1977).

Bitars' statement on page 20 of their brief that under this doctrine, a monument need not be a single, continuous feature so long as any replacement is located in the same general location, is quite misleading given what they argue next, that the Adams and Haggerty fences were only inches apart.

There is no evidence in the record, nor is there any way to reasonably construe the evidence there is in the record, that the Haggerty fence was a **replacement** of the Adams fence. In fact, although his testimony is not in fact 'uncontroverted' as Defendants claim, Phil Bitar testified to the contrary, that the Adams and Haggerty fences existed at the same time a few inches apart. (RP 120-21.) The Haggerty fence replaced the Adams fence only in Phil Bitar's mind, because when he removed the Adams fence in 1999 (Finding of Fact 17, RP 150-52) he removed the only physical manifestation of the perceived physical limits of the land he now claims, and therefore needs some 'replacement' in order for his adverse possession or mutual recognition claims to have any chance of success.

Bitars did, however, replace the Adams fence with an underground 'invisible' dog fence (Finding of Fact 18), which by definition is not a well defined line upon the ground, but rather an invisible one beneath it.

Bitars' assertion that Mr. Bitar's testimony that the Adams and Haggerty fences co-existed a few inches apart was "uncontraverted," and that Haggerty "did not testify on this subject," is simply wrong. Mr. Haggerty testified (CP 116) as follows:

Q. Okay. Now at any point in time while you lived on your property there, were there two fences side by side along that westerly boundary of the Bitar property?

A. Side by side? I don't think so, no.

Haggerty further described in detail the process by which he placed the cattle fence now referred to as the Haggerty fence. He found some sort of marker along the south line he used as a starting point, cut down some alder trees that were in the way, "and then built the fence straight north from that point to what we figured was probably the center of the property" (CP 101). When asked whether he took any steps to make the fence consistent with the boundary line other than starting from a marker, he answered, "Not really. It was just pretty much eyeballing it." (CP 105)

Clearly, he did not describe finding the Adams fence just a few inches from the fence he was installing, and of course he testified that there were never two fences side by side within a few inches while he lived on this property.

Mr. and Mrs. Bitar both testified, at least initially, that it is the Adams fence that established the west end of the property they claim (Mrs. Bitar at RP 76, Mr. Bitar at RP 148). Mr. Bitar's own testimony regarding the location of the Adams fence is actually a bit troubling. Bitars offered into evidence no photographs depicting the Adams fence which they assert establishes the west end of the land they claim. In discussing the south portion of the Adams fence on cross exam, the following exchange took place.

Q. To your knowledge, do you have a photograph showing the Adams fence, showing this part of the Adams fence west of the barn?

A. Yeah, actually, but it wasn't worth throwing in because it was high resolution, and it showed only a few stakes, and I thought what's the point? Our case doesn't hinge on it, so who cares?

Yes, we got a high resolution photograph from 1995 that shows two stakes, and it was the only fence there, but I didn't bother putting it in because it is not decisive.

Q. When you say it shows two stakes, you mean fence posts?

A. Correct. (RP 158-159)

Since the Bitars' only evidence of the location of the Adams fence is their self-serving testimony that the two fences existed together just a few inches apart, and that testimony is refuted by that of the disinterested witness who actually installed the Haggerty fence, the trial court properly

found a lack of (credible) evidence of the Adams fence's precise location. This is especially so since Bitars acknowledged the existence of at least one photograph showing a part of this fence, which they chose not to offer into evidence.

- f. Bitars' actions in installing and later replacing the underground 'invisible' dog fence were correctly found to provide no support for Bitars' claims. (Finding of Fact 23 & 24.)

The Bitars' trial testimony regarding the installation and re-installation of the underground 'invisible' dog fence is insufficient to provide any support for their adverse possession claim.

Obviously, it is only the installation and re-installation process itself that was visible. The finished product left no visible above-ground signs of its presence. (RP 171-72.)

