

040001-3

040001-3

No.64661-3-I

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

Larry W. & Kaaren A. Reinertsen,

Respondents,

v.

Carolyn Rygg & Craig Dilworth,

Appellants.

"AMENDED" BRIEF OF RESPONDENTS

G. Geoffrey Gibbs, WSBA No. 6146
Attorneys for Respondents Reinertsen

ANDERSON HUNTER LAW FIRM P.S.
2707 Colby Avenue
P. O. Box 5397
Everett, Washington 98206-3566
Telephone: (425) 252-5161
Facsimile No.: (425) 258-3345
ggibbs@andersonhunterlaw.com

2010/04/23 11:00 AM
GIBBS, G. G.
REINERTSEN, L. W. & KAAREN A.

TABLE OF CONTENTS

I.	Identity of Parties	1
II.	Introduction – What Issues Are Involved on Appeal	1
III.	Issues That Should <u>Not Be</u> Considered by this Court	2
IV.	Argument – Issues that Should be Considered	3
	A.	Court’s Decision on Remand Regarding Assault Correct . 3
	B.	Findings Regarding Claims of Adverse Possession and Mutual Acquiescence by Trial Judge Adequate and Should be Sustained. 6
		1. Line of Pyramidalis 7
		a. Adverse Possession 7
		b. Mutual Recognition & Acquiescence10
		2. Board Fence portion of the Boundary11
		a. Adverse Possession13
		b. Mutual Recognition & Acquiescence14
		3. Split Rail Fence Portion of the Boundary15
		a. Adverse Possession 15
		b. Mutual Recognition & Acquiescence 16
	C.	No Bias or Prejudice Shown – Recusal Unwarranted 17
	D.	Residential Address or Location of Attorney Irrelevant .. 22
V.	Argument – Issues that <u>Should Not</u> be Considered	23
	A.	The ruling of the trial court that the “distance” in the legal descriptions control (over compass bearing or a claim that grantor’s intent was 7.5’ from the Reinertsen’s house)... 23

B. Judge Hulbert’s authority to proceed with hearings “on remand” (separate from issues raised about “ex parte” contact).24

C. Issues Pertaining to Judge Hulbert hearing the case on remand. 24

D. Irregularities in procedures leading up to the hearing “on remand” by trial judge Hulbert;.....25

E. Claims of Discovery Errors or Omissions Prior to Trial...26

F. Consideration of New Evidence 26

VI. Summary 27

TABLE OF AUTHORITIES

Cases

<i>Standing Rock Homeowners Ass'n v. Misich</i> , 106 Wn.App. 231, 234 (2001)	5
<i>ITT Rayonier, Inc. v. Bell</i> , 112 Wn.2d 754 (1989)	8
<i>Miller v. Anderson</i> , 91 Wn.App. 833 (1998)	8
<i>Riley v. Andres</i> , 107 Wn.App. 391 (2001)	8
<i>Shelton v. Strickland</i> , 106 Wn.App. 45 (2001)	8
<i>Anderson v. Hudak</i> , 80 Wn.App. 398 (1995)	9
<i>Lilly v. Lunch</i> , 88 Wn.App. 306 (1997)	9
<i>Lingvall v. Bartmess</i> , 97 Wn.App. 245 (1999)	9
<i>Riley v. Andrews</i> , 107 Wn.App. 391 (2001)	9
<i>Merriman v. Cokeley</i> , 168 Wash. 2d 627 (2010)	10
<i>State v. Gamble</i> , 168 Wn 2d 187 (2010)	20
<i>State v. Post</i> , 118 Wn. 2d 596 (1992)	20
<i>State v. Perala</i> , 132 Wn.App. 98; review denied 158 Wn.2d 1018 (2006)	20

Statutes

RCW 4.16.020	8
--------------	---

I. IDENTITY OF PARTIES

Larry W. and Kaaren A. Reinertsen are the plaintiffs in the underlying Superior Court case involved in this matter, Snohomish County Cause No. 04-2-08016-7. The defendants in that case are Carolyn Rygg and Craig Dilworth, plaintiffs in this cause.

