BOUNDARY RETRACEMENT LATEST CASES

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Daniel R. Northrop, Plaintiff, Kay M. Boerst and Peter S. Boerst, Plaintiffs-Appellants-Petitioners, v. Betty Opperman, Connie Henn, Floyd Opperman, Keith Opperman, Mark Henn and Pamela Opperman, Defendants-Respondents.
No. 2009AP1559
SUPREME COURT OF WISCONSIN

2011 WI 5*; *2011 Wisc. LEXIS 4

December 1, 2010, Argued
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NOTICE: THIS OPINION IS SUBJECT TO FURTHER EDITING AND MODIFICATION. THE FINAL VERSION WILL APPEAR IN THE BOUND VOLUME OF THE OFFICIAL REPORTS.

LUCAS LETTER HEAD NOTES [LLHN]:

Real Property Law; Boundary Establishment:
Real Property Law; Deeds; Deed Interpretation; Ambiguities:
[LLHN1] A boundary line different from that described in the respective deeds of adjoining landowners may be established under the respective principles of adverse possession, prescription, agreement, practical location, acquiescence or estoppel. Each of these has a different factual background though too often they are confused by the courts.

Real Property Law; Boundary Establishment; Adverse Possession:
Real Property Law; Deeds; Deed Interpretation; Ambiguities:
[LLHN2] It is also well settled that, where the description of the premises in a deed is definite, certain, and unambiguous, extrinsic evidence to show acquiescence in a different location is inadmissible, unless such practical location is followed by an adverse possession for such a length of time as to bar an action for the recovery of the lands.

Real Property Law; Boundary Establishment; Doctrine of Acquiescence:
Real Property Law; Boundary Establishment; Doctrine of Estoppel:
Real Property Law; Deeds; Deed Interpretation; Ambiguities:
[LLHN3] Insofar as boundary disputes are concerned, we are unable to discern from the cases any functional differences between acquiescence and estoppel. These two terms do not represent separate doctrines or concepts. Acquiescence is a condition or fact which, if proven, results in an estoppel against the party who has acquiesced.

Real Property Law; Boundary Establishment; Doctrine of Acquiescence:
Real Property Law; Deeds; Deed Interpretation; Ambiguities:
[LLHN4] The word "acquiescence" has been used in numerous Wisconsin cases, not always consistently. Sometimes the word is seemingly used to mean that the conduct of the parties in acquiescing, that is, agreeing to or complying with, a boundary line constitutes the best evidence of the boundary line. The word "acquiescence" is thus used to mean that the conduct of neighbors is evidence of a boundary line.

Real Property Law; Boundary Establishment; Practical Location:
Real Property Law; Boundary Establishment; Doctrine of Acquiescence:
Real Property Law; Deeds; Deed Interpretation; Ambiguities:
[LLHN5] Other times the word "acquiescence" is seemingly used in the case law to refer to a legal doctrine, namely boundary by acquiescence or agreement. The doctrine of acquiescence has also sometimes been referred to as "rules as to practical location."

Real Property Law; Boundary Establishment; Doctrine of Acquiescence:
Real Property Law; Boundary Establishment; Doctrine of Estoppel:
Real Property Law; Deeds; Deed Interpretation; Ambiguities:
[LLHN6] If parties acquiesce in a wrong boundary, when the true boundary can be ascertained from the deed, it is treated both in law and equity as a mistake and neither party is estopped from claiming to the true line.

Real Property Law; Boundary Establishment; Doctrine of Acquiescence:
Real Property Law; Boundaries; Evidence of Boundaries:
Real Property Law; Deeds; Deed Interpretation; Ambiguities:
[LLHN7] The case law relating to the doctrine of acquiescence is not consistently stated or applied. The concept of acquiescence in the evidentiary sense is often used in cases resolving conflicts between a landmark and a survey.

Real Property Law; Boundaries; Evidence of Boundaries:
[LLHN8] Since the applicable principles do not vary depending on the nature of the barrier claimed to have become a boundary, the term "fence" is used generically to denote all barriers allegedly marking boundaries between adjoining landowners, without regard to whether the barrier was man-made or natural.

Real Property Law; Boundary Establishment; Evidence of Boundaries:
Real Property Law; Boundaries; Evidence of Boundaries; Best Available Evidence:
Real Property Law; Deeds; Deed Interpretation; Rules of Construction:
Civil Procedure; Appeals; Standards of Review; Clearly Erroneous Review:
[LLHN9] In the survey/fence cases, a circuit court first determines whether the boundary line can be determined from the deed and original monuments or markers. If the boundary line cannot be so determined, the circuit court looks to the best evidence of the boundary line. The circuit court's determination of the best evidence locating the boundary line in the survey/fence cases is essentially a finding of fact. An appellate court does not set aside findings of fact unless they are clearly erroneous.

Real Property Law; Boundaries; Evidence of Boundaries; Occupation:
[LLHN10] The evidence of undisputed occupation and fencing in accordance with the originally surveyed line for about 30 years, not only of the piece of land in controversy, but of other parcels of land in that immediate neighborhood, raises a presumption that the line so recognized is the true line. So strong a presumption is thus raised in the present case that we do not regard it as overcome or seriously weakened by the simple fact that upon a resurvey, based upon no original monument, another line several rods distant is established.

Real Property Law; Boundaries; Evidence of Boundaries; Best Available Evidence:
Real Property Law; Boundaries; Evidence of Boundaries; Extrinsic Evidence:
Real Property Law; Boundaries; Evidence of Boundaries; Monuments:
Real Property Law; Boundaries; Evidence of Boundaries; Survey Measurements:
Real Property Law; Deeds; Deed Interpretation; Rules of Construction:
[LLHN11] The original location of monuments must always prevail, but that when those monuments have disappeared they must be established by the best evidence the nature of the situation is susceptible of. Extrinsic evidence, such as an old fence, may have so much greater probative force than more recent surveying measurements as to prevail over the latter as a matter of law.

Real Property Law; Boundaries; Evidence of Boundaries; Best Available Evidence:
Real Property Law; Boundaries; Evidence of Boundaries; Extrinsic Evidence:
Real Property Law; Boundaries; Evidence of Boundaries; Monuments:
Real Property Law; Deeds; Deed Interpretation; Rules of Construction:
[LLHN12] The answer to the pertinent question—where is the boundary line?—must be established by the best evidence available. Monuments set by the original survey in the ground, and named or referred to in the plat, are the highest and best evidence. If there are no such monuments, then stakes set by the surveyor or soon thereafter are the next best evidence. Buildings, fences, and other substantial improvements built according to the stakes laid out while they were present are the next best evidence of the line.

Real Property Law; Boundaries; Evidence of Boundaries; Best Available Evidence:
Real Property Law; Boundaries; Evidence of Boundaries; Extrinsic Evidence:
Real Property Law; Deeds; Deed Interpretation; Rules of Construction:
[LLHN13] The time will soon come when the boundary line will have been lost by the destruction of all monuments, natural or artificial, and by the death of the old inhabitants. Then resort must be had to evidence of lesser degree to establish ancient boundaries, and long-continued occupation with respect to unchanged lines, and reputation, even, may be the best evidence available.

Real Property Law; Boundary Establishment; Doctrine of Acquiescence:
Real Property Law; Boundaries; Evidence of Boundaries; Best Available Evidence:
Real Property Law; Boundaries; Evidence of Boundaries; Extrinsic Evidence:
Real Property Law; Boundaries; Evidence of Boundaries; Parol Evidence:
Real Property Law; Boundaries; Evidence of Boundaries; Monuments:
Real Property Law; Deeds; Deed Interpretation; Rules of Construction:
[LLHN14] If original monuments can be found and identified, they will govern. If no certain monuments can be found a lesser degree of testimony may be resorted to; and long continued occupancy and acquiescence, and even reputation and hearsay as to the boundaries, may have weight.

Real Property Law; Boundary Establishment; Doctrine of Acquiescence:
Real Property Law; Boundaries; Evidence of Boundaries; Best Available Evidence:
Real Property Law; Boundaries; Evidence of Boundaries; Fences and Landmarks:
[LLHN15] Under the repeated decisions of this court the ancient fence lines around this parcel of land, maintained as they were for at least thirty and probably fifty years, should be taken as fixing the correct boundaries of the tract.

Real Property Law; Boundary Establishment; Doctrine of Acquiescence:
[LLHN16] Where the exact location of a boundary line is not definitely known, a dispute involving the boundary line must be determined by looking to the conduct of the parties with reference thereto. Thus, long acquiescence by the owners of adjoining lands in the location of the dividing line between their lands may, in effect, establish such line.

Real Property Law; Boundaries; Evidence of Boundaries; Resurveys:
[LLHN17] Resurveys may be unreliable as evidence of a boundary line.

Real Property Law; Boundary Establishment; Practical Location:
Real Property Law; Boundaries; Evidence of Boundaries; Occupation:
[LLHN18] Boundary lines may be established by practical location and undisturbed possession for a great many years, and there does not seem to have been any necessity to disturb them at this late day.

OPINION

REVIEW of a decision of the Court of Appeals.

[P1] SHIRLEY S. ABRAHAMSON, C.J. This is a review of a published decision of the court of appeals, [1] which affirmed in part and reversed in part the judgment of the Circuit Court for Ashland County, John P. Anderson, Judge. Kay and Peter Boerst seek review of that part of the court of appeals decision affirming the circuit court's determination that the boundary line between their property and the property of Betty and Floyd Opperman is the center line of Henn Road. [2] We affirm this part of the decision of the court of appeals.

1 *Northrop v. Opperman, 2010 WI App 80, 325 Wis. 2d 445, 784 N.W.2d 736.*
2 The court of appeals reversed that part of the circuit court's judgment relating to obliteration of the section corner and "suggesting [LEXIS at 2] Henn Road is the section boundary." *Northrop, 2010 WI App 80, 325 Wis. 2d 445, P15, 784 N.W.2d 736.* Neither party has sought review of this part of the decision of the court of appeals.

As the court of appeals explained, the suit was initiated by Daniel Northrop, who owns the parcel immediately to the north of the Boersts. Northrop sued the owners of the parcel north of the parcel owned by Betty and Floyd Opperman. Only the Boersts appealed the circuit court's judgment to the court of appeals and sought review in this court. *Northrop, 325 Wis. 2d 445, ¶4 n.1, 2010 WI App 80, 784 N.W.2d 736.*

[P2] The Boersts own a parcel of land in Section 9 that is adjacent to and east of a parcel of land in Section 8 owned by the Oppermans. The boundary line in dispute in this action is the western boundary of the Boersts' property in Section 9 and the eastern boundary of the Oppermans' property in Section 8.

[P3] The circuit court determined that the center line of Henn Road (which runs north and south) is the boundary line between the Boersts' and the Oppermans' properties. The court of appeals affirmed this part of the circuit court's judgment. [3]

3 *Northrop, 2010 WI App 80, 325 Wis. 2d 445, P12, 784 N.W.2d 736.*

[P4] The Boersts present the issue as "whether the doctrine of acquiescence allows mistaken boundaries [LEXIS at 3] to become legal boundaries after twenty years of mistaken belief has passed." This presentation of the issue is driven by the circuit court's and the court of appeals' use of the word "acquiescence" in their analyses. Our review is not constrained by this statement of the issue. The issue before the court is whether the court of appeals erred in holding that the circuit court correctly determined that the center line of Henn Road is the boundary line separating the parcel of land owned by the Boersts from the parcel of land owned by the Oppermans.

[P5] We conclude that in determining the boundary line by evaluating the evidence of common usage and acquiescence and not by using the legal doctrine of acquiescence, the circuit court applied the correct legal analysis in the present case. After finding that the actual boundary line [4] could not be determined from the deed and original monuments or markers, the circuit court evaluated the evidence and established the boundary line based upon the best evidence available. There are sufficient facts in the record upon which the circuit court based its findings that the actual boundary line could not be determined from the deed and the original monument [LEXIS at 4] or markers and that the best evidence supports the center line of Henn Road as the boundary line separating the parcels owned by the parties to this review. The best evidence was not the successive surveys but common usage and acquiescence.

4 The actual or true boundary line ordinarily refers to the line that was fixed by the original survey or plat. See, e.g., *City of Racine v. Emerson, 85 Wis. 80, 86, 55 N.W. 177 (1893).*

I

[P6] Resolution of a boundary dispute is ordinarily fact-driven, and the present case is no exception. The record in this case reflects a rich history of over 120 years involving the lands in question in Sections 8 and 9.

[P7] We begin the history in July 9, 1886, with the original survey of Henn Road. The Butternut Town Board laid out a public highway, Henn Road, described as beginning at the "southwest corner of section 9 (nine) thence north on the sec line to the north west corner of section 9 (nine)." Henn Road then continues west from the northerly end of the north/south part of the road. Although the Road presently curves, apparently it was originally a right-angle intersection with the corner common to Sections 4, 5, 8, and 9 believed to be at the intersection of the [LEXIS at 5] two parts of the Road.

[P8] In 1907, the Town of Butternut contracted with Ashland County Surveyor George Parker to run survey lines according to the original government survey or, if the original landmarks were destroyed or lost, to reestablish those corners under the general rules adopted by the government in the survey of public lands. Parker submitted a survey in 1908. Shortly thereafter the Town Board directed Parker to complete the survey and finish setting the monuments as contracted.

[P9] As a result of the 1908 Parker survey, litigation ensued between owners of parcels in Section 8 and Section 5. Section 5 borders Section 8 to the north, and Sections 5, 8, and 9 share (along with section 4) a common corner. In that litigation it was alleged that the 1908 survey moved the boundary line between Sections 8 and 5 south of the east/west part of Henn Road. The jury returned a verdict determining that the owner of parcels in Section 8 owned the land up to the center line of the east/west part of Henn Road.

[P10] In 1911 another survey by Parker was presented to the Town Board. The Town Board records indicate some wrangling over the acceptance of the 1911 survey, but in 1912 a certificate of survey [LEXIS at 6] bearing Parker's name was recorded. The 1912 survey contains different bearings than the 1908 survey submitted by Parker for the boundary line between Sections 8 and 9.

[P11] In 1917 the same owner of parcels in Section 8 again initiated litigation to resolve a boundary dispute. In the 1917 action, the owner of parcels in Section 8 claimed title to portions of land north of the east/west part of Henn Road. He based his claim on the 1912 Parker survey, arguing that the boundary line between Sections 8 and 5 was north of Henn Road. The owner of parcels in Section 5 alleged that the road was accepted by everyone as the boundary line between Sections 5 and 8 and that people living along the road, relying upon that line, had made large and extensive improvements on the land.

[P12] Based on the evidence introduced at trial, the parties stipulated that the common corner of Sections 4, 5, 8, and 9 in Township 41 North, Range 1 West, Ashland County, Wisconsin, is at the intersection of the center line of Henn Road, setting Henn Road as the boundary between Sections 5 and 8.

[P13] For 88 years after this stipulation, the record supports the proposition that Henn Road was honored as the boundary line between Sections 5 [LEXIS at 7] and 8, and the original intersection of Henn Road was honored as the common corner.

[P14] One example of reliance by the government and property owners upon that common corner can be found in the 1935 conveyance of land from the then-owners of parcels in Section 8 to the State of Wisconsin for the purposes of building a new Highway 13 through Section 8 and the plat of the right of way required. The conveyance described the land conveyed by reference to the northeast corner of Section 8, and the Plat of the Right of Way Required shows the common corner of Sections 4, 5, 8, and 9 at the original intersection of the north/south and east/west parts of Henn Road. [5]

5 The 1935 conveyance for Highway 13 described the real estate conveyed as follows:

> All that part of a strip or parcel of land lying within the Southeast Quarter (SE 1/4) of the Northeast Quarter (NE 1/4) and the West Half (W 1/2) of the Northeast Quarter (NE 1/4) of Section 8, Township 41 North, Range 1 West, a reference line to which is more fully described as follows:
>
> Beginning at a point on the North section line and 2594.1 ft. west of the Northeast corner of Section 8 aforesaid; thence southeasterly at an angle of 48 degrees 19 [LEXIS at 8] minutes with said North section line for a distance of 3615.6 ft. to an intersection with the East and West one-quarter line of Section 8 aforesaid.

[P15] The "boundary peace" was disturbed in 2005 when a surveyor found a concrete monument in the swamp northwest of the original intersection of Henn Road and notified the county surveyor. The county surveyor accepted the concrete monument as a section corner under the 1912 survey and recorded a corner restoration sheet (tie sheet) for the corner common to Sections 4, 5, 8, and 9. According to the 2005 survey, north/south Henn Road actually lies entirely in Section 9, approximately 600 feet east of Section 8, giving the Boersts additional acreage and the Oppermans less acreage.

[P16] The Oppermans, through an independent surveyor, prepared an alternative tie sheet for the common corner, setting the original intersection of Henn Road as the common corner. The county surveyor did not accept this alternative tie sheet.

[P17] The 2005 survey caused significant disruption and confusion for landowners in the area. [6] This litigation ensued.

6 Letter from Ashland County Highway Department to affected property owners (Oct. 3, 2006):

> It has come to the attention of [LEXIS at 9] Ashland County, that a serious mistake has been discovered with respect to property boundaries in Sections 4, 5, 6, 7, 8 and 9, Township 41 North, Range 1 W, Town of Chippewa, Ashland County. For many years, property has been utilized and occupied based on assumptions that the Town Roads fell on the Section lines when in-fact, the Section Lines and Sections Corners are up to 100 to 400 feet off of the road centerline. This discrepancy has already led to conflicts with neighboring property owners.

II

[P18] The Boersts commenced this action, asking the circuit court to declare them the rightful owners of land lying west of the north/south Henn Road. A one-day trial ensued consisting almost entirely of expert testimony concerning the location of the corner common to Sections 4, 5, 8, and 9.

[P19] Pertinent to our analysis, the circuit court made the following findings of fact:

o The original section corner monument between Sections 4, 5, 8, and 9 in Township 41 North, Range 1 West, Ashland County, Wisconsin no longer exists.

o No competent evidence is before the court to determine where the original section corner monument was originally placed.

o No clear and convincing evidence exists that the resetting [LEXIS at 10] of the corners in the 1912 Parker survey (upon which the 2005 tie sheet is based) was correct.

o Neither party has shown by clear and convincing evidence where the actual boundary line exists.

[P20] The circuit court further concluded that the original boundary line between Sections 8 and 9 cannot be determined solely by the descriptions in the deeds.

[P21] The deed to the Boersts' parcel describes the real estate as "The Southwest one-fourth (1/4) of the Northwest one-fourth (1/4) of Section Nine (9), Township Forty-one (41) North, Range One (1) West, Town of Chippewa, County of Ashland, Wisconsin." The deed to the Oppermans' parcel describes the real estate as "The Southeast Quarter of the Northeast Quarter, Section 8, Township 41 North, of Range 1 West . . . ."

[P22] Although the descriptions in the deeds are unambiguous on their face, the real estate described cannot be located on the ground because, as the circuit court explained, "the corner of Sections 4, [7] 5, 8, and 9 cannot be located." Thus it is not possible using the deed descriptions and nothing more to locate on the ground the southwest one-fourth of the northwest one-fourth of Section 9 and the southeast quarter of the northeast quarter [LEXIS at 11] of Section 8. [8]

7 Section 4 is north of section 9.
8 A description of a parcel as a quarter section in one deed may be ambiguous although a reference to a different quarter section in another deed may be unambiguous. Likewise, a statute that is unambiguous in one context may be ambiguous in another context. *Teschendorf v. State Farm Ins. Cos., 2006 WI 89, ¶20, 293 Wis. 2d 123, 717 N.W.2d 258*. In contrast with the present case, in *Chandelle Enterprises, LLC v. XLNT Dairy Farm, Inc., 2005 WI App 110, ¶¶12-16, 282 Wis. 2d 806, 699 N.W.2d 241*, the court of appeals concluded that under the facts of that case the description of the property as a quarter section was not ambiguous. In Chandelle, the court of appeals did not look to extrinsic evidence outside of the deeds because "the fact that a surveyor, using the deeds, has established what the parties agree is the true boundary line demonstrates that the descriptions were sufficiently clear and definite." *Chandelle, 282 Wis. 2d 806, ¶16, 2005 WI App 110, 699 N.W.2d 241*.