The invisible fence was placed along the perimeter of Bitars' five acre parcel, the dimensions of which were 641' x 340' as reflected in the survey (Trial Exhibit 2). Of that total perimeter, the west boundary's 340 feet is 17.3% ($641 + 641 + 340 + 340 = 1,962$. $340/1,962 = 17.3\%$.) of the total perimeter. Mr. Bitar did not testify how long it took him to initially install the invisible fence within the disputed area, nor how long it took to re-install it within the disputed area. He did testify that the re-installation took him four to six months. (RP 141.) Utilizing his longer estimate, one

can reasonably estimate that the re-installation within the disputed area itself took him about one month, (6 months x 30 days = 180 days x .173 = 31.1 days), and that the initial installation probably took a bit longer since it was the initial work, so if we double the re-installation time and estimate the time of the initial installation within the disputed area as a full two months, even though the Bitars themselves did not provide any evidence on this point, we still have only about three months of visible work in the disputed area.

Given the requirement that one's open and notorious use must last uninterrupted for ten years, *Bryant v. Palmer Co.*, 86 Wn. App. 204, 209; 936 P.2d 1163 (1997), citing *ITT Rayonier, Inc. v. Bell*, 112 Wn2d 754, 757; 774 P.2d 6 (1989), a total of approximately three month's work in the disputed area is simply of no consequence, even if that work itself was open and notorious while it was under way.

- g. The trial court properly found that the Bitars' possession of the disputed area was not exclusive. (Finding of Fact 21)

It is difficult to understand the Bitars' assertion that the trial court's finding, that Bitars' possession of the disputed area was not exclusive, was not supported by substantial evidence in the record. Stated another way, the trial court properly found that Bitars failed to carry their burden of exclusive use for ten years.

Beginning in 2002, Christopher Tompkins cleared brush and mowed throughout the disputed area annually, devoting a full day of work on each occasion. (RP 43-46.) Bitars was aware of Tompkins's activities but did not complain or even comment. (RP 47.)

Tompkins' level of maintenance, annual brush clearing and mowing, was at least equal to (actually a bit more than) Bitars' purported level of maintenance in the disputed area, mowing every other year and blackberry spraying every three years. (Finding of Fact 14.) Such evidence virtually *compels* a finding that Bitars' possession of the disputed area was not exclusive beginning in 2002.

- h. The trial court's finding that the underground invisible dog fence was not intended as a boundary fence was altogether appropriate. (Finding of Fact 23.)

The trial record reflects three separate fences in the vicinity of the disputed area at various times; Bitars' underground invisible dog fence, Adams' horse fence and Haggertys' cattle fence. Each was a 'special purpose' fence, in that each was electrified for the purpose of containing animals, dogs, horses or cattle.

Although the trial court spoke in terms of intention, what is really significant is the specialized **purpose** of these various fences which the trial court actually alluded in its Findings of Fact 7 and 18. That is

especially the case because of the presence of a pond and the marshy ground to the west of it through which the true boundary runs, where the evidence establishes it is simply not feasible to install electrified fencing.

Indeed, Mr. Bitar himself testified that he removed the Adams' horse fence because he did not have horses or cattle (RP 169.) From this an inference can be reasonably drawn that not even Bitar himself considered the Adams horse fence to serve the purpose of marking the boundary. This is even further reinforced by the fact that when the Bitars replaced the Adams' fence, they replaced it with a below-ground 'invisible' fence that cannot possibly serve the function of marking a boundary.

"In determining what acts are sufficiently open and notorious to manifest a claim to land, the character of the land must be considered." *Chaplin v. Sanders*, 100 Wn.2d 853,863; 676 P.2d 431 (1984). Here, the character of the land is such that the pond and wet land through which the boundary runs effectively eliminate the use of a fence to mark the boundary. The placement of fencing in the vicinity of this pond is necessarily dictated by the character of the land rather than by the location of the boundary. Bitars, Adams and Haggerty all faced the same physical

conditions that simply precluded the special purpose fencing they all preferred from serving the additional purpose of marking the boundary.

As the trial court noted in its Finding of Fact 18, the **purpose** of this fence was to contain the Bitars' dog. Regardless of Bitars' intent, his underground 'invisible' fence was not physically capable of serving the purpose of marking the boundary, at least not in an open and notorious fashion. Accordingly, the trial court's reference to Bitars' intent lends no support to Bitars' challenge of its decision.