II. INTRODUCTION – WHAT ISSUES ARE INVOLVED IN THIS APPEAL

In light of the extensive nature of the pleadings from Rygg & Dilworth, some effort should be devoted to defining what issues are appropriate for decision on appeal in this matter. To determine issues on appeal, the key rulings or orders are four:

- A. “*Unpublished Opinion*” of this Court of July 9, 2007
- B. *Order Denying Motion for Reconsideration and Changing Opinion*, October 10, 2007;
- C. *Supplemental Findings Re: Counterclaims, Judgment & Decree and Orders on Motions*;¹ and
- D. *Order Re: Motion to Clarify and Amend Legal Descriptions*).²

Drawing upon the litany of issues raised in the *Brief of Appellants*, we believe the following issues are ripe to be decided in this, the second appeal

¹ CP 1190
² CP 1169

of this matter (at least before this Court, not counting all the appeals to Supreme Court, etc.);

- A. Did the trial judge resolve the issue pertaining to the claim of “assault” correctly in light of this Court’s ruling in its “unpublished opinion”;
- B. Did Rygg and Dilworth meet their burden of proof to establish a boundary based upon adverse possession and mutual acquiescence;
- C. Was there “ex parte” contact and, if so, does it rise to the level to disqualify Judge Hulbert and mandate a new trial; and
- D. Issues pertaining to the residence of the undersigned attorney in the same neighborhood;

III. ISSUES THAT SHOULD NOT BE CONSIDERED BY THIS COURT

Drawing further from the litany of issues in the Rygg/Dilworth *Brief of Appellants*, there are numerous issues referred to therein what should not be considered or ruled upon by this Court. They include:

- A. The ruling of the trial court that the “distance” in the legal descriptions control (over compass bearing or a claim that grantor’s intent was 7.5 feet from the Reinertsen’s house);
- B. Judge Hulbert’s authority to proceed with hearings “on remand” (separate from issues raised about “ex parte” contact);
- C. Issues pertaining to Judge Hulbert hearing the case at trial or on remand;
- D. Irregularities in procedures leading up to the hearing “on remand” by trial judge Hulbert;

- E. Claims of “discovery errors” or omissions prior to the original trial;
- F. The Court should not considered new “evidence” not admitted at trial or admitted by the trial judge “on remand”.

IV. ARGUMENT – ISSUES THAT SHOULD BE CONSIDERED

As a prelude, we note that this Court in its two decision remanding this case to the trial judge, David Hulbert, (1) did not order a new trial but rather remanded the matter for the entry of supplemental “findings of fact and theories presented at trial”³ and (2) specifically authorized the matter to be heard by the trial judge, David Hulbert, despite his no longer being actively on the bench.⁴

A. COURT’S DECISION ON REMAND REGARDING THE “ASSAULT” WAS CORRECT.

This Court, in its Unpublished Opinion of July 9, 2007, indicated with respect to the Dilworth claim of assault and the original trial ruling that there existed essentially a “mutual combat” as follows:

“Mutual combat and provocation are irrelevant to a claim of civil assault. Washington has expressly refused to adopt the rule that parties engaged in mutual combat will be denied relief in a civil action. *Hart v. Geysel*, 159 Wash. 632,635, 294 P. 570 (1930).”⁵

³ *Unpublished Opinion* in 55842-1-I , July 9, 2007 at page 9.

⁴ *Order Denying Motion for Reconsideration and Changing Opinion*, Case No. 55842-1-I , October 10, 2007 at page 1 (adding footnote).

⁵ *Unpublished Opinion* in 55842-1-I at page 9.

When the matter was heard by Judge Hulbert on remand, the Court revised its prior ruling to conform to the decision of this Court, ruling as follows:

“The Court finds that although the parties engaged in mutual combat in anger, they did not do so with deadly weapons or force. Under the reasoning of the decision by the Court of Appeals, that they engaged in mutual combat does not defeat a claim for civil assault brought by Defendant Dilworth. The court does find that Plaintiff Larry Reinertsen did strike a blow that made incidental contact with the eyeglasses worn by Defendant Dilworth.

“As a result, the Court will now find under the law as expressed by the Court of Appeals that an assault did occur. While the Court does not necessarily believe actual or demonstrated damages need by proven in a case of civil assault, there is no evidence of any quantifiable monetary damages incurred by Defendant Dilworth. Further, his assertion in testimony, when viewed in light of his presence, demeanor and testimony, that the result of the confrontation in question was that he and his mother were in ongoing fear of Larry Reinertsen is not accepted or given credibility by the Court. Therefore, the Court will find an assault occurred but declines to award any damages to Defendant Dilworth.”⁶

This issue was raised on appeal in the briefest manner in a only 4 lines and the challenge to it appears to be that the trial judge did not specifically delineate why he found Dilworth’s testimony as to damages at trial not credible. Contrary to the minimal assertions therein, there was no evidence produce at trial regarding any monetary or economic damages incurred or

⁶ CP 1190.

claimed by Dilworth.⁷ His only testimony regarding potential damages was a claim that he was “concerned for myself and also for my mother”⁸ and that he had incurred attorney’s fees in the lawsuit.⁹

The burden of proving “damages” related to the assault lies with Dilworth who claimed assault. He provided no evidence of any monetary damages and Judge Hulbert’s ruling on the assault on remand was appropriate and justified. The basis for overturning such a ruling would be a showing on appeal that his ruling was not supported by substantial evidence or an abuse of discretion.¹⁰ Judge Hulbert noted that there was “no evidence of any quantifiable monetary damages incurred by Defendant Dilworth”.¹¹

B. FINDINGS REGARDING CLAIMS OF ADVERSE POSSESSION AND MUTUAL ACQUIESCENCE BY TRIAL JUDGE ADEQUATE AND SHOULD BE SUSTAINED.

