

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STEPHEN E. WESCOTT and)	
DEBRA WESCOTT, husband)	No. 62674-4-I
and wife,)	
)	
Respondents and Cross)	DIVISION ONE
Appellants,)	
)	
v.)	UNPUBLISHED OPINION
)	
CURTIS JOHNSON and JOAN)	
JOHNSON, husband and wife and the)	
marital community composed thereof,)	
)	
Appellants and Cross)	
Respondents.)	FILED: November 16, 2009
)	

Appelwick, j. — A party seeking to establish a boundary line by mutual recognition and acquiescence must prove the necessary elements by clear, cogent, and convincing evidence. Here, the Johnsons satisfied this evidentiary burden by establishing that the parties and their predecessor mutually recognized and accepted the well defined boundaries of a concrete boat ramp for more than ten years. But, the Johnsons failed to demonstrate that the parties mutually recognized or accepted a boundary line running directly north from the west end of the boat ramp. The trial court therefore did not err in quieting title in the remaining disputed area to the Westcotts in accordance with the surveyed property line. Accordingly, we reject the Johnsons’ appeal and the Westcotts’ cross appeal and affirm the trial

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court's decision.

FACTS

Both sides appeal the trial court's resolution of a property line dispute. Most of the court's findings of fact are unchallenged.

Stephen and Debra Westcott and Curtis and Joan Johnson own adjacent lots in the Tulalip Indian Reservation near Everett that border on Puget Sound to the south. The Westcotts purchased their property in September 1987 from the estate of Lorence Marquiss. The Johnsons purchased the lot immediately to the east in October 2001 from Steve and Gloria Spiger, who had owned the property since about 1981. For many years, the owners of both lots used a driveway and boat ramp that Steve Spiger constructed in 1983.

In 2004, the Westcotts commissioned a survey that showed portions of the Johnsons' driveway and boat ramp were on the Westcotts' property. On March 7, 2007, following a series of disputes between the Westcotts and the Johnsons about the location of the property line, the Westcotts filed a quiet title action. By counterclaim, the Johnsons sought title to the disputed area by adverse possession and mutual recognition and acquiescence.

At trial, Guy Marquiss testified that in 1983, his father Lorence asked him to replace the deteriorating bulkhead along the southern boundary of the Marquiss property. Marquiss did not have the property surveyed before beginning construction. Rather, he located what he believed to be the property stake at the southwest corner of the property that the neighbor had placed following a survey.

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Marquiss then manually measured the distance to the southeast corner of the property. Marquiss was confident in the accuracy of the measurement, because it coincided with a spike in the old bulkhead, a survey stake on the hillside, and a line from a cyclone fence that ran for a short distance along the northeast boundary of the Marquiss property. After locating what he believed to be the southeast corner, Marquiss constructed the new bulkhead, which consisted of a row of sunken pilings.

At about the same time that Marquiss was completing the bulkhead, Steve Spiger was constructing his residence on the adjoining lot to the east. Because of the steep slope of the property, Spiger removed about 400 cubic yards of dirt to allow him to place the residence closer to the water. Spiger also constructed a concrete driveway from the northern boundary of the property to the residence and then down to the water.

Like Marquiss, Spiger did not survey the southern boundary of his property. He measured from the southeast corner of his lot to the Marquiss bulkhead, which he believed marked the southwest corner of the lot. At Spiger's request, Marquiss agreed not to sink the usual number of return closure pilings, which normally would have been placed directly to the north from the bulkhead's southeast corner. In exchange, Spiger poured concrete from his driveway up to the end of the bulkhead to help prevent erosion and to facilitate Spiger's use of his driveway without fear of running into pilings. Both parties viewed this agreement as a mutual benefit. Spiger also constructed a concrete boat ramp directly adjacent to the Marquiss' bulkhead that ran down from the driveway to the water.

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Both Marquiss and Spiger believed that their respective construction projects were wholly on their own property, but both were in error about the location of the boundary line. The 2004 survey established that the true property line was located to the east of the bulkhead and thus ran north over a portion of the Spigers' boat ramp and driveway.

The Marquisses and the Spigers remained close friends until Lorence Marquiss died in 1986. Spiger readily granted the Marquisses and other neighbors permission to use the driveway and boat ramp, because there was no other water access nearby. For some time, Spiger also allowed fishermen access to the water, but later stopped giving permission because of the resulting mess left on the beach.

The Westcotts, who purchased the Marquiss property in 1987, quickly became close friends with the Spigers. In the following years, Spiger undertook a series of projects along the western boundary of his property, including landscaping and the construction of various rockeries and retaining walls. In 1989 and 1992, Spiger asked for and received permission from the Westcotts to extend portions of the middle and lower driveway several feet to the west, in order to allow for easier access to his garage. In each case, "[w]hile neither party knew exactly where the boundary line was delineated, there was a general concept that [the] Spigers were encroaching on the Westcott property and that was done with the express permission of the owners." At some point, Spiger also repoured the boat ramp, raising the level of the ramp but not extending it to the west.

