IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ELMER SEGRAVES, a single man,	)	**No. 29269-0-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
CARL C. FULTON and JANE DOE FULTON, husband and wife; FLOYD FULTON and PATRICIA FULTON, husband and wife,	)	**UNPUBLISHED OPINION**
Appellants.	)	

Kulik, C.J. — This is a boundary line dispute. Elmer Segraves owns property that has been in his family since 1948. Carl Fulton, Jane Doe Fulton, and Floyd and Patricia Fulton (Mr. Fulton) purchased property adjoining Mr. Segraves's property in 2001. From 1937 to 2001, a fence existed within the boundaries of the Fulton property. Mr. Segraves contends the fence line marks the boundary between the properties. The true boundary is on Mr. Segraves's side of the fence line. Mr. Segraves filed an action to quiet title to the disputed .99 of an acre. After trial, the court vested title in Mr. Segraves, based on the evidence of mutual recognition and acquiescence.

We conclude the record contains substantial evidence to support the trial court's findings and its conclusions. We affirm.

FACTS

Mr. Fulton owns property in Columbia County, Washington. The adjoining property to the south is owned by Elmer Segraves. Mr. Fulton purchased his property from James Oakley Hughes who had purchased the property from Gene and Beulah Maynard.

Mr. Segraves's property has been owned by his family since 1948. Before that, the property was owned by Russell Davidson. Kurt Segraves grew up on the property. His parents raised cattle, grass, and asparagus. Eventually, Kurt Segraves inherited the property. He and his wife continued to farm the property. They grew wheat, mustard, and alfalfa. In 2009, Elmer Segraves purchased the property from his uncle, Kurt. Elmer Segraves is a beekeeper.

The Fulton property was once owned by Gene and Beulah Maynard. Their son, Sherman Maynard, age 70, lived on the property from birth until 1962. Mr. Maynard is now a retired cattle and wheat rancher. In 1972, Gene and Beulah Maynard sold the property to James Oakley Hughes. In 2001, Mr. Hughes sold the property to Mr. Fulton.

The disputed piece of property is located between the Fulton property and Mr.

Segraves's property. This piece of property was formed when a fence was placed north of the property line within the boundaries of the Fulton property. It is undisputed that this fence was in existence from 1937 to 2001. The disputed property consists of approximately .99 acres.

In November 2001, a dispute arose after Mr. Fulton purchased the property and obtained a survey. The survey revealed that the existing fence was on the Fulton property. After the purchase was finalized, Mr. Fulton removed the fence and Mr. Segraves rebuilt it. In 2006, Mr. Fulton removed parts of the fence and installed an irrigation system on the disputed property. Mr. Segraves removed the irrigation system and rebuilt the fence. Mr. Fulton removed the fence for a second time.

In 2009, Elmer Segraves filed a complaint to quiet title to the disputed property. Mr. Fulton filed an answer, affirmative defenses, and a counterclaim. The parties filed cross-motions for summary judgment.

In its order granting partial summary judgment, the court denied Mr. Fulton's claim that he had obtained an adverse interest in the disputed property since 2001. The court ruled that because the activities of the parties had not ripened into adverse possession, the use of the property, removal of the fence, submissions of the property to the United States Department of Agriculture Conservation Reserve Enhancement Program

and the Department of Fish and Wildlife Landowner Incentive Program were irrelevant and inadmissible at trial. Significantly, the court also concluded that there were two issues of material fact regarding: (1) "the purpose of the *fence* evidenced on the *1941 survey* . . . and the *2001 survey* at the time of the purchase by [Mr. Fulton]," and (2) whether or not the fence that was in existence *prior to 2001* constituted a "'boundary fence.'" Clerk's Papers (CP) at 136 (emphasis added).

At trial, Kurt Segraves, age 59, and Mr. Maynard, age 70, testified that the fence had existed in its current location for as long as they could remember.

Mr. Maynard moved off the property in 1962. In 1972, his parents sold the property to James Oakley Hughes. Mr. Maynard, the son of the owners of the Fulton property, testified that he "always assumed" the fence was the boundary. Report of Proceedings (RP) (June 16, 2010) at 9. Kurt Segraves stated that both his family and their neighbors worked together to maintain the fence. Specifically, Kurt Segraves testified that the Hughes and the Maynards also maintained the fence. In Kurt Segraves's view, the fence served two purposes: (1) to mark the boundary between the two properties and (2) to control livestock on the Maynard (Fulton) property. In his affidavit, Kurt Segraves explained, "I took care of my property on my side of the fence, and my neighbor James Oakley Hughes took care of his property on his side of the fence." CP at

65.

