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No. 74707-0-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

MARK MULDAUR and DIANE A. SUTHERLAND, husband and wife

Respondents

v.

AMY C. GARLING

Appellant.

BRIEF OF RESPONDENTS

Joseph A. Grube, WSBA No. 26476
Karen K. Orehoski, WSBA No. 35855
Breneman Grube Orehoski, PLLC
Attorneys for Respondents
1200 Fifth Avenue, Suite 625
(206) 624-5975
Attorneys for Respondents

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I. INTRODUCTION

Appellant Amy Garling sued her neighbors, Respondents Mark Muldaur and Diane Sutherland, over a 114 square foot strip of property. Respondents filed a counterclaim seeking to have the property title quieted to them. At trial the overwhelming evidence established that Mr. Muldaur and Ms. Sutherland adversely possessed the disputed strip of property in 2003, after 10 years of open, notorious, actual, uninterrupted, exclusive and hostile use of the property. The uncontroverted evidence also established that Garling's predecessors in interest acquiesced in the boundary as it had been understood since at least 1988. The trial court entered a judgment quieting title in Respondents. Respondents request affirmance of the trial court judgment maintaining the status quo as it has existed for almost three decades.

II. RESPONDENTS' STATEMENT OF THE CASE

Mark Muldaur and Diane Sutherland purchased and moved into their home in the Ballard neighborhood of Seattle in 1993, over twenty years ago (Lot 6). RP 192, 235; Tr. Ex. 5. Appellant Amy Garling purchased her home (Lot 7) in 2009. Tr. Ex. 6. At trial the chain of title of Lot 7 was established as follows:

Grantor	Grantee	Date	Record
Unknown	Mark Huston	1988	RP 119-120
Mark Huston	Lance King	12/29/99	Tr. Ex. 7
Hot-Foot ¹	Amy Garling	June 10, 2009	Tr. Ex. 6

When Mark Muldaur and Diane Sutherland purchased their home in 1993 there was an existing chain link fence running behind their home which separates their home and yard from the alley behind their home. RP 193, 235; Tr. Ex. 103. The chain link fence runs North to South. Tr. Ex. 101. The chain link fence ends with a fence post on the northeast corner of what is referred to in this case as the disputed area. *Id.* Directly north of Respondent's property (and the chain link fence post) is Appellant Garling's property (Lot 7). *Id.* This means that the chain link fence post is in the southeast corner of Plaintiff Garling's property. *Id.*

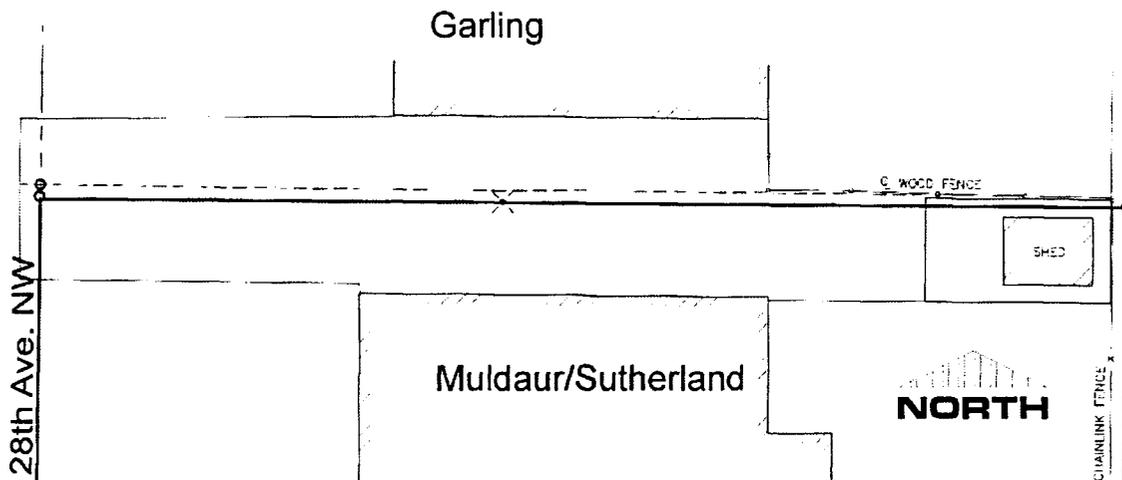
Since long before 1993 a concrete pad has existed in the northeast corner of Lot 6, encroaching on Lot 7. RP 195, 236; Tr. Ex. 101. The concrete pad lines up with the metal post. RP 195, 236, 237; Tr. Ex. 101.