[P23] The circuit court therefore looked to extrinsic evidence to determine the boundary line and concluded that "the best evidence available are the lines of occupation and possession" and that the landowners and [LEXIS at 12] the County have used the center line of Henn Road as the boundary line between the properties at issue for "almost all of the twentieth century and up until the year 2005." Accordingly, the circuit court concluded that "[i]t is the judgment of this court that a longstanding common usage and acquiescence to ownership and possession to real estate has occurred in the area of the Henn Road in Ashland County near the common sections of 4, 5, 8, and 9 [and] [t]he centerline of the existing Henn Road is determined to be the boundary line between the property owners in this case." For the reasons set forth, we agree with the circuit court's determination of the location of the boundary line at issue based on the evidence in this case, not based on the legal doctrine of acquiescence.

[P24] The court of appeals devoted its decision predominantly to rejecting the Boersts' argument (which relied on *Buza v. Wojtalewicz, 48 Wis. 2d 557, 180 N.W.2d 556 (1970))* that the doctrine of acquiescence is not applicable in the present case because the doctrine applies only to boundary disputes arising from ambiguous deeds. The court of appeals concluded that Buza does not hold that an unambiguous deed trumps mistaken [LEXIS at 13] boundary lines after the statutory period has run.

III

[P25] The Boersts dispute the court of appeals' affirmance of the circuit court's judgment that the center line of Henn Road marks the boundary line.

[P26] Wisconsin has a long line of cases settling boundary disputes. The case law demonstrates that the resolution of boundary disputes depends on fact-specific analyses. The court has stated that "[a]s is usual, boundary disputes are generally between friends who become enemies and the facts are detailed and somewhat confusing, all of which give rise to the conflicting principles of law." [9] These conflicting principles of law are not unique to Wisconsin law.

9 *Beduhn v. Kolar, 56 Wis. 2d 471, 473, 202 N.W.2d 272 (1973).*

[P27] The parties and the amicus curiae brief of the Wisconsin Realtors Association attempt to categorize a multitude of Wisconsin boundary dispute cases in an effort to establish principles of law that can be applied in the present case. The parties do not necessarily agree on the categorization of the cases or the principles of law derived from the cases. Indeed, the cases cannot easily and consistently be divided into doctrinal categories, and doctrinal categories significantly overlap. [LEXIS at 14] [10]

10 **[LLHN1]** "A boundary line different from that described in the respective deeds of adjoining landowners may be established under the respective principles of adverse possession, prescription, agreement, practical location, acquiescence or estoppel. Each of these has a different factual background though too often they are confused by the courts." 6 John S. Grimes, Thompson on Real Property § 3034, at 506 (1962).

[P28] One "category" of cases is adverse possession, now governed by *Wis. Stat. § 893.25* (2007-08). [11] As both parties clearly state, in their briefs and at oral argument, neither party is asserting adverse possession in this case. [12] We therefore do not review the present case as an adverse possession case.

11 All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.
12 The amicus argued that the present case is an adverse possession case.

[P29] Other formulations of categories of cases include cases in which adjoining owners dispute the location of the boundary line, subsequently establish a boundary line by mutual agreement, and acquiesce in its location; [13] cases in which adjoining owners take conveyances from a common grantor that describe the premises conveyed [LEXIS at 15] by lot numbers but the grantees have purchased with reference to a boundary line then marked on the ground; [14] cases in which adjacent property owners agree to have the land surveyed to build a fence, build a fence in reliance on the survey, and acquiesce to the boundary; [15] cases in which the description of the premises in a deed is definite, certain, and unambiguous and extrinsic evidence is inadmissible to show acquiescence to a boundary line in a different location; [16] cases in which a survey is in conflict with a longstanding fence line; [17] and estoppel cases. [18] These formulations or categories tend to overlap and are not used in a consistent fashion in the case law. [19]

13 See, e.g., *Pickett v. Nelson, 71 Wis. 542, 546, 37 N.W. 836 (1888).*
14 See, e.g., *Thiel v. Damrau, 268 Wis. 76, 81, 66 N.W.2d 747 (1954).*
15 See, e.g., *Nagel v. Philipsen, 4 Wis. 2d 104, 110, 90 N.W.2d 151 (1958).*
16 See, e.g., *Grosshans v. Rueping, 36 Wis. 2d 519, 528, 153 N.W.2d 619 (1967)* (quoting *Elofrson v. Lindsay, 90 Wis. 203, 205, 63 N.W. 89 (1895))*; *Elofrson v. Lindsay, 90 Wis. 203, 205, 63 N.W. 89 (1895)* **[LLHN2]** ("It is also well settled that, where the description of the premises in a deed is definite, certain, [LEXIS at 16] and unambiguous, extrinsic evidence to show acquiescence in a different location is inadmissible, unless such practical location is followed by an adverse possession for such a length of time as to bar an action for the recovery of the lands.").
17 See, e.g., *City of Racine v. Emerson, 85 Wis. 80, 55 N.W. 177 (1893).*

18 See, e.g., *Gove v. White, 23 Wis. 282 (1868)*. For discussions of boundary by estoppel, see Jacqueline P. Hand & James Charles Smith, Neighboring Property Owners § 6.11 (1988); Clark on Surveying and Boundaries § 20.04 (7th ed. 1998).
19 For instance, in *Buza v. Wojtalewicz, 48 Wis. 2d 557, 567, 180 N.W.2d 556 (1970)*, the court stated that **[LLHN3]** "insofar as boundary disputes are concerned, we are unable to discern from the cases any functional differences between acquiescence and estoppel. These two terms do not represent separate doctrines or concepts. Acquiescence is a condition or fact which, if proven, results in an estoppel against the party who has acquiesced."

[P30] No attempt is made to include herein an exhaustive list of the formulations, terminology, or categories used by this court in the numerous boundary dispute cases. Instead we have included a number of the more commonly [LEXIS at 17] used formulations to illustrate the language used in our case law to resolve boundary disputes and the historic inability of the court to consistently classify boundary disputes into doctrinal categories.

[P31] In the present review, the parties focus on the word "acquiescence," used by the circuit court and court of appeals. **[LLHN4]** The word "acquiescence" has been used in numerous Wisconsin cases, not always consistently.

[P32] Sometimes the word is seemingly used to mean that the conduct of the parties in acquiescing, that is, agreeing to or complying with, a boundary line constitutes the best evidence of the boundary line. The word "acquiescence" is thus used to mean that the conduct of neighbors is evidence of a boundary line.

[P33] [LLHN5] Other times the word "acquiescence" is seemingly used in the case law to refer to a legal doctrine, namely boundary by acquiescence or agreement. [20] The doctrine of acquiescence has also sometimes been referred to as "rules as to practical location." [21]

20 For discussions of the two separate and distinct uses of the word "acquiescence," see Annotation, Establishment of Boundary Line by Oral Agreement or Acquiescence, 69 A.L.R. 1430, § IV(a), (i) (1930 & Cumulative Supp.); James [LEXIS at 18] O. Pearson, Annotation, Fence as Factor in Fixing Location of Boundary Line, 7 A.L.R. 4th 53, § 2.1 (1981 & Cumulative Supp.).

For discussions of the doctrine of boundary by acquiescence, see Hand & Smith, supra note 18, § 6.10; Clark on Surveying and Boundaries § 20.03 (7th ed. 1998); Lawrence Berger, Unification of the Doctrines of Adverse Possession and Practical Location in the Establishment of Boundaries, *78 Neb. L. Rev. 1, 11-15*.
21 *Ross v. Severance, 198 Wis. 489, 491-92, 224 N.W. 711 (1929)* (quoting 9 Corp. Jur. 242); *Lundgreen v. Stratton, 73 Wis. 659, 663, 41 N.W. 1012 (1889)*.

For a discussion of the doctrine of practical location of boundaries, see Clark on Surveying and Boundaries § 20.05 (7th ed. 1998).

[P34] Citing *Pickett v. Nelson, 71 Wis. 542, 546, 37 N.W. 836 (1888)*, the Boersts assert that the doctrine of acquiescence applies only when a party proves (1) genuine uncertainty about the boundary line that cannot be resolved; (2) a dispute or controversy concerning the line; and (3) an agreement that resolves the dispute.

[P35] The circuit court in the present case seemed to use the word "acquiescence" in the evidentiary sense as well as in reference to the legal doctrine of acquiescence. [LEXIS at 19] The circuit court used the word "acquiescence" in the evidentiary sense, concluding that it is "necessary to look to extrinsic evidence [to determine the boundary line] and this court believes the best evidence available are the lines of occupation and possession. . . . [L]ongstanding common usage and acquiescence to ownership and possession to real estate have occurred in the area of the Henn Road in Ashland County, near the common sections of 4, 5, 8, and 9."

[P36] The circuit court appears to have also concluded that the legal doctrine of acquiescence is applicable in the present case because the boundary line is in dispute and cannot be determined by the legal description in the deed.

[P37] In contrast, the Boersts contend that the legal doctrine of acquiescence does not apply in the present case. The Boersts contend that the deed is unambiguous and therefore extrinsic evidence should not have been used to determine the boundary line. [22]

22 In *Chandelle Enterprises, LLC v. XLNT Dairy Farm, Inc., 2005 WI App 110, ¶16, 282 Wis. 2d 806, 699 N.W.2d 241*, the court of appeals concluded that "because, in this case at least, the description by quarter section is not ambiguous, the doctrine of acquiescence [LEXIS at 20] does not apply."

[LLHN6] If parties acquiesce in "a wrong boundary, when the true boundary can be ascertained from the deed, it is treated both in law and equity as a mistake and neither party is estopped from claiming to the true line." *Hartung v. Witte, 59 Wis. 285, 289, 18 N.W. 175 (1884)* (quoted with approval in *Chandelle, 282 Wis. 2d 806, ¶11, 2005 WI App 110, 699 N.W.2d 241)*.

See also cases cited in note 16, supra.

[P38] [LLHN7] The case law relating to the doctrine of acquiescence is not consistently stated or applied. [23] The concept of acquiescence in the evidentiary sense is often used in cases resolving conflicts between a landmark and a survey. We therefore turn to this line of cases.

23 Citing *Buza v. Wojtalewicz, 48 Wis. 2d 557, 563, 180 N.W.2d 556 (1970)*, the court of appeals in the present case viewed the doctrine of acquiescence as a court-adopted doctrine supplementing the doctrine of adverse possession. According to the court of appeals, adverse or hostile intent is a prerequisite of adverse possession, and the doctrine of acquiescence substitutes mutual acquiescence for adverse or hostile intent. *Northrup, 325 Wis. 2d 445, ¶9, 2010 WI App 80, 784 N.W.2d 736*.

Several cases have recognized, however, that hostile intent "does not mean a deliberate, willful, [LEXIS at 21] unfriendly animus. If the elements of open, notorious, continuous and exclusive possession are satisfied, the law presumes the element of hostile intent." *Burkhardt v. Smith, 17 Wis. 2d 132, 139, 115 N.W.2d 540 (1962)*.

In *Peter H. & Barbara Steuck Living Trust v. Easley, 2010 WI App 74, ¶34, 325 Wis. 2d 455, 785 N.W.2d 631*, the court of appeals declared that "it is not clear whether the doctrine of acquiescence remains a distinct means of proving adverse possession when, as here, there is no issue concerning the twenty-year time period."

[P39] After reviewing the case law, we conclude that the instant case most closely approximates and is governed by the principles set forth in boundary dispute cases in which a survey is in conflict with a longstanding landmark. In these cases, the survey raises questions about the accuracy of a landmark that has generally been accepted by property owners as the boundary line for a substantial period of time.

[P40] Cases involving this type of dispute ordinarily have involved a conflict between a survey and a longstanding fence line. The applicable principles in these cases do not, however, depend on the fact that the landmark is a fence. A fence in these cases [LEXIS at 22] is analogous to any landmark allegedly marking a boundary between adjoining landowners. [24]

24 See, e.g., *Brew v. Nugent, 136 Wis. 336, 339, 117 N.W. 813 (1908)* (evidence of acquiescence in the location of a fence since torn down along with "evidence that a stone existed at the easterly end of such fence some years after it was constructed, which people regarded as a landmark, was sufficient to warrant the conclusion that such old fence was properly placed and the disputed boundary 50 feet south of it, notwithstanding the very positive evidence of the surveyor . . . ."; James O. Pearson, Annotation, Fence as Factor in Fixing Location of Boundary Line, 7 A.L.R. 4th 53, § 1[a] (1981 & Cumulative Supp.) **[LLHN8]** ("Since the applicable principles do not vary depending on the nature of the barrier claimed to have become a boundary, the term 'fence' is used generically to denote all barriers allegedly marking boundaries between adjoining landowners, without regard to whether the barrier was man-made or natural.").

IV

[P41] We turn to the survey/fence cases for guidance in resolving the boundary dispute in the present case.

[P42] [LLHN9] In the survey/fence cases, a circuit court first determines whether the boundary line [LEXIS at 23] can be determined from the deed and original monuments or markers. If the boundary line cannot be so determined, the circuit court looks to the best evidence of the boundary line. The circuit court's determination of the best evidence locating the boundary line in the survey/fence cases is essentially a finding of fact. [25] An appellate court does not set aside findings of fact unless they are clearly erroneous. *Wis. Stat. § 805.17(2).* [26]

25 *Nagel v. Philipsen, 4 Wis. 2d 104, 107, 90 N.W.2d 151 (1958).* See also *Okemo Mountain, Inc. v. Lysobey, 178 Vt. 608, 883 A.2d 757, 760 (Vt. 2005).*
26 The clearly erroneous standard of review for findings of fact made by a circuit court is essentially the same as the great weight and clear preponderance test. *State v. Hambly, 2008 WI 10, ¶16 n.7, 307 Wis. 2d 98, 745 N.W.2d 48.*

[P43] The survey/fence analysis is demonstrated in *Welton v. Poynter, 96 Wis. 346, 71 N.W. 597 (1897)*, in which a fence line that existed for 30 years was thought to mark the boundary line. A survey was performed under which the boundary line did not coincide with the fence line. It was not established, however, how the new survey line was located, nor whether any original stakes or monuments were [LEXIS at 24] used. The court, faced with choosing between the fence and the survey as the boundary line, relied on evidence of undisputed occupancy rather than the survey. The court was unwilling to disturb the existing understanding of the property owners. The court explained its reasoning as follows:

> **[LLHN10]** [T]he evidence of undisputed occupation and fencing in accordance with [the originally surveyed] line for about 30 years, not only of the piece of land in controversy, but of other parcels of land in that immediate neighborhood, raises a presumption that the line so recognized is the true line . . . . So strong a presumption is thus raised in the present case that we do not regard it as overcome or seriously weakened by the simple fact that upon a resurvey, based upon no original monument, another line several rods distant is established. *Welton, 96 Wis. at 347.*

[P44] In *Brew v. Nugent, 136 Wis. 336, 117 N.W. 813 (1908)*, the court was again asked to determine whether a longstanding fence line or a survey should be used to establish the boundary line. The court determined, based on what it viewed as settled law, that **[LLHN11]** the original location of monuments must always prevail, but that when those monuments have [LEXIS at 25] disappeared "they must be established by the best evidence the nature of the situation is susceptible of." *Brew, 136 Wis. at 338*. The court concluded that extrinsic evidence, such as an old fence, may have so much greater probative force than more recent surveying measurements "as to prevail over the latter as a matter of law . . . ." *Brew, 136 Wis. at 339*.

[P45] A more recent case involving a boundary dispute predicated on the discrepancy between an ancient fence line and a survey supports using an evidentiary analysis. See *Grell v. Ganser, 255 Wis. 381, 39 N.W.2d 397 (1949)*.

[P46] The court was prescient in *City of Racine v. Emerson, 85 Wis. 80, 55 N.W. 177 (1893)*, in providing principles that remain sound more than a century after the decision was written. In that case, a resurvey commissioned by the City of Racine created boundary lines that did not coincide with the defendant's existing fence line, which he alleged was set along the original stakes laying out the street running on the boundary of his property.

[P47] The City of Racine court concluded that **[LLHN12]** the answer to the pertinent question--where is the boundary line?--must be established by the best evidence available. It declared that "monuments [LEXIS at 26] set by the original survey in the ground, and named or referred to in the plat, are the highest and best evidence." [27] If there are no such monuments, then stakes set by the surveyor or soon thereafter are the next best evidence. [28] Buildings, fences, and other substantial improvements built according to the stakes laid out while they were present are the next best evidence of the line. [29]

27 *City of Racine v. Emerson, 85 Wis. 80, 86-87, 55 N.W. 177 (1893).*
28 Id.
29 Id.

[P48] The City of Racine court predicted that original monuments will be lost or destroyed and that the time will come when the best evidence to establish property lines may be long continued occupation:

> **[LLHN13]** The time will soon come when [the boundary line] will have been lost by the destruction of all monuments, natural or artificial, and by the death of the old inhab-

itants. Then resort must be had to evidence of lesser degree to establish ancient boundaries, and long-continued occupation with respect to unchanged lines, and reputation, even, may be the best evidence available. *City of Racine, 85 Wis. at 88-89*.

[P49] The time has come in the present case to apply the rule that an ancient fence (or other landmark) may be competent evidence [LEXIS at 27] of the location of the boundary when original monuments cannot be found. [30]

30 *Nys v. Biemeret, 44 Wis. 104, 110 (1878)* further illustrates this rule that when the actual boundary line cannot be determined, the circuit court must use extrinsic evidence to determine the location of the boundary line: **[LLHN14]** "If original monuments can be found and identified, they will govern. . . . If no certain monuments can be found . . . a lesser degree of testimony may be resorted to; and long continued occupancy and acquiescence, and even reputation and hearsay as to the boundaries, may have weight."

See also *Wunnicke v. Dederich, 160 Wis. 462, 467, 152 N.W. 139 (1915)* **[LLHN15]** ("Under the repeated decisions of this court the ancient fence lines around this parcel of land, maintained as they were for at least thirty and probably fifty years, should be taken as fixing the correct boundaries of the tract.").

See also 10 David A. Thomas ed., Thompson on Real Property: Second Thomas Edition § 90.03(a)(7), at 628 (1998) **[LLHN16]** ("Where the exact location of a boundary line is not definitely known, a dispute involving the boundary line must be determined by looking to the conduct of the parties with reference thereto. Thus, long [LEXIS at 28] acquiescence by the owners of adjoining lands in the location of the dividing line between their lands may, in effect, establish such line . . . .") (citations omitted).

[P50] The circuit court made findings of fact that the original section corner monument between Sections 4, 5, 8, and 9 in Township 41 North, Range 1 West, Ashland County, Wisconsin no longer exists; that no competent evidence is before the court to determine where the original section corner monument was originally placed; that no clear and convincing evidence exists that the resetting of the corners in the 1912 Parker survey was correct; that neither party has shown by clear and convincing evidence where the actual boundary line exists. All of these findings of fact are supported by the record.

[P51] The Boersts rely upon the 2005 survey (based on a survey performed in 1912) using a corner marker that was found to establish a common corner for Sections 4, 5, 8, and 9. This 2005 survey disrupted the long-honored boundary line in reference to the center line of Henn Road.

[P52] Based on these facts, the circuit court properly focused its analysis on what constitutes the best evidence available to establish the boundary line. The best [LEXIS at 29] evidence of the boundary line in the present case is, as the circuit court found, the long occupation of the properties by the parties to the present case, their neighbors and their predecessors in title. According to the record, for more than a century the center line of Henn Road has been honored as the boundary between the properties by not only the parties in this suit (and their predecessors in interest), but also generally throughout the surrounding area and by the government.