- i. The trial court's conclusion that Bitars' occupancy of the disputed area was not open and notorious until 2004 was properly supported by the trial record.

As demonstrated above, when Bitars dug up and repaired their previously invisible underground dog fence in 2004, the work itself took approximately one month within the disputed area itself. That 'invisible' fence was the only 'improvement' Bitars ever made in the disputed area, and its repair in 2004 was the first visible indication of any occupancy by Bitars in the disputed area since its original installation in 1999, aside from whatever family activities centering around the pond may have occasionally spilled over to the extreme west edge of the pond or the heavily vegetated, marshy land in the immediate vicinity.

Those family activities and their minimal nature are addressed in

detail above and need not be repeated here.

An approximately one month period of work, resulting upon its completion in no visible improvement or other alteration of the land, is simply insufficient, standing alone or in combination with all the other evidence Bitars introduced, to reverse the trial court's verdict.

- j. The issue that the court did not find that the Adams and Haggerty fences adjoined each other within inches was addressed in subsection 'e' above and need not be repeated here.
2. The trial court properly quieted title to the disputed area in favor of Tompkins.
 - a. Bitars failed to carry their burden of proving the necessary elements of adverse possession.

Each of the elements necessary to establish ownership by adverse possession has been addressed above and need not be repeated. However, one frequently overlooked requirement warrants discussion based on the particular facts of this case.

The requirement that boundary lines be well defined is most frequently addressed in discussions of mutual recognition and acquiescence, but is equally applicable to adverse possession claims.

Bryant v. Palmer Co., 86 Wn. App. 204; 936 P.2d 1163 (1997); *Scott v. Slater*, 42 Wash 2d 366, 369; 255 P.2d 377 (1953.)

Both Mr. and Mrs. Bitar **initially** testified that the land they claimed extends to the location where the **Adams** fence once stood (Mrs. Bitar at RP 76 , Mr. at RP 148). Of course they later removed it without a trace and replaced it with an ‘invisible’ below ground fence. (RP 150-52.)

However, as Bitars’ trial testimony developed, especially that of Mr. Bitar, the actual location of the Adams fence became more and more elusive, and their adverse possession claim more and more problematic.

Beginning at RP 120 line 6, Mr. Bitar was asked on direct exam about the location of the reddish-colored Adams fence in relation to the Haggerty fence. He described them as next to one another, “. . . but as you go [south] toward the railroad tie there would have been some ‘divergence.’” He went on to explain on RP 121 why he disagrees with the testimony of his wife that the Adams fence connected to the same railroad tie the Haggerty fence connected to, stating, “. . . so it’s like the red [Adams] fence is **sort of vaguely in our memory** back then, it was there, but it probably cut the corner. That is what I would **conjecture.**”

(Emphasis added.)

On cross, he was asked about this ‘divergence’ between the Adams and Haggerty fences he described on direct exam, beginning on RP 152, line 23. In the rather long-winded exchange that followed, Mr. Bitar

acknowledged on RP 153 that:

“I don’t have an explicit visual memory of what happened in that corner.”

Then he expressed a thought that although he did not complete, might very well have been on the mind of the trial judge as well as everyone else in the courtroom:

“If somebody can convince me either way by proper documented evidence . . .”

By this point in the trial, the location of the Adams fence was in serious doubt, and the Bitars’ claim that was still based on it was in equally serious trouble.

Bitar, that ‘copious photo taker,’ offered into evidence no photographs depicting the Adams fence. Nonetheless, he was asked on cross whether he had any such photographs. His rather startling response is worth revisiting:

Q. To your knowledge, do you have a photograph showing the Adams fence, showing this part of the Adams fence west of the barn?

A. Yeah, actually, but it wasn’t worth throwing in because it was high resolution, and it showed only a few stakes, and I thought what’s the point? Our case doesn’t hinge on it, so who cares? (RP 159.)

“Our case doesn’t hinge on it, so who cares?”