¹ There were several transfers in between Lance King's ownership of Lot 7 and Amy Garling's purchase of Lot 7 which are not relevant to the issues in this case.

The concrete pad also lines up with a seam in the driveway. *Id.*

Since Mark Muldaur and Diane Sutherland moved into their home in 1993, they and their various neighbors to the north (Garling's predecessors in interest) have treated the chain link fence post on the northeast corner of the Muldaur/Sutherland property as the marker for the division of the properties. RP 229, 236. Mark Huston (Appellant's predecessor in interest) purchased his home on Lot 7 in 1988. RP 119. He lived there until 1999, when he sold it to Lance King. Tr. Ex. 7. Mr. Huston testified that he always believed the metal post was the boundary corner between Lot 6 and 7. RP 116. He treated it as so. *Id.* The chain link fence post also lines up with a seam in the driveway between the properties. Tr. Exs 106 – 108. Mark Huston always believed that seam represented the property line, and treated it as so. RP 116.

The area between the driveway seam, the concrete pad, and the metal fence post on the one hand, and the platted property line on the other hand were referred to in the trial court as the "disputed area". Tr. Ex. 101. For purposes of demonstration, the disputed area is highlighted in yellow:



The Sutherlands also testified that that they exclusively used the disputed area since they moved in in 1993. RP 196, 239. In the northeast corner (behind the shed and on the pad) they stored garden tools and garden supplies. RP 196. They maintained it by weeding. *Id.* They accessed it to perform maintenance on the shed (which was placed later). RP 197. None of the owners or prior owners of Lot 7 ever used that area. *Id.* They have never maintained it. *Id.* Until this lawsuit no owner ever claimed that area belonged to Lot 7. RP 198. In the early 2000s, Lance King built a wooden fence to the north of the disputed area, but it was placed consistently with the understood and acquiesced to boundary. RP 206. Lance King testified that when he built the fence, he believed the metal fence post was on the Sutherland's lot. RP 74-76.

Lance King testified that the metal fence post predated his purchase of the property. RP 71. He testified the concrete pad predated his purchase of the property. *Id.* He testified that he never used the concrete pad or parked on the south side of the seam in the driveway. RP 72, 78.

Since 1993, the Muldaur/Sutherlands have exclusively parked in the driveway between the two lots. RP 200. They park to the right (south) side of the concrete seam, as they understood that to be the boundary. RP 201. When they enter or exit their vehicles, they often step on the other side of the seam. RP 202. None of the owners of Lot 7 have ever used the area south of the seam in the driveway to park. *Id.*; RP 208.

The evidence adduced at trial established that prior owner Lance King, who occasionally parked his boat on the north side of the driveway seam, never parked it on the south side. RP 205. He never parked or stored anything on the south side of the seam. *Id.* Amy Garling never used the area south of the driveway seam to park. RP 205-206.

All of the testimony at trial – and certainly the testimony believed by the trial court, established that for 23 years the Respondent’s exclusively and continuously used and openly possessed the disputed area as a true owner would.

III. ARGUMENT

a. Standards of Review

Amy Garling assigned error to some, but not all of the trial court's findings. Unchallenged findings are verities on appeal. *State v. Stenson*, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997); *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994).

This Court will accept the trial court's challenged findings as verities "so long as they are supported by substantial evidence." *In re Marriage of Katare*, 175 Wn.2d 23, 35, 283 P.3d 546 (2012) (citing *Ferree v. Doric Co.*, 62 Wn.2d 561, 568, 383 P.2d 900 (1963)). "Substantial evidence" is not uncontroverted evidence — it "is that which is sufficient to persuade a fair-minded person of the truth of the matter asserted." *Katare*, 175 Wn.2d at 35 (citing *King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 142 Wn.2d 543, 561, 14 P.3d 133 (2000)).