The Johnsons purchased the Spiger property in 2001, and eventually a

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dispute developed over the Johnsons' use of the area just to the north of the bulkhead. The 2004 survey showed that one portion of the Johnsons' driveway encroached 141 inches onto the Westcotts' property and that nearly seven feet of the boat ramp was located on the Westcotts' property. After the Johnsons' rejected the Westcotts' attempts to settle the dispute by means of an easement, the Westcotts filed the quiet title action.

The trial court initially concluded that the evidence failed to support the Johnsons' claims of adverse possession or mutual recognition and acquiescence and quieted title to the Westcotts in accordance with the 2004 survey line. The court then granted the Johnsons' motion for reconsideration in part, concluding that the evidence established the boundary of the boat ramp by mutual recognition and acquiescence. The court quieted title of the boat ramp to the Johnsons and all remaining property west of the survey line to the Westcotts.

Both the Johnsons and the Westcotts have appealed.

DECISION

On appeal, the Johnsons contend that the trial court erred in applying mutual recognition and acquiescence only to the boat ramp area. They argue that by creating a small "zig-zag" shaped parcel, the trial court failed to give effect to the boundary line that the parties recognized. They also maintain that the trial court's resolution is inequitable, because it renders the driveway and boat ramp useless to both parties and effectively exacerbates, rather than resolves, the boundary dispute. They maintain that the court should have drawn the boundary as a straight line from

the junction of the bulkhead and boat ramp to the northern property line.¹

In their cross appeal, the Westcotts contend that the trial court should restore its original decision quieting title to the Westcotts in accordance with the entire 2004 survey line. They argue that the evidence failed to establish mutual acceptance of the mistaken boundary for a period of ten years or that Marquiss and Spiger agreed to a boundary at the bulkhead, based on independent mistaken measurements.

A party seeking to establish a boundary line by mutual recognition and acquiescence must establish the following elements by clear, cogent, and convincing evidence:

(1) The line must be certain, well defined, and in some fashion physically designated upon the ground, e.g., by monuments, roadways, fence lines, etc.; (2) in the absence of an express agreement establishing the designated line as the boundary line, the adjoining landowners, or their predecessors in interest, must have in good faith manifested, by their acts, occupancy, and improvements with respect to their respective properties, a mutual recognition and acceptance of the designated line as the true boundary line; and (3) the requisite mutual recognition and acquiescence in the line must have continued for that period of time required to secure property by adverse possession.^[2]

The parties must recognize the purported boundary line as a true boundary and not merely as a barrier.³ Evidence is clear, cogent, and convincing “when the ultimate fact in issue is shown by the evidence to be ‘highly probable.’”⁴

Marquiss testified that before constructing the bulkhead in 1983, he precisely

¹ On appeal, the Johnsons do not challenge the trial court’s rejection of their adverse possession claim.

² Lamm v. McTighe, 72 Wn.2d 587, 592–93, 434 P.2d 565 (1967); see also Lilly v. Lynch, 88 Wn. App. 306, 316–17, 945 P.2d 727 (1997).

³ Muench v. Oxley, 90 Wn.2d 637, 641, 584 P.2d 939 (1978), overruled on other grounds by Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984).

⁴ In re Dependency of K.R., 128 Wn.2d 129, 141, 904 P.2d 1132 (1995) (quoting In re Sego, 82 Wn.2d 736, 739, 513 P.2d 831 (1973)).

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determined the southeast corner of the property by measuring from the property stake placed by the neighbor to the west after a recent survey. He explained that he was confident about the location, because his measurement coincided "within a couple of inches" with the partial cyclone fence along the northeast boundary, a survey stake in the middle of the hillside, and a metal spike that he found in the old bulkhead. Spiger also recognized the same point as the boundary line and asked Marquiss to limit the number of return closure pilings at that boundary to facilitate his use of the driveway. Marquiss agreed and Spiger, with Marquiss' permission, then poured concrete up to the precisely measured junction and constructed the boat ramp along the same line.

Marquiss' care in measuring the southeast corner, Spiger's own measurements and actions, and the parties' agreement about their respective projects amply support the trial court's determination that both men recognized and acquiesced in the end of the bulkhead as the boundary line, even though they did not expressly discuss the property line.

After 1983, when he constructed the boat ramp, the evidence was undisputed that Spiger exercised exclusive control over the boat ramp, including granting permission to neighbors and others to access the driveway and boat ramp and denying access to certain persons. He never requested permission from the Marquisses or the Westcotts to undertake any actions in conjunction with the ramp, including substantially raising the elevation of the ramp in about 1992.

Spiger also testified that he gave permission to the Westcotts to use the boat

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ramp even before they purchased the property, knowing that they were unable to access the beach from their bulkhead. According to Spiger, the Westcotts used the boat ramp primarily to walk to the beach from their property, but rarely used the ramp after constructing a stairway from their bulkhead. Westcott acknowledged that at the time he purchased the lot, he did not believe the boat ramp was on his property. He claimed that he developed some doubts at a later time, but there is no evidence that the Westcotts ever asserted control over any portion of the boat ramp or ever expressed any claim to the boat ramp until after the 2004 survey.

