IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RICHARD CALLAGHAN and SHARON CALLAGHAN, husband and wife, Appellants, v. LINDA A. HADLEY aka LINDA A. MORROW, Trustee of the Linda A. Morrow Trust; JOHN H. HADLEY, JR., Trustee of the John H. Hadley, Jr. Trust; and JOHN H. HADLEY, JR. and LINDA A. HADLEY, husband and wife, Respondents.	)	No. 66655-0-I DIVISION ONE UNPUBLISHED OPINION FILED: June 11, 2012

Grosse, J**. —** A party who asserts a boundary line under a theory of mutual recognition and acquiescence must prove that there is a certain well-defined line for that boundary. Here, there is no evidence of a clear line, monuments, or other evidence from which one could establish a well-defined line. Accordingly, we affirm.

FACTS

At issue is the location of the boundary between two properties on Camano Island. Richard and Sharon Callaghan (collectively, Callaghan) filed a complaint to quiet title under theories of mutual recognition and acquiescence and adverse possession. The trial court rejected their claim as a matter of law on cross-motions for summary judgment, and quieted title in favor of the title holders, Linda Hadley and John Hadley, Jr., trustees of the Linda A. Morrow

Trust and the John Hadley, Jr. Trust (collectively, Hadley). Almost a year later, the trial court upheld on summary judgment Hadley's counterclaim for trespass with some restrictions and would not permit Callaghan to amend his pleadings to assert a claim for an easement. Callaghan appeals.

ANALYSIS

A boundary line that is at odds with the true boundary line revealed by a survey may be established through mutual recognition and acquiescence. As our Supreme Court has made clear in Merriman v. Cokeley, "[a] fence, a pathway, or some other object or combination of objects clearly dividing the two parcels must exist."[1] In Merriman, the court reiterated that a clear dividing line must be present in the area of the disputed border, holding that "three widely spaced markers . . . set in a thicket of blackberry bushes, ivy, and weeds, did not constitute a clear and well-defined boundary."[2]

To establish a boundary line by mutual recognition and acquiescence the boundary must be "certain, well defined, and in some fashion physically designated upon the ground, e.g., by monuments, roadways, fence lines, etc."[3] The owners on each side, and their respective predecessors in interest, must

[1] 168 Wn.2d 627, 631, 230 P.2d 162 (2010) (citing Lamm v. McTighe, 72 Wn.2d 587, 593, 434 P.2d 565 (1967)).
[2] 168 Wn.2d at 632; see also Scott v. Slater, 42 Wn.2d 366, 368, 255 P.2d 377 (1953) (no well-defined boundary established where there was no fence or defining point of cultivation on the ground near disputed border), overruled on other grounds by Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984); Green v. Hooper, 149 Wn. App. 627, 642, 205 P.3d 134 (2009) (retaining wall constructed of railway ties insufficient to establish boundary by acquiescence where wall ended before disputed area).
[3] Lamm, 72 Wn.2d at 593.

have manifested their mutual recognition and acceptance of the line "by their acts, occupancy, and improvements with respect to their respective properties."[4] "A party claiming title to land by mutual recognition and acquiescence must prove (1) that the boundary line between the two properties was 'certain, well defined, and in some fashion physically designated upon the ground' . . .; (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."[5] The claiming party bears the burden of showing by clear, cogent, and convincing evidence that both parties acquiesced in the line as a boundary for 10 years.[6] A claimant cannot establish acquiescence in a boundary line through unilateral acts.[7] Our courts have long required a mutually respected and definitive line in the area of a disputed border before determining that adjoining property owners have acquiesced to an adjusted boundary.[8]

Even if all of the declarations were accepted, there is no evidence of a clear line of demarcation. In his deposition, Callaghan avers that the previous owner of his property showed him the property line with "[g]eneral directions."

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[4] Lamm, 72 Wn.2d at 593.
[5] Merriman, 168 Wn.2d at 630 (quoting Lamm, 72 Wn.2d at 593).
[6] Lilly v. Lynch, 88 Wn. App. 306, 316-17, 945 P.2d 727 (1997) (citing Muench v. Oxley, 90 Wn.2d 637, 641, 584 P.2d 939 (1978), overruled on other grounds by Chaplin, 100 Wn.2d at 861 n.2.
[7] Heriot v. Smith (Lewis), 35 Wn. App. 496, 501, 668 P.2d 589 (1983) (citing Houplin v. Stoen, 72 Wn.2d 131, 431 P.2d 998 (1967)).
[8] Lamm, 72 Wn.2d at 593.