This Court has already determined that Judge Hulbert’s ruling that the “distance” would control with respect to the inherent inconsistencies in the two legal descriptions was appropriate and supported by substantial evidence. This issue is not one on appeal.

⁷ Dilworth’s direct testimony acknowledged that he had suffered no monetary or economic damages. See RP 299 (lines 4-9) and RP 304 (lines 3-20).

⁸ RP 249-250

⁹ RP 298 (beginning at line 25) – 299.

¹⁰ *Standing Rock Homeowners Ass’n v. Misich*, 106 Wn.App. 231, 243, 23 P.3rd 520 (2001) as cited by this Court in its Unpublished Opinion of July 9, 2007 in this cause.

¹¹ CP 1191, line 12.

The issue presented in the earlier and this appeal relates to Rygg's¹² claims of "adverse possession" and "mutual acquiescence". In this regard, we start from the premise that the "burden of proof" at trial regarding claims of adverse possession or mutual acquiescence is on the proponent of such claims, Rygg herein. The trial judge followed this Court's direction on remand to "enter facts and theories presented at trial."¹³ The trial judge having now done so,¹⁴ these issues are now back before this Court.

The boundary in question has been segregated at trial into 3 sections for legal discussion, named (a) the "line of pyramidalis"; (b) the "board fence" and (c) the "split rail fence". We will attempt to deal with issues raised in this appeal in that lineal fashion.

1. Line of Pyramidalis

The trial judge has made specific findings with regard to this area; to wit:

- a. Reinertsen was the one who planted the bushes; and
- b. That such bushes were wholly within his surveyed boundary.¹⁵

¹² Although references herein will often include both appellants, Rygg and Dilworth, so far as we know and at the time of trial, Carolyn Rygg was and is the sole owner of the real property in question and Craig Dilworth has no recorded interest therein.

¹³ *Unpublished Opinion* in 55842-1-1 at page 9.

¹⁴ CP 1190.

¹⁵ CP 1190.

His findings and ruling in regard to this area is well supported on the record at trial. There is no error claimed or dispute in this regard raised by Rygg and Dilworth on appeal.

Adverse Possession

With regard to a claim of adverse possession in this area of the boundary, the trial judge has specifically ruled that the only evidence of adverse possession put forward at trial was of “incidental spraying” of the bushes by a service with which Rygg had a contract and that such evidence was insufficient to constitute “adverse possession”. Similarly, the Rygg claim of putting down “pine needles” among the bushes was a form of “ground cover” or efforts to prune on her side of the bushes did not constitute sufficient evidence to support a claim of adverse possession or mutual acquiescence.

To establish a claim of adverse possession, the possession must be: (1) exclusive, (2) actual and uninterrupted, (3) open and notorious, and (4) hostile.¹⁶ Possession of the property with each of the necessary elements must exist for ten years.¹⁷ The party claiming adverse possession has the burden of establishing each element.¹⁸

¹⁶ *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989).

¹⁷ RCW 4.16.020

¹⁸ *Id.*

Whether a person has gained title by adverse possession is a mixed question of law and fact. The trier of fact decides whether the requisite facts exist.¹⁹

The open and notorious element of adverse possession requires that (1) the true owner had actual notice of the adverse use throughout the statutory period, or (2) the claimant used the land such that any reasonable person would have thought he owned it.²⁰ In other words, the claimant must show that the title owner either knew or should have known that the occupancy constituted a claim of ownership.²¹

While our court have on occasion and in particular circumstances held that “adverse possession” may be found even when a fence has not been erected.²² But an element must be found that the Reinertsens in this case “knew” or had reason to know that, if spraying did occur or pine needles were put down, these actions were of the nature and kind that it was contrary to their ownership of the disputed property. Factually this cannot be sustained. It can be and

¹⁹ *Miller v. Anderson*, 91 Wn.App. 833, 828, 964 P.2nd 365 (1998)

²⁰ *Riley v. Andres*, 107 Wn.App. 391, 396, 27 P.3d 618 (2001);
Shelton v. Strickland, 106 Wn.App. 45, 51-52, 21 P.3d 1179 (2001).

²¹ *Anderson v. Hudak*, 80 Wn.App. 398,405, 907 P.2nd 305 (1995)

²² *See Lilly v. Lynch*, 88 Wn.App. 306, 945 P.2d 727 (1997);
Lingvall v. Bartmess, 97 Wn.App. 245, 982 P.2d 690 (1999);
Riley v. Andrews, 107 Wn.App. 391 (2001)

was argued at trial that the Reinertsens raised objection to the “spraying” and no clear evidence that it continued for 10 years over their objection.

