COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

MAJERUS CONSTRUCTION, INC., a Washington corporation, and DEIDRE BENWELL, a single person,	)	**No. 27493-4-III**
Respondents,	)	**ORDER GRANTING MOTION FOR RECONSIDERATION AND AMENDING OPINION**
v.	)	
CARYL J. CLIFTON, in his separate capacity,	)	
Appellant.	)	

The court has considered respondents' motion for reconsideration of this court's opinion of April 29, 2010, and is of the opinion the motion should be granted and the opinion amended. Therefore,

IT IS ORDERED the motion for reconsideration is granted and the opinion shall be amended as follows:

On page 8, the last full paragraph which begins "The court" shall be deleted and substituted with the following two paragraphs:

> The court concluded that "Majerus is entitled to judgment against [Mr.] Clifton for slander of title." CP at 544. But the trial court did not address the element of falsity in the findings of fact or memorandum opinion. "In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain

their burden on this issue." *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). Remand would be required if the trial court had addressed the element of falsity, and it was merely unclear whether the trial court addressed malice. However, the trial court did not enter any findings on the element of falsity, nor did it address falsity in its memorandum opinion. The absence of a finding of falsity means this court must presume that Majerus failed to sustain its burden on the issue. Without a finding that supports the trial court's conclusion of law, the conclusion cannot stand.

The conclusion of law stating that Mr. Clifton filed his deed to intentionally cloud Majerus's title could indicate maliciousness, but it is unclear. "Malice is not present where the allegedly slanderous statements were made in good faith and were prompted by a reasonable belief in their veracity." *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 375, 617 P.2d 704 (1980). The trial court's findings of fact fail to support its conclusion that Mr. Clifton slandered Majerus's title.

DATED:

BY A MAJORITY:

_____
TERESA C. KULIK
CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MAJERUS CONSTRUCTION, INC., a Washington corporation, and DEIDRE BENWELL, a single person,	)	**No. 27493-4-III**
Respondents,	)	**Division Three**
v.	)	**UNPUBLISHED OPINION**
CARYL J. CLIFTON, in his separate capacity,	)	
Appellant.	)	

Kulik, C.J. —Majerus Construction, Inc., and a subsequent purchaser, sued Carl Clifton to quiet title in a 10-foot strip between their properties and for damages for slander of title. The trial court quieted title in Majerus and awarded damages for slander of title. Mr. Clifton appeals, asserting the trial court erred by concluding that the existing fence was not a boundary by acquiescence and by concluding that Mr. Clifton slandered Majerus's title. We affirm the quiet title and reverse the slander of title.

FACTS

In 1972, Caryl Clifton purchased a five-acre piece of property on Reser Road in Walla Walla County. Walter Johnson owned the adjacent property to the west. A four-foot post and wire fence runs the length of the properties north to south and has been in place for at least 50 years. Both Mr. Clifton and Mr. Johnson believed the fence line was the boundary line between their properties and treated it as such.

In 1973, Mr. Clifton had his property surveyed. The survey revealed that the fence

was about 10 feet west of his boundary line, inside Mr. Johnson's property. But a second survey showed the fence line about 8 feet inside Mr. Johnson's property. On November 27, 1973, Mr. Johnson quitclaimed the strip of land that is between Mr. Clifton's west boundary line and the fence to Mr. Clifton. Mr. Clifton did not record the deed. However, because both parties believed the fence was the true boundary line, they believed that the quitclaim deed transferred a 10-foot strip of land to the west of the fence line. Mr. Clifton testified that he occasionally maintained the 10-foot strip of land on Mr. Johnson's side of the fence. Mr. Johnson testified that he never observed Mr. Clifton maintaining the strip west of the fence. Mr. Johnson's testimony reflected his belief that the fence had always been the boundary, as long as he could remember.

