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No. 66162-1-I

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION ONE

2011 JUN 20 2:16:57

SUSAN CONNOR, a single woman,  
Plaintiff/Appellant,

v.

RICHARD L. KING, and AUDREY J. KING, husband and wife, and the  
marital community composed thereof,

Defendants/Respondents.

APPELLANT SUSAN CONNOR'S REPLY BRIEF

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ORIGINAL

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## I. INTRODUCTION

The trial court's conclusion that the boundary between the South Side (owned by Mr. Richard King and referred to by him as the hill property) and the North Side (owned by Dr. Susan Connor and referred to by Mr. King as the farm property) ran along a non-existent fence at the base of the hillside by the pasture does not reflect physical reality. Neither Point A nor Point B, as described on Dr. Connor's deed, lie at the base of the hillside by the pasture. Rather, Point A is located approximately 20 feet above the pasture and Point B 60 feet above the pasture. See Ex. 29. Therefore, the line connecting Point A and Point B is necessarily located on the hillside.

Mr. King's recitation of the facts conflates testimony and misstates what was said at trial. Contrary to his arguments, the interpretation of a deed is a question of law, not of fact. And the trial court erred when it held as a matter of law that the only monument on the ground, an existing fence between Points A and B, was not the "Existing Fence" referred to in Dr. Connor's deed.

The grantor, Raymond Nelson, told the story of the boundary at trial. In 1974, he sold the North Side to Mr. Roberts. The 1974 boundary is described as "being an existing fence on the hillside." Ex. 11. After he

sold the North Side, Mr. Nelson then decided to move the boundary further north to provide himself, as owner of the South Side, or hill property, with more land. His son “straightened out” the boundary fence to accommodate Mr. Nelson’s decision. But by then it was too late to legally move the boundary. In the end, Mr. Nelson testified it did not matter because he knew that eventually Mr. Roberts would purchase the South Side, and he did in 1977. And regardless of where the boundary was located in either 1974 or 1977, Mr. Nelson testified that it ran along a fence line that contoured the hillside, not in a straight line.

Mr. Roberts and his partner, Sam Roffe, used the North Side farm for horses. They bulldozed the hillside up to the Existing Fence, and maintained the fence. Teyo Santana, the farm manager for 20 years, testified that he replaced fence posts and repaired breaks in the barbed wire for the entire time he managed the property. Hence, even if the Court affirms the trial court and finds a straight line to be the boundary, Dr. Connor, either through her own efforts or through tacking, has adversely possessed the property up to the Existing Fence.

## **II. MS. BOSSE'S TESTIMONY IS UNHELPFUL AND IRRELEVANT**

Mr. King places great reliance on testimony from Judy Bosse, but as he recognizes, she moved off of the property in the 1960s. Resp. Br. at 4. As a result, she has no personal knowledge of where any fence used as a boundary in 1974 would have been located, and any speculation by her on that issue lacks foundation and is irrelevant.

Mr. King also relies on Ms. Bosse's testimony about an aerial photo (Ex. 41) allegedly taken in 1969 to establish the location of the fence.<sup>1</sup> Resp. Br. at 4-5. But the record does not reflect what area of the photograph Ms. Bosse testified about. For example, she describes a circular driveway by her house. See RP 228:19-23. But the photo depicts several areas that could be described as circular driveways. See Ex. 41. And there are several areas where cleared land and trees meet, but none are concretely identified as the property in question. RP 228-30. This testimony is confusing and unhelpful.

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<sup>1</sup> No testimony established the date of the photograph other than Mr. King's attorney making a passing reference to it in colloquy with the court.

### III. MR. KING MAKES NUMEROUS MISSTATEMENTS ABOUT THE TESTIMONY GIVEN AT TRIAL

#### A. Mr. Nelson did not Identify the Fence in the Bosse Photo as the Boundary Fence

Mr. King cites to several portions of Mr. Nelson's testimony regarding the Bosse Photo (Ex. 38) and claims that Mr. Nelson identified the fence in this photo as the boundary fence. He did not.