The foregoing circumstances were sufficient to permit the trier of fact to find, by clear, cogent, and convincing evidence, that the Johnsons, the Westcotts, and their predecessors in interest—both by their beliefs and by their actions—recognized the well defined western edge of the boat ramp as the true boundary for more than ten years. The evidence was therefore sufficient to support the trial court's decision applying mutual recognition and acquiescence to the boat ramp.

The Westcotts maintain it is highly unlikely that both Marquiss and Spiger erred in measuring their respective property lines and mutually agreed on the same location for the boundary. They maintain that it would have been easy for Spiger to determine the true property line at the time. But in reaching its decision, the trial court clearly rejected the Westcotts' suggestion at trial, based on Marquiss' testimony, that Spiger may have intentionally extended his property line by removing pilings from the Marquisses' bulkhead before pouring the concrete for the boat ramp. No evidence supported such a claim, and ultimately, the trial court's determination of

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a mutual mistake rested heavily on a credibility assessment that cannot be reviewed on appeal.⁵

Contrary to the Johnsons' contentions, the evidence also supports the trial court's determination that they failed to establish a boundary by mutual recognition and acquiescence in the area directly north of the boat ramp. Unlike the evidence involving the boat ramp, the evidence regarding the upland area to the north of the boat ramp failed to establish mutual acquiescence to any well defined boundary line. Rather, the evidence was essentially undisputed that all parties treated the ongoing landscaping and driveway projects as providing mutual benefits that did not depend on a precise knowledge of the actual property line. In 1989 and 1992, the Westcotts expressly granted Spiger permission to encroach onto their property by extending his driveway in two locations. But, the permission was asked for and granted with no recognition of a particular boundary line and only a general belief by both parties that the driveway was being extended into the Westcotts' property.

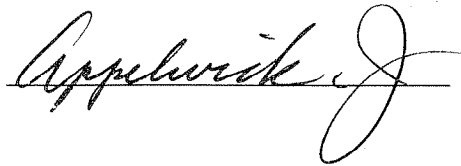
The Johnsons claim that the trial court should have extended the boundary in a straight line northwards from the junction of the bulkhead and boat ramp. But, because there is no evidence that the parties mutually recognized such a line or that the line was designated in any manner on the ground, the trial court did not err in rejecting the Johnsons' claim based on mutual recognition and acquiescence.⁶

⁵ See Westmark Dev. Corp. v. City of Burien, 140 Wn. App. 540, 557, 166 P.3d 813 (2007).

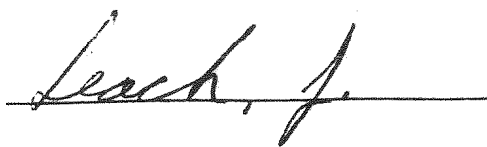
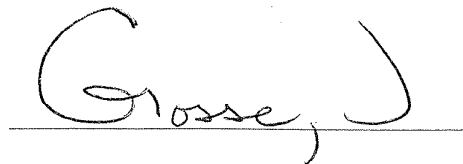
⁶ The Johnsons are essentially asking for the same result they would have obtained by adverse possession or a prescriptive easement. But, the trial court expressly rejected their adverse possession claim and, in any event, the clear evidence that the Johnsons used the disputed areas by permission defeats both theories. See Nw. Cities Gas Co. v. W. Fuel Co., 13 Wn.2d 75, 84, 123 P.2d 771 (1942) (permissive use generally cannot ripen into a prescriptive right); Chaplin, 100 Wn.2d at 861-62 (permissive use defeats the hostility element of adverse possession).

The Johnsons also contend that the trial court's decision is inequitable, because it effectively "renders the entire disputed strip of property useless to both parties, neither of whom has adequate space." They assert that they can no longer drive a car to their garage or to the boat ramp without trespassing on the Westcotts' property. But the Johnsons do not indicate whether or to what extent they raised this contention at trial; they did not raise it on reconsideration.⁷ Nor do they cite any evidence in the record to support their conclusory allegations. Under the circumstances, we are unable to review these contentions.⁸

We reject both the Johnsons' appeal and the Westcotts' cross appeal and affirm the trial court's decision.

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WE CONCUR:

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⁷ We note that the Johnsons' motion for reconsideration, which the trial court granted in part, focused on the boat ramp area and expressly asked the court to "revise its previous ruling and quiet title to that area of property wherein the boat ramp rests to defendants."

⁸ The Westcotts moved to strike the photographic appendices to the Johnsons' briefs, because they included hand-drawn boundary lines that were not considered by the trial court. A commissioner denied the motion to strike, and the court denied the Westcotts' motion to modify the commissioner's ruling. This court is fully able to disregard any information that was not before the trial court and to recognize the potential distortions caused by the annotated lines in the appendices.