On February 25, 2005, Majerus Construction purchased Mr. Johnson's property, including the 10-foot strip between the fence and the original boundary line. Majerus developed the property and sold a home and parcel to Deirdre Benwell. Ms. Benwell contacted Mr. Clifton to inquire about building her own fence. She informed Mr. Clifton of survey stakes marking her property that were on Mr. Clifton's side of the fence. Mr. Clifton discovered the stakes on his property and filed his 1973 quitclaim deed. Filing the deed clouded the titles to the developed parcels and Majerus could not sell its homes. Majerus, joined by Ms. Benwell, sued to quiet title in the 10-foot strip of land and for damages for slander of title.

The trial occurred April 21 through 23, 2008. Mr. Johnson and Mr. Clifton

testified. Much of the testimony concerned the history of the survey work on both Mr. Johnson's and Mr. Clifton's properties. In closing argument, both plaintiff and defense counsel argued boundary by acquiescence. Majerus and Ms. Benwell prevailed. The trial court (1) concluded the fence did not constitute a boundary by acquiescence, (2) quieted title in Majerus and Ms. Benwell in a strip of property to the east side of the fence,

(3) concluded that Mr. Clifton slandered the title of Majerus, and (4) awarded Majerus $63,147.35 in damages for slander of title. Mr. Clifton appeals.

ANALYSIS

Boundary by Mutual Acquiescence. This court reviews findings of fact for substantial evidence. Substantial evidence is evidence sufficient to persuade a rational, fair-minded person that the fact is true. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). Conclusions of law are reviewed de novo. *Id.* at 880.

Mr. Clifton asserts that the trial court erred by concluding that the fence near the east-west boundary between Mr. Clifton's property and Mr. Johnson's property (now Majerus's and Ms. Benwell's property) was not a boundary by acquiescence.

To establish a boundary by acquiescence, one must show:

> (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.

Lamm v. McTighe, 72 Wn.2d 587, 593, 434 P.2d 565 (1967).

The trial court made no findings of fact or conclusions of law regarding whether Mr. Johnson or Mr. Clifton considered the fence a boundary. However, the court referenced the fence as a boundary in the court's memorandum opinion. "A trial court's oral or memorandum opinion is no more than an expression of its informal opinion at the time it is rendered. It has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment." *State v. Mallory*, 69 Wn.2d 532, 533-34, 419 P.2d 324 (1966). Here, the trial court's memorandum opinion is not incorporated into the findings, but it is incorporated into the judgment; thus, it has a binding effect.

In the memorandum opinion, the court states that the fence was "in place for many years" and that it was visible to all. Clerk's Papers (CP) at 546. The court then stated that Mr. Clifton "certainly assumed it was [the legal property line] and used [his] property with that belief." CP at 546. The court also wrote:

> In the case before the bar, there was no direct testimony regarding the fence in question. It appears it had been in place even before ownership by Walt Johnson and [Mr.] Clifton. There was also no direct testimony that between [Mr. Clifton] and [Mr.] Johnson they had agreed orally or in writing that the fence would be the boundary line, nor that there was a question about what the true boundary line was (between them).

CP at 547.

The trial court found that Majerus purchased the land from Mr. Johnson, in good faith and for valuable consideration. Majerus recorded its deed before Mr. Clifton, giving Majerus superior title over Mr. Clifton under the recording act. RCW 65.08.070.

Mr. Clifton appeals, asserting that the trial court's findings do not support its conclusion. He asserts that the findings support mutual acquiescence in the fence as the boundary. Mr. Clifton does not assign error to any particular findings of fact, but he does assign error generally to the court's letter opinion, the findings of fact and conclusions of law, and the judgment.

Findings of fact are reviewed for substantial evidence. Both Mr. Clifton and Mr. Johnson testified at trial and each made statements regarding the fence as a boundary.