Based on the specific testimony of both Mrs. and Mr. Bitar, (Mrs. Bitar at RP 76 , Mr. at RP 148), their case did in fact hinge on the location of the Adams fence, at least up to the moment at trial. But given the obvious lack of evidence of the Adams fence's location, he might have more accurately stated, 'Our case doesn't hinge on it **anymore.**'

A short time later, Mr. Bitar was asked whether the connector boxes for the invisible dog fence were visible in the disputed area, and the following exchange took place.

Q. You will agree with me in the disputed area you can't even see the connector boxes, can you?

A. Yes, we are going on the Haggerty fence in this lawsuit, not the invisible fence. The Haggerty fence is quite visible.

Q. I thought you said that you are going with the Adams fence, or, at least, your wife said you are going with the Adams fence in this litigation. Do you disagree with her on that?

A. The litigation is about the boundary marked by the Haggerty fence.

Q. So you disagree with your wife that the property that you're claiming-- your wife testified and I will represent to you my recollection is, at least, that your wife testified you guys are claiming property up to and including where the Adams fence was. Do you disagree with it?

A. We are claiming it up to the Haggerty fence where I installed my permanent dog fence because that's been the property boundary there since 1996 or 1995. (RP 172-73.)

This last statement is quite bizarre. It would mean that from 1995 until they replaced the Adams fence with their invisible dog fence in 1999, Bitars claimed to the Haggerty fence some unknown distance west of the Adams fence that still stood between their property and the Haggerty fence. Clearly, the Bitars are willing to switch the extent of their claim between the Adams and Haggerty fences to meet whatever they perceive to be the needs of their claim at any given moment.

But possession must be continuous, uninterrupted and exclusive for ten years to satisfy the adverse possession requirements. RCW 4.16.020; *ITT Rayonier* at 757, citing *Chaplin*, 100 Wn.2d at 857. We have found no support in the case law, and Bitars have cited none, for the proposition that the requirement of uninterrupted possession permits a shifting during the requisite ten years (or during the trial itself) from an encroaching structure erected by the owner of one lot (Adams), to a different structure erected by the owner of an adjoining lot (Haggerty) which is not itself an encroachment since it was clearly erected on that second owner's land by its true owner.

Furthermore, any assertion that the distance between the fences, whatever it may have been, should be ignored as *de minimis* is likewise without merit. First, the record fails to establish whatever distance may have separated the Haggerty and Adams fences.

Second, the court in *Wells v. Parks*, 148 Wash. 328, 332 (Wash. 1928), overruled on other grounds in *Chaplin v. Sanders*, 100 Wn.2d 853,861; 676 P.2d 431 (1984), ruled that the doctrine of *de minimis non curat lex*, (the law does not take notice of very small matters) has no application in an adverse possession case, noting for instance that the court in *Milbank v. Rowland*, 63 Wash. 519 (Wash. 1911) properly concerned itself in such a case with a strip of land three and one-half inches in width.

Thus, Bitars cannot within the requisite ten year period (or during the trial itself) simply shift the extent of their claimed possession from the Adams' fence to the nearby Haggerty fence, especially since the fences themselves are the only visible improvements of possession. Instead, they must prove ten years of continuous, uninterrupted, exclusive possession with no shifting around from one structure to another in an attempt to cobble together the necessary time of possession.

Finally, as Mr. Bitar begrudgingly acknowledged, because of the pond and wet land around its western edge through which the true boundary runs, the higher, firm ground to the west of the true boundary was the only practical place to install electrified fencing, (RP157) as Adams, Haggerty and Bitar all did.

Those fences, all of them, are indicative of nothing more than their admittedly specialized function of containing animals by use of electric

current, and their incompatibility with the water or wet land through which the true boundary runs.

- b. Bitars failed to carry their burden of establishing the elements of mutual recognition and acquiescence by the requisite clear, cogent and convincing evidence.