[P53] Henn Road is the landmark that was laid out closest in time to the original government survey. The records of the boundary dispute litigation between neighbors owning property in Sections 8 and 5 in 1909 and 1917 (involving the 1912 survey relied upon by the Boersts) provide supporting evidence that Henn Road was reputed to lie on the boundary line and that the center line of Henn Road has been relied upon by the property owners in the area as the boundary line for many, many years. Finally, as stated in City of Racine, **[LLHN17]** resurveys may be unreliable as evidence of a boundary line. *City of Racine, 85 Wis. at 86-87*.

[P54] The record supports the circuit court's determination that the center line of Henn Road has [LEXIS at 30] been relied upon by the government and private owners alike as the boundary line between sections 8 and 9 in Township 41 North, Range 1 West, Ashland County, Wisconsin. The evidence in the record prior to the events leading to this litigation supports a finding of long-time undisturbed possession of property based upon the center line of Henn Road as the boundary line.

[P55] The court's conclusion in City of Racine applies here: **[LLHN18]** Boundary lines may be established by "practical location and undisturbed possession for a great many years, and there does not seem to have been any necessity to disturb them at this late day." *City of Racine, 85 Wis. at 89-90*.

[P56] In sum, in determining the boundary line by evaluating the evidence of common usage and acquiescence and not by using the legal doctrine of acquiescence, the circuit court applied the correct legal analysis in the present case. After concluding that the actual boundary line could not be determined from the deed and original monuments or markers, the circuit court evaluated the evidence and established the boundary line based upon the best evidence available. There are sufficient facts in the record upon which the circuit court based its findings [LEXIS at 31] that the actual boundary line could not be determined from the deed and the original monument or markers and that the best evidence supports the center line of Henn Road as the boundary line separating the parcels owned by the parties to this action. The best evidence was not the successive surveys but common usage and acquiescence.

By the Court.--The decision of the Court of Appeals is affirmed.

JOHN ALEXANDER ETHEN REVOCABLE TRUST AGREEMENT DATED OCTOBER 17, 1996, John Alexander Ethen, Trustee, and Janet Ruth Ethen Revocable Trust Agreement Dated October 17, 1996, Janet Ruth Ethen, Trustee, Plaintiffs, Appellees and Cross-Appellants,

v.

RIVER RESOURCE OUTFITTERS, LLC, and Christine K. Fischer, Defendants and Appellants.

No. DA 10-0457.

Supreme Court of Montana

361 Mont. 57 (Mont. 2011)

256 P.3d 913, 2011 MT 143

June 21, 2011

LUCAS LETTER HEAD NOTES [LLHN]:

Civil Procedure; Appeals; Plaintiff's Burden:
Civil Procedure; Appeals; Standards of Review; Abuse of Discretion:
Civil Procedure; Appeals; Standards of Review; Conclusions of Law:
Civil Procedure; Appeals; Standards of Review; Credible Evidence:
[LLHN1] This Court reviews findings of facts to determine whether substantial credible evidence supports the district court's findings. We must review the evidence in the light most favorable to the plaintiff. We review for correctness a district court's conclusions of law. We review for an abuse of discretion a district court's decision to award attorney fees under § 27-8-313, MCA.

Real Property Law; Deeds; Deed Interpretation; Intent:
Real Property Law; Deeds; Deed Interpretation; Ambiguities:
[LLHN2] The court must interpret the plain language of an unambiguous deed. The court cannot resort to extrinsic evidence of the grantor's intent to interpret an unambiguous deed.

Real Property Law; Deeds; Deed Interpretation; Intent:
Real Property Law; Deeds; Deed Interpretation; Extrinsic Evidence:
[LLHN3] A certificate of survey becomes part of the deed when a deed grants land according to an official survey. A certificate of survey does not constitute extrinsic evidence of the grantor's intent, but constitutes an essential part of the grantee's deed.

Real Property Law; Water Boundaries; Meander Lines:
Real Property Law; Water Boundaries; Ambulatory Nature:
[LLHN4] A surveyor uses a meander line to show that a body of water serves as the boundary. A meander line sets specific measurements on a survey to define the quantity of land for purchase. Meander lines define a boundary as moving with a body of water's shifting bank, even though meander lines contain specific measurements. A boundary along a body of water runs to the edge of the body of water. A boundary along a body of water generally does not become definite and fixed unless the grantor explicitly indicates such intent.

Civil Procedure; Trials; Bench Trials:
Civil Procedure; Trials; Trier of Facts; Credibility of Witnesses:

[LLHN5] The surveyors presented contradictory testimony. The district court determines the credibility of the witnesses and the weight assigned to their respective testimony.

Real Property Law; Deeds; Deed Interpretation; Intent:
Real Property Law; Water Boundaries; Meander Lines:
[LLHN6] A deed need not specifically characterize the boundary line as a meander line when the narrative description of the land grant clearly indicates that the boundary meanders along a watercourse.

Real Property Law; Boundary Establishment; Adverse Possession:
[LLHN7] Plaintiff must prove through clear and convincing evidence that their possession qualified as open, notorious, exclusive, adverse, continuous, and uninterrupted in order to establish ownership through adverse possession.

[256 P.3d 914] [256 P.3d 915]

OPINION

BRIAN MORRIS, Justice.

¶ 1 Appellees John and Janet Ethen (Ethens) sought declaratory relief in the Third Judicial District Court, Granite County, to resolve a boundary dispute with Appellants River Resource Outfitters (Joneses) and Christine Fischer (Fischer) (collectively Neighbors). The court declared that the common boundary line between the parties' properties runs in a meander line along the west bank of Flint Creek. We affirm.

¶ 2 We review the following issues on appeal: [256 P.3d 916]

¶ 3 ***Whether the District Court improperly relied upon extrinsic evidence to determine legal title to the disputed property.***

¶ 4 ***Whether the District Court correctly determined that the boundary line between the parties' properties meanders along Flint Creek.***

¶ 5 ***Whether Ethens filed a timely claim for declaratory relief.***

¶ 6 ***Whether the District Court failed to join other landowners on Flint Creek.***

¶ 7 ***Whether Neighbors gained title to the disputed property through adverse possession.***

¶ 8 ***Whether the District Court abused its discretion when it declined to award attorney fees to Ethens.***

FACTUAL AND PROCEDURAL HISTORY

¶ 9 Ethens purchased property in Granite County in July 2007. Neighbors own properties that border Ethens' property. James and Mary Mellen (Mellens) originally owned in one common tract Neighbors' and Ethens' properties. Mellens' tract consisted of approximately 125 acres. Flint Creek runs north and south through the property. A county road runs east and west through the property.

¶ 10 Mellens conveyed approximately 35 acres to Thelma and Warren Cummins, Sr. in 1960 through a deed titled the "Mellen-Cummins Deed." The deed stated that Mellens intended to convey "only all of the lands which they own [w]est of Flint Creek and [s]outh of the present [c]ounty [r]oad." Warren Cummins, Sr. quitclaimed Cummins' parcel to Thelma Cummins Brownell in 1976. The deed excluded a paragraph from the original Mellen-Cummins Deed. The relevant boundary description did not change. Thelma deeded her parcel to Warren Cummins, Jr. (Cummins) in 1996.

¶ 11 Mary Mellen transferred the remainder of the original 125-acre tract that she and James had retained, approximately 90 acres, to her daughter, Frances E. Lane (Lane), in 1963. Lane created the Lane Ranch in 1977. Flint Creek served as the boundary between Cummins's property (to the west) and the Lane Ranch (to the east). The county road served as Cummins's north boundary with the Lane Ranch.

¶ 12 Charles Lane commissioned surveyor William Bayer (Bayer) in 1982 to create three parcels from the approximately 90-acre parcel known as the Lane Ranch. Bayer created the first recorded certificate of survey (COS 162) involving any of these properties. Bayer referred to the Mellen-Cummins Deed to prepare the survey. Bayer surveyed the west bank of Flint Creek with a compass and set course points along the bank of the creek. Bayer did not set any pins along Flint Creek. Bayer created three parcels—two two to the east of Flint Creek, and one to the north of the county road. The diagram below roughly depicts COS 162.

(Image Omitted)

¶ 13 James and Deanna Lane sold Parcel 2 of COS 162 to Fischer in 1990. Fischer later **[256 P.3d 917]** commissioned plat 45-M in order to subdivide her property. Bayer prepared plat 45-M in accordance with COS 162 and the Mellen-Cummins Deed. Fischer sold approximately ten acres of Parcel 2 along Flint Creek to Joneses. Fischer retained approximately 20 acres south of Joneses' parcel along Flint Creek. Cummins owned the parcel to the west of Flint Creek. Cummins eventually sold his parcel to Ethens in 2007. The following diagram roughly depicts the current configuration of the parcels in relation to Flint Creek.

(Image Omitted)

¶ 14 Ethens' deed from Cummins describes Ethens' property by incorporating certificate of survey 521 (COS 521). COS 521 constituted a retracement survey of the property originally created in the Mellen-Cummins Deed. Cummins commissioned COS 521 in order to resolve a dispute regarding the south boundary with a different neighbor. COS 521 incorporates most of the same course points along Flint Creek that Bayer had set forth in COS 162.

¶ 15 The parties dispute ownership over a small strip of land west of Flint Creek. The contested area of land consists of 0.61 acres along the Joneses/Ethens boundary and 1.04 acres along the Fischer/Ethens boundary. The Mellen-Cummins Deed and the subsequent certificates of survey describe the boundary in dispute. The Mellen-Cummins Deed describes the boundary between Ethens' property and Neighbors' properties as running along the west bank of Flint Creek. The narrative descriptions in COS 162, COS 521, and plat 45-M likewise describe the boundary as running along the west bank of Flint Creek.

¶ 16 COS 162 set forth fixed course points along the west bank of Flint Creek. Bayer mapped the course points in 1982 along the top of the west bank of Flint Creek. The course points now lie slightly west of the west bank of Flint Creek. A subsequent surveyor's fixing of these course points on the ground has led to the dispute over the acreage just west of Flint Creek.

¶ 17 Ethens claim that Flint Creek constitutes the property boundary between their property and Neighbors' properties. They argue that Bayer's course points in COS 162 created a meandering boundary line along Flint Creek. Ethens rely on the original Mellen-Cummins Deed and the succeeding certificates of survey to support their argument that a meandering boundary along [256 P.3d 918] Flint Creek provides landowners on both sides of the creek access to its waters.

¶ 18 Cummins advertised the parcel that he sold to Ethens as creek front property. Ethens became aware of the fact that Neighbors disputed the boundary while they negotiated the purchase of the property from Cummins. Ethens decided to purchase the property based on their research and subsequent belief that Cummins's parcel bordered Flint Creek. Ethens negotiated a reduced purchase price for the property in light of the potential boundary dispute with Neighbors.

¶ 19 Neighbors commissioned a new survey of their properties shortly after Ethens purchased the property from Cummins. Certificate of survey 788 (COS 788) placed fixed pins on the ground along the west bank of Flint Creek according to the course points in Bayer's 1982 survey. COS 788 depicts a boundary line that used a straight line to connect the pins, unlike the previous surveys that had drawn the boundary along Flint Creek. The boundary line in COS 788 lies just to the west of Flint Creek. This property boundary excludes Ethens' access to Flint Creek. Ethens sought declaratory relief to resolve the dispute.

¶ 20 The District Court held a bench trial. The court declined Neighbors' summary judgment motion that had sought to join to the action other landowners with a property interest in parcel 3. Ty Throop (Throop) purchased parcel 3 of COS 162 from Lanes over twenty years ago. Throop owned parcel 3 at the time of trial. Throop testified on behalf of Neighbors regarding his interpretation of parcel 3's boundary with Ethens' property.

¶ 21 The court agreed with Ethens that the Mellen-Cummins Deed and the subsequent certificates of survey, COS 162, COS 521, and plat 45-M, described a meandering boundary line along the west bank of Flint Creek. The parties agreed that Flint Creek qualifies as a non-navigable stream. The court declared, therefore, that Ethens' property line extended to the center of Flint Creek. The court also declared that COS 788 constituted an invalid survey and ordered it stricken from the public record.

¶ 22 The court rejected Neighbors' alternative claim that they had acquired property west of Flint Creek through adverse possession. The court likewise rejected Neighbors' claims that Ethens had acquiesced to a fixed boundary line west of Flint Creek, that the doctrines of laches and equitable estoppel barred Ethens' claim, and that Ethens had failed to join an indispensible party. The court declined to award Ethens' request for attorney fees. Neighbors appeal and Ethens cross-appeal on the issue of attorney fees.

STANDARD OF REVIEW

¶ 23 **[LLHN1]** This Court reviews findings of facts to determine whether substantial credible evidence supports the district court's findings. *Mont. Rail Link v. CUSA PRTS., LLC,* 2009 MT 432, ¶ 26, 354 Mont. 101, 222 P.3d 1021. We must review the evidence in the light most favorable to the plaintiff. *Id.* We review for correctness a district court's conclusions of law. *Id.* We review for an abuse of discretion a district court's decision to award attorney fees under § 27-8-313, MCA. *Renville v. Farmers Ins. Exch.,* 2004 MT 366, ¶ 20, 324 Mont. 509, 105 P.3d 280.

DISCUSSION

¶ 24 ***Whether the District Court improperly relied upon extrinsic evidence to determine legal title to the disputed property.***

¶ 25 **[LLHN2]** The court must interpret the plain language of an unambiguous deed. *Tester v. Tester,* 2000 MT 130, ¶ 25, 300 Mont. 5, 3 P.3d 109. The court cannot resort to extrinsic evidence of the grantor's intent to interpret an unambiguous deed. *Id.* The Mellen-Cummins Deed appears in Ethens' chain of title. Neighbors nevertheless argue that Ethens' deed from Cummins provides an unambiguous property description, and, therefore, the court improperly considered extrinsic evidence in the form of the Mellen-Cummins Deed.

¶ 26 *Tester* dealt with a boundary dispute similar to the dispute here. The Court in *Tester* looked first to the parties' chains of title. *Id.* at ¶ 15. The district court had interpreted one of the deeds in the chain of title contrary to the plain language of that [256 P.3d 919] deed. *Id.* at ¶ 27. The deed unambiguously set forth the disputed boundary. *Id.* at ¶ 28. The district court should have limited its analysis to the deed's unambiguous language. The district court instead improperly considered extrinsic evidence of the grantor's intent to locate the boundary that was not included in the language of the deed. *Id.*

¶ 27 Ethens' deed from Cummins describes the property as set forth "in certificate of survey 521." **[LLHN3]** A certificate of survey becomes part of the deed when a deed grants land according to an official survey. *Olson v. Jude,* 2003 MT 186, ¶ 46, 316 Mont. 438, 73 P.3d 809. COS 521 does not constitute extrinsic evidence of the grantor's intent. *Tester,* ¶ 27. COS 521 constitutes an essential part of Ethens' deed from Cummins. *Olson,* ¶ 46. The District Court properly examined COS 521. *Id.*

¶ 28 The parties dispute the meaning of the metes and bounds description in COS 521. COS 521 constituted a retracement survey of Ethens' parcel that originally had been created in the Mellen-Cummins Deed. Cummins commissioned COS 521 in order to resolve a dispute regarding the parcel's southern boundary. COS 521 states on its face that the survey serves "to clarify omissions in previous deed transfers for this parcel of land."

¶ 29 The surveyor who created COS 521 testified that he had relied on the Mellen-Cummins Deed. In fact all of the surveyors who testified referred to the Mellen-Cummins Deed. Neighbors never objected to any reference to the Mellen-Cummins Deed by the surveyors. The parties also stipulated on the first day of trial that the court should admit any documents that described the parties' chains of title. The court admitted the parties' chains of title. Ethens' chain of title includes the Mellen-Cummins Deed.

¶ 30 Neighbors inconsistently argued their position regarding the Mellen-Cummins Deed. Neighbors presented the District Court with the Mellen-Cummins Deed in their first motion for summary judgment on October 22, 2008. Neighbors initially argued that the Mellen-Cummins Deed provided critical evidence relevant to the boundary dispute. They argued in their first summary judgment brief that the Mellen-Cummins Deed unambiguously excluded Ethens' access to Flint Creek. Neighbors changed course, however, by the time that they had filed their second summary judgment brief on November 25, 2008. They argued instead in their second summary judgment brief that the Mellen-Cummins Deed constituted extrinsic evidence. Neighbors failed to explain their change in position.

¶ 31 The District Court allowed the Mellen-Cummins Deed into evidence. The Mellen-Cummins Deed, prepared before Ethens' deed from Cummins, provides the first description of the disputed boundary. Ethens' chain of title includes the Mellen-Cummins Deed. *Tester,* ¶ 15. The information contained in the Mellen-Cummins Deed cannot be considered extrinsic evidence under these circumstances. *Id.* at ¶ 27. The District Court simply interpreted the plain language of the Mellen-Cummins Deed, the subsequent certificates of survey, and Ethens' deed from Cummins. The court properly examined the chains of title to the parties' properties in seeking to define the boundary. *Id.* at ¶ 15.

¶ 32 ***Whether the District Court correctly determined that the boundary line between the parties' properties meanders along Flint Creek.***

¶ 33 Neighbors argue that the District Court incorrectly found that the evidence described the parties' boundary as a meander line along the west bank of Flint Creek instead of a fixed boundary just west of Flint Creek. The court relied on certificates of survey that describe the boundary, the properties' chains of title, lay testimony, and expert testimony from several Montana land surveyors. The court sorted through sometimes contradictory evidence to determine whether the disputed boundary constituted a meander line or a fixed and definite boundary line.

¶ 34 This Court discussed the definition and purpose of meander lines in *Andersen v. Monforton,* 2005 MT 310, ¶ ¶ 17-30, 329 Mont. 460, 125 P.3d 614. **[LLHN4]** A surveyor uses a meander line to show that a body of [256 P.3d 920] water serves as the boundary. *Id.* at ¶ 19. A meander line sets specific measurements on a survey to define the quantity of land for purchase. Meander lines define a boundary as moving with a body of water's shifting bank, even though meander lines contain specific measurements. *Id.* at ¶ 20. A boundary along a body of water runs to the edge of the body of water. A boundary along a body of water generally does not become definite and fixed unless the grantor explicitly indicates such intent. *Id.* at ¶ 21; § 70-16-201, MCA.

¶ 35 The Mellen-Cummins Deed describes the boundary between Ethens' property and Neighbors' properties as the west bank of Flint Creek. The Mellen-Cummins Deed explicitly states its intention "to convey and warrant conveyance only all of the lands which [the Mellens] own [w]est of Flint Creek." The Mellen-Cummins Deed did not reserve a portion of land west of the west bank of Flint Creek. *Andersen,* ¶ 21. The Mellen-Cummins Deed did not set forth any fixed points west of the west bank of Flint Creek. The plain language of the Mellen-Cummins Deed supports the court's finding. *Mont. Rail Link,* ¶ 26. Nothing in the Mellen-Cummins Deed indicates an intent to create a fixed boundary west of the west bank of Flint Creek. Section 70-16-201, MCA.

¶ 36 COS 162 constitutes the first recorded survey of the disputed properties. COS 162's narrative describes the boundary between the parties' properties as running along the west bank of Flint Creek. Bayer prepared COS 162 according to the Mellen-Cummins Deed. Bayer surveyed Flint Creek with a compass and set course points along the west bank of the creek. Bayer set the course points in order to calculate acreage for Lane's parcels.

¶ 37 Bayer had intended to create a fixed boundary line along the top of the west bank of Flint Creek. He did not believe, however, that the Mellen-Cummins Deed granted Cummins access to Flint Creek. Bayer admitted on cross-examination that the call to the west bank of Flint Creek in the Mellen-Cummins Deed constituted a bound call. Bound calls, according to Bayer, supersede survey data. Montana law confirms Bayer's testimony. *See Bollinger v. Hollingsworth,* 227 Mont. 454, 457, 739 P.2d 962, 964 (1987) (citing *Buckley v. Laird,* 158 Mont. 483, 492, 493 P.2d 1070, 1075 (1972)). The bound call to Flint Creek in COS 162 therefore would override any set course points, including the course points that Bayer himself had set. *Id.* Bayer also agreed that the boundary did not create a straight line, but fluctuated along the west bank of Flint Creek.