The testimony at trial never pinned down which fence Mr. Nelson referred to in his testimony. Mr. King began by asking Mr. Nelson in general about the back of his pastureland: "You know we have been focusing on the back of your pasture before or where it meets the trees and goes up the hill?" RP 172:3-5. He then asked if a fence existed there, to which Mr. Nelson responded: "Yes, there was a fence through there, but I was always concerned that they would break down the fence and get up on Florence Acres Highway, and that would have been real serious if something like that happened." RP 172:10-13. Mr. King never asked if that fence was the boundary fence.<sup>2</sup>

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<sup>2</sup> Even though Mr. King argues that the Existing Fence was meant only to keep cattle and horses on the North Side property, the Existing Fence does not actually enclose the land. Once the Existing Fence meets Point A, it stops. But the North Side property continues, unfenced, several hundred feet further east until it meets a fence at its eastern boundary. See Ex. 28. Cattle could easily get onto Florence Acres Road by going through that unfenced area.

He then attempted to establish that a fence was located at the base of the hill, but Mr. Nelson testified: “When I bought it, it kind of went up into the hill and then back down again amongst the trees there, but I know the kids always rode their horses out there. They were following the fence line where they were riding the horses.” RP 172:24-173:1. Mr. King also asked: “If you were to say like how far up on the hillside, are we talking 30 or 40 feet, or are we talking 100 feet up into the hillside?” RP 173:16-18. But Mr. Nelson answered with a non-sequitur: “Well, I always went with Lorenzes telling me that there was 23 acres on the hill, and that’s the part that we were going to be selling. We took off for my brother’s house, and we built up on the hill there.” RP 173:19-22. No answer was actually ever given as to how far up the hill the fence was located.<sup>3</sup>

Mr. King never asked the crucial question about the fence depicted in Exhibit 38, that is: “Is this fence that we are discussing the boundary fence that you refer to in Dr. Connor’s deed?” Indeed, when confronted with Exhibit 38, Mr. Nelson did not recall the fence portrayed in that photograph testifying: “Well, I don’t know if this is the fence that the boys fixed up and moved. I’m not sure about that.” RP 179:17-18. Mr.

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<sup>3</sup> At trial, Mr. King’s attorney continuously referenced a fence “significantly up the hillside”, but he never established what he meant. See RP 175:6-9.

King fails to cite to or explain this testimony even though he claims Mr. Nelson identified the boundary fence from this exhibit.<sup>4</sup>

**B. Mr. King Mischaracterizes Mr. Nelson's Testimony About Moving the Fence After the 1974 Sale**

Mr. King argues that Mr. Nelson fixed up and moved the boundary before the 1974 sale. See Resp. Br. at 7. But Mr. Nelson's testimony does not support that assertion. Rather, his testimony indicates that his son moved the fence between 1974 and 1977, impermissibly changing the boundary and adding more land to the South Side, now owned by Mr. King:

Q: That's 1974. You mentioned that Roberts had a couple of years where he had to pay eight percent more if he purchased the uphill property.

A. Yes.

Q: Do you know if there was any alignment or change of the fence during that time? Is that when Vern Jr.. –

A. Yes.

Q. Do you recall, was that a significant change in the alignment of the fence or was it just straightening out? Tell me in your own words.

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<sup>4</sup> Mr. King never established that the fence depicted in Exhibit 38 ran between Point A to Point B as described in Dr. Connor's deed.

A. Well, it was straightened out, and we included all those cleared in the bottom and the hill ground where the trees were.

Q: So the fence included everything that was cleared?

A: Yes.

Q: Did it include any of the trees?

A: No.

Q: Okay. Was that the fence line that was intended to be the borderline between the two properties?

A: You mean the fence, the new fence?

Q: Yes. I guess I should back up a little bit. In 1974, was it that fence that was intended to be the boundary between the two properties?

A: Yes, Yes.

Q: That was adjusted a little bit?

A: That's right.

Q: Do you think that that adjustment added more property to the farmland or added more property to the hill land or was it pretty much ---

A: It provided more property to the hill land when they put that fence in.

RP 183:4-184:10. Indeed, the change in Point B between the 1974 deed and the 1977 deed, from 300 to 392 feet north of Florence Acres Road, supports the fact that Mr. Nelson impermissibly changed the boundaries

during this time period – 392 feet north of Florence Acres Road is located at the base of the hill by the pasture.<sup>5</sup> See Ex. 28.