James Hughes, son of James Oakley Hughes, stated that the purpose of the fence was to keep livestock from entering the marshy area containing two springs on the Segraves's side of the fence. Significantly, he remembered survey markers being 200 feet beyond the fence on the Segraves's side. James Hughes also testified as to the Segraves' use of the disputed property. When asked whether the Segraves farmed the "property to the right," Mr. Hughes stated, "[t]hat was a real small section that they farmed, yeah." RP (June 17, 2010) at 310.

There was conflicting testimony concerning the existence of a drainage ditch on the Segraves' side of the fence. Kurt Segraves describes one spring on the disputed property. He maintained that there was no irrigation ditch. Mr. Maynard also stated that there was no ditch on the Segraves' side of the fence. However, James Hughes testified that the fence was used to keep cattle out of the irrigation ditch. He also testified that there were two springs.

Jeanne Hughes Whitefeather, granddaughter of James Oakley Hughes, believed that the property line went beyond the existing fence. She explained that the fence was erected to keep cattle out of the water. Ms. Whitefeather stated that her grandparents maintained a ditch on the Segraves' side of the fence and that one of them told her that

the ditch was on the Segraves' side of the fence but it was Hughes' property.

Paul Gibbons is a neighbor of Elmer Segraves. Mr. Gibbons worked with Kurt Segraves. Mr. Gibbons grew wheat and hay on the Segraves' property from 1980 to 1985. He also worked for the Hughes moving hay and farming. Mr. Gibbons testified that the fence marked the line between the Segraves and Fulton properties. Mr. Gibbons never saw a ditch on the disputed property. Mr. Gibbons also recalled many times when cattle would break through the fence and eat the Segraves' crop. He would repair the fence with the help of James Oakley Hughes and Anne Hughes.

Paul Tomkins, a surveyor, testified concerning a 1937 aerial photograph that shows a "hazy line" that might be a ditched area running south of the fence. RP (June 17, 2010) at 283-84.

The court vested title in Mr. Segraves and denied Mr. Fulton's request for an easement over the property. In its findings and conclusions, the court concluded that the fence was recognized by the parties as the boundary.

ANALYSIS

A claim of adverse possession or mutual acquiescence presents a mixed question of law and fact. *See Lilly v. Lynch*, 88 Wn. App. 306, 318, 945 P.2d 727 (1997). An appellate court first reviews the trial court's findings of fact under the substantial

evidence standard, asking whether each finding is supported by evidence sufficient to persuade a fair-minded person of the truth of the declared premise. *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 210, 936 P.2d 1163 (1997). An appellate court then reviews the trial court's legal conclusions de novo. *Id.*

Mutual Acquiescence. The trial court based its decision on the doctrine of mutual acquiescence. A party claiming title to land by mutual acquiescence must prove (1) that the boundary line between two properties was a certain and well-defined physical designation, (2) that the adjoining landowners, or their predecessors in interest, in the absence of an express boundary line agreement, manifested a mutual recognition of the designated boundary line as the true boundary line, in good faith "by their acts, occupancy, and improvements," and (3) that the mutual recognition of the boundary line continued for the period of time necessary to establish adverse possession. *Lamm v. McTighe*, 72 Wn.2d 587, 593, 434 P.2d 565 (1967). "These elements must be proved by clear, cogent, and convincing evidence." *Merriman v. Cokeley*, 168 Wn.2d 627, 630, 230 P.3d 162 (2010). To meet this standard of proof, the evidence must show the ultimate facts to be highly probable. *Id.* at 630-31.

The parties agree that the first and third elements of mutual acquiescence have been met. It is undisputed that the fence line is well defined. And the parties do not

challenge the court's finding that the fence was in existence from 1937 to 2001.

The controversy here involves the second element—whether there was mutual recognition of the boundary line. The evidence must be sufficient to show that the Segraves manifested a mutual recognition of the designated boundary line as the true boundary line, in good faith by their acts, occupancy, and improvements. *See Lamm*, 72 Wn.2d at 593. In other words, the claimant must show that both parties manifested a mutual recognition of the boundary and that the claimant occupied and improved the land with reference to the line.

The court concluded that the fence "was an actual boundary fence so recognized by the adjacent owners and not merely a fence to contain livestock." CP at 154. The court did not make findings describing relevant acts by the Segraves. But, when needed, the review of memorandum opinions and transcripts of oral opinions can be used to determine the factual basis for the trial court's opinion. *In re Welfare of Todd*, 68 Wn.2d 587, 592-93, 414 P.2d 605 (1966). While the trial court does not provide detailed information in its findings and conclusions, additional information is available in the court's oral ruling.