¶ 38 Another Montana surveyor, Barney Hallin (Hallin), testified that the boundary set forth on COS 162 constituted a meandering boundary line along Flint Creek. Hallin interpreted COS 162 in light of the Mellen-Cummins Deed. He also relied on the narrative included in COS 162 that describes the boundary as running along the west bank of Flint Creek. Hallin testified that COS 521 likewise set forth a meandering boundary line.

¶ 39 Cummins commissioned COS 521 to resolve a boundary dispute with his neighbor to the south. The narrative in COS 521 describes Ethens' eastern boundary as "along the west bank of Flint Creek." Hans Bohrnsen (Bohrnsen) prepared COS 521. Bohrnsen incorporated Bayer's course points along the west bank of Flint Creek. Bohrnsen testified, similar to Bayer, that a survey does not require fixed pins if the deed calls to a natural monument creating the boundary. Flint Creek constitutes a natural monument creating the boundary between the parties' properties. Bohrnsen testified that COS 521 does not set a fixed boundary line. COS 521 set forth a meandering boundary line that fluctuates with the course of Flint Creek.

¶ 40 Tom Moodry, another Montana surveyor, testified for Neighbors that the disputed boundary lies to the west of the west bank of Flint Creek. Moodry based his testimony on a different interpretation of the same certificates of survey and the Mellen-Cummins Deed. He believed that the grantor of the

Mellen-Cummins Deed had not intended to convey access to the waters of Flint Creek. He reached this conclusion despite the language in the Mellen-Cummins [256 P.3d 921] Deed that the boundary ran "along the west bank of Flint Creek." Moodry interpreted the phrase "along the west bank of Flint Creek" to mean "close to, nearby, parallel to, but away from the running water" of Flint Creek.

¶ 41 **[LLHN5]** The surveyors presented contradictory testimony. The district court determines the credibility of the witnesses and the weight assigned to their respective testimony. *Kulstad v. Maniaci,* 2009 MT 326, ¶ 52, 352 Mont. 513, 220 P.3d 595. The District Court agreed with Hallin and Bohrnsen that the evidence established a meandering boundary along Flint Creek. Bayer did not characterize the boundary line that he had created in COS 162 as a meandering boundary. Bayer testified, however, that he had intended the boundary to run along Flint Creek. Bayer set fixed course points for the purpose of determining acreage. This Court similarly identified a meandering boundary line in *Andersen* as one that runs along the edge of a creek and serves to quantify acreage. *Andersen,* ¶ 20.

¶ 42 Neighbors also argue that the absence of the term "meander line" from the relevant deeds and certificates of survey supports the existence of a fixed boundary line. **[LLHN6]** A deed need not specifically characterize the boundary line as a meander line, however, when the narrative description of the land grant clearly indicates that the boundary meanders along a watercourse. *Andersen,* ¶ 21. The narrative descriptions in COS 162, COS 521, and plat 45-M all describe the boundary as running along Flint Creek. *Id.* The surveys also portray a boundary line that runs along Flint Creek.

¶ 43 The District Court based its finding that COS 162, COS 521, and plat 45-M set forth a meandering boundary line along Flint Creek on the exhibits and testimony. Hallin's testimony and Bohrnsen's testimony support the District Court's finding. *Id.* Other substantial credible evidence in the record, including the Mellen-Cummins Deed, further supports the court's findings. *Mont. Rail Link,* ¶ 26. The court properly characterized the disputed boundary as a meandering line along Flint Creek. *Id.*

¶ 44 ***Whether Ethens filed a timely claim for declaratory relief.***

¶ 45 Neighbors make a series of related arguments that Ethens failed to file a timely claim for relief. They argue either that the statute of limitations had run on Ethens' claim or that the doctrines of laches, equitable estoppel or acquiescence bar Ethens' claim. Neighbors base these arguments on the premise that Ethens or their predecessors in interest knew that COS 162 and COS 521 set forth a fixed boundary line and did nothing until Neighbors filed COS 788.

¶ 46 Neighbors commissioned COS 788 after Ethens had purchased their property. Earlier surveys had reflected a meandering boundary line along Flint Creek. COS 788, unlike the previous surveys, placed fixed pins on the ground according to Bayer's course points from COS 162. The surveyor drew straight lines in order to connect the newly placed pins. COS 788 set forth for the first time a fixed boundary line west of Flint Creek. The pins locate the boundary approximately 20 to 100 feet west of Flint Creek. The fixed boundary in COS 788 runs through the middle of an old building on Ethens' property. Ethens had no involvement in the preparation or recordation of COS 788.

¶ 47 Neighbors filed COS 788 on November 27, 2007. Ethens filed their claim for declaratory relief in response to COS 788 three weeks later on December 19, 2007. Neighbors fail to cite a relevant statute of limitation. Ethens filed their claim less than a month after Neighbors had filed COS 788. The equitable doctrine of laches likewise does not bar Ethens' claim disputing the fixed boundary set forth in COS 788. The relative alacrity exercised by Ethens cannot qualify as sitting on their rights. *Montanans for Just. v. State,* 2006 MT 277, ¶ 25, 334 Mont. 237, 146 P.3d 759. The record does not support Neighbors' claim that Ethens had acquiesced to a fixed boundary. The doctrine of equitable estoppel likewise does not bar Ethens' claim.

¶ 48 ***Whether the District Court failed to join other landowners on Flint Creek.***

[256 P.3d 922] ¶ 49 Section 27-8-301, MCA, provides that the court must join any person who has an interest that a declaratory judgment would affect. M.R. Civ. P. 19(a)(1) requires a district court to join a party to an action if complete relief cannot occur in the party's absence. Complete relief relates to persons already parties, rather than to relief between a party and the absent person. *Mt. West Bank v. Mine & Mill Hydraulics, Inc.,* 2003 MT 35, ¶ 32, 314 Mont. 248, 64 P.3d 1048. The facts and circumstances of each case determine whether a court must join a particular non-party. *Id.* We will reverse for an abuse of discretion the district court's decision whether to join a party. *Mohl v. Johnson,* 275 Mont. 167, 169-70, 911 P.2d 217, 219 (1996).

¶ 50 The bank in *Mt. West Bank* brought a foreclosure action against Mine & Mill Hydraulics (Mine & Mill) after Mine & Mill had defaulted on several of its loan obligations. *Mt. West Bank,* ¶ 34. The action involved multiple parties all whom had some type of interest in the disputed property. *Id.* The district court denied the defendant's request to join Mountain Hydraulics. *Id.* The former directors of Mine & Mill had created Montana Hydraulics after Mine & Mill had failed. Montana Hydraulics held no legal interest in the disputed property. *Id.* Montana Hydraulics did not qualify as an indispensable party. *Id.*

¶ 51 The District Court determined that it could grant meaningful relief without joining other landowners along Flint Creek. The boundary at issue lies between Ethens' property and Neighbors' properties. The parties dispute ownership over a strip of acreage west of Flint Creek as described in COS 788.

¶ 52 Other neighboring landowners hold no legal interest in the disputed acreage at issue in this case. *Mt. West Bank,* ¶ 34. In fact, the owner of parcel 3 testified at trial. The owner of parcel 3 had notice of Ethens' declaratory relief action and elected not to intervene. Other landowners may, including the owner of parcel 3, have an interest in the court's interpretation of the relevant surveys. The only boundary in dispute in this action, however, lies between Ethens' property and Neighbors' properties. This decision does not determine the rights of any other landowners along Flint Creek. Section 27-8-301, MCA. We cannot say that the District Court abused its discretion in declining Neighbors' efforts to join other landowners under these circumstances. *Mt. West Bank,* ¶ 32.

¶ 53 ***Whether Neighbors gained title to the disputed property through adverse possession.***

¶ 54 **[LLHN7]** Neighbors must prove through clear and convincing evidence that their possession qualified as "open, notorious, exclusive, adverse, continuous, and uninterrupted" in order to establish ownership through adverse possession. *Meadow Lake Estates Homeowners Assn. v. Shoemaker,* 2008 MT 41, ¶ ¶ 36-37, 341 Mont. 345, 178 P.3d 81. Neighbors presented evidence of their properties' tax assessments. Neighbors had paid taxes on the disputed acreage and claimed that they exclusively had used property to the west of Flint Creek.

¶ 55 Neighbors maintain that they have used the disputed property west of Flint Creek for recreation and had chosen to leave the land undisturbed. Ethens presented similar testimony. The court found that both parties in fact had used the disputed property to access Flint Creek. Neighbors failed to provide the Court with clear and convincing evidence that their use of the disputed property west of the west bank of Flint Creek qualified as exclusive. *Shoemaker,* ¶ 36.

¶ 56 ***Whether the District Court abused its discretion when it declined to award attorney fees to Ethens.***

¶ 57 The district court may award attorney fees at its discretion under § 27-8-313, MCA, when equitable considerations support the award. *United Natl. Ins. Co. v. St. Paul Fire & Marine Ins. Co.,* 2009 MT 269, ¶ 38, 352 Mont. 105, 214 P.3d 1260. The District Court identified no equitable considerations that would support an award of attorney fees to Ethens. Both parties genuinely believed that they owned the disputed property. Ethens had negotiated a $130,000 reduced purchase price for their property in light of potential attorney fees that could result from litigation to resolve the boundary dispute. The District Court did not abuse its [256 P.3d 923] discretion under these circumstances when it declined to award attorney fees to Ethens. *Id.* at ¶ 38.

¶ 58 Affirmed.

We Concur: PATRICIA COTTER, MICHAEL E. WHEAT, BETH BAKER and JIM RICE, JJ.

Christopher G. Butler and Kerri S. Butler, husband and wife, Respondents,

v.

Sandra Coyle, a single person, Appellant.

Nos. 29198-7-III, 29517-6-III

Court of Appeals of Washington, Division 3

February 2, 2012

LUCAS LETTER HEAD NOTES [LLHN]: [1]

Civil Procedure; Appeals; Issues Raised First Time on Appeal:
Civil Procedure; Appeals; Theories not Raised at Trial:
[LLHN1] Generally, appellate courts will not entertain issues raised for the first time on appeal. The reason for this rule is to afford the trial court the opportunity to correct errors, thereby avoiding unnecessary appeals and retrials. We likewise do not consider theories not presented below. New theories presented for the first time to the trial court as part of a motion for reconsideration need not be considered, and the same holds true for arguments raised for the first time in an appellant's reply brief.

Civil Procedure; Appeals; Assignment of Error; Generally:
Civil Procedure; Appeals; Assignment of Error; Wavier:
[LLHN2] Our rules require appellant to support each assignment of error with appropriate argument and citations to the record. Failure to do so for an assignment of error waives the assignment. Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. It is incumbent on counsel to present the court with argument as to why specific findings of the trial court are not supported by the evidence and to cite to the record to support that argument. Naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.

Civil Procedure; Appeals; Standards of Review; Substantial Evidence:
Civil Procedure; Appeals; Standards of Review; De Novo Review:
Civil Procedure; Appeals; Standards of Review; Sufficiency of Evidence:
Civil Procedure; Appeals; Credibility Determinations; Not Reviewable:
[LLHN3] We review whether substantial evidence supports the trial court's factual findings and then review, *de novo*, whether the trial court's conclusions of law flow from the supported findings. Substantial evidence will support a finding when the evidence in the record is sufficient to persuade a rational, fair-minded person that the finding is true. A challenge to the sufficiency of the evidence admits the truth of the opposing party's evidence and any inference drawn therefrom and requires that the evidence be viewed in a light most favorable to the opposing party. Credibility determinations are solely for the trier of fact and cannot be reviewed on appeal.

Real Property Law; Boundaries; Evidence of Boundaries; Monuments:
[LLHN4] For surveying purposes, a monument is a permanent natural or artificial object on the ground that helps establish the location of the boundary line called for. Natural monuments include such objects as mountains, streams, or trees, while artificial monuments consist of marked lines, stakes, roads, fences, or other objects placed on the ground. If the monument has width, the general rule is that the boundary is the center line of the monument.

[1] All head notes in this opinion provided by the Editor of TLL for the convenience of our readers. JNL.

Real Property Law; Deeds; Legal Descriptions; Priority of Calls:
Real Property Law; Boundaries; Evidence of Boundaries; Monuments:
[LLHN5] In cases of conflicting calls in a deed, the priority of calls is: (1) lines actually run in the field, (2) natural monuments, (3) artificial monuments, (4) courses, (5) distances, (6) quantity or area. It is a well-established rule of law that description by monuments will control over description by metes and bounds.

Real Property Law; Deeds; Legal Descriptions; Particular & General Descriptions:
[LLHN6] Where a particular and general description in a deed conflict, and are repugnant to each other, the particular will prevail unless the intent of the parties is otherwise manifested on the face of the instrument.

Real Property Law; Deeds; Legal Descriptions; Particular & General Descriptions:
[LLHN7] The particular versus general description principle applies only when the two conflicting descriptions are independent efforts directed at describing a third thing-the boundary. It does not apply where, as here, the purpose of the particular metes and bounds description is to more precisely identify the location of the general description, for instance a monument. Where a general description is followed by a particular one, the particular description will not restrict the general if it is used in the sense of reiteration.

UNPUBLISHED OPINION

Siddoway, J.

Sandra Coyle appeals the trial court's entry of a judgment reforming deeds and an easement to make clear that her neighbors partially own and have the right to use a road that Ms. Coyle attempted to close to their use. We affirm the trial court's judgment and, in a consolidated matter, affirm the trial court's order finding Ms. Coyle in contempt for interfering with survey work required by the court's judgment. While we deny Christopher and Kerri Butler's request for an award of fees and costs incurred in the appeal, we grant their motion for terms for Ms. Coyle's failure to appear at the time set for oral argument.

FACTS AND PROCEDURAL BACKGROUND

Sandra Coyle owns real property located on Corkscrew Canyon Road in Tum Tum, Washington. Christopher and Kerri Butler own neighboring property on Corkscrew Canyon Road immediately adjacent to and southeast of Ms. Coyle's property. Both Ms. Coyle and the Butlers trace their title back to a common grantor, Reforestation Inc., which acquired both properties in June 1967. In October 1967, Reforestation entered into an unrecorded contract to sell what became the Butler property to Paul E. Parker and Janet J. Parker; a fulfillment statutory warranty deed transferring title to the Parkers was recorded in January 1974. In 1968, Reforestation entered into a contract to sell what became the Coyle property to George B. Woodbury and Joanne L. Woodbury; like the Parker fulfillment deed, the fulfillment statutory warranty deed transferring title to the Woodburys was recorded in January 1974.[1] We refer to these initial conveyances, by their recording dates, as the 1974 deeds or conveyances.

[1] The Butlers' evidence established that the Parkers conveyed the Butler property by statutory warranty deed to Neumann, Neumann quitclaimed to Potter, Potter quitclaimed to Peone, and the Butlers acquired title through a statutory warranty deed from Peone. Exs. 7-10. Evidence established that the Woodburys conveyed the Coyle property by statutory warranty deed to Fifield, and that Ms. Coyle acquired title through a statutory warranty deed

The 1974 conveyances by Reforestation of the Butler and Coyle properties to the Parkers and the Woodburys identified the boundary line between the properties as the

> center line of present lane road, the center line of which is described as follows: Commencing at a point on the North line of said Lot 4, which is S89º 29' E., 941.25 feet from the NorthWest corner of said Lot 4, thence South 26º 11' 54" West 410.93 feet; thence South 52º 28' 59" West, 340.6 feet to the center of LaPray-Bridge Road No. 590, and reserving to the vendor, its successors or assigns easement and rights of way over prior and existing roads and easement for utilities. Ex. 5; *see also* Ex. 11.

LaPray-Bridge Road is an earlier name for what is now more commonly called Corkscrew Canyon Road. At trial, the parties stipulated that the "present lane road" referenced in the legal description, a dirt road currently used as a driveway by the Butlers, has been in the same location since 1961.

In addition to the rights in the road created by the deeds' description of the center line as a boundary and the deeds' reservation of rights-of-way over prior and existing roads to Reforestation's successors, Reforestation executed and recorded an easement in 1973 that provided for

> ingress and egress, over and across all roads presently existing or heretofore reserved by the grantor herein in deeds executed and to be placed of record, or already of record within the above described property. Said easement to be for the benefit of and appurtenant to each and every part of the subject legal description. Ex. 4.

An inconsistency in identifying the properties benefitted and burdened by the easement appears on the face of the easement document. A map is attached, which the document expressly states is its more particular description of the affected properties. *Id.* The caption on the first page of the easement document states "BB Property" in its upper left-hand corner and the parcels depicted on the attached map-all of which are located within the *west* half of section 5-are designated by number, with the prefix "BB." *Id.* The Coyle property is identified on the map as BB-4 and the Butler property is identified on the map as BB-3. Nonetheless, the legal description set forth on the first page of the easement describes the affected properties as situated in "[t]he *East* Half . . . of Section 5," despite the fact that the map does not depict any properties located in the east half of section 5. *Id.* (emphasis added).

The record suggests that for some 35 years following the recording of this 1973 easement and the 1974 deeds neither the internally-inconsistent easement document nor the description of the boundary between the properties gave rise to any difficulties between the owners of the properties. The Butlers purchased their property on Corkscrew Canyon Road in July 2004.

In the spring of 2007, Ms. Coyle purchased her property and in October 2007 hired Todd J. Emerson, PLS,[2] to survey the boundary line between her property and the Butler property in anticipation of erecting a fence. In preparing his survey, Mr. Emerson discovered a discrepancy between the location of the existing center line of the lane road and the metes and bounds description of that center line set forth in the Butler and Coyle deeds, as depicted in the following map:

(IMAGE OMITTED)

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from Fifield. Exs. 12-14. The portions of the legal description and reservations that are relevant to this dispute were the same or substantively equivalent in each conveyance.

[2] Registration as a professional land surveyor (PLS) in Washington is addressed by chapter 18.43 RCW and Title 196 WAC.

Clerk’s Papers (CP) at 211 (digital alterations ours).

In his survey, which Mr. Emerson recorded in February 2008, he based the boundary line between the properties on the metes and bounds description of the road center line rather than its actual center line. Acting on the recorded survey, Ms. Coyle began fencing in what she contended was her land in April 2008. Her construction of the fence eventually cut off the Butlers’ access to their property by enclosing the lane road. The Butlers filed a complaint for declaratory relief, reformation, slander of title, and injunctive relief in July 2008 and obtained a preliminary injunction requiring Ms. Coyle to remove the fence pending the outcome of the lawsuit.

Both Mr. Emerson and Thomas Todd, PLS, the Butlers’ expert, testified at trial. The discrepancy between the metes and bounds description of the road center line and its actual center line was undisputed. Mr. Emerson testified that the discrepancy created an ambiguity that he disclosed to Ms. Coyle and the Butlers, hoping to get their agreement to a boundary line that could be formally established through a boundary line adjustment. He testified that he surveyed the center line of the road on the ground and suggested it as an agreed boundary, acknowledging that it might have been the intended boundary at the time of the original conveyance by Reforestation. When Ms. Coyle and the Butlers did not reach agreement on a boundary line, he recorded his survey. At trial, he could identify no reason why he relied on the metes and bounds description from the deeds rather than the actual center line in depicting the boundary line between the Coyle and Butler properties.