This Court will not re-weigh evidence. *Bale v. Allison*, 173 Wn. App. 435, 458 (Div. 1 2013). A party challenging the court's findings of fact cannot rely on "contrary evidence and testimony that was rejected by the trial court." *Id.* Rather, this Court defers to the trial court's factual findings. *Id.* "The appellant must present argument to the court why

specific findings of fact are not supported by the evidence and must cite to the record to support that argument” or they become verities on appeal. *Inland Foundry Co. v. Dep’t of Labor and Indus.*, 106 Wn.App. 333, 340, 24 P.3d 424 (2001).

b. The trial court’s findings are amply supported and Appellant fails to cite to the record and fails to present argument about the challenged findings.

Although the Appellant has challenged trial court findings in her Assignments of Error, her opening brief contains no discussion or argument as to why those findings are unsupported by substantial evidence; nor do they contain any citation to the record. Therefore, all of the trial court’s findings must be considered verities. RAP 10.3; *Inland Foundry*, 106 Wn.App. at 341; *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1988). Nonetheless, out of an abundance of caution, Respondents direct this Court to portions of the record supporting the challenged findings.

1. The chain link fence ends with a fence post on what was commonly believed to be the northeast corner of the Respondents’ property. FFCL 6 and 16.

Garling challenges one sentence of Finding of Fact 6: “The chain link fence ends with a fence post of what was commonly believed to be the northeast corner.” Mark Huston, who purchased Lot 7 in 1988, testified

that he always assumed the metal post was the boundary corner between Lots 6 and 7. RP 116. Diane Sutherland testified similarly, as did her husband. RP 194, 212, 236. Lance King testified that he assumed the fence post was approximately the property line. RP 75, 80.

2. Since at least 1988, the owners of Lots 6 and 7 have mutually acquiesced in location of boundary line as along the seam/wood fence to metal post. FFCL 16.

Garling also challenges the trial court's finding that the owners of Lot 6/7 mutually acquiesced in the location of the boundary line as found by the trial court. Mark Huston testified that from 1988 (when he moved in) through 1999 (when he moved out) he always thought the seam in the driveway was the boundary and treated it as such. RP 116-117. Diane and Mark Sutherland testified similarly. RP 201; 212; 218. Lance King never parked anything to the south side of the seam. RP 205. Nobody else has regularly used the driveway to the south side of the seam. RP 208.

3. The concrete pad encroaches across the deeded boundary line. FFCL 7.

Garling also challenges the finding that the concrete pad located on Lot 6 and 7 encroaches across the deeded property line. This is a frivolous challenge. Both surveys establish the encroachment. Tr. Exs. 1 & 2. Further, Appellant's own expert (surveyor Travis Lanktree) testified as

much. RP 172-173; 180.

4. *The parties and their predecessors have treated fence post, concrete pad and driveway seam as the boundary marker since at least 1993. (FFCL 8, 9, 12.)*

Garling challenges the finding that the parties and their predecessors in interest treated the metal fence post, the concrete pad, and the driveway seam as delineating the boundary marker. Former owner of Lot 7 (Mark Huston) testified that he always assumed the driveway seam, was the boundary between the two properties. This challenge should be rejected. Mr. Huston testified as follows:

Q: [i]n all the years you lived there, from 1987 to 1999...you were working on that assumption that the seam was the boundary line and that's how you acted with respect to what you owned versus what lot 7 owned, right?

A: Yes.

RP 117. He further testified about the metal post:

Q: And you always assumed that this metal post was the boundary corner, didn't you?

A: Yes."

RP 116 – 117. He never stored anything on the south side of the seam. RP 117 – 118. Garling and her boyfriend have never stored anything on the south side of the seam. RP 134. Diane Sutherland testified that she and her

husband always regarded the driveway seam and metal fence post as the boundary. RP 229.