To claim that in the Pacific Northwest and this property in particular, putting down “pine needles” could even be noticed by an adjacent neighbor is suspect at best. Such actions (pine needles and occasional spraying) do not constitute sufficient evidence of “adverse possession”.

The focus may be then turned to Rygg’s assertion of “mutual recognition and acquiescence” with respect to this portion of the boundary.

Mutual Recognition & Acquiescence

Our Supreme Court has recent commented on this theory of gaining title, noting as follows:

“A party claiming title to land by mutual recognition and acquiescence must prove (1) that the boundary line between two properties was “certain, well defined, and in some fashion physically designated upon the ground, e.g., by monuments, roadways, fence lines, etc.”; (2) that the adjoining landowners, in the absence of an express boundary line agreement, manifested in good faith a mutual recognition of the designated boundary line as the true line; and (3) that mutual recognition of the boundary line continued for the period of time necessary to establish adverse possession (10 years). Lamm v. McTighe, 72 Wash.2d 587, 593, 434 P.2d 565 (1967). These elements must be proved by clear, cogent, and convincing evidence. Lilly v. Lynch, 88 Wash.App. 306,

316-17, 945 P.2d 727 (1997). To meet this standard of proof, the evidence must show the ultimate facts to be highly probable. *Douglas NW., Inc. v. Bill O'Brien & Sons Constr., Inc.*, 64 Wash.App. 661, 678, 828 P.2d 565 (1992).”
Merriman v. Cokeley, 168 Wash.2nd 627, 630-631 (2010).

Within the area of “pyramidalis”, there are no demonstrated “monuments”, fences or any designation upon the ground that would qualify this claim under the law. Factually there were only the Pyramidalis bushes themselves that the trial court determined were planted by the Reinertsens. This theory must also fail with respect to this area of the boundary. Our focus with respect to both theories advanced by Rygg now turns to the next area of the boundary, the “board fence”.

2. Board Fence portion of the Boundary

The findings of the trial court were as follows:

“With respect to the area of the “board fence”, sometimes referred to as a “6 foot board fence”, the Court finds that the Reinertsens originally laid down a line of used railroad ties as a retaining wall, not necessarily on the surveyed boundary but close to the actual line. The court further finds that the predecessor to the defendants conferred with the Plaintiffs and wanting to erect a barrier fence, with the agreement of the Plaintiffs, did so placing its base upon the railroad ties belonging to the Plaintiffs for “mutual convenience” so that weed would not grow in the minimal area between the railroad ties and his fence if placed on the actual boundary line. The line ascribed by the actual fence is not on or in the ground but rather on top of the railroad ties put in place by the Plaintiffs (now replaced with concrete blocks). Thereafter, it was the Plaintiffs who on a number of occasions

took action to replace the railroad ties and later substitute concrete blocks. The Plaintiffs placed ornamentation upon their side of the fence. The actions of these defendants were generally limited with regard to the fence. The surveys vary somewhat but appear to indicate that the fence sits between .9 foot to 1.68 feet west of the actual property line (per metes and bounds). The continued actions of the Plaintiff in replacing the railroad ties or concrete base defeat the claim of the Defendants that their possession of all east of the fence was exclusive and hostile. Essentially the Plaintiffs continued to exercise dominion and control over the area in which the railroad ties or concrete blocks were located. It was never made clear to the Court by either party the actual location of the original line of railroad ties or even the current line of cement blocks. Pictures admitted showing the fence would appear to indicate that the cement blocks are likely between a few inches and a foot wide under the fence line. This was insufficient for the Court to make a specific finding of the location of a boundary by adverse possession had the Court so found.”²³

To assist this Court, we refer to photographs submitted by Rygg and Dilworth at trial (Exhibits 40 and 42) showing a portion of the “board fence” in question, the photos taken from their side of the boundary. The Court could also examine Exhibit 10 at trial, with particular attention to photographs 10(e) and (p). These photographs all document a portion of the “railroad ties” and the replacement concrete placed in the ground by the Reinertsens. That the

²³ CP 1190, 1192, beginning at line 14.

Reinertsens were the parties that placed the railroad ties and concrete over the years was undisputed at trial.²⁴

It would appear that the trial judge determined that the line described in the ground by the railroad ties and concrete was “close to the actual boundary line”²⁵ and that the fence sitting on top of the ties and concrete was somewhere between 10 and 20 inches over the Reinertsens’ boundary line (.9 and 1.68 feet).²⁶

Adverse Possession

We incorporate without necessarily repeating herein the discussion above of the legal requirements for adverse possession set forth in statute and case law.