Mr. Todd testified that in his opinion, Mr. Emerson’s survey should have reflected the actual center line of the road as the boundary, because the road, being a monument, ordinarily takes precedence over an inconsistent metes and bounds description in a deed. Mr. Todd also offered an explanation for the discrepancy between the metes and bounds description and the actual center line: he concluded that the starting point for the course and distance measurements had been different. Both surveyors testified that Mr. Emerson relied for his survey on a northwest corner of section 5 that had been reestablished by surveyor Scott Valentine in 1982, after having earlier been lost. Both surveyors agreed that the metes and bounds description in the 1974 Reforestation deeds was almost certainly based on a survey, given its measurements to within a hundredth of a foot, although no record of the survey remained. Mr. Todd testified that it was improbable that Mr. Valentine had reestablished the northwest corner at precisely the same point as its earlier location.

In reviewing Mr. Emerson’s work, Mr. Todd noticed that the boundary line based on the metes and bounds description did not terminate at the center of Corkscrew Canyon Road, as it should have by its terms (the last call being “thence South 52º 28’ 59” West, 340.6 feet to the center of LaPray-Bridge Road No. 590”). Exs. 5, 11. Mr. Todd’s research revealed that the center of LaPray-Bridge Road, now Corkscrew Canyon Road, had not changed. By moving the terminus of Mr. Emerson’s boundary line so that it would fall in the center of Corkscrew Canyon Road and then adjusting the point of beginning to keep it on the true north line of section 5, Mr. Todd found that the entire boundary line shifted northwesterly approximately 32 feet, coming into alignment with the actual center line of the road. From this, Mr. Todd concluded that whoever prepared the metes and bounds description used in the 1974 deeds surveyed the same center line existing on the ground today, but relied on a northwest corner of section 5 that was about 32 feet to the [west] of the corner reestablished in 1982 by Mr. Valentine.

When asked about Reforestation’s easement prepared and recorded in 1973, Mr. Todd testified that it made no sense unless it was intended to refer to the properties that were depicted on its attached map, and which were located in the west half, not the east half, of section 5.

After hearing the evidence presented by the parties, the trial court entered findings, conclusions, and a judgment reforming the parties' deeds to establish that the boundary line between the Butler and Coyle properties was the actual center line of the lane road, reforming the easement for what it found to be a scrivener's error, and finding that Ms. Coyle had committed common law trespass. During trial, Ms. Coyle had testified that if the trial court established the center line of the road as a boundary, she would build a fence down the middle of the road, so the trial court also granted a permanent injunction preventing Ms. Coyle from interfering with the Butlers' use of the easement. Ms. Coyle retained new counsel and filed a motion for reconsideration, which was denied. She timely appealed.

Post judgment, the Butlers moved for a contempt order against Ms. Coyle, demonstrating that she was violating the court's injunction and preventing preparation of a new survey, which was one aspect of the relief ordered by the court. The trial court found Ms. Coyle in contempt and entered judgment against her for the terms and fees imposed. Ms. Coyle timely appealed that order and judgment, which we consolidated with her initial appeal.

ANALYSIS

I

The Butlers argue that many of Ms. Coyle's assignments of error improperly raise issues for the first time on appeal, are insufficiently supported by argument or reference to the record as required by the rules on appeal, or are otherwise improper. We agree and first address the assignments of error that we will not consider for reasons that are well-settled in the case law or under our rules.[3]

RAP 2.5(a) and the Collateral Bar Rule Preclude Review of Assignments of Error 1, 2, 3, 4, 7, 8, 9, 10, and 17

[LLHN1] Generally, appellate courts will not entertain issues raised for the first time on appeal. RAP 2.5(a); *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008). The reason for this rule is to afford the trial court the opportunity to correct errors, thereby avoiding unnecessary appeals and retrials. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). We likewise do not consider theories not presented below. *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991).

New theories presented for the first time to the trial court as part of a motion for reconsideration need not be considered, *Wilcox v. Lexington Eye Inst.*, 130 Wn.App. 234, 241, 122 P.3d 729 (2005), *review denied*, 157 Wn.2d 1022 (2006); *Int'l Raceway, Inc. v. JDFJ Corp.*, 97 Wn.App. 1, 7, 970 P.2d 343 (1999), and the same holds true for arguments raised for the first time in an appellant's reply brief, *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). A party generally cannot raise new grounds challenging the propriety of an underlying court order during a contempt proceeding under the collateral bar rule. *In re Det. of Broer*, 93 Wn.App. 852, 858, 957 P.2d 281, 973 P.2d 1074 (1998), *review denied*, 138 Wn.2d 1014 (1999).

Ms. Coyle's following assignments of error are not entitled to review based upon these principles:

Ms. Coyle's first assignment of error alleges that she was a bona fide purchaser. This case involves a boundary line described in Ms. Coyle's deed, an easement of which she had notice, and a road

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[3] Ms. Coyle represents herself in this appeal. As a *pro se* litigant, Ms. Coyle is held to the same standard as an attorney and must comply with all procedural rules on appeal. *Westberg v. All-Purpose Structures, Inc.*, 86 Wn.App. 405, 411, 936 P.2d 1175 (1997); *In re Marriage of Olson*, 69 Wn.App. 621, 626, 850 P.2d 527 (1993).

actively being used by the Butlers, making it unlikely that she could viably claim to be a bona fide purchaser without notice. In any event, the theory was not presented until Ms. Coyle's motion for reconsideration and we will not consider it.

Her second assignment of error alleges that portions of Mr. Todd's testimony lacked sufficient foundation. No such evidentiary challenge was made below and we need not consider it.

Her third assignment of error alleging that the Butlers' suit was brought in violation of the statute of limitations reveals a lack of understanding of when a cause of action accrues. As a threshold matter, however, it was not raised until her *pro se* response to contempt proceedings and is both untimely and a prohibited collateral attack on the underlying order.

Her fourth assignment of error alleging that the trial court failed to observe the requirements of chapter 58.04 RCW pertaining to lost or uncertain boundary lines has no application to this case,[4] and again, was not raised below.

Assignments of error 7, 9, and 10, pertaining to the validity of the 1973 easement, *and 8 and 17*, pertaining to an alleged failure on the part of the Butlers to amend their pleadings to request relief, fail for the same reasons.

Ms. Coyle for the first time on appeal also makes several groundless arguments under irrelevant state and federal constitutional and statutory provisions that appear throughout her briefing. These include assertions that the trial court's reformation of the deeds violated the statute of frauds, that the trial court unlawfully deprived her of several constitutional rights in violation of 18 U.S.C. §§ 241-42, and that this court should prosecute opposing counsel on perjury and forgery charges. Br. of Appellant at 35, 37-38, 50. These arguments are as untimely as they are meritless and will not be considered.

Insufficient Argument Precludes Review of Assignments of Error 5, 11, 12, 13, 14, a portion of 15, 16, 20, 21, and 22

[LLHN2] Our rules require Ms. Coyle to support each of her assignments of error with appropriate argument and citations to the record. Failure to do so for an assignment of error waives the assignment. RAP 10.3(a)(5)-(6); *Milligan v. Thompson*, 110 Wn.App. 628, 635, 42 P.3d 418 (2002); *Holland v. City of Tacoma*, 90 Wn.App. 533, 538, 954 P.2d 290 (noting that "[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration"), *review denied*, 136 Wn.2d 1015 (1998); *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (concluding that "[i]t is incumbent on counsel to present the court with argument as to why specific findings of the trial court are not supported by the evidence and to cite to the record to support that argument"); *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) ("'[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.'" (quoting *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970), *cert. denied*, 401 U.S. 917 (1971))).

Even construing Ms. Coyle's brief in the most charitable light, the following assignments of error are so lacking in reasoned argument and citation to the record that we would have to guess at reasoning that might support them, something we will not do:

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[4] Provisions of RCW 58.04.020 relative to establishing lost boundaries in property disputes are inapplicable to situations where parties contend that different, existing boundaries are the true division line. *Stewart v. Hoffman*, 64 Wn.2d 37, 390 P.2d 553 (1964).

Assignment of error 5 alleges that the trial court erred in finding that Mr. Valentine's re-establishment of the northwest section corner was 32 feet off, but Ms. Coyle's argument is not supported by adequate argument. The substance of her argument primarily reiterates assignment of error 2.

Assignments 11 and 12, which challenge the admission of an aerial photograph of the properties with an allegedly forged date, are not supported by any argument that can be considered.

Assignment 13 contests the trial court's finding that a handwritten date appearing on a photograph existed on the photograph when obtained by opposing counsel and was not forged by him or at his direction. Rather than argue from the evidence, Ms. Coyle claims that this finding interfered with investigation by the Washington State Bar Association of a complaint she filed based on the photo. The state bar association has no primary jurisdiction to determine the issue, which was properly resolved by the court; moreover, the bar association had deferred the processing of Ms. Coyle's complaint pending resolution of the action below.

Assignment 14, which complains of a lengthy delay in the entry of findings below, is not supported by any citation to the record evidencing a delay.

Assignment 15 is likewise unreviewable insofar as it pertains to her contention that the trial court erred by finding that the 1973 easement burdens her property.

Assignment 16 alleges that the trial court erred by finding common law trespass, based on the trial court's reference at trial to the trespass supporting nominal recovery, but it is completely devoid of meaningful argument.

Assignment 20 simply asserts that the trial court erred by not reconsidering its decision in this matter. The argument supporting this assignment of error is cumulative and need not be separately addressed.

Assignment 21 raises a First Amendment challenge and service of process issues without any accompanying argument.

Assignment 22 is supported by no relevant authority in claiming that the trial court's order for issuance of a writ of restitution was improperly granted.

Based upon a careful review of Ms. Coyle's briefing, only four of her assignments of error sufficiently raise issues warranting review. Restated for purposes of clarity, they are:

1. Assignment of error 15: Whether substantial evidence supports certain portions of the trial court's findings.

2. Assignment of error 19: Whether the center line of the present lane road can constitute a monument for surveying purposes because it allegedly cannot be mathematically ascertained from the recorded deeds.

3. Assignment of error 6: If the center line of the present lane road constitutes a monument, whether the trial court erred by giving priority to the monument call in the deeds over the metes and bounds call.

4. Assignment of error 18: Whether Ms. Coyle is entitled to any relief as a result of an allegedly deficient first page of the judgment summary as specified by RCW 4.64.030.

II

We understand Ms. Coyle's assignment of error 15 to contend that substantial evidence does not support certain of the trial court's findings. She adequately presents only two challenges: she contends, first, that when reciting the contents of the deeds at issue, the trial court's finding of fact 1.1 includes language not included in those documents and, second, that there was no evidence the 1973 easement contained a scrivener's error as determined by the court's finding of fact 3.3.

[LLHN3] We review whether substantial evidence supports the trial court's factual findings and then review, *de novo*, whether the trial court's conclusions of law flow from the supported findings. *Ruse v. Dep't of Labor & Indus*., 138 Wn.2d 1, 5, 977 P.2d 570 (1999). Substantial evidence will support a finding when the evidence in the record is sufficient to persuade a rational, fair-minded person that the finding is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). "A challenge to the sufficiency of the evidence admits the truth of [the opposing party's] evidence and any inference drawn therefrom and requires that the evidence be viewed in a light most favorable to [the opposing party]." *Bott v. Rockwell Int'l*, 80 Wn.App. 326, 332, 908 P.2d 909 (1996). Credibility determinations are solely for the trier of fact and cannot be reviewed on appeal. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003).

Ms. Coyle complains that the trial court erred when reciting the contents of the Butler deed in its finding 1.1, by adding specific language referring to an easement for ingress and egress that is not included in that document. Br. of Appellant at 43. Although the formatting of the finding could suggest that all of the language set off by indentation came from a single document, the text of the finding explicitly cites to exhibits other than the deed. When read, the substance of the finding is supported by the evidence and is not misleading.

Next, Ms. Coyle contests the trial court's finding that the 1973 easement contained a scrivener's error mistakenly describing the subject properties as being located in the eastern half of section 5, rather than the western half. Read in its entirety, the easement document itself, considered in the light of the surrounding circumstances and the situation of the parties, was sufficient support for the finding. The trial court was justified in inferring from those matters that the easement's single inconsistency was a drafting error. *See Maxwell v. Maxwell*, 12 Wn.2d 589, 599, 123 P.2d 335 (1942) (notwithstanding drafting error, "the correct real property description expressive of the intention of the parties can readily be determined").

In addition, the court was presented with the following testimony of Mr. Todd:

Q. And do you see any conflicts between the legal description and the map?

A. The legal description says the east half of Section 5 and we're working in the west half. ... .

Q. The-When it says "east half of Section 5 except for the east half of the northeast quarter of the northwest quarter, "does that make any sense?

A. No.

Q. Okay. How would it have to read for it to make sense?

A. I think-It would have to be the west half of Section 5.

Q. Now if we make that the west half of Section 5 does the map that's attached make sense?

A. Yes, it does.

Q. And so, if we make that the west half then the exception that is written-written into there, would that be that rectangular portion about where it says "County Road" on the map?

A. Yes.

Q. Okay. So if this document were revised to say "West half of Section 5" instead of "East half of Section 5" then the map attached makes sense?

A. Yes, sir.

Report of Proceedings at 79-80.

The two findings of the trial court that are adequately challenged by Ms. Coyle are supported by substantial evidence.

III

The crux of Ms. Coyle's appeal appears to be the issues we glean from her assignments of error 19 and 6, which we address next: whether the present lane road was properly recognized as a monument by the trial court for purposes of the boundary line dispute and, if so, whether the actual center line of that road was entitled to more weight in determining the boundary than the conflicting metes and bounds description contained in the recorded deeds.

[LLHN4] For surveying purposes, a monument is a permanent natural or artificial object on the ground that helps establish the location of the boundary line called for. *DD&L, Inc. v. Burgess*, 51 Wn.App. 329, 331 n.3, 753 P.2d 561 (1988). Natural monuments include such objects as mountains, streams, or trees, while artificial monuments consist of marked lines, stakes, roads, fences, or other objects placed on the ground. *Id*. If the monument has width, the general rule is that the boundary is the center line of the monument. *Id*.

Relying on *Kesinger v. Logan*, 113 Wn.2d 320, 779 P.2d 263 (1989), Ms. Coyle argues that the center line of the present lane road cannot constitute a monument because "[a] location referenced in a deed is not a monument unless it is capable of being mathematically ascertained from the deeds on record." Br. of Appellant at 11. But all that is required by Washington cases in this respect is that the monument be "'a point capable of being mathematically ascertained.'" *Kesinger*, 113 Wn.2d at 329 (quoting *Matthews v. Parker*, 163 Wash. 10, 15, 299 P. 354 (1931)). Ms. Coyle introduces the concept that it must be mathematically ascertainable "from the deeds on record." Her suggested gloss makes no sense; a requirement that the surveyed position of a monument must be determinable from deeds on record would defeat the purpose of calling to a monument in the first place. Ms. Coyle's position is contrary to explicit Washington case law; in *Matthews*, the court recognized that monuments need only be capable of "be[ing] mathematically established upon the ground." 163 Wash. at 15.

The decision in *Kesinger* does not support Ms. Coyle's position. In that case, the court treated a metes and bounds description as controlling even though it referred to and purported to account for a canal company's historic right-of-way; the canal company argued that its alleged 50-foot right-of-way was a monument and, since the right-of-way was mentioned in Ms. Kesinger's deed, it took precedence over the metes and bounds description allowing for only a 20-foot right-of-way. But unlike the road in this case, the canal company's right-of-way could not be seen and surveyed on the ground; it existed, if at all, only in legal acts of conveyance or reservation-and there was no conveyance establishing a 50-foot width for the right-of-way. The canal's claimed right-of-way could not be mathematically ascertained because of the lack of a conveyance establishing essential information: its width. 113 Wn.2d at 329. In this case, Mr. Todd testified that the center line of the present lane road could be mathematically ascertained and Mr. Emerson proved that it could, by surveying the center line without difficulty. The trial court had an ample basis for finding that the center line of the present lane road is a valid monument for purposes of describing a boundary.[5]

Ms. Coyle also argues that even if the present lane road is a valid monument, the trial court erred by giving it priority over the metes and bounds description of the boundary line in the deeds. **[LLHN5]** In cases of conflicting calls in a deed, "the priority of calls is: (1) lines actually run in the field, (2) natural monuments, (3) artificial monuments, (4) courses, (5) distances, (6) quantity or area." *DD&L*, 51 Wn.App. at 335-36; *see also Bullock v. Yakima Valley Transp. Co*., 108 Wash. 413, 417, 184 P. 641, *adhered to on reh'g*, 187 P. 410 (1919) (holding that "[i]t is a well established rule of law that description by monuments will control over description by metes and bounds").

In *Ray v. King County*, 120 Wn.App. 564, 592, 86 P.3d 183, *review denied*, 152 Wn.2d 1027 (2004), the court addressed similar conflicting elements in a deed and applied the general rule as to their precedence. The deed at issue in *Ray* described the location of a railroad right-of-way as follows:

> "Such right of way strip to be fifty (50) feet in width *on each side of the center line of the railway track* . . . which location is described as follows to-wit.
>
> Commencing at a point 410 feet West from North East corner of Section six (6) township 24 N R 6 East and running thence on a one (1) degree curve to the left for 753 3/10 feet thence South 16 degrees and 34 minutes West 774 2/10 feet thence with a 3 degree curve to the right for 700 feet . . . thence S 36° 15' W 150 feet to South boundary of lot 3 of said Sec 6 which point is 1320 feet North and 2170 feet west from SE corner of said Sec 6." 120 Wn.App. at 572 (emphasis added).

The course and distance description of the center line of the railway track did not match the actual location of the center line on the land. *Id*. at 592. The court held that "because the monument"-the railroad tracks-"controls over the distance calls, we hold that the strip of land conveyed in this deed is centered on the railroad tracks, as constructed." *Id*. The trial court in this case was presented with similar evidence, reasonably leading to its conclusion that the boundary line must be controlled by the location of the road on the ground.

Ms. Coyle ignores these cases dealing with the relative weight given conflicting calls in favor of a different rule of construction: she relies on a more general rule that **[LLHN6]** """[w]here a particular and general description in a deed conflict, and are repugnant to each other, the particular will prevail unless the intent of the parties is otherwise manifested on the face of the instrument."'" Br. of Appellant at 25 (quoting *Stockwell v. Gibbons*, 58 Wn.2d 391, 397, 363 P.2d 111 (1961) (quoting Annotation, *Rule That Particular Description in Deed Prevails Over General Description*, 72 A.L.R. 410, § II(a) (1931))). Ms. Coyle submits that the metes and bounds description of the center line is a particular description, which prevails over the deed's direct reference to the center line, which she characterizes as a general description.

Two responses are in order. First, Washington precedents establishing the principle of construction that applies to the specific conflict in this case-monument calls versus metes and bounds calls-control over Washington precedents establishing more general rules of construction. Second, **[LLHN7]** the "particular versus general description" principle relied upon by Ms. Coyle applies only when the two

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[5] Ms. Coyle's argument that the road cannot be considered a monument because it has shifted over time and is therefore not permanent is precluded since the parties stipulated that the road had not shifted since 1961. Further, this argument was not raised until her reply brief and is therefore untimely. Reply Br. of Appellant at 14. Finally, the Butlers offered photographs and testimony sufficient to support a finding that the road had not moved.

conflicting descriptions are independent efforts directed at describing a third thing-the boundary. It does not apply where, as here, the purpose of the "particular" metes and bounds description is to more precisely identify the location of the "general" description: the monument. Notably, the A.L.R. annotation on which Ms. Coyle indirectly relies states that "[w]here a general description is followed by a particular one, the particular description will not restrict the general if it is used in the sense of reiteration." 72 A.L.R. at 423, § III(b). Here, the metes and bounds description was clearly used in the sense of reiteration; the deeds rely for a boundary on "the center line of present lane road," and continue, "the center line of which is described as . . . ." This merely reiterative role of the metes and bounds description manifests the drafter's intent that the actual center line of the road controls and supports the trial court's conclusion that the actual center line demarks the boundary. CP at 322 (Conclusion of Law 2.15).