5. *The Respondent's use of the disputed area has been open and exclusive.* (FFCL 13)

The overwhelming evidence was that the Respondents used the disputed area of the driveway exclusively. Former owner Lance King testified he never used the driveway to park and that if he ever crossed over to the south side of the driveway seam while using the disputed area it was "infrequent". RP 63-64. Former owner Mark Huston testified that he never stored anything on the south side of the driveway seam, and never parked in the driveway. RP 118. If the driveway was needed for a delivery or some type of work on the house, he would "ask the owner [of Lot 6] and they were fine with that." RP 119. Diane Sutherland testified that from 1993 to the present they have parked in the disputed area. RP 200-201.

c. The trial court's findings support its determination of adverse possession.

A party adversely possesses real property which she has possessed in an (1) open and notorious, (2) actual and uninterrupted, (3) exclusive and (4) hostile manner for ten years. *ITT Rayoneir, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6, 8 (1989); RCW 4.16.020(1). "Neither actual occupation,

cultivation or residence are [sic] necessary to constitute actual possession.” *Bellingham Bay Land. Co. v. Dibble*, 4 Wash. 764, 770 (1892). If a line of use is “obvious upon the ground to “[p]rudent observation,” adverse possession may exist up to a “reasonable projection” of that line. *Frolund v. Frankland*, 71 Wn.2d 812, 8210 (1967) *overruled on other grounds by Chaplin v. Sanders*, 100 Wn.2d 853 (1984).

When a person adversely possesses property for ten years, such possession ripens into an original title. *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 855 (1963). The 10-year statute of limitations does not require the owner by adverse possession to have held the property in an adverse manner continuously up to the time she seeks to quiet title by lawsuit. *Id.* at 855. Instead, she may bring her action any time after she has held possession adversely for ten years. *Id.*

The trial court, being well aware of the elements of adverse possession, expressly found that Respondents adversely possessed the Disputed Area. FFCL 13-14, 16.

1. The trial court’s findings are sufficient to establish the elements of adverse possession of the disputed area.

Appellant argues that the trial court “failed to enter specific findings that the Sutherlands’ use constituted actual possession.” Appellants Br. at

p. 18. This misstates the record. The trial court specifically found that Respondents “openly and notoriously exercised continuous dominion and control over the disputed area.” FFCL 13; CP 243. It found that Respondents’ “use of the area north of their shed on the concrete slab on which it sits has been open and by the evidence their use has been exclusive of any use by the owner of Lot 7. *Id.* It found that Respondents have used the driveway, regarding the seam in the concrete as the property line. *Id.* It found that they exclusively maintained and cared for the disputed area. *Id.* It found they exclusively stored materials, and exclusively parked their car in the disputed area. *Id.*

[P]roof that the use by one of another’s land has been open, notorious, continuous, and uninterrupted for the required time creates a presumption that the use was adverse unless it is otherwise explained; and the burden is then upon the servient owner to show that the use was permissive.

Hovila v. Bartek, 48 Wn.2d 238, 241, 292 P.2d 877, 879 (1956). Trial courts may infer permission only if the record “support[s] a reasonable inference of permissive use.” *Drake v. Smersh*, 122 Wn.App. 147, 153-54, 89 P.3d 726 (Div. 1 2004).

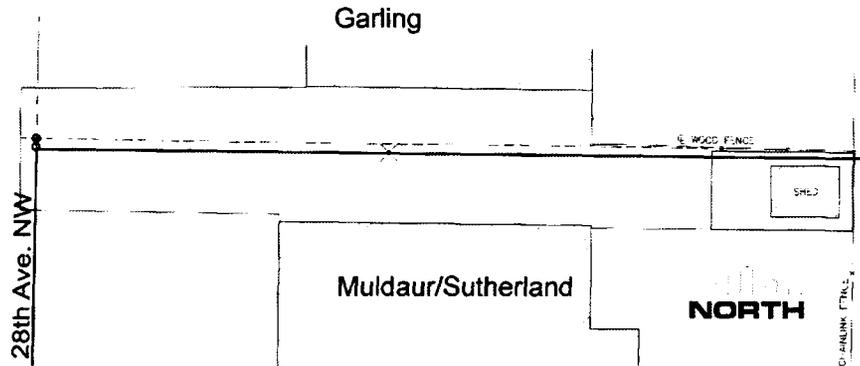
The trial court did not make a finding that the Respondents’ use was “permissive on inception” because the record would not support such a