As demonstrated above, Bitars have not proven by the requisite clear, cogent and convincing evidence a single, identifiable, well-defined line existing for ten years. *Lilly v. Lynch*, 88 Wn. App. 306, 316-17, 945 P.2d 727 (1997). Proof of the location of their initial target, the Adams fence, was sorely lacking. Bitars themselves seemed to acknowledge as much when they sought to shift the limit of their claim of possession from the Adams fence to the Haggerty fence at trial, as their ‘proof’ of the Adams fence location fell apart. Mr. Bitar’s rather startling revelation that he possessed a high resolution photograph of part of the Adams fence, or at least some of its fence posts, but declined to offer it into evidence, seriously undermined the integrity of Bitars’ case. (RP 158-159)

Initially, Mr. Bitar was in agreement with Mrs. Bitar that the Adams fence served as the boundary line for their adverse possession claim, testifying as follows:

- Q. Sir, it’s my understanding from your wife’s testimony that the property you’re claiming is the property that goes west to the Adams fence, where the Adams fence was. Is that

your understanding of your claim as well?

A. Yes. (RP 148.)

Switching their reliance on the fly from the Adams fence to the Haggerty fence not only smacked of desperation, but underscored that Bitars never had a coherent claim to begin with.

Perhaps worse yet is their reliance on a complete mischaracterization of the testimony of Mr. Adams. Counsel for Bitars confronted the witness with his deposition testimony about an agreed-upon property line. The witness specifically asked counsel for the context of the witness's answer, but counsel declined to provide it. (RP 200-01.)

On re-direct exam, it was a rather simple matter of common decency to provide to the witness the context of his answer that he requested. It immediately became clear that the agreed-upon property line about which he testified at his deposition was at the front or east end of the Adams / Bitar lot, not at the west end of the lot which is under consideration here. (RP 202.)

Whether careless or calculated, Bitars' misrepresentations to this court that Mr. Adams's testimony established an agreed-upon boundary must be rejected along with the rest of their baseless claim of mutual recognition and acquiescence.

It should finally be noted that John Haggerty testified that there was in fact no agreement between Haggertys and the Adams regarding the boundary separating their respective properties. (CP 99.)

3. The Haggertys' permission was not nullified by clear notice or an obvious change in use.

Finally, Bitars assert that, based on *Miller v. Anderson*, 91 Wn. App. 822; 964 P.2d 365(1998) the Bitars "made obvious changes in the use of the disputed area" that constitute "clear notice or obvious change in use" that would vitiate permission.

Tompkins proved a grant of permission by Haggertys to leave the encroaching Adams fence in place. It is clearly Bitars' burden to prove a termination of that permission.

Let us first consider the starting point for this analysis as established by the *Miller* court itself at 831. The court stated:

"Prescriptive rights are not favored, and permission once granted is presumed to continue."

". . . the rule should protect and encourage the person granting the permission."

Pursuant to *Miller* at 832, in order to establish the termination of the Haggertys' grant of permission, Bitars must prove either the sale of the servient estate (Haggertys' land), clear notice of a hostile claim or an obvious change in use from that for which permission was granted.

The Adams' sale to the Bitars in 1995 did not affect the Haggertys' grant of permission, because as *Miller* clearly establishes, it is the sale of the **servient estate**, i.e. the Haggertys' land, that terminates the grant of permission, not Adams' sale to Bitars in 1995. Haggertys' sale to the Tompkins occurred in 2002, less than ten years ago.

Bitars do not claim to have given Haggertys some "clear notice" of a hostile claim by some express notification to them.

As to Bitars' claim of an obvious change in use, it is important to keep in mind the nature of the permission actually granted to Adams by the Haggertys, specifically that the Adams could leave their encroaching animal confinement fence right where it was. The record clearly reflects that the permission granted was not based on any type or level of use on their side of that fence, but simply on the continued presence of the encroaching fence at that location.

Bitars removed that fence in 1999 (Finding of Fact 17, RP 150-52) and replaced it with another animal confinement fence. John Haggerty testified that he was aware of the Bitars' removal of the Adams fence and their installation in its place of the underground dog fence, and did not complain. (CP 123-24). The obvious conclusion to be drawn from this evidence is that Haggertys' previous grant of permission did not change

with Bitars' replacement of one fence by another at the same location, but instead continued on as before.

It necessarily follows that Haggertys' grant of permission to maintain an encroaching fence, whether it be Adams' horse fence or Bitars' replacement dog fence at the same location, did not terminate until Haggertys' sale to Tompkins in 2002.