Faced with the fact that the Reinertsens acted on a number of occasions to replace and upgrade the railroad ties and place concrete and concrete blocks in the disputed area, it can only be said that there actions were consistent with ownership of the property in question. That they allowed the “board fence” to continue to rest atop the concrete and blocks was only a continuation of the permission they granted to Dr. McCarty for the board fence to remain on top rather than aside the railroad and ties to avoid weeds proliferating in the

²⁴ See Testimony of Craig Dilworth, RP 300 (beginning at line 12).

²⁵ Id at line 16.

²⁶ Id at lines 25-26.

space betwixt the two. Dr. McCarty's letter admitted at trial as **Exhibit 18** is further evidence of this agreement. It was clearly not an agreement to alter the boundary line but one to avoid continued maintenance of the boundary by both parties. The only "monuments" on or in the ground was the concrete placed on the boundary line by the Reinertsens.

Mutual Recognition & Acquiescence

Perhaps here, more than in any other section of the boundary, one might rush to assume applicability of "mutual recognition and acquiescence", given the nature of the construction of the fence atop the railroad ties by agreement between the then neighbors, McCarty and Reinertsens. But as it relates to the boundary, it has always been the case that the Reinertsens maintained the "base" of railroad ties and later cement and cement block at or very near the boundary line. That they continued the informal "license" granted to Dr. McCarty to keep the fence atop the ties and concrete to "avoid weeds growing up" betwixt the same was a matter of neighborly courtesy, not evidence of an intent to accede to the board fence as a boundary.

It could just as easily be claimed by the Reinertsens that the railroad ties and concrete formed a boundary line by "mutual recognition and acquiescence". In fact, inasmuch as the concrete and

ties were laid in the ground, they served as monuments to the boundary line so established.

3. Split Rail Fence portion of the Boundary

The balance of the boundary in question has been denominated the “split rail fence”.

Adverse Possession

The trial judge made the following findings with respect to the “split rail fence” portion of the boundary and adverse possession:

“With regard to the “split rail fence” and a claim of adverse possession, the Court finds that “a” split rail fence was erected by Dr. McCarty probably sometime in 1969 or the early 70’s. See Exhibit 8. There was no evidence before the Court as to exactly where Dr. McCarty located the split rail fence. However, the testimony was clear to the Court that the split rail fence deteriorated and fell down sometime in the past. The “survey” admitted as Exhibit 2, dated May 29, 1995, shows a “split rail fence” on the eastern boundary of the Rygg property (that boundary not involved in this suit) but does not show any split rail fence on the west toward the Reinertsens. The court must then presume from this evidence that the fence no longer existed as of 1995. The defendants then, at some time, resurrected the fence after 1995 (not within the 10 year period for adverse possession). But in doing so, they could not prove to the Court’s satisfaction that it was erected exactly in the place or on the line set by the former split rail fence, nor can they show with any certainty where the former split rail fence was located. As a result, the court is unable to find that a specific boundary was established by a fence that existed for longer than the required 10-year period to sustain a claim for adverse possession in this portion of the boundary. The testimony of the defendants in regard to where they erected the new split rail fence was

not of sufficient weight or specificity to establish their burden of proof in this regard."²⁷

There was a clear factual dispute at trial as to the location of the split rail fence when originally erected by Dr. McCarty and when reconstructed in 2003 by Rygg and Dilworth.²⁸

Larry Reinertsen clearly and unequivocally testified that the reconstructed fence was not in the same location as the original McCarty fence.²⁹

The trial court was not presented with any factual evidence (other than the mere assertion by Rygg and Dilworth³⁰) that they attempted to reconstruct the fence in 2003 in the same location. In fact, a survey performed for Carolyn Rygg in 1995, while showing the "board fence" in question, did not show any "split rail fence" to have existed or remained at that point.³¹

Rygg and Dilworth, at trial, failed to present any real or substantive evidence of exactly where the split rail fence had been originally built by Dr. McCarty (in metes and bounds, surveys or otherwise). It was their burden of proof to do so. Rygg and

²⁷ CP 1190, 1193, beginning at line 9.

²⁸ See testimony of Craig Dilworth as to the date of reconstructing the fence in 2003 at RP 289 (lines 11-16) and RP 299 (beginning at line 21).

²⁹ See RP 43 (lines 11-20), RP 45 (beginning at line 5 through RP 46); RP 48 (beginning at line 15) through RP 49 (line 2); and RP 99 (line 1-13).

³⁰ See testimony of Carolyn Rygg at RP 160-161 (beginning at line 20);.

³¹ See Exhibit 2, 1995 Continental Survey.

Dilworth acknowledged that the “fence had fallen down” and no longer effectively existed at some point in time. Their efforts to resurrect it and place it where they thought it might have been came only shortly before the case was filed and in its resurrected state, it remained for far, far less than the required 10 years.