Mr. Clifton testified that he had no reason to believe that the fence was not the boundary line, and that he treated the fence as the boundary by keeping his things on his side of the fence. However, in 1973, when Mr. Johnson conveyed the approximately 10-foot strip of land to Mr. Clifton, Mr. Clifton stated that he would spray the thistles on the west side (Mr. Johnson's side) of the fence. Mr. Clifton stated, "I didn't think there was any use in tearing the fence down and moving it over there. I did keep that property up, that little strip. It wasn't that big of thing, and I did all the years." Report of Proceedings at 207.

Mr. Johnson testified that he understood the fence to be the boundary between his

property and Mr. Clifton's property. His testimony reflected his belief that the fence line has always been the boundary, as long as he could remember. Mr. Johnson also believed that the land he conveyed in the 1973 quitclaim deed was on the west side of the fence. However, Mr. Johnson stated that he never saw Mr. Clifton taking care of the strip on the west side of the fence. Mr. Johnson stored his things on his side of the fence, and his things were never comingled with the things Mr. Clifton stored on Mr. Clifton's side of the fence.

Based on these facts, it appears that Mr. Johnson always believed that the fence line was the boundary, but Mr. Clifton only believed the fence line was the boundary until the 1973 deed, when he believed that approximately 10 feet west of the fence line was the boundary. The doctrine of boundary by acquiescence requires that the parties mutually agree on the boundary line. Mr. Johnson and Mr. Clifton did not agree. Therefore, the elements of boundary by acquiescence are not established.

The trial court properly applied the recording act, which grants superior title to the first person to file their deed. RCW 65.08.070. Here, Majerus filed first and, thus, has superior title over Mr. Clifton.

Slander of Title. Mr. Clifton also asserts that the trial court's conclusion that he slandered Majerus's title is not supported by the court's findings in either the findings of fact or the memorandum opinion. He contends the trial court failed to address the elements of slander of title. Mr. Clifton argues that he believed his deed was valid when

he recorded it and that he recorded it in good faith.

> *Rorvig v. Douglas* defines slander of title as:
>
> (1) false words; (2) maliciously published; (3) with reference to some pending sale or purchase of property; (4) which go to defeat plaintiff's title; and (5) result in plaintiff's pecuniary loss.

Rorvig v. Douglas, 123 Wn.2d 854, 859, 873 P.2d 492 (1994).

At issue here are elements 1 and 2—falsity and maliciousness. Finding of fact 8 states:

> Subsequent to the purchases and sales from Walter Johnson, Sr., to Majerus and from Majerus to [Ms.] Benwell, [Mr.] Clifton caused to be recorded a Quit Claim Deed from Walter Johnson Sr., to [Mr.] Clifton, dated November 27, 1973 [description of the land conveyed.]
>
> . . . .
>
> . . . This description included portions of what is now Lots 5 and 6 of the Carmella Short Plat, such being the land which had been conveyed by [Mr.] Johnson to Majerus in the February 25, 2005, Statutory Warranty Deed, thus clouding title to Lot 5 owned by [Ms.] Benwell and Lot 6 still owned by Majerus.

CP at 542-43.

Conclusion of law 4 states:

> The conduct of [Mr.] Clifton in filing the Quit Claim Deed in order to intentionally cloud Plaintiffs' title to the subject property proximately caused economic loss to Majerus.

CP at 543.

The court concluded that "Majerus is entitled to judgment against [Mr.] Clifton for slander of title." CP at 544. But the trial court did not address the element of falsity in the findings of fact or memorandum opinion. "In the absence of a finding on a factual

issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue." *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). Remand would be required if the trial court had addressed the element of falsity, and it was merely unclear whether the trial court addressed malice. However, the trial court did not enter any findings on the element of falsity, nor did it address falsity in its memorandum opinion. The absence of a finding of falsity means this court must presume that Majerus failed to sustain its burden on the issue. Without a finding that supports the trial court's conclusion of law, the conclusion cannot stand.

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We affirm the trial court's order quieting title in Majerus and reverse the slander of title.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

_____
Kulik, C.J.

WE CONCUR:

Sweeney, J.

Korsmo, J.