Thus, since Haggertys' express grant of permission to Adams continued until 2002, and was not dependent upon or limited to any other particular type or level of use, it is not necessary to reach the question of whether Bitars carried their burden of proving an obvious change in use sufficient to notify Haggertys of a hostile claim.

But let us consider that question just for sake of completeness. In order to carry their burden of proving an obvious change in use, assuming it to be relevant at all, Bitars must necessarily first establish how the Adams used the disputed area for sake of comparison. There is simply no evidence that Bitars' use differed from Adams, since Bitars never proved how Adams actually used the land east of the encroaching fence to begin with.

We will not belabor here the ample support in the record for the trial court's findings that Bitars' activities in the disputed area were

minimal. The question here is whether there was “evidence of a change in use . . . that would have notified the [Haggertys] of an adverse claim and thus terminated permission.” *Miller* at 832. When asked how frequently he observed the Bitars in the disputed area, Mr. Haggerty testified (CP 130) that “. . . they poked around the edge of the pond on probably not more than a half dozen occasions during the time we were there.” Haggertys lived on that property while the Bitars were their neighbors from early 1995 to late 2002, so he actually observed the Bitars ‘poking around’ the area on the average of less than once per year.

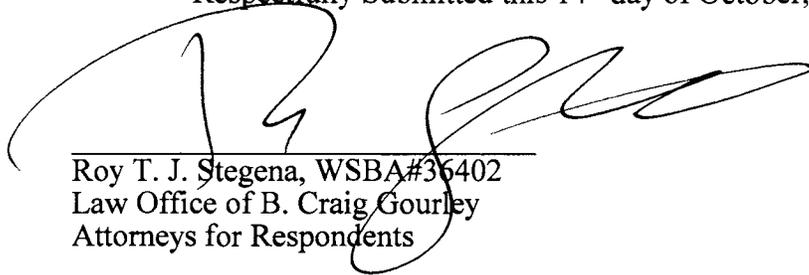
Mr. Haggerty testified that the Adams also used the disputed area (CP 118), but Bitars never developed any details of that use to which the Bitars’ own use could be compared. The record therefore does not provide any basis upon which to compare Bitars’ use with that of the Adams, as observed by Haggertys. Nevertheless, what Mr. Haggerty did observe of Bitars’ use of the disputed area, ‘poking around’ there less than once per year on average, falls far short of notice of a hostile claim in any event.

In summary, Haggertys’ grant of permission for an encroaching fence to remain in place continued until they sold their land to Tompkins in 2002. Bitars failed to prove any obvious change in use such that would provide notice to Haggertys of a now hostile claim.

IV. CONCLUSION

The trial court properly concluded from the evidence that Bitars failed to carry their burden of proving the elements of adverse possession or mutual recognition and acquiescence. Their appeal should accordingly be denied.

Respectfully Submitted this 14th day of October, 2009.



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THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION I

PHILIP BITAR and MARIE BITAR,
Defendants/Appellants,
v.
CHRISTOPHER TOMPKINS and
LISA TOMPKINS,
Plaintiffs/Respondents.

NO. 636219-I
PROOF OF SERVICE

TO: Clerk of the Court,

AND TO: Appellants PHILIP BITAR and MARIE BITAR and Thom Graafstra, their attorney,

I, Tracy Swanlund, declare and state on oath and under penalty of perjury as follows:

1. I am over 21 years of age and otherwise competent to testify to the matters set forth.
2. On the 14th day of October 2009, I did cause to be delivered via legal messenger service the following document:

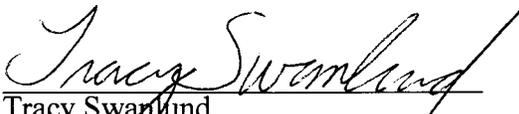
Respondents' Brief

3. This document was directed to:

Thom Graafstra
21 Avenue A
Snohomish, WA 98290

THE FOREGOING IS TRUE AND BASED ON MY PERSONAL KNOWLEDGE.

DATED: October 14, 2009.


Tracy Swanlund

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