Regardless, Mr. Nelson testified that it was his intent in 1977 to “sell a property line that matched an existing fence or close to the existing fence that had been sold before[.]”<sup>6</sup> RP 186:1-5. That boundary fence was constructed of barbed wire and steel or wooden posts, just like the Existing Fence. RP 179:23-25. Moreover, that fence was not at the base of the hill. Rather, the fence Mr. Nelson testified about “included all those cleared in the bottom and the hill ground where the trees were.” RP 183:11-16 (emphasis added). In addition to being caused by the contour of the hillside, the meander that Mr. King complains of was likely caused when the fence was moved to meet the new 392-foot corner description.

This description matches that of the Existing Fence that runs along the contour of the hill at a natural break between the toe of the slope and the steep hill property. The Existing Fence runs along the contour from Point A towards Point B up to a point where it veers north to a point 392

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<sup>5</sup> Ironically, Mr. Douglas Slager, a surveyor with Harmsen and Associates, testified for Mr. King that a boundary cannot be changed once set. See RP 154:16-24.

<sup>6</sup> The language in Dr. Connor’s deed describes the boundary as “being an existing fence.” Ex. 11. It does not describe that fence as connecting Point A and B, only as located between Point A and B. Indeed, Mr. Pendergraft testified that he discounted the Existing Fence because it did not run to Point B.

feet north of the road where it was moved after 1974. It was never a fence along the base of the hill and along the pasture. Finally, the straight line imposed by the trial court cuts off the trail along which Mr. Nelson testified that the “kids” rode their horses – the same trail used by Dr. Connor until this litigation commenced.<sup>7</sup> See RP 173:2-6.

**C. Mr. King Misstates Mr. Santana’s Testimony**

Without citation to the record, Mr. King argues that Mr. Santana testified that Mr. Roberts – who owned a half interest in the North Side and a full interest in the South Side – bulldozed both areas above and below the Existing Fence. Resp. Br. at 9. Again, Mr. King is wrong.

Mr. Santana testified that Mr. Roberts only bulldozed the area below the Existing Fence. RP 201:19-202:4. (“Q: Would it have been below the barbed wire fence where he cleared? A: Yes, down below the barbed wire.”). Mr. Santana did not know who put up the barbed wire fence as it was there when he began working on the property. RP 199:25-200:2. Moreover, the fact that, at the time Mr. Santana arrived at the

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<sup>7</sup> As pointed out in Dr. Connor’s opening brief, when one looks at the trail in elevation, rather than as an overview, it appears to be a straight line on the hillside. Indeed, Teyo Santana describes the fence as more or less straight: “From that corner on the swamp where the pin number is, the barbed wire goes right here. From right here, it started kind of going at an angle, and then it goes up, and then it goes straight across, and then comes down and straight across again to the other pin number, two big corners.” RP 208:21-209:4.

property, the fence was used primarily to keep horses from going up the hill does not take away from the original use of the fence as a boundary demarcation. It easily can be both.

**D. The Record is Clear that Mr. Roberts Died in 1980**

Mr. King establishes the date of Mr. Robert's death through his discussion of the chain of title to the North and South Side properties. He points out that the Estate of Homer Roberts assigned a one-half interest in the North Property to the Roffes in 1980. Resp. Br. at 8. And the estate quit claimed its interest in the North Side to the Roffes in 1990. Id. No need for an estate would have existed if Mr. Roberts had been alive.

**E. Mr. King's Explanations for the Non Existence of the Fence are not Plausible**

Mr. King's speculation regarding the fate of the boundary fence is not plausible. The fence, as Mr. Nelson described it, was on the hillside – so are Points A and B. It is simply not plausible that it was washed away in a flood of the flat, farm land. See Resp. Br. at 20. Indeed, for water to reach Points A and B as described in Dr. Connor's deed, her entire house would be underwater.

Further, the idea that a horse owner would replace a barbed wire fence with another barbed wire fence given that barbed wire fencing

should not be used with horses makes no sense. Id. The only explanation for the Existing Fence – along the trail described by Mr. Nelson – is that it is the boundary fence referred to in Dr. Connor’s deed.

**IV. MR. KING’S LEGAL ARGUMENTS DO  
NOT RECITE THE CORRECT STANDARD OF REVIEW**

**A. Interpretation of a Deed is a Question of Law, Not a Question of Fact**

Mr. King’s citation to Thompson v. Schlittenhart, 47 Wn. App. 209, 734 P.2d 48 (1987) does not change the Court’s analysis. In Thompson, the Court of Appeals recited the general rule that the intent of the grantor is to be found from the face of the deed where possible. Id. at 212. Only if the language is uncertain, does the Court resort to extrinsic evidence. Id.