finding. The portion of the record cited by Appellant (RP 110-14) does not establish “permission” to use the disputed area by the owner of Lot 7. Although Mr. Huston testified that he told Mark Muldaur he was welcome to use “the driveway”, upon cross examination (RP 114-118) Mr. Huston explained that he was not referring to the area to the south of the concrete seam. RP 117-118. This is because Mr. Huston thought the concrete seam *was* the boundary line. RP 120. The Respondents never asked Appellant to park in the disputed area. RP 40. They never asked Appellant’s boyfriend to park in the disputed area. RP 136. Owner Lance King never gave Respondents permission to use any portion of his property. RP 66. Nowhere in the trial court record is there any testimony wherein an owner of Lot 7 testified they gave Respondents permission to use any portion of the disputed area. Because there was no evidence of “permissive” use of the disputed area, the trial court did not err. A trial court is not required to make negative findings. *Daughtry v. Jet Aeration Co.*, 18 Wn. App. 155, 566 P.2d 1267 (Div. 1 1977). To the extent the “lack of permission” is considered a material fact, it is considered that the finding is adverse to the party in whose favor the finding would have been made. *City of Spokane v. Department of Labor and Industries*, 34 Wn. App. 581, 663 P.2d 843 (Div.

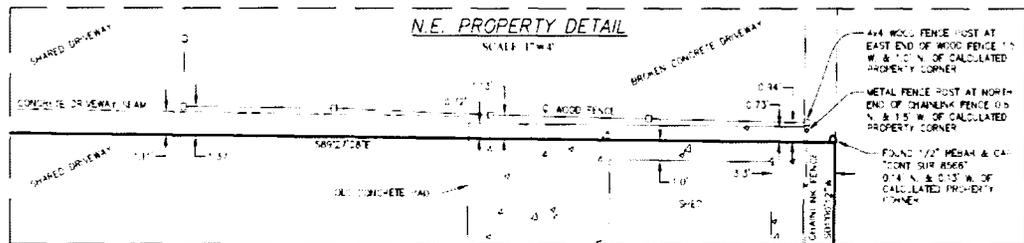
3 1983). Thus, a material fact is treated as if found against the party having the burden of proof when the trial court makes no express finding regarding that fact, unless the fact is supported by uncontroverted evidence in the record. *Pacesetter Real Estate, Inc. v. Fasules*, 53 Wn. App. 463, 767 P.2d 961 (Div. 3 1989); *Lobdell v. Sugar 'N Spice, Inc.*, 33 Wn. App. 881, 658 P.2d 1267 (Div. 1 1983); *State v. Moon*, 48 Wn. App. 647, 739 P.2d 1157 (Div. 1 1987).

2. *The trial court's findings establish the elements of boundary line by mutual acquiescence.*

Appellant next argues that the trial court did not find the existence of a “certain, well-defined line physically designated on the ground...” necessary to support its conclusion of mutual recognition and acquiescence. App. Br. At p. 21. This is incorrect. The trial court specifically adopted the Record of Survey (Tr. Ex. 101) and found that the disputed area consists of “114 square feet of the area to the south of the wooden fence and the concrete driveway seam as depicted below:



CP 240; FFCL 5. The trial court further found that the chain link fence post and fence, along with the concrete pad, encroach on Lot 7. CP 241; FFCL 6-7. Tr. Ex. 101. It further found that the “edge of the pad is aligned with the chain link fence post and runs east to west, where it eventually terminates and a concrete driveway seam begins.” *Id.* That portion of Finding No. 7 is unchallenged and is a verity. The findings further call out an excerpt of Tr. Ex. 101:



The trial court clearly found a “well defined line physically designated on the ground” to support its determination of boundary by acquiescence.

d. The trial court's determination of adverse possession was not error.

- 1. The evidence at trial established Respondents' actual and exclusive use and possession of the disputed area.*

Appellant correctly states the test for actual possession: "Considering the nature of the land and the area where it situated, were the claimants acts on the ground the kind of use a true owner would make of such land?" Wash. Prac., Real Estate § 89. (2d Ed).