Under the second element of the doctrine of mutual acquiescence, the evidence must show that the parties agreed or acquiesced to the boundary. *Houplin v. Stoen*, 72

Wn.2d 131, 137, 431 P.2d 998 (1967). The boundary must be a true boundary, not merely a barrier. *Lamm*, 72 Wn.2d at 592 (quoting *Thomas v. Harlan*, 27 Wn.2d 512, 519, 178 P.2d 965 (1947)).

Both parties rely on *Lamm*. In *Lamm*, a boundary dispute arose over a strip of land running north and south between adjoining pieces of property. Sometime between 1936 and 1938, Mr. Vail and Ms. Pentecost discussed the desirability of a more definite marking to identify their properties. Mr. Vail indicated that he would erect a fence (Vail fence), and did so. Subsequently, the Pentecosts cleared the land up to the fence, planted bushes, mowed some of the grass, and occasionally drove over the property. *Id.* at 590. The McTighes purchased the Vail property and built a new fence over the same general course as the Vail fence. The Pentecosts continued their use of the property as before. *Id.*

In 1962, the Lamms purchased the Pentecost property. In 1963, the McTighes had a survey performed that revealed that the fence was approximately 15.5 feet east of the surveyed line. The McTighes built a fence along the surveyed line, preventing the Lamms from using the disputed strip. The Lamms filed an action to quiet title. *Id.*

The trial court concluded the boundary established prior to the survey had been established by recognition and acquiescence. *Id.* at 591. The appellate court agreed,

concluding the essential elements of mutual acquiescence were proved, demonstrating that the Vail fence, built in 1937 or 1938, was recognized and acknowledged as a boundary fence. *Id.* at 594. The appellate court noted that when the McTighes purchased the Vail property in 1945, both they and the Pentecosts (Lamms), treated the Vail property as the boundary line.

The appellate court concluded that the fact that the McTighes "intended, accepted, and acted" upon the 1946 fence as a boundary line was "logically deducible" from the following circumstances: (1) the 1946 fence commenced and terminated at the same general corners as the Vail fence, (2) the 1946 fence was erected concurrently with the construction of the McTighe's eastern boundary-line fence, (3) the Pentecosts and the Lamms acknowledged, recognized, and accepted the fence as the boundary by their acts of dominion up to the fence line, and (4) the McTighes "occupied their property up to the fence line, passively observed their neighbors' acts of dominion in relation to the now disputed strip, and made no overt claim to any property lying westerly of the fence line" until the dispute arose. *Id.*

Mr. Fulton argues that there was nothing more than mutual acquiescence in the existence of the fence as a barrier, not as a boundary line. It is undisputed that the fence served as a barrier to cattle. The court found that an actual boundary fence was

recognized by the parties from 1937 to 2001. The testimony of Kurt Segraves, Sherman Maynard, and James Hughes supports the court's conclusion that there was mutual acquiescence between the Segraves and the Maynards of the fence as the boundary.

Mr. Fulton suggests that the purpose of the fence was to keep cattle from getting into an irrigation ditch located on the Segraves' side of the fence. Mr. Fulton also suggests that Mr. Maynard described this as a ditch during his testimony. But Mr. Maynard described a ditch that apparently ran across the Fulton property. Mr. Maynard testified that there was a little stream running from the disputed area but there was no ditch on the Segraves' side of the fence.

Ms. Whitefeather, the granddaughter of James Oakley Hughes, stated that she remembered a ditch on the disputed property. However, the court apparently discounted this testimony because Ms. Whitefeather also stated that she had not seen any springs on the disputed property. The court also rejected the testimony of Paul Tomkins. Mr. Tomkins, a surveyor, examined a 1937 aerial photograph and saw a "hazy line" south of the fence that he thought may have been a ditch. RP (June 17, 2010) at 283-84.

Mr. Fulton next argues that the doctrine of mutual acquiescence does not apply because the evidence does not show that the Segraves occupied or improved the disputed property. Here, the evidence showed that both Kurt Segraves and Mr. Maynard treated

the fence as a boundary. The evidence also showed that over the years, the Segraves, the Maynards, and the Hughes repaired the fence. James Oakley Hughes testified that the Segraves farmed a small portion of the disputed property. And the court noted that there was no evidence showing that the Maynards or the Hughes had been on the disputed property except during the flood of 1996.

Based on the record here, the trial court did not err by concluding that the doctrine of mutual acquiescence applied. We affirm the title in Mr. Segraves.

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.

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Kulik, C.J.

WE CONCUR:

_____ _____
Korsmo, J. Siddoway, J.