Here, the language in Dr. Connor’s deed, which the trial court found had priority because it is first in time, is not ambiguous. Points A and B are established, and the boundary between runs along an “Existing Fence.” The only question is the location of the Existing Fence – which must exist between Points A and B, not at the base of the hill as Mr. King argues.

Both Mr. King and Dr. Connor agree that the Existing Fence is not a straight line. Indeed, Mr. King argues that “in some parts his [Mr.

Nelson's] repairs and replacements gave the fence more of a contour.”

See Resp. Brief at 7. And as pointed out above, Mr. Nelson testified that his intent was to divide the property along an existing fence, not a straight line. RP 183:11-16. Given that both parties and the grantor agree that the boundary line should run along a fence line, and not be a straight line, the trial court erred in ordering otherwise.<sup>8</sup>

**B. The Court Failed to Give Priority to Dr. Connor's Deed**

The trial court, although finding Dr. Connor's deed had priority, apportioned the property along the straight line called for in Mr. King's deed. But Dr. Connor, whose deed is first in time, is not required to “yield any portion of [her] land to satisfy any subsequent grants made by [Nelson].” Hruby v. Lonseth, 63 Wash. 589, 592, 116 P. 26 (1911). Both parties and the grantor agree that any fence must follow the contour of the hillside. As stated above, it was error for the trial court to fail to give all portions of the deed priority.

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<sup>8</sup> Indeed, Mr. Slager completely ignored the intent of the grantor when surveying the property. He testified that he looked for a straight line as the boundary, not a fence, despite the language in Dr. Connor's deed. RP 144:5-10. Yet, he acknowledged that no reason existed that the Existing Fence could not be the boundary. RP 148:19-149:8.

**C. The Use of the Hillside Was Sufficiently Open and Notorious**

Mr. King incorrectly argues that Dr. Connor must show that the trusts which held title to the South Side from 1987 through 2003 had actual notice of the use of the hill up to the Existing Fence to meet the open and notorious element of adverse possession. Resp. Br. at 31. However, open and notorious use may be proved by either showing actual notice or “that the claimant used the land such that any reasonable person would have thought he owned it.” Riley v. Anders, 107 Wn. App. 391, 396-97, 27 P.3d 618 (2001). “In other words, the claimant must show that the true owner knew, or should have known, that the occupancy constituted an ownership claim.” Anderson v. Hudak, 80 Wn. App. 398, 405, 907 P.2d 305 (1995). As discussed infra, Section IV.D., testimony at trial demonstrated that the fence was obvious to anyone on the hillside. See also RP 136:23-137:3 (“Q: ... [D]id you see a barbed-wire fence on the hillside? ... A: Yes.” from Mr. King’s testimony); 264:24-265:5 (“I climbed over [the fence] the first day I was on the property.” from Mr. Pendergraft’s testimony).

Contrary to Mr. King’s arguments, “[t]he court need not find a ‘blazed or manicured trail’ establishing the disputed boundary; rather, the

court may project a line between objects where it is reasonable and logical and the claimant's use of the land was open and notorious." Id. at 396.

Here, regardless of the state of repair of the Existing Fence, the reasonable and logical use of the land was a horse trail, which Dr. Connor used seasonally – seven months of the year as found by the trial court. CP 36 (FOF 1.29). As pointed out in her opening brief, the trial court erred when it found as a matter of law seasonal use was insufficient.

**D. The Use of the Hillside was Sufficiently Hostile**

"[T]he necessary occupancy and use of the property need only be of the character that a true owner would assert in view of its nature and location." Anderson, 80 Wn. App. at 403. Indeed, the element of hostility does not require that a person do everything an owner could do with the land." Lingvall v. Bartmess, 97 Wn. App. 245, 254, 982 P.2d 690 (1999) (emphasis in original).

Mr. King relies on cases that pre-date Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984), in a misguided attempt to demonstrate that the subjective intent of the party seeking to adversely possess the land should be considered by the Court. See Resp. Br. at 41 (citing Lappenbusch v. Florkow, 175 Wash. 23, 26 P.2d 388 (1933); Hawk v.