As described above, the disputed area is a driveway and a corner area behind a neighboring fence. The trial court found that both the owners of Lot 6 and Lot 7 have treated "the seam in the driveway pad, the concrete pad under the Muldaur/Sutherland Shed, and the metal fence post as establishing the property line between the two parcels." FFCL 12. It found that they exercised "continuous, exclusive dominion and control over the disputed area." FFCL 13. They exclusively stored materials in the area. *Id.* They exclusively maintained and cared for the disputed area. *Id.* They exclusively parked their car on the portion of the driveway up to the south of the concrete seam and up to the concrete pad. *Id.*² The trial court also

² This particular finding is unchallenged and is a verity on appeal.

found that “[n]o other person, or owner of Lot 7 has used the disputed area since 1993, other than with the permission of Mr. Muldaur and Ms. Sutherland.” *Id.* Further, there was testimony that Respondents once told visitors to Lot 7 who had parked on the driveway that “this is our property. You’re in the wrong place.” RP 79. The findings and substantial evidence supporting them are all consistent with Respondents’ treatment of the disputed area as a true owner would.

2. *Substantial evidence supports the trial court’s determination that the Respondents’ use of the disputed area was not “permissive.”*

Appellant next argues, without citation to the record, that the evidence at trial “unequivocally” demonstrates Respondents’ use of the disputed area was permissive at its inception. No such evidence was presented by *any* witness. The trial court found that the possession was adverse, not permissive. As discussed above, a trial court is not required to make negative findings. *Daughtry*, 18 Wn. App. 155. The testimony of Mark Huston (the only owner at “inception” according to the Appellant’s argument) clearly establishes that he believed the property south of the concrete seam was part of Lot 6. RP 120. Subsequent owner of Lot 7 Lance King never gave permission to use

any portion of his property. RP 66. Appellant had the burden to prove that Respondents' use was permissive. *Hovila v. Bartek*, 48 Wn.2d 238, 241, 292 P.2d 877, 879 (1956). She failed to present any evidence establishing that.

e. The scope of the trial court's order regarding the area around the disputed area was not an abuse of discretion.

Although conceding that the trial court was "well intentioned", Appellant next challenges the trial court's order quieting title in "an area around the concrete seam reasonably necessary to continue parking along the concrete seam..." FFCL 15; RP 291-93. "Courts may create a penumbra of ground around areas actually possessed when reasonably necessary to carry out the objective of settling boundary disputes." *Lloyd v. Montecucco*, 83 Wn. App. 846, 853-54, 924 P.2d 927, 931 (Div. 2 1996). A party is not required to prove they possessed "every square yard of the disputed tract..." *Lloyd*, 83 Wn.App. at 854. The trial court has the authority to carve out an area around adversely possessed property if it is necessary to maintain or access it. It may award title of the additional area to the adverse possessor as well. *Lloyd*, 83 Wn.App. at 853-854.

[w]hen the adverse possessor has objects on the ground that constitute actual possession, he may be

in possession of a certain penumbra of ground around them if that is “reasonably necessary to carry out his objective.”

If the adverse possessor maintains a building wholly or partly on the disseisee's land, he is in adverse possession of walkways or approach areas around the building to the extent they are reasonably necessary to gain access to it. When an adverse possessor makes active physical use of a portion of the disseisee's land, a penumbral area of adverse possession may extend into adjacent areas that are little used if they are logically connected with the area actively used and isolated from the disseisee's remaining land, so that the possessor has “dominion and control” over them.

17 Wash. Prac., Real Estate § 8.9 (2d ed.) (emphasis added)

The trial court inquired of Appellant’s counsel whether, under Appellant’s theory, she could build a wall exactly upon the driveway seam, to which counsel for Appellant answered yes. RP 292. Appellant’s boyfriend also indicated an intent to place a rockery along the property line. RP 129. Clearly these actions would interfere with the way the Respondents have used the disputed area since 1993.