Mutual Recognition & Acquiescence

Similarly, the failure to document the location of the “split rail fence” back when raised by Dr. McCarty is also a failure in the burden of proof incumbent upon Rygg and Dilworth with respect to “mutual recognition and acquiescence” of the split rail fence and the boundary it may have one time depicted. The claim by Rygg and Dilworth that the fence existed from 1976 – 1986 is irrelevant without “clear, cogent and convincing” evidence of its location at that time. After it ceased to exist, raising another fence “about” or “near” the same area is not of sufficient clarity to meet the burden of proof incumbent for this theory to prevail. The Court found as follows:

“Finally, with respect to the split rail fence, the line was at one time well established (when Dr. McCarty built the fence) but its actual location at the time was not proven at trial. The location at the time of trial was known through surveys but it had previously fallen down and the evidence was not sufficient to show that it existed prior to the survey of May 29, 1995 (Exhibit 2) and therefore lacked the 10 years requisite period. For these and other reasons, the Court does not believe the Defendants have met their burden in showing mutual

acquiescence and recognition with respect to this or the other portions of the disputed boundary.” ³²

C. No Bias or Prejudice Shown – Recusal Unwarranted

We believe it important to set forth the findings of the trial judge with respect to the Rygg and Dilworth motion for “recusal” brought in December 2009. In denying that motion, Judge Hulbert ruled as follows:

“This motion is denied. The Defendants herein have repeatedly alleged “bias” of the undersigned based upon (1) my adherence to certain findings related to their counter-claims of adverse possession and mutual acquiescence and recognition and (2) my relationship with the Anderson Hunter Law Firm and G. Geoffrey Gibbs, attorney for the plaintiffs.

“The undersigned was the trial judge on the case and made certain findings and rulings rejecting counter-claims based on adverse possession and mutual acquiescence and recognition. On remand, I am but following the mandate from the Court of Appeals to expand, supplement and add to the basis for these findings. That I adhere to my original positions in this regard should come as no surprise to the Defendants since they were denied a new trial and I have not changed my mind in regard to their counter-claims (save the one on assault dealt with below). That I do so now is no indication of bias or pre-judging the defendants case; I have already rendered judgment in that regard after trial and denying reconsideration.

“Further, so far as I know, almost all judges in Snohomish County have a level of familiarity, if not friendship, with attorney G. Geoffrey Gibbs but such friendship is no indication of bias or prejudice in favor of his clients. At the time this matter was originally assigned to me for trial, defendants’ attorney, Brian McLean, and Mr. Gibbs met with me in chambers. I indicated to Mr. McLean that I was a

³² CP 1190, 1195, beginning at line 1.

friend of Mr. Gibbs, seeing him on occasion and irregularly socially, but felt then, as I do now, that my friendship would have no impact on my decision in this case. Mr. McLean questioned me about past cases I had handled that involved Mr. Gibbs as an attorney and my rulings in those cases (at least some of which were against Mr. Gibbs and his clients). Mr. McLean discussed this matter with his clients and they waived any objection to my sitting on this matter.

“Since trial was concluded and the various appellate proceedings undertaken, my contact with Mr. Gibbs has been minimal. I have served as mediator on a few cases in which he has been involved and on occasion utilized, in the normal course or any mediation, conference rooms in the Anderson Hunter offices for this purpose. Such use of conference rooms was limited to the duration of the mediations. I have never had any financial relationship with the Anderson Hunter Law Firm save only receiving compensation from their clients (generally shared with the other party(ies)) for my services as a mediator.

“With regard to claims of “ex parte” contact between myself and Mr. Gibbs, I can only surmise that the definition of ex parte contact under which the Defendants are operating is not the same as mine. The only contact in relation to this case that I have had with Mr. Gibbs has been through written communication (generally e-mail, letter or pleadings) and it is my belief that the attorney for the Defendants, Ms. Starczewski, has been copied on every one of those. She has used these same methods to contact me. This does not amount to prohibited “ex parte” contact and both counsel have addressed those communications to me at the address I have provided to them. The use of this method was confirmed by prior orders of Judge McKeeman and myself.

“As a result, I do not believe I have any actual bias nor created the appearance of bias and decline to recuse myself and force the parties to endure an entirely new trial after five years.”³³

³³ CP 1190, 1197, beginning at line 15.

Rygg and Dilworth are not able to point to any evidence of actual “prejudice or bias” exhibited by Judge Hulbert as he heard and ruled on this matter “on remand”. In fact, with respect to one issue he acknowledged the rulings of the Court of Appeals and changed his finding with regard to “assault” and entered a finding in that respect. That he chose to maintain his position with respect to theories of adverse possession and mutual recognition and acquiescence does not indicate bias or prejudice. A party seeking recusal has the burden of proving actual prejudice or bias. See *State v. Gamble*, 168 Wn.2d at 187-88;(2010); *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992); *State v. Perala*, 132 Wn.App. 98, 113, 130 P.3d 852, *review denied*, 158 Wn.2d 1018 (2006).