Walthew, 814 Wash. 673, 52 P.2d 1258 (1935))<sup>9</sup>. He argues, incorrectly, that the possibility that the Existing Fence may have originally been a pasture fence rather than a boundary fence should somehow defeat the hostility element of adverse possession. But Chaplin expressly rejected the inclusion of the adverse possessor's subjective intent as part of the analysis:

The "hostility/ claim of right" element of adverse possession requires only that the claimant treat the land as his own as against the world throughout the statutory period. The nature of his possession will be determined solely on the basis of the manner in which he treats the property. His subjective belief regarding his true interest in the land and his intent to dispossess or not dispossess another is irrelevant to this determination.

Id. at 861-62.

Whether a fence constitutes a pasture fence or a boundary fence goes only to the issue of whether the use of the land was permissive. Id. at 862. Here, the trial court found that permission ended on the date of Mr. Roberts' death. CP 28 (FOF 1.28). And Mr. King acknowledges that Mr. Roberts died in 1980. Resp. Br. at 8 ("In 1980, the Estate of Homer

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<sup>9</sup> For this reason, Peoples Savings Bank v. Bufford, 90 Wash. 204, 155 P. 1068 (1916), is distinguishable. In Peoples, the court relied on the subjective intent of the party seeking to adversely possess the land in holding "[t]he statute begins to run from the date of

Roberts assigned a one-half undivided interest in the Farm Property to Sam and Hazel Roffe.”). Because the Estate of Roberts did not own the entire interest in the North Side, the section of the hillside below the Existing Fence could be adversely possessed (see section IV.F, infra).<sup>10</sup> See Teyo Santana’s testimony at: RP 199:4-12 (describing repairs to the fence including new posts); 217:11-13 (“Q: Over the almost 20 years that you worked there, was that fence there the entire time you worked there? A: It was there all the time. It’s still there, too, yes.”); 217:15-22 (“Q: Over those 20 years, you repaired that fence? A: Not too much because the blackberry bushes take over. ... I put in new fences to keep when anybody goes up on the hill. I put board posts and a fence, and I blocked the animals to get out from the farm.”); 220:8-13 (“Q: So that area, over the 20 years that you worked there, animals basically had access up to the fence, is that correct? A: Yes because like I said, the lower road, when they bulldozed, the road can go up and then go across and then went

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possession, only when it is sustained by a hostile intent to claim adversely, or, where possession is taken by mistake.” Id. at 206.

<sup>10</sup> Mr. King also incorrectly argues that because the surveyors were trespassing on undisputed portions of Dr. Connor’s property, her objection to their presence does not constitute evidence of hostility. But such compartmentalization of the evidence does not work. The evidence must be examined as a whole. And the trespass by the surveyors, hired by Mr. King, constitutes the beginning of this entire saga now before the court.

down.”); 220:22-24 (“Q: Did you ever see anyone else in the area? A: Nobody else.”); 221:1-5 (“Q: During the 20 years or so that you worked there, even though that fence was somewhat overgrown, was that fence fairly obvious if you walked up that hill? A: You can see it in parts to this day. You can still see it.”); 221:6-8 (“Q: For that 20 years, you could probably see it, is that correct? A: Yes.”).

Recall also, that Teyo Santana stayed on the property for a time after Dr. Connor purchased it in 1995. RP 205:20-206:6. As cited supra, his testimony is that he maintained the fence the entire time that he was on the property.

**E. The Use of the Hillside was Sufficiently Exclusive**

Mr. King’s logging of the hillside does not destroy the element of exclusivity.<sup>11</sup> “To interrupt adverse possession there must be actual cessation of the possession; a mere protest will not interrupt possession that is hostile at its inception.” Lingvall, 97 Wn. App. at 256; Crites v. Koch, 49 Wn. App. 171, 174, 741 P.2d 1005 (1987) (“In order to be exclusive for purposes of adverse possession, the claimant’s possession need not be absolutely exclusive.”). Indeed, his logging activities caused

Dr. Connor to seek a restraining order to protect further encroachments on the hillside.

Similarly, the trespassing of neighborhood children caused her to install no trespassing signs – as a true owner would. Although the court did not give her testimony credence without photographic proof, the fact is that she did not simply ignore the problem. She reacted to the encroachment and tried to protect her property.