The evidence at trial was that Respondents open their car doors and walk into an area beyond the “disputed area” when they are entering and exiting their vehicles. RP 128. When parking the Respondents “often” swing their car doors beyond the driveway seam in the driveway. RP 230.

They routinely have to walk in the area north of the driveway seam to get in and out of their car. RP 231. Contrary to Appellant's argument, there was substantial undisputed evidence that the Respondents used the area north of the driveway seam to enter and exit their vehicles. Appellant admitted it. RP 36. Former owner Lance King admitted it. RP 65. Respondent Diane Sutherland testified to it. RP 201-202. Appellant's boyfriend testified that the car doors cross over the line. RP 128. Creating a penumbra of ground around the disputed area so that the Respondents can enter and exit their vehicles (as they have since 1993) was reasonably necessary to carry out the objective of resolving this boundary dispute, and the trial court did not err.

f. The trial court did not err by quieting title on the basis of mutual recognition and acquiescence because the driveway seam, concrete pad and metal fence post form a certain, well-defined line that was understood to be the boundary and was treated as the boundary since at least 1988.

The trial court also quieted title using the doctrine of "mutual recognition and acquiescence." This doctrine supplements adverse possession. *Lilly v. Lynch*, 88 Wn. App. 306, 315, 945 P.2d 727, 732 (Div. 2)(1997). A boundary line between adjoining properties, which is different than a true boundary revealed by a subsequent survey, may be established

through mutual recognition and acquiescence in a definite line by interested parties for a long period of time. *Lamm v. McTighe*, 72 Wn.2d 587, 591, 434 P.2d 565 (1967). The party claiming title to land by mutual recognition must show (1) that the boundary line is certain, well defined and physically designated upon the ground by a fence, for example; (2) that the adjoining landowners have manifested a mutual recognition of the designated boundary line as the true line; and (3) that mutual recognition of the boundary line continued for at least 10 years. *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162, 164 (2010). Respondents presented substantial evidence supporting each of these elements.

The physical line formed between the concrete driveway seam, the concrete pad, to the metal post are clearly a “combination of objects clearly dividing the two parcels.” *Merriman*, 162 Wn.2d at 632. They are obvious and unmistakable and designated on the ground.

Appellant argues that there was no evidence that these objects (all of which pre-date any witness that testified) were “intended” to designate a boundary line, but that is not the standard. The standard is whether the parties and their predecessors recognized the line as the true boundary line for at least the requisite period. Former owner of Lot 7 Mark Huston

unequivocally testified that from 1988 until 1999 he believed the seam in the driveway was the boundary line and treated it as such:

Q: But in all the years you lived there, from 1987 [*sic*] to 1999...you were working on that assumption that that seam was the boundary line and that's how you acted with respect to what you owned versus what lot 6 owned, right?

A: Yes.

RP 117. *See also* RP 116 (Huston again affirming that he always assumed the seam was the boundary and that the metal post was the corner). Respondents also testified that the seam was recognized by his family and all the neighbors prior to Appellant as the true boundary. RP 257. It is harder to imagine more compelling evidence of mutual recognition and acquiescence.

Further, there was no evidence presented that any owner of Lot 7 performed any construction or improvements in the disputed area.

It is sufficient to bring the doctrine [of mutual acquiescence] into play if the adjoining parties in interest have, for the requisite period of time, actually demonstrated, by their possessory actions with regard to their properties and the asserted line of division between them, a genuine and mutual recognition and acquiescence in the given line as the mutually adopted boundary between their properties. **This approach is founded upon the truism that actions are often, if not always,**

stronger talismans of intentions and beliefs than words.

Lamm v. McTighe, 72 Wn.2d at 593 (1967) (emphasis added). As discussed above, no owner of Lot 7 ever stored anything in the disputed area. RP 197. No owner of Lot 7 parked in the disputed area. RP 78, 118. The one improvement (the fence built by Lance King) was not placed in the disputed area, and the owner admitted that if he would have tied the fence off from the metal post he would have asked permission. RP 88. The substantial evidence at trial was that the owners of Lot 7 and Lot 6 treated the disputed area as belonging to Lot 6 since at least 1988.

g. Appellant is not entitled to attorney fees.