IV

Ms. Coyle's assignment of error 18 challenges the form of the judgment, arguing that RCW 4.64.030(2)(b) requires that the judgment summary include some description of the property at issue and a reference to its full legal description on the first page.[6] A judgment reforming a deed and easement arguably does not "provide[] for the award of any right, title, or interest in real property" triggering application of the statutory requirement, although the notice-providing purpose of the requirement would be served by applying it in reformation cases. We need not decide whether the requirement applies, however, because even if it does, the judgment includes a legal description of the land at issue on its second, third, and fourth pages. Substantial compliance with the statute is all that is required and is all that is reasonably possible where the relief granted by the court makes it difficult or impossible to include the entire judgment summary on the first page. *Hu Hyun Kim v. Lee*, 102 Wn.App. 586, 592, 9 P.3d 245 (2000), *rev'd on other grounds*, 145 Wn.2d 79, 31 P.3d 665, 43 P.3d 1222 (2001). Ms. Coyle has not shown that any substantive requirement of the statute has been violated or identified any remedy that is necessary or appropriate.

V

The Butlers request attorney fees and costs on appeal pursuant to RCW 4.84.185, which permits a trial court to make such an award where a civil action is found to be frivolous. RAP 18.9(a) provides that we may impose terms or sanctions against a party, including sua sponte, where that party "uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules." In determining whether to impose terms or sanctions under RAP 18.9, we must bear in mind (1) that a civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; and (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal. *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 241, 119 P.3d 325 (2005) (quoting *Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 442-43, 730 P.2d 653 (1986)).

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[6] RCW 4.64.030(2)(b) provides that "[i]f the judgment provides for the award of any right, title, or interest in real property, the first page must also include an abbreviated legal description of the property in which the right, title, or interest was awarded by the judgment, including lot, block, plat, or section, township, and range, and reference to the judgment page number where the full legal description is included, if applicable; or the assessor's property tax parcel or account number, consistent with RCW 65.04.045(1) (f) and (g)."

The vast majority of the assignments of error made by Ms. Coyle to the conduct and outcome of trial can be characterized as frivolous; resolving all doubts in her favor, however, we cannot say that the patent and latent ambiguities in the deeds and easement gave rise to no debatable issues. Her appeal of the trial court's contempt order can be characterized as frivolous in its entirety. The appeal of a contempt order does not open the door to renewed or new collateral attacks on the underlying judgment, which were the only arguments made by Ms. Coyle; all such arguments were totally devoid of merit.

Given the rules' appropriate regard for a party's right of appeal, we are constrained to limit fee awards to cases where an appeal is frivolous in its entirety. Having consolidated the cases for appeal on our own motion, they were briefed on a consolidated basis and must be considered as one. We therefore deny the Butlers' request for fees and costs on appeal. We do so with a cautionary note to Ms. Coyle that she should take care not to reargue matters whose resolution is final and not to raise new issues that were required to be raised if at all in the first trial; if she does so, she faces a real risk of being assessed fees and costs as sanctions.

VI

The parties were notified approximately two months in advance that Ms. Coyle's appeal was set for oral argument at 9:00 a.m. on October 27, 2011. Less than an hour before the scheduled argument, Ms. Coyle telephoned the office of the clerk to report that she would not appear due to an unexplained family emergency. The Butlers' lawyer, Chris Montgomery, did appear, having prepared for oral argument and driven to Spokane from Colville for the purpose of the hearing.

At the beginning of the docket, the chief judge advised Mr. Montgomery that the court was prepared to decide the appeal without oral argument and asked if the Butlers would waive argument; on behalf of his clients, Mr. Montgomery respectfully declined. The judge then notified him that notwithstanding his declination, the panel was of the unanimous view that it could, and it therefore would, decide the appeal on the briefs.

The Butlers have now moved for terms and elaborated on Mr. Montgomery's reasons, stated briefly on October 27, for believing that Ms. Coyle's nonappearance should not be excused by the court. In response, Ms. Coyle declines to explain her absence, which she characterizes as a private matter.

The Butlers should not be required to bear the expense of their lawyer's preparation and travel to Spokane for the hearing, which was rendered pointless through no fault of their own. They are awarded the $991.16 in terms requested by their motion.

We affirm the trial court's "Reformation of Easement, Reformation of Deeds, Permanent Injunction and Judgment" entered April 20, 2010, and its "Order Finding Defendant in Contempt; and for Entry of Judgment" and its "Judgment" entered November 5, 2010 in the contempt proceeding.

A majority of the panel has determined that 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.

WE CONCUR: Kulik, C.J. Korsmo, J.

MOHONK PRESERVE, INC., Respondent,

v.

CHRISTOPHER E. ULLRICH et al., Appellants

2014-05234, 517707

Supreme Court of New York, Third Department

990 N.Y.S.2d 660; 119 A.D.3d 1130

July 10, 2014

LUCAS LETTER HEAD NOTES [LLHN]: [1]

[1] All head notes in this opinion provided by the Editor of TLL for the convenience of our readers. JNL.

Civil Procedure; Appeals; Credibility Determinations:
Civil Procedure; Appeals; Standards of Review; Credible Evidence:
[LLHN1] Upon review of a verdict following a nonjury trial, this Court, while granting deference to Supreme Court's credibility assessments, has the authority to independently review the evidence and grant the judgment that such evidence warrants.

Real Property Law; Rights & Remedies; Quiet Title Actions:
Evidence; Burden of Proof; Preponderance of Evidence:
[LLHN2] In an action to quiet title, the plaintiff bears the burden of proving his or her claim by a preponderance of the evidence.

Real Property Law; Deeds; Deed Interpretation; Intent:
Real Property Law; Deeds; Deed Interpretation; Extrinsic Evidence:
Real Property Law; Deeds; Deed Interpretation; Ambiguities:
Real Property Law; Deeds; Deed Interpretation; Rules of Construction:
Real Property Law; Deeds; Legal Descriptions; Priority of Calls:
[LLHN3] In the context of a boundary dispute, deeds must be construed in accordance with the parties' intent and extrinsic evidence is admissible to clarify any ambiguities. Further, references to natural landmarks and artificial monuments take precedence over mere metes and bounds descriptions.

Civil Procedure; Trials; Trier of Facts; Credibility of Witnesses:
Evidence; Testimony; Credibility of Witnesses; Experts:
[LLHN4] It is appropriate to consider the failure of defense witnesses to adequately explain widespread errors between witnesses' survey results and the evidence in the chain of title.

Graff Law, LLC, Kingston (Sharon A. Graff of counsel), for appellants.

Kellar Kellar & Jaiven, Kingston (Paul T. Kellar of counsel), for respondent.

Before: Lahtinen, J.P., McCarthy, Rose, Lynch and Devine, JJ. Lahtinen, J.P., Rose, Lynch and Devine, JJ., concur.

OPINION [N.Y.S.2d 661]

McCarthy, J.

MEMORANDUM AND ORDER

Appeals (1) from an order of the Supreme Court (Cahill, J.), entered April 18, 2013 in Ulster County, upon a decision of the court in favor of plaintiff, and (2) from the judgment entered thereon.

Plaintiff is a not-for-profit organization, founded in 1963 as the Mohonk Trust, that exists primarily to protect and manage land in the Shawangunk Mountains that it holds in trust for the public. In 1981, defendant Thomas E. Marks and his former wife purchased a parcel adjoining plaintiff's property. In 2005, Marks and his current wife, defendant Helen G. Ullrich, who was by then a co-owner of the parcel, sold that same parcel to defendants Christopher E. Ullrich and Sarah C. Emond (hereinafter collectively referred to as the current owners). That same year, a dispute arose when plaintiff's employees observed that signs had been removed and trees had been cut near the current owners' southern and plaintiff's northern boundary. In 2009, plaintiff commenced this action, pursuant to RPAPL article 15, to, among other things, establish the boundary line in accordance with a survey it had commissioned and to obtain a preliminary injunction prohibiting defendants from trespassing or despoiling its land. Defendants answered and thereafter presented their own survey. Although the survey was in substantial agreement with plaintiff's survey regarding the originally disputed boundary line, it also depicted that the current owners owned a substantial portion of property that is northwest of their property as depicted in plaintiff's survey. According to plaintiff's survey, that disputed area was on a parcel of land that plaintiff purchased in 2010. Soon after that purchase, an additional conflict arose surrounding allegations that the current owners had also removed timber from this disputed portion of land. Thereafter, plaintiff filed an amended **[A.D.3d 1131]** complaint seeking to additionally establish the boundary lines for its newly-acquired parcel in accordance with its surveys and to obtain a preliminary injunction to prevent defendants from entering that parcel. Defendants counterclaimed, seeking, among other things, to establish the disputed boundary lines in accordance with their survey. After a nonjury trial, Supreme Court entered an order and judgment finding that, among other things, plaintiff's survey was controlling as to the disputed boundary lines and awarding plaintiff damages for 49 trees cut from its property.[1]

Defendants now appeal.

Supreme Court did not err in crediting plaintiff's survey as establishing the relevant boundary lines. **[LLHN1]** Upon review of a verdict following a nonjury trial, this Court, while granting deference to Supreme Court's credibility assessments, has the authority to independently review the evidence and grant the judgment that such evidence warrants (*see Henshaw v Younes*, 101 A.D.3d 1557, 1560, 957 N.Y.S.2d 501 [2012]; *Krol v Eckman*, 305 A.D.2d 709, 710, 759 N.Y.S.2d 793 [2003]). **[LLHN2]** In an action to quiet title, the plaintiff bears the burden of proving his or her claim by a preponderance of the evidence (*see Glenn Acres Tree Farm, Inc. v Town of Hartwick Historical Socy., Inc*., 84 A.D.3d 1529, 1529-1530, 922 N.Y.S.2d 651 [2011]). **[LLHN3]** In the context of a boundary dispute, deeds must be construed in accordance **[N.Y.S.2d 662]** with the parties' intent and extrinsic evidence is admissible to clarify any ambiguities (*see Henshaw v Younes*, 101 A.D.3d at 1559; *Schweitzer v Heppner*, 212 A.D.2d 835, 838, 622 N.Y.S.2d 142 [1995]). Further, references to "'natural landmarks and artificial monuments take precedence over mere metes and bounds descriptions'" (*Brown v Ames*, 290 A.D.2d 693, 694, 735 N.Y.S.2d 664 [2002], quoting *Zelnik Realty v York*, 170 A.D.2d 926, 928, 566 N.Y.S.2d 752 [1991]).

Initially, we agree with both parties' concessions at trial that, despite consideration of over 150 deeds, some stretching back into the 1700s, independent documentary evidence does not conclusively establish the disputed boundary lines. Accordingly, the record before us illustrates that each parties' expert witnesses necessarily relied on incomplete, ambiguous and sometimes even self-contradictory descriptions of relevant parcels when they drafted surveys showing the alleged placement of the disputed boundary lines. Considering this imperfect documentary evidence, the resolution of the dispute, in large part, turned on the credibility of each parties' expert witnesses' testimony in regard to the proposed surveys (*see e.g. Levy v Braley*, 176 A.D.2d 1030, 1032, 574

[1] Although the order specifies that Supreme Court awarded damages for 31 trees, the monetary award, as confirmed in the judgment, indicates that the court actually provided damages for 49 trees.

N.Y.S.2d 873 [1991]). **[A.D.3d 1132]**

Supreme Court made numerous findings that testimony regarding the production of plaintiff's survey was more credible than the testimony regarding the production of defendants' survey. Plaintiff's surveyor, Richard Brooks, testified that the survey he produced was certified as being in accordance with the standards of the New York State Licensed Professional Land Surveyors, and he noted that the most recent draft of the survey contained notations describing the changes made in each of the six revisions that he had made to incorporate newly-acquired information since his original draft in 2006. In contrast, the surveyor who produced defendants' survey, Rodney Knowlton, did not testify that his survey was certified to any professional standards. Even more strikingly, Knowlton acknowledged that he had created earlier survey drafts, but that he had discarded each upon Christopher Ullrich's disapproval of the results of those surveys. Notably, defendants did not provide any additional evidence that could be reasonably interpreted as clarifying what revisions were made to defendants' survey or whether they would generally be accepted as permissible within the professional surveying community.

Further, although Knowlton acknowledged that a survey should depict improvements made to land, he also admitted that his survey did not contain improvements on portions of the contested land, such as a driveway, a septic tank, a wellhead and power utility poles, all of which were noted on plaintiff's survey.[2] In addition, defendants' survey failed to depict conflicting boundaries as depicted in senior surveys, failed to depict numerous pieces of hardware and markings left by previous surveyors and failed to clearly label parcels by their current owners, all of which, according to various testimony by expert witnesses for plaintiff, departed from generally accepted professional practices.

In addition, Knowlton's credibility was drawn further into question based on the introduction of certain highly reliable documentary evidence that contradicted certain of his conclusions. Multiple witnesses, including Knowlton on cross-examination, **[N.Y.S.2d 663]** agreed that defendants' survey had omitted a certain lot by doubling the width of a different lot, a decision that directly contradicted uncontroverted evidence from a field book and map dating back to 1793. In addition, despite the fact that at least 12 deeds in the chain of title for one nearby parcel **[A.D.3d 1133]** called for a boundary line as a ledge of rocks, Knowlton instead used a stone wall that was never mentioned in any deed for the parcel as marking that boundary line. Not only did Knowlton ignore the repeatedly noted landmark for this boundary line, but he did so despite the fact that use of the ledge boundary line was relatively consistent with the purported acreage of the parcel contained in various deeds, whereas use of the stone wall decreased the acreage of the parcel by over a quarter from such purported acreage.

Moreover, defendants failed to provide an adequate account of how evidence relating to the current owners' chain of title fit into Knowlton's depiction of their property. Although acreage is not necessarily a compelling factor on its own, none of defendants' expert witnesses provided a reasonable explanation for the significant discrepancy between the acreage provided for in the current owners' deed and the acreage that defendants' survey attributed to the current owners, which was over four times greater than that described in the deed. Given the additional evidence that defendants' survey depicted multiple parcels as also significantly departing from the acreage described in respective deeds, **[LLHN4]** it is appropriate to consider the failure of defense witnesses to adequately explain how such widespread errors would have remained uncorrected in later deeds and surveys (*see Levy v Braley*, 176 A.D.2d at 1033).

Finally, Supreme Court properly rejected defendants' central contention that a defect in

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[2] Although not germane to the instant discussion, the visibility of improvements was relevant to the issue at trial of whether plaintiff, in any event, had established ownership of disputed portions of land by adverse possession.

plaintiff's survey caused it to place various parcels approximately 660 feet too far to the south. As to this point, both parties opined as to the location of the Benjamin Freer lot, a parcel of land eventually acquired by plaintiff and which bordered the current owners' parcel to the north. An 1837 deed describing the lot provides for an eastern boundary along a road that, as it travels north, bends eastward. While plaintiff's survey places the Freer parcel's eastern boundary along a point in the road that contains a bend substantially similar to the 1837 description, defendants' survey placed the Freer lot further north along the same road at a point that, as Knowlton conceded, does not match the described curvature. In light of this evidence, and providing deference to Supreme Court's assessments of the various experts' credibility, the court's finding that plaintiff's survey established the disputed boundary lines was warranted (*see Leitch v Jackson*, 243 A.D.2d 873, 874, 662 N.Y.S.2d 940 [1997]; *Schweitzer v Heppner*, 212 A.D.2d at 839; *Stratton v Keefe*, 191 A.D.2d 871, 873, 594 N.Y.S.2d 842 [1993]; *Fletcher v Flacke*, 97 A.D.2d 623, 623-624, 468 N.Y.S.2d 938 [1983]).

However, Supreme Court erred in awarding damages to **[A.D.3d 1134]** plaintiffs for trees cut by Christopher Ullrich in 2005. Under RPAPL 861, an owner may recover treble the stumpage value of a tree, $250 per tree or both when, without the owner's consent, any person cuts or removes a tree from the owner's land. CPLR 214 (4) provides that an action to recover damages for injury to property is subject to a three-year statute of limitations (*see Mandel v Estate of Frank L. Tiffany*, 263 A.D.2d 827, 829, 693 N.Y.S.2d 759 [1999]).[3] Here, evidence **[N.Y.S.2d 664]** was presented that Christopher Ullrich admitted to cutting 31 trees in 2005, all later determined to be within plaintiff's parcel. As this case was commenced in 2009, the cause of action with respect to the 31 trees was time-barred. On the other hand, the cause of action seeking damages for the trees that were cut in 2010 is not time-barred. Considering the testimony from an employee of plaintiff that he determined that the 18 trees were cut after plaintiff acquired ownership of the parcel in 2010 and that Christopher Ullrich had admitted to cutting those trees, we see no reason to disturb that portion of Supreme Court's determination.

Defendants' remaining contentions are rendered academic by this decision.

Lahtinen, J.P., Rose, Lynch and Devine, JJ., concur.

ORDERED that the order and judgment are modified, on the law, without costs, by reducing the damages that defendants owe to plaintiff for cut trees to $4,500, and, as so modified, affirmed.

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[3] To the extent that *Ton-Da-Lay, Ltd. v. Friedman* (75 A.D.2d 976, 977, 428 N.Y.S.2d 372 [1980]) asserts that RPAPL 861 claims are subject to a six-year statute of limitations, it should not be followed.

CLIFFORD G. LARSEN and PATRICIA P. LARSEN, Plaintiffs, Counterdefendants, Appellees, and Cross-Appellants,

v.

KENNETH RICHARDSON, JR., LORNA RICHARDSON, DENNIS RUANA, JOYCE RUANA and all other persons, unknown, claiming or who might claim any right, title, estate or interest in or lien or encumbrance upon the real property described in the complaint adverse to the Plaintiffs' ownership or any cloud upon Plaintiffs' title thereto, whether such claim or possible claim be present or contingent, Defendants, Counterclaimants, Appellants, and Cross-Appellees.

No. DA 10-0210

Supreme Court of Montana

2011 MT 195

August 16, 2011

LUCAS LETTER HEAD NOTES [LLHN]:

Civil Procedure; Appeals; Standards of Review; Clearly Erroneous Review:
Civil Procedure; Appeals; Standards of Review; Substantial Evidence:
Civil Procedure; Trials; Province of Court & Jury:
Evidence; Testimony; Credibility:
Civil Procedure; Appeals; Standards of Review; De Novo Review:
[LLHN1] We review the factual findings of a trial court sitting without a jury to determine whether the findings are clearly erroneous. A finding is clearly erroneous if it is not supported by substantial evidence, if the trial court has misapprehended the effect of the evidence, or if a review of the record leaves this Court with a definite and firm conviction that a mistake has been made. In determining whether substantial evidence supports the trial court's findings, we view the evidence in the light most favorable to the prevailing party. Furthermore, due regard must be given to the opportunity of the trial court to judge the credibility of the witnesses. It is the province of the trial court to weigh the evidence and resolve any conflicts between the parties' positions, and this Court will not second-guess the trial court's determinations regarding the strength and weight of conflicting testimony. Lastly, we review a trial court's conclusions of law de novo, to determine whether the court's interpretation of the law is correct.

Real Property Law; Quiet Title Actions:
Real Property Law; Title Quality:
[LLHN2] In an action to quiet title or remove a cloud thereon the general rule is that plaintiff must succeed on the strength of his own title and not on the weakness of his adversary's, except where the parties claim title from a common source. Want of title in plaintiff renders it unnecessary to examine that of defendant.

Real Property Law; Boundaries; Evidence of Boundaries; Any & All Evidence:
[LLHN3] In ascertaining the true and correct boundaries of a parcel, the surveyor is obligated to consider any and all evidence. This rule is inflexible.