**F. Mr. Roffe’s Half Interest in the North Side Prevents Merger of the Estate of Roberts’ Deeds to the North and South Sides**

Mr. King argues that no evidence of Mr. Robert’s death is in the record, but then argues that the transfer of the deeds to the Estate of Roberts in 1980 creates merger of the North and South Side, preventing adverse possession by Mr. Roffe. Resp. Br. at 40-42. He cannot have it both ways – either the record contains the date of Mr. Robert’s death or it does not. Moreover, as the trial court recognized, any permission to use the hillside ceased with Mr. Robert’s death. CP 36 (FOF 1.28). Mr. King’s merger argument is an attempt to get around the explicit fact that

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<sup>11</sup> Mr. King claims to have done “substantial development” on the hillside in the disputed area. The record reflects only that he trespassed and logged the hillside, destroying portions of the Existing Fence in the process. RP 123:17-124:1; 129:4; 128:21-129:4.

Mr. Roberts died in 1980 and the use of the hillside since that date has been hostile to the Estate that took title thereafter.

Merger requires unity of title. See, e.g., Schlager v. Bellport, 118 Wn. App. 536, 541 & n.12, 76 P.3d 778 (2003) (holding in the context of easements, “[a]bsent unity of title, the merger doctrine does not apply”) (citing Lacy v. Seegers, 445 So.2d 400, 401 (Fla. App. 5th Dist. 1984) (no unity of title where one parcel held individually and second held as a tenancy in the entirety); Pochinski Realty Assoc. v. Puizio, 598 A.2d 523, 525 (N.J. Super. 1991) (no unity of title where one parcel held individually and second held as tenant in common)). Here, the North Side was held by two parties, the Estate of Mr. Roberts and Mr. Roffe, from 1980 through 1990. Ex. 6 & 9. While evidence exists in the record demonstrating that Mr. Roffe used the North Side property to access the fence and repair it, no evidence exists that demonstrates he did so with permission from the Estate. Dr. Connor is entitled to tack this adverse use to her own use. Draszt v. Nacarrato, 146 Wn. App. 536, 542, 192 P.2d 91 (2008).

**G. Dr. Connor's Timber Trespass Claim Should be Remanded to the Trial Court for Appropriate Findings**

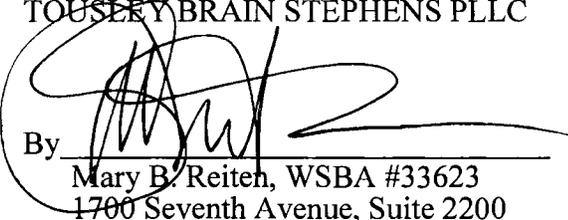
Because Dr. Connor owns the property to the north of the Existing Fence either through what was deeded to her or through adverse possession, Mr. King trespassed when he destroyed the Existing Fence and logged timber to its north. The extent of this timber trespass and the amount of damages owed to Dr. Connor as a result should be determined by the trial court on remand.

**V. CONCLUSION**

For the foregoing reasons and those stated in her opening brief, Dr. Connor respectfully moves this Court to reverse the trial court and find as a matter of law that all of the description in her deed has priority and that the Existing Fence – the only monument on the ground – establishes the boundary between her property and Mr. King's. In the alternative, she asks that this Court find that the facts as found by the trial court establish her adverse possession of the property. Finally, she asks that the Court remand her claim of timber trespass for appropriate findings on the extent and amount of damages.

DATED this 20 day of June, 2011.

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**CERTIFICATE OF SERVICE**

I, Betty Lou Taylor, hereby certify that on the 20th day of June, 2011, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

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Mill Creek, WA 98012-6388

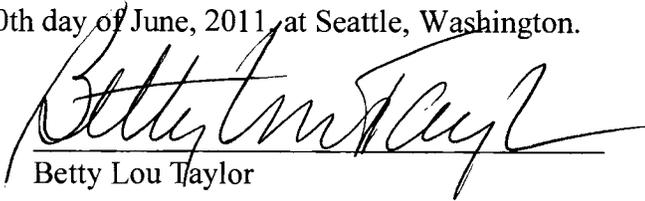
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*Attorneys for Defendants/Respondents*

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

EXECUTED this 20th day of June, 2011, at Seattle, Washington.

  
Betty Lou Taylor