Callaghan asserted that his predecessor pointed out that "the property line went down the center of the gorge there[,] where the bluff starts. There was a large-diameter aluminum pipe in the middle of the gorge that was inactive. He indicated it went down to the middle of the gorge to the beach." Callaghan further stated:

> The recognized common property line between my property and Mr. Berg's property had always been roughly 5 feet east of a swale on the ground that ran North and South. The line continued down through the center of the gorge, which was marked with an aluminum pipe.

The evidence presented here does not establish or clearly define the asserted property line or refer to any physical demarcation of the line. Callaghan attempts to establish the line by reference to a shallow "swale" or "ditch," which was caused by a pre-existing drainage line. That swale was covered over when Callaghan installed the new drain line in 1997 to 1998. Moreover, the 1997 Callaghan survey clearly showed that the drain line only intersected a small portion of Hadley's property, near the second northern-most holly tree. That line is not the same line that Callaghan now appears to claim. The drain line in fact is not clearly visible from the surface or the beach, but is under overgrown brush, debris, and soil. In his deposition, Callaghan admits that the drain line is covered with heavy vegetation. This falls far short of what is required to establish mutual recognition and acceptance. It is not "certain, well defined, and in some fashion physically designated upon the ground, e.g., by monuments, roadways, fence lines, etc."[9]

[9] Lamm, 72 Wn.2d at 593.

Callaghan raises a variety of issues with the exclusion of certain declarations because of hearsay or violation of the dead man's statute.[1] Even considering the evidence presented in those declarations, the evidence is devoid of any clear line or demarcation to mark a boundary line different than that contained in the survey. The area claimed here is ill-defined and there is nothing consistent to demarcate the boundary. Callaghan spoke of a path leading to the beach, but at the same time admits to its overgrowth. The parties submitted pictures to the court, but on appeal have only provided this court with black and white photocopies. At oral argument, Callaghan presented color photographs. However, none of these photographs show a definitive line. At most there is a slight indentation that can be seen on a small part of the property. But it is not that indentation that Callaghan claims as the boundary; rather, it is somewhere "roughly" five yards east of it. It is impossible to tell from those pictures with any specificity what the line of demarcation would be on the property. Indeed, the trial court commented on the inadequate pictures in the trial record and the difficulty of demonstrating any line. The presence of a physically designated and mutually respected boundary line is crucial to the determination of an adjusted border.[11] There is simply no such evidence here.

Callaghan argues that the trial court erred in not permitting him to amend his complaint to assert a claim for an easement. CR 15(a) provides that leave to amend a complaint should be "freely given when justice so requires." A trial

[1] RCW 5.60.030.
[11] Merriman, 168 Wn.2d at 630-31.

court's denial of a motion to amend is reviewed for an abuse of discretion. The yardstick courts apply is whether the amendment would cause prejudice to the nonmoving party. To determine whether prejudice results, a court considers unfair surprise, introduction of remote issues, or potential delay. If a claim can be litigated with the same evidence already in the case, it may be proper for a trial court to allow an amendment.[12] As this court recently stated, "[A] party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along."[13] It would be unfair to permit Callaghan to raise an issue on a claim which he failed to present the first time.

The court noted that Callaghan claimed title to the disputed property under the doctrines of adverse possession and mutual agreement and acquiescence and no alternative claim for an easement. Hadley denied those claims and countered with a trespass claim. Callaghan denied the trespass claim but did not assert any counterclaim against Hadley. After considering all of the summary judgment motions, the court resolved the issue of title to the disputed property and entered final judgment awarding Hadley title to the property with Callaghan having no interest therein.

Moreover, we note as the trial court did, that in order to remove the statute of frauds requirement, Callaghan would have had to prove part performance establishing: (1) actual and exclusive possession, (2)

[12] Kirkham v. Smith, 106 Wn. App. 177, 181, 23 P.3d 10 (2001).
[13] Karlberg v. Otten, No. 64595-1-I, slip op. at 7-8 (Wash. Ct. App. April 2, 2012) (internal quotation marks omitted) (citation omitted).

consideration, and (3) permanent improvement.[14] The record before the court did not establish those elements and thus there could be no easement.

Accordingly, we affirm the trial court.

Grosse, J.

WE CONCUR:

Leach, C.J.

Becker, J.

[14] Berg v. Ting, 125 Wn.2d 544, 556, 886 P.2d 564 (1995).