“Recusal lies within the discretion of the trial judge, and his or her decision will not be disturbed without a clear showing of an abuse of that discretion.”

“The trial court is presumed ... to perform its functions regularly and properly without bias or prejudice. . . . The party moving for recusal must demonstrate prejudice on the judge’s part.”

“Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.” *State v. Bilal*, 77 Wash.App. 720, 722, 893 P.2d 674 (1995) (quoting *State v. Ladenburg*, 67 Wash.App. 749, 754-55, 840 P.2d 228 (1992)). *In order to establish that the trial court’s involvement in the matter violated the appearance of fairness, the claimant must provide some evidence of the judge’s actual or potential*

bias. State v. Post, 118 Wash.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992). The critical concern is determining whether a proceeding would appear to be fair to a reasonably prudent and disinterested person. State v. Dugan, 96 Wash.App. 346, 354, 979 P.2d 885 (1999). “ ‘The test for determining whether the judge’s impartiality might reasonably be questioned is an objective test that assumes that a reasonable person knows and understands all the relevant facts.’ ” In re Marriage of Davison, 112 Wash.App. 251, 257, 48 P.3d 358 (2002) (quoting Sherman v. State, 128 Wash.2d 164, 206, 905 P.2d 355 (1995)) (internal quotation marks omitted).” State v. Perala, 132 Wn.App. 98 (2006) (citing Wolfkill Feed & Fertilizer Corp. v. Martin, 103 Wash.App. 836, 840-841, 14 P.3d 877 (2000)).

To show a violation, Rygg and Dilworth need to present evidence of the judge’s actual or potential bias. This they have not done and the presumption remains that the trial court performed properly without bias or prejudice. The fact that a judge and an attorney have conversation unrelated to the case in question does not raise the spectre of prohibited “ex parte” communications. Nor does it raise an issue of “appearance of fairness”. Judges and attorneys are part of the same practicing legal profession and have interpersonal as well as professional contact often on a daily basis. Some attorneys, particularly in smaller counties, will begin a trial on a new case in front of the same judge before the judge has issued a decision in the preceding trial.

Allegations contained in the Rygg and Dilworth brief that Judge Hulbert was “on the payroll” or receiving “paychecks, free office space, free office equipment, and free office staff” are entirely misleading and intended only to be provocative in the worst sense. As has been repeatedly stated, Judge Hulbert has never been an “employee” of Anderson Hunter. After retiring from the bench, Judge Hulbert engaged in mediation services throughout Snohomish County. On a very few occasions over the last 6 years, he has been utilized to mediate cases in which an Anderson Hunter attorney was involved, but being retained for his services by both parties, not just Anderson Hunter. That a mediation occurred in the offices of Anderson Hunter does not equate to Judge Hulbert being given “free office space, free office equipment, and free office staff”. The only times Judge Hulbert has appeared in the offices of Anderson Hunter were for the purpose of conducting independent mediations on cases wholly unrelated to cases involving these parties and no discussions were engaged in that in any related to this case.

D. Residential Address or Location of Attorney Irrelevant

That the undersigned lives in the same area or even next door to one of the parties is wholly irrelevant to the case. The record will reflect that there was no testimonial or other evidence offered from the attorney, only

advocacy and argument. That the Reinertsens “conferred” with their attorney was disclosed and obvious.³⁴ There is no statutory or case law that demands that an attorney disclose their address or knowledge of the case in general. What is important is that evidence admitted by the judge at trial. This argument is specious and wholly without merit.

V. ARGUMENT – ISSUES THAT SHOULD NOT BE CONSIDERED

There are a number of issues raised in the Rygg and Dilworth Brief that should not be considered by this Court for reasons as stated below.

A. The ruling of the trial court that the “distance” in the legal descriptions control (over compass bearing or a claim that grantor’s intent was 7.5 feet from the Reinertsen’s house).

This Court has already sustained the ruling of Judge Hulbert as to the appropriate correction to the “inconsistent legal descriptions” that burdened the title to both properties in its original decision. To allow this issue to be raised at this juncture is not appropriate and Rygg and Dilworth should be estopped from doing so. Res Judicata applies. The “remand” to the trial court was to enter supplemental findings that would allow a more adequate appellate

³⁴ See CP 1140, *Plaintiff’s Memorandum in Response to Various Motions* filed on Nov. 4, 2009 in Superior Court Case No. 04-2-08016-7.

review on the limited issues of assault, adverse possession and mutual recognition and acquiescence.³⁵

B. Judge Hulbert's authority to proceed with hearings "on remand" (separate from issues raised about "ex parte" contact).