Appellant is not entitled to attorney fees under any theory. First, she is not the prevailing party. Second, Ms. Garling expressly argued against an award of attorney fees under RCW 7.28.083(3) to the Muldaur/Sutherlands in the trial court on the grounds that such an award would not be “equitable and just”. CP 292. She claimed that both parties “vigorously pursued their respective claims and defenses in good faith.” *Id.* The trial court agreed with Appellant and denied the Respondents’ Motion:

Plaintiff’s complaint...served to bring the existing property line dispute before the court for resolution, which in the end, benefits both parties as the

existence of this particular property line dispute could, and most likely would, have materially affected the marketability of both properties.

CP 317-318³ “Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 861, 281 P.3d 289, 294 (2012). Appellant should be judicially estopped from changing her position on the applicability of RCW 7.28.083(3) to the facts of this case.

h. Respondents are entitled to attorney fees and costs.

Respondents, however, request their attorneys’ fees on appeal pursuant to RCW 7.28.083, RAP 18.1, and RAP 18.9.

First, this appeal is frivolous. Although the Appellant challenges several findings, she fails to cite to the record in support of those challenges and she fails to present argument with respect to those challenges. *See* Section B *supra*. The appeal is factual and the challenged findings are amply supported by the evidence. This is essentially a “factual appeal and is totally devoid of merit”, justifying an award of fees under RAP 18.9. *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187, 191-92

³ In the hope of simply ending this litigation, Respondents did not appeal that Order.

(1980).

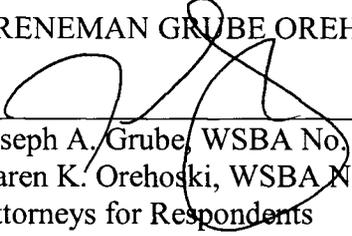
Second, RCW 7.28.083 provides an award of fees to the prevailing party in an adverse possession case if, considering all of the facts, the court determines such an award is “equitable and just.” This quiet title action, commenced and continued by the Appellant, involves 114 square feet that have been used continuously by the Respondents since 1993. The Respondents have been forced to defend this action in order to preserve a 26 year *status quo*. They incurred over \$50,000 in fees in the trial court alone. CP 285. And although the trial court found that the fees were reasonable (CP 318), it did not award them. They respectfully submit the continuation of this action by the Appellant in light of the overwhelming evidence of adverse possession and boundary line by acquiescence is inequitable and unjust and entitles them to fees under the foregoing statute.

IV. CONCLUSION

For the foregoing reasons, Respondents request that the trial court be affirmed and that they be awarded attorneys’ fees for defending this appeal.

RESPECTFULLY SUBMITTED this 3rd day of August, 2016

BRENEMAN GRUBE OREHOSKI, PLLC



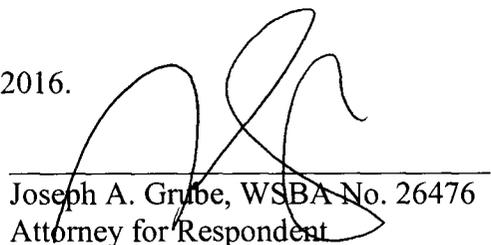
Joseph A. Grube, WSBA No. 26476
Karen K. Orehoski, WSBA No. 35855
Attorneys for Respondents

CERTIFICATE OF SERVICE

I, Joseph A. Grube, certify that all at times mentioned herein I was and now am a citizen of the U.S. and a resident of the State of Washington, over the age of 18 years, not a party to this proceeding or interested therein, and competent to be a witness therein. My business address is that of Breneman Grube Orehoski, PLLC, 1200 Fifth Avenue, Suite 625, 98101. On August 3, 2016, I caused a copy of the foregoing BRIEF OF RESPONDENTS to be served on the following parties:

Via email and U.S. Mail
David A. Petteys
2208 NW Market Street, Suite 420
Seattle, WA 98107
dpetteys@malonelegal.com

Dated this 3rd day of August, 2016.



Joseph A. Grube, WSBA No. 26476
Attorney for Respondent

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