Real Property Law; Boundaries; Rules for Locating Boundaries:
Real Property Law; Boundaries; Evidence of Boundaries; Actually Run on the Ground:
Real Property Law; Boundaries; Evidence of Boundaries; Following in the Footsteps
[LLHN4] The object of all rules for the establishment of boundaries is to ascertain the actual

location of the boundary as made at the time. As to boundary disputes, the primary purpose is to track the footsteps of the original surveyor, to locate the survey as it was intended to be located on the ground by him. Although, in the present case, the deeds to the Section 13 properties were prepared without the benefit of a proper field survey, we conclude that the foregoing principles nevertheless apply in determining the locations of the boundaries described in those deeds. In other words, the duty is to track the courses laid out by the deed writers in the boundary descriptions.

Real Property Law; Deeds; Deed Interpretation; Rules of Construction:
Real Property Law; Deeds; Deed Interpretation; Contemporaneous Circumstances:
Real Property Law; Deeds; Deed Interpretation; Parol Evidence:
[LLHN5] For the proper construction of a deed, the circumstances under which it was made or to which it relates, including the situation of the subject of the deed and of the parties to it, may be shown so that the judge is placed in the position of those whose language the judge is to interpret. When a property description alludes to facts beyond the deed, parol evidence may be offered, not to contradict the description, but to locate the deed upon the land.

Real Property Law; Boundaries; Evidence of Boundaries:
Real Property Law; Boundaries; Evidence of Boundaries; Following in the Footsteps:
Real Property Law; Boundaries; Evidence of Boundaries; Best Available Evidence:
[LLHN6] When a surveyor is unable to follow the precise "footsteps" of his or her predecessor, then a surveyor must attempt to track the original surveyor's work using whatever recoverable evidence that exists.

Real Property Law; Boundaries; Evidence of Boundaries:
Real Property Law; Boundaries; Evidence of Boundaries; Monuments:
[LLHN7] Discovery of the original monument itself is not a necessity, since many types of evidence can be resorted to that will suffice as proof of the original location.

Real Property Law; Deeds; Deed Interpretation; Rules of Construction:
Real Property Law; Deeds; Legal Descriptions:
Real Property Law; Deeds; Legal Descriptions; Priority of Calls:
[LLHN8] The priority of calls in the description of property was developed through case law in the 1800's and is also governed by statutory law. The general hierarchy is as follows: lines actually run on the ground by the creating surveyor prevail over natural monuments (e.g., a tree), which prevail over artificial monuments (e.g., surveyor's stakes), which prevail over references to adjoining boundaries (e.g., "to Hunter's property line"), which prevail over directions (e.g., northwest), which prevail over distances (e.g., 30 feet), which prevail over area (e.g., 5 acres), which prevails over place names. These rules grew out of the peculiar exigencies of the country, and were molded by experience, to meet the demands of justice. The rules are founded on reason, experience and observation and pertain, not to the admissibility, but to the weight of evidence.

Real Property Law; Deeds; Deed Interpretation; Rules of Construction:
Real Property Law; Deeds; Legal Descriptions:
Real Property Law; Deeds; Legal Descriptions; Priority of Calls:
Real Property Law; Boundaries; Evidence of Boundaries; Monuments:
[LLHN9] Any natural object, when called for distinctly, and satisfactorily proved—and the more prominent and permanent the object, the more controlling as a locator—becomes a landmark not to be rejected, because the certainty which it affords, excludes the probability of mistake, whereas course and distance, depending, for their correctness, on a great variety of circumstances, are constantly liable to be incorrect.

Real Property Law; Deeds; Deed Interpretation; Rules of Construction:
Real Property Law; Deeds; Legal Descriptions:
Real Property Law; Deeds; Legal Descriptions; Priority of Calls:
Real Property Law; Boundaries; Evidence of Boundaries; Monuments:
[LLHN10] The priority of calls is not absolute, however, and a lower-ranked call may prevail over a higher-ranked call if the circumstances show that the lower-ranked call is the more reliable evidence of the boundary's true location. Monuments, as a general rule, prevail over courses and distances unless the result would be absurd and one clearly not intended, or all the facts and circumstances show that the call for course and distance is more reliable than the call for monuments. Still, the lowest grade, to wit, course or distance, is made to prevail over the highest grade, to wit, rivers, creeks, etc., when, upon applying the calls of the grant to the land, the surrounding and connected circumstances adduced in proof to explain the discrepancy, show that course or distance is the most certain and reliable evidence of the true locality of the grant. Although area is the lowest ranking element, if the instrument conveyed an exact area of one acre, then area would be the controlling element, and lines and monuments would probably yield.

Real Property Law; Deeds; Deed Interpretation; Rules of Construction:
Real Property Law; Deeds; Legal Descriptions; Priority of Calls:
Real Property Law; Deeds; Deed Interpretation; Intent:
[LLHN11] The general rule is that in determining boundaries resort is to be had, first, to natural objects or landmarks, because of their very permanent character, next, to artificial monuments or marks, then to boundary lines of adjacent owners, and then to courses and distances. But this general rule, as to the relative importance of these guides to the ascertainment of a boundary of land, is not an inflexible or absolute one. The use of the rule is as a means to the discovery of the intention of the parties. To arrive at the intention of the parties to the instrument is the purpose of all rules of construction, and this applies to the description of premises conveyed as well as to other parts of the instrument.

Real Property Law; Deeds; Deed Interpretation; Rules of Construction:
Real Property Law; Deeds; Legal Descriptions; Priority of Calls:
Real Property Law; Boundaries; Evidence of Boundaries; Monuments:
[LLHN12] It is not true, that there is such magic in a monument called for that it will be made to control in construction invariably. If it controls it is only because it is to be regarded as more certain than course or distance. If it should in a given case be less certain, the rule would fail with the reason for it and the monument would yield to the course and distance and an artificial monument will yield more readily than a natural one.

Real Property Law; Deeds; Deed Interpretation; Rules of Construction:
Real Property Law; Boundaries; Evidence of Boundaries; Retracement Surveys:
Real Property Law; Boundaries; Evidence of Boundaries:
Real Property Law; Boundaries; Evidence of Boundaries; Best Available Evidence:
[LLHN13] The order of application a surveyor should consider and the attorney should apply is not an absolute rule of application to determine where the "true and correct" location of the disputed boundary line(s) was originally placed. If, in conducting a retracement, the surveyor encounters possibly conflicting interpretations of the evidence indicated and then recovered, preference should be towards that decision which best fits the majority of the recovered evidence—in other words the decision that has the fewest number of conflicting elements. The final decision accepted should then best reflect what the original intent was in the conveyance. This philosophy should not be a problem to either the surveyor, the attorney, or the court, even though it may be that an element lower in the

scale is given preference over one placed in a higher ranking.

Real Property Law; Deeds; Deed Interpretation; Rules of Construction:
Real Property Law; Boundaries; Evidence of Boundaries; Monuments:
Real Property Law; Deeds; Deed Interpretation; Intent:
[LLHN14] In the construction of the property description, the trial court was not bound to give controlling effect to every call in the field notes, or even to strictly follow the ordinary priority of calls. Circumstances may vary their usual order of dignity. These preferences for monuments over courses and distances are merely constructional preferences and will yield to the manifest intent of the grantor if this can be ascertained.

Contract Law; Contract Interpretation; Intent:
Real Property Law; Deeds; Deed Interpretation; Intent:
[LLHN15] A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful. Furthermore, the whole of a contract is to be taken together so as to give effect to every part if reasonably practicable, each clause helping to interpret the other.

Real Property Law; Boundaries; Evidence of Boundaries; Monuments:
Real Property Law; Deeds; Legal Descriptions; Priority of Calls:
Real Property Law; Deeds; Deed Interpretation; Intent:
Real Property Law; Boundaries; Evidence of Boundaries; Retracement Surveys:
[LLHN16] A monument controls only if it can be regarded as more certain than other calls ranked lower in the hierarchy. Furthermore, a boundary determination should best reflect the original intent of the parties to the conveyance, and preference should be for the determination that best fits the majority of the recovered evidence.

Real Property Law; Boundaries; Evidence of Boundaries; Fences and Landmarks:
[LLHN17] There is a critical distinction between a fence which establishes a boundary line, and a fence that merely separates one side of the fence from the other. The former is a monument as well as a fence, while the latter is merely a fence.

Real Property Law; Easements; Prescriptive Easements:
Real Property Law; Easements; Prescriptive Easements; Burden of Proof:
Real Property Law; Easements; Prescriptive Easements; Elements:
[LLHN18] The burden at trial on a party seeking to establish an easement by prescription is to show, by clear and convincing evidence, open, notorious, exclusive, adverse, continuous, and uninterrupted use of the claimed easement for the full statutory period, which is five years. All elements must be proved because one who has legal title should not be forced to give up what is rightfully his without the opportunity to know that his title is in jeopardy and that he can fight for it. If the claimant shows open, notorious, exclusive, continuous, and uninterrupted use, a presumption arises that the use was also adverse and the burden shifts to the landowner to establish that the claimant's use was permissive.

Real Property Law; Easements; Prescriptive Easements:
Real Property Law; Easements; Prescriptive Easements; Burden of Proof:
Real Property Law; Easements; Prescriptive Easements; Elements:
[LLHN19] The mere use of the land for the required statutory period, however, is generally insufficient to give rise to the presumption of a grant. Occasional recreational use is insufficient to raise the presumption of adverse use. Unexplained use cannot form a basis for a claim of prescriptive

right. Generally some circumstances or act, in addition to the use, tending to indicate that the use was not merely permissive, is required. To be adverse, the use of the alleged easement must be exercised under a claim of right and not as a mere privilege or license revocable at the pleasure of the owner of the land; such claim must be known to, and acquiesced in by, the owner of the land.

Real Property Law; Easements; Prescriptive Easements:
Real Property Law; Easements; Prescriptive Easements; Adverse Use:
Real Property Law; Easements; Prescriptive Easements; Permissive Use:
[LLHN20] Use of a neighbor's land based on neighborly accommodation or courtesy is not adverse and cannot ripen into a prescriptive easement. Neighborly accommodation, express or implied, is a form of permissive use which, by custom, does not require permission at every passing. If a use begins as a permissive use, it is presumed to continue as such, and periodic express grants of permission are not required to maintain the permissive character of the use, especially where the use remains essentially the same.

OPINION

James C. Nelson Justice

¶1 Plaintiffs Clifford G. Larsen and Patricia P. Larsen (the Larsens) commenced this action in the Fourth Judicial District Court, Missoula County, seeking to quiet title to a 26.96-acre parcel of land. Defendants Kenneth Richardson Jr., Lorna Richardson, Dennis Ruana, and Joyce Ruana (collectively, the Richardsons) counterclaimed that they hold an easement by prescription over a portion of that land. Subsequently, the Richardsons amended their counterclaim to allege they own the northernmost 9.74 acres of the parcel outright, retaining their easement theory as an alternative ground for relief. Following a bench trial, the District Court ruled that the Larsens own the entire 26.96 acres and that the Richardsons do not hold a prescriptive easement. The District Court granted in part, and denied in part, the Larsens' request for costs and attorney's fees.

¶2 The Richardsons appeal and the Larsens cross-appeal, raising the following issues:

1. Did the District Court err in determining that the Larsens own the disputed 9.74 acres?

2. Did the District Court err in determining that the Richardsons do not hold a prescriptive easement?

3. Did the District Court err in denying the Larsens' request for attorney's fees?

4. Did the District Court err in denying the Larsens' request for certain costs? We affirm as to Issues 1, 2, and 3. We reverse and remand as to Issue 4.

BACKGROUND

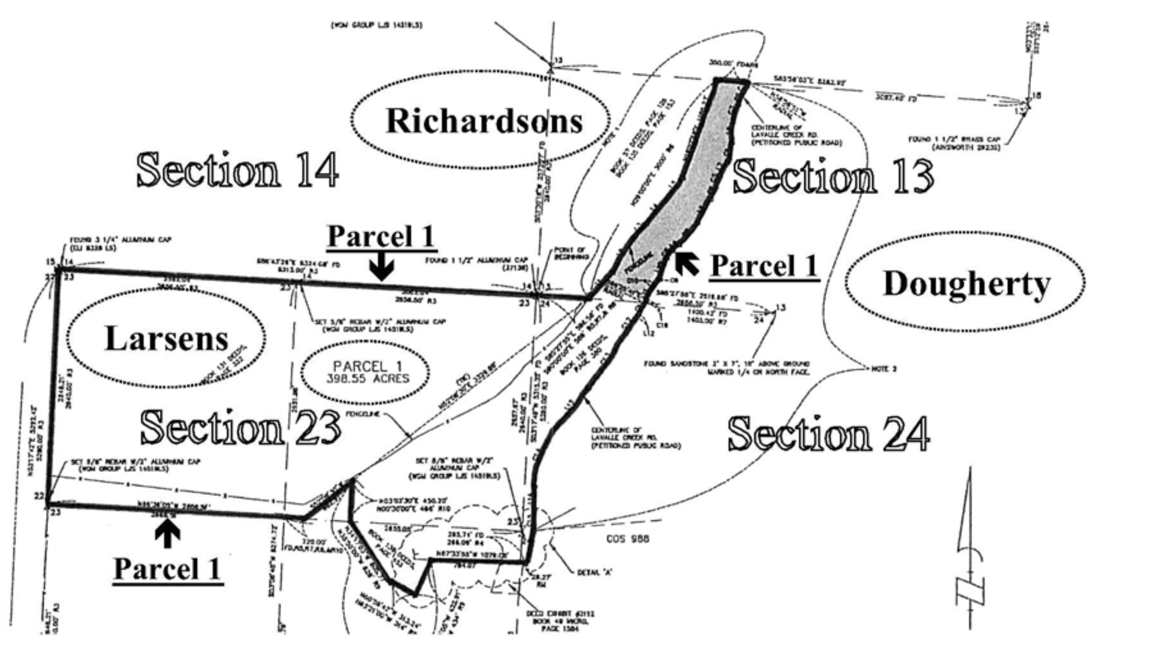
The Property in Dispute

¶3 In August 2003, the Larsens purchased approximately 400 acres of land enclosed by the bold line and designated "Parcel 1" on Diagram I below. (The diagrams displayed herein are included in the record, with some labeling added and editorial modification for clarity.) This land is located northwest of the City of Missoula and is bounded along its east edge by LaValle Creek Road. The Richardsons own adjacent property (roughly 1,500 acres) to the north and west. Dougherty Ranch owns adjacent property to the east.

¶4 Parcel 1 is situated primarily in Section 23 of Township 14 North, Range 20 West, Principal Meridian, Montana. It also extends east into Section 24 and then north into Section 13. When the Larsens filed this action, they sought to quiet title to the portion of Parcel 1 jutting up into Section 13, which is the shaded 26.96-acre finger of land on Diagram I above and the area enclosed by the letters C, F, E, and D on Diagram II below. The Richardsons did not contest the Larsens' ownership of the southern 17.22 acres. Rather, the dispute centered on the northern 9.74 acres, represented by crosshatching and enclosed by the letters B, F, E, and A on Diagram II.

¶5 The Richardsons' land to the west is used for pasturing cattle annually from May to October. Since the 1940s, the Richardson family and, in later years, the Richardsons' lessees have used some old corrals, a loading chute, and fences within the disputed 9.74 acres to move cattle to and from the Richardsons' land. Thus, the Richardsons claimed an easement to continue using the corrals and adjacent area (roughly 1.5 acres in total) as they had for the previous 60 years.

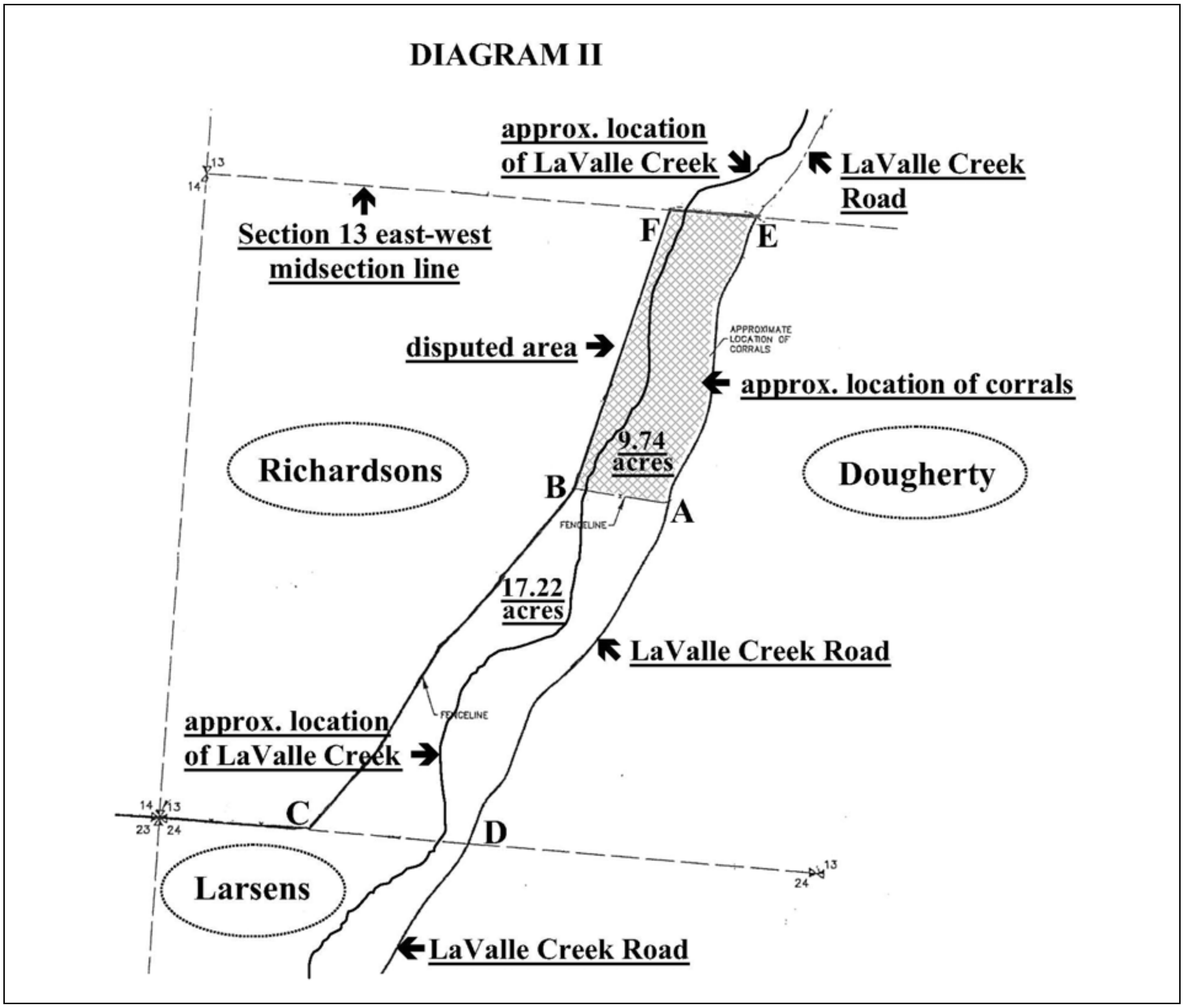
DIAGRAM I



¶6 As noted, the Richardsons later added a claim of outright ownership of the 9.74 acres. This claim was premised on the fact that various deeds, dating back to 1910, describe the boundary between what is now the Larsens' property and the Richardsons' property within Section 13 as a "line of fence" that proceeds northeasterly from Point C (*see* Diagram II) to a point where said fence "jogs" to the east across LaValle Creek to LaValle Creek Road. (The approximate course of LaValle Creek has been added to Diagram II.) This "jog" represents the northern boundary of the Larsens' finger of land. The Richardsons claimed that the existing fence from Point B to Point A is the "jog" referenced in the deeds. If correct, then they own the disputed 9.74 acres north of that fence. But if the "jog" is located further north, from Point F to Point E as the Larsens contend, then the Larsens own the 9.74 acres.