During discussion therein, it would appear that in their Brief, Rygg and Dilworth once again raise the issue of the ability of Judge Hulbert to proceed with hearings "on remand" because the appellants had sought *Writs of Prohibition* and *Mandamus* before the Supreme Court.³⁶ However, the Supreme Court on repeated occasions denied the Rygg and Dilworth requests to stay lower court proceedings³⁷ and ultimately dismissed the entire action as inappropriate.³⁸

C. Issues Pertaining to Judge Hulbert hearing the case on remand.

It appears that Rygg and Dilworth are again raising the issue of whether Judge Hulbert, having failed to be re-elected, had the authority to serve as the judge "on remand".³⁹ Again, this issue has been previously raised in the first appeal before this Court and before the Supreme Court and "res judicata" applies. This Court specifically

³⁵ *Unpublished Opinion* in 55842-1-1, July 9, 2007

³⁶ See *Brief of Appellants* at page 26..

³⁷ See Letters from Supreme Court Clerk Ronald Carpenter to parties dated Sept. 15, 2009 and Nov. 12, 2009 in Supreme Court Case No. 83302-8.

³⁸ See *Ruling Dismissing Original Action*, entered Sept. 11, 2009 in Supreme Court Case No. 83302-8.

³⁹ See *Brief of Appellants* in this matter at page 17.

and on its own motion “amended” its original opinion adding a footnote specifically authorizing Judge Hulbert to hear the matter.⁴⁰ The Supreme Court specifically addressed this issue when it denied “discretionary review” on this issue.⁴¹

D. Irregularities in procedures leading up to the hearing “on remand” by trial judge Hulbert;

Beginning on page 29 of the Brief of Appellants, they present a shotgun litany of claimed procedural errors, including that rulings and opinions were exchanged by letter or e-mail. But this same issue was brought before the Supreme Court by Rygg and Dilworth when they sought Writs of Prohibition / Mandamus.⁴²

But inasmuch as Judge Hulbert did not have an office at the Snohomish County Superior Court and directed communications be sent to his home via mail and internet, there are no issues in this regard of merit. We refer the Court to our discussion of these issues in our *Memorandum of Counsel* filed with the court on June 18, 2009 in the Superior Court case. Therein we noted that any correspondence sent to the judge was also sent at the same time to opposing counsel,

⁴⁰ *Order Denying Motion for Reconsideration and Changing Opinion*, October 10, 2007, in Case No. 64661-3-1

⁴¹ *Ruling Denying Review*, dated Jan. 12, 2009, in Supreme Court Case No. 82381-2.

⁴² See Supreme Court Case No. 83302-8.

and that Ms. Starczewski herself sent materials and pleadings to Judge Hulbert in the same fashion.

E. Claims of Discovery Errors or Omissions Prior to Trial

The claims related to discovery violations are reflected in the *Brief of Appellants* beginning on page 17. There were no discovery errors or omissions that affected the trial in 2004 or the various and multiple appeals on this matter. To claim that the undersigned attorney lives in the same neighborhood rises to the level of relevant discoverable evidence when the undersigned did not serve as a testimonial witness during the trial is specious.

F. Consideration of New Evidence

We remind the Court that this matter was referred back to Judge Hulbert not for a new trial but to supplement his findings with respect to certain limited issues. That he denied to open up the matter for additional witnesses or testimony is in accord with this Court's decision.⁴³

⁴³ *Unpublished Opinion* in 55842-1-I

VI. SUMMARY

The trial judge has now expanded upon his reasoning and rulings to support his findings that Rygg and Dilworth did not meet their burden of proving either adverse possession or mutual recognition and acquiescence with respect to any of the 3 subdivisions of the property boundary in question.

The trial judge has amended his finding regarding assault pursuant to this Court's reasoning in its Unpublished Opinion in this case.

That Judge Hulbert should hear this case was decried by this Court in its amendment to its own decision and that he could hear the case on remand was affirmatively endorsed by this Court and the Supreme Court.

That the undersigned could continue to represent the Reinertsens has been sustained at all appellate levels.

There is no evidence of bias or prejudice exhibited by Judge Hulbert just because he elected to change his ruling and finding with regard to assault but not as to adverse possession and mutual recognition and acquiescence.

There is no evidence that any incidental personal contact between Judge Hulbert and the undersigned during the course of a "mediation" in any way involved this case or prejudiced Judge Hulbert in any manner.

The appeal should be denied in all respects on the merits.

RESPECTFULLY SUBMITTED this 1st day of November, 2010.

ANDERSON HUNTER LAW FIRM P.S.

By 
G. Geoffrey Gibbs, WSBA No. 6146
Attorneys for Respondents Reinertsen