The Deeds

¶7 At the end of 1909, all of Section 13 was owned by John R. Latimer. Latimer conveyed his ownership of Section 13 in three separate transactions. First, in 1910, he sold the portion of Section 13 now owned by the Richardsons, referred to herein as "the Richardson property, " which is the area west of LaValle Creek Road except the finger of land. Second, in 1913, Latimer sold the portion of Section 13 now owned by Dougherty, referred to herein as "the Dougherty property, " which is the area east of LaValle Creek Road. Third, in 1933, Latimer sold the portion of Section 13 now owned by the Larsens, referred to herein as "the Larsen property, " which is the finger of land.



¶8 The subsequent deeds conveying the Dougherty property and the Larsen property contain boundary descriptions that are identical, in material respects, to the 1913 and 1933 deeds, respectively. As for the Richardson property, the 1910 deed describes the boundary without specific measurements, but the 1943 deed of that property, by which it was conveyed to the Richardson family, includes specific bearings and distances.

¶9 The synopsis of the deed language is as follows. Diagram II is displayed again here for reader convenience. [Not shown again.]

First, the boundary between the Richardson property and the Larsen property (within Section 13) begins at Point C and proceeds in a northeasterly direction along a line of fence to a point where said fence jogs to the east across LaValle Creek, thence easterly along the jog in the fence to LaValle Creek Road. The 1910 deed of the Richardson property and all deeds of the Larsen property state that the "jog" is "near the center" of Section 13. The courses provided in the 1943 deed of the Richardson property likewise indicate that the jog is near Section 13's east-west midsection line (*see* Diagram II). The 1943 deed further states that the jog is 350 feet in length. The deeds to the Dougherty property and the Larsen property establish that the jog ends at the point where LaValle Creek Road crosses the east-west midsection line, which is therefore the northeast corner of the finger of land. All of this leads to the conclusion that the jog began approximately at Point F (which is 350 feet west of LaValle Creek Road on the midsection line) and ran east to Point E. In fact, there is no dispute that the deeds, "as they are written," place the jog from Point F to Point E. The Larsens' expert (James R. Weatherly, a licensed professional engineer with WGM Group, Inc.) and the Richardsons' expert (Ronald D. Milam, a professional land surveyor with DJ&A, P.C.) agreed on this point.

¶10 Nevertheless, Weatherly and Milam ultimately disagreed about the location of the jog. Weatherly maintained that it was from Point F to Point E, while Milam insisted that it was from Point B to Point A. This disagreement was based on existing conditions in the field. On one hand, there presently is a fence from Point C to Point B, which seemingly "jogs" over to Point A. In contrast, there is no fence presently running north from Point B to Point F to Point E. Furthermore, while there is evidence of old fencing north of Point B, it is unclear whether these remains were part of a prior boundary fence. On the other hand, however, there is no evidence that the B-to-A fence existed when the 1910 deed was written, and language in the various deeds indisputably puts the "jog" in the vicinity of Points F and E. Moreover, evidence introduced at trial indicates that the finger of land was understood to be 30 acres in size. If the jog is from Point F to Point E, then the finger works out to be 26.96 acres. But if the jog is from Point B to Point A, then the finger works out to be only 17.22 acres.

¶11 As fleshed out at trial, Milam's conclusion that the jog is from Point B to Point A is grounded in two propositions. The first is that the writers of the 1910, 1913, 1933, and 1943 deeds "did not know where [Section 13's] east-west midsection line was located upon the ground." Milam opined that there in fact was a fence from Point B to Point A in 1910, which the deed writers mistakenly thought was situated approximately on the midsection line; therefore, when they referred to a jog "near the center" of Section 13, they meant this fence. Essentially, Milam posited that the deed writers understood the midsection line to be 1, 150 feet south of where it actually is, nearly halfway between the true midsection line and Section 13's southern boundary.

¶12 Milam conceded, however, that surveyors of the era could have established an accurate east-west midsection line. Weatherly testified to the same effect and noted that even if the deed writers got it wrong, "[w]e certainly wouldn't expect them to be eleven hundred and fifty feet off of that line." Weatherly pointed out that while the 1910 deed writers simply referred to a jog in the fence "near the center" of Section 13, the post-1910 deed writers went to the trouble of giving specific bearings and distances in order to nail down the boundaries more tightly. Weatherly attributed significance to the fact that they made this effort, and he disagreed with the notion that the deed writers were as mistaken as Milam suggested. Furthermore, Weatherly's research revealed that Latimer was involved in a boundary dispute in 1910 relating to other property he owned in the area and that he had gone to court to get the legal description of the property clarified. Weatherly, therefore, doubted Milam's assumption that Latimer was so careless as to sell his property in Section 13 with such dramatically incorrect legal descriptions.

¶13 The second proposition underlying Milam's approach is that the B-to-A fence is an "artificial monument" which has "a higher order of importance" than the bearings and distances stated in the deeds. Surveyors retracing a metes-and-bounds [1] description are guided by a hierarchy or "priority of calls" in the event of a conflict between elements within the land description. Monuments [2] generally control over inconsistent courses and areas (i.e., number of acres), the rationale being that

[1] Metes and bounds: "The territorial limits of real property as measured by distances and angles from designated landmarks and in relation to adjoining properties." *Black's Law Dictionary* 1080 (Bryan A. Garner ed., 9th ed., Thomson Reuters 2009).

[2] Monument: "Any natural or artificial object that is fixed permanently in land and referred to in a legal description of the land." *Black's Law Dictionary* 1099.

the latter depend for their correctness on a variety of circumstances and, therefore, are generally less reliable than a monument established on the ground at the time of the survey. *See* Walter G. Robillard & Lane J. Bouman, *Clark on Surveying and Boundaries* § 14:21, 397 (7th ed., Lexis Law 1997), § 15:08A, 147 (LexisNexis Matthew Bender Supp. 2010); Walter G. Robillard & Donald A. Wilson, *Brown's Boundary Control and Legal Principles* 121-23 (6th ed., John Wiley & Sons 2009). Milam took the position that the B-to-A fence is a "jog" in the fence line; that it is thus a monument called for in the deeds; and, as such, that it controls over the bearings, distances, number of acres, and "near the center" language recited in the deeds. He therefore expressly "disregarded" any terms in the deeds that were inconsistent with the jog's being located between Points B and A. Weatherly, in contrast, refused to treat the B-to-A fence as a controlling monument without any evidence that it was the "jog" to which the deed writers were referring, particularly when doing so would require disregarding the vast majority of descriptive language in the deeds.

The Instant Lawsuit

¶14 Based on the deeds and field measurements, Weatherly and his land surveyors completed a survey, ultimately recorded as Certificate of Survey 5900, depicting the exterior boundaries of the Larsens' property (*see* Diagram I). The survey showed the northern boundary of the finger of land from Point F to Point E, indicating that the Larsens own the disputed 9.74 acres. The Larsens provided a copy of the survey to the Richardsons in January 2005. By their own admission, the Richardsons believed it to be "true and accurate." They did not assert that they "owned" the area north of the B-to-A fence. Rather, they told the Larsens that they wanted to continue using the corrals and surrounding area for transporting cattle to and from their property. In a letter addressed to the Larsens, the Richardsons stated: "All we want is to use the existing corrals 4 or 5 times a year and be able to access our property which would be about 11/2 acres. We along with other neighbors have done this for the past several years with no problems." The parties considered a lease or a land swap, but when negotiations reached an impasse, the Larsens recorded Weatherly's survey (COS 5900) and notified the Richardsons that they intended to fence the property along the boundary lines shown on COS 5900. Concerned about liability exposure, the Larsens asked the Richardsons to remove the corrals and holding fences, which were in a dilapidated condition. The Richardsons refused, claiming a prescriptive easement.

¶15 The Larsens thus commenced the present action in July 2007. In February 2008, the Richardsons advised the District Court that they believed COS 5900 contained "major errors." They requested a four-month extension of discovery so that Milam could examine the property, which could not be done while there was still snow on the ground. The District Court granted this request. Ultimately, Milam issued a report in June 2008 and a supplemental report in September 2009, offering the opinion that the property line of the Richardsons and the Larsens "is upon the existing fence line as in existence today" (i.e., from Point C to Point B to Point A), meaning that the Richardsons own the disputed 9.74 acres. Milam based this determination on where the fence, the jog, and the road can be found at present. He expressly "disregarded" all bearings, distances, and language in the deeds indicating that the jog is from Point F to Point E.

The District Court's Decision

¶16 After the District Court denied the parties' cross-motions for summary judgment, the case proceeded to a bench trial in September and October 2009. Ten witnesses testified, including Weatherly and Milam. The District Court entered its Findings of Fact and Conclusions of Law and Order in March 2010.

¶17 First, the court found that despite minor differences in the language used, all deeds in the Richardsons' and the Larsens' chains of title describe the location of the jog in the fence as at or near the midsection of Section 13. The court observed that a fence presently existing at Section 13's midsection "is not necessary to determine the boundary, when the language describing the boundary can be traced back to 1910 and other information in the deeds places the boundary near the midsection of Section 13."

¶18 Next, addressing the Richardsons' claim that the B-to-A fence is the "jog" to which the deeds refer, the District Court observed that the location of this fence "does not match up with language and measurements placing the jog at the east-west midsection line of Section 13 and does not comply with the legal description of Richardson's property as set forth in the 1943 grant." The District Court found that placing the jog at the B-to-A fence "would require the court to ignore and give no meaning to significant conflicting language contained in the deeds pertaining to the boundary."

¶19 The District Court observed that there is some onsite physical evidence of posts and wire near Section 13's east-west midsection line and north of Point B. The court found that the posts and wire could be the remains of a fence existing in 1910 (along the B-to-F-to-E lines on Weatherly's survey). As for a "jog" between Point B and Point A, the District Court observed that there "is no evidence that an east-west fence south of the cattle corrals existed in 1910. Aerial photos of the property are inconclusive." [3] The District Court further found that there "is no evidence that the existing [B-to-A] fence was built for purposes of delineating a property boundary. Instead, the evidence indicates that the fence was built for purposes of holding cattle for loading and off loading."

¶20 The District Court specifically found Weatherly's testimony to be "much more convincing" than Milam's testimony. Moreover, based on prior correspondence between the Richardsons and the Larsens, and as confirmed by the testimony of Cliff Larsen and Lorna Richardson at trial, the court observed that "[i]t is evident what the mutual mindset of the parties to this litigation was prior to the surveys. The mutual belief was that the lands upon which the corrals are located belong to the Larsens." The court noted that, according to tax records, the Larsens and their predecessors in interest have been paying taxes on the disputed 9.74 acres for over 100 years. The Richardsons, in contrast, have never paid taxes on that property. "It was only after the survey of Ron Milam that the Richardsons came to believe that they owned the land where the corrals are located." The court indicated that it found Milam's surveying approach to be "inept."

¶21 Lastly, as to the question whether the Richardsons hold a prescriptive easement, the District Court credited the testimony of Judith Anderson and Alex Polakow indicating that the Richardsons' use of the corrals and surrounding area was permissive. Anderson was the Larsens' predecessor in interest. She owned the Larsen property from 1990 to 2003. Her father, Walter L. Pope, owned the property from 1940 to 1969. Polakow was a groundskeeper for Pope in the 1950s and 1960s. According to Polakow, Kenneth Richardson Sr. requested and obtained permission from Pope to place a fence across the property near the corrals in order to increase the size of his holding area when loading cattle. Anderson testified (by deposition) that the corrals were located at a flat spot in the terrain where the county maintenance of LaValle Creek Road ended. She explained that it was more convenient for the Richardsons to load and offload cattle at that location, which Anderson and Pope permitted. In this regard, the Richardsons' 1,500 acres border LaValle Creek Road north of the corrals. In addition, their property has been accessible on the west side from Highway 93 since the 1960s. However, according to Roger Indreland (a neighboring rancher) and Lorna Richardson (one of the defendants in this case), the corrals were in place in the 1940s when the Richardsons first began using them—in fact, they were already "old" at that point—and it would have been "very expensive" for the Richardsons to create an access point to their property north of the corrals. The

[3] Several aerial photographs were introduced at trial. The photographs were dated 1937, 1940, 1966, 1981, and 1996. As such, they provided no evidence of a fence prior to 1937. Moreover, the only evidence of a fence in the 1937 and 1940 photographs was the appearance of a change in vegetation in the vicinity of Points B and A. No actual fence posts could be discerned in the photographs due to the altitude.

District Court, therefore, found that Pope accommodated the Richardsons by giving them permissive use of the property for the ingress and egress of their cattle and by allowing the Richardsons to use the corrals located on his property.

¶22 In its Conclusions of Law, as to the competing claims of ownership, the District Court concluded that COS 5900 shows the correct boundary between the Richardson property and the Larsen property in Section 13. The court rejected Milam's contention that the B-to-A fence is an ascertained monument which takes precedence over all other language in the deeds. The court observed that the location of the "jog" referred to in the deeds is a factual issue, and there is no evidence showing that the B-to-A fence was the intended "jog" or that it even existed in 1910.

¶23 As to the prescriptive easement counterclaim, the District Court concluded that the Richardsons had failed to show their use of the disputed 9.74 acres was adverse. Instead, the court concluded that the Larsens had presented evidence showing the Richardsons' use of the corrals and surrounding area was a "neighborly accommodation" by Pope and, as such, was permissive.

¶24 In light of the foregoing, the District Court ordered that the Larsens are the owners of the property described by COS 5900 and that the Richardsons do not have a prescriptive easement over any portion of the Larsens' property. Thereafter, the Larsens filed a Bill of Costs and a separate Motion to Assess Attorney's Fees. The District Court awarded some of the requested costs and denied others. The court also denied the request for attorney's fees in its entirety. The Richardsons appeal the District Court's rulings against them regarding their ownership and prescriptive easement claims, and the Larsens appeal the District Court's denial of attorney's fees and certain costs.

STANDARDS OF REVIEW

¶25 **[LLHN1]** We review the factual findings of a trial court sitting without a jury to determine whether the findings are clearly erroneous. *Eldredge v. Asarco, Inc.*, 2011 MT 80, ¶ 30, 360 Mont. 112, 252 P.3d 182; M. R. Civ. P. 52(a). A finding is clearly erroneous if it is not supported by substantial evidence, if the trial court has misapprehended the effect of the evidence, or if a review of the record leaves this Court with a definite and firm conviction that a mistake has been made. *Eldredge*, ¶ 30. In determining whether substantial evidence supports the trial court's findings, we view the evidence in the light most favorable to the prevailing party. *Guthrie v. Hardy*, 2001 MT 122, ¶ 24, 305 Mont. 367, 28 P.3d 467. Furthermore, due regard must be given to the opportunity of the trial court to judge the credibility of the witnesses. M. R. Civ. P. 52(a). It is the province of the trial court to weigh the evidence and resolve any conflicts between the parties' positions, and this Court will not second-guess the trial court's determinations regarding the strength and weight of conflicting testimony. *State v. Lally*, 2008 MT 452, ¶ 22, 348 Mont. 59; 199 P.3d 818. Lastly, we review a trial court's conclusions of law de novo, to determine whether the court's interpretation of the law is correct. *Eldredge*, ¶ 30; *Stanley v. Lemire*, 2006 MT 304, ¶ 52, 334 Mont. 489, 148 P.3d 643. This includes the trial court's interpretation and application of a statute. *Patrick v. State*, 2011 MT 169, ¶ 11, ___Mont. ___, ___P.3d ___("A district court's interpretation and application of a statute is a conclusion of law that this Court reviews for correctness.").

DISCUSSION

¶26 ***Issue 1. Did the District Court err in determining that the Larsens own the disputed 9.74 acres?***

¶27 The Richardsons (more specifically, their counsel) commence their opening brief on appeal with the statement: "The question before the Court is whether the property the Richardsons have owned, used and maintained since 1943 should be taken away from them." This statement, apparently designed to engender sympathy for the Richardsons' plight, is patently misleading. That is *not* the question before this Court, nor has it ever been the question in this case. The question, rather, is whether the Richardsons (or the Larsens) own the disputed property in the first place. As the District

Court found, the Richardsons' belief was that the land upon which the corrals are situated belongs to the Larsens. Their response upon seeing COS 5900—which they believed to be "true and accurate"—was not that they *own* the area north of the existing B-to-A fence, but that they have a right to continue *using* the area (approximately 1.5 acres) for loading and offloading cattle. As the Richardsons stated in a March 2006 letter to the Larsens: "All we want is to use the existing corrals 4 or 5 times a year and be able to access our property which would be about 11/2 acres. We along with other neighbors have done this for the past several years with no problems." It was only after Milam generated his opinion about the B-to-A fence that the Richardsons claimed they own the land north of that fence. The question remains whether Milam's analysis is legally correct.

¶28 In this regard, the Richardsons contend that the District Court "misapplied the rules of deed construction" and made "numerous reversible errors" in its findings of fact and conclusions of law. The Richardsons' brief is a virtual laundry list of alleged errors. Yet, the Richardsons utterly fail to present a cogent analysis explaining why, under the facts and the law, they own the disputed 9.74 acres and the Larsens do not. Their arguments are disjointed, conclusory, and ultimately without merit.

¶29 For starters, the Richardsons shoot themselves in the foot with repeated citations to the following legal principle: **[LLHN2]** "'In an action to quiet title or remove a cloud thereon the general rule is that plaintiff must succeed on the strength of his own title and not on the weakness of his adversary's, except where the parties claim title from a common source. Want of title in plaintiff renders it unnecessary to examine that of defendant.'" *McAlpin v. Smith*, 123 Mont. 391, 395, 213 P.2d 602, 603-04 (1950) (quoting 51 C.J. *Quieting Title* § 73). The Richardsons assert that the Larsens must establish ownership based strictly on the deed they received from Judith Anderson in 2003 and that it is improper to consider any "weaknesses" in the Richardsons' chain of title. [4]

¶30 The first problem with this argument is that it cuts both ways. The Richardsons contend that the Larsens "cannot prove ownership based on their own deed, [and thus] their case should be dismissed *with ownership of the disputed property vested in the Richardsons*" (emphasis added). However, the failure of the Larsens' claim would not, *ipso facto*, establish ownership in the Richardsons. The Richardsons filed a counterclaim asserting ownership of the disputed 9.74 acres, yet at no point have they demonstrated, based "on the strength of [their] own title and not on the weakness of [their] adversary's," that they own this property. And in fact, the language of the 1943 deed by which the Richardson family acquired their property in Section 13 indisputably puts the "jog" near Section 13's midsection line, in the vicinity of Points F and E. In other words, the Richardsons themselves cannot succeed on the strength of their own title insofar as their claim of ownership is concerned. Hence, under the Richardsons' argument based on *McAlpin*, neither they nor the Larsens would own the disputed 9.74 acres. Rather, that property would still be vested in Latimer.

¶31 Furthermore, the Richardsons' reliance on *McAlpin* is not well taken. The Larsens hired a surveying firm to conduct a retracement survey of the exterior boundaries of their property. The Richardsons then hired their own surveyor to review that retracement survey. Both Weatherly and Milam began their respective analyses by, first, obtaining the deeds in the Larsens' chain of title and the chains of title of the adjacent landowners (Dougherty and the Richardsons). This is standard practice in conducting a retracement survey, as both Weatherly and Milam testified. *See also* Robillard & Bouman, *Clark on Surveying and Boundaries* § 14:21, 397 (1997) **[LLHN3]** ("In ascertaining the true and correct boundaries of a parcel, the surveyor is obligated to consider any and all evidence. This rule is inflexible."). [5] Weatherly and Milam reached their ultimate conclusions

[4] The Larsens and the Richardsons disagree as to whether they "claim title from a common source." We do not address this question, however, as it is unnecessary to do so for the reasons which follow.

[5] At trial, Weatherly and Milam testified that they rely on, or are guided by, three so-called "bibles" of

regarding the boundaries based on the language of the deeds in all three chains of title. Thus, the Richardsons' criticisms of the Larsens and the District Court for considering the deeds to the Richardson property in their respective boundary analyses rings hollow, given that the Richardsons and their expert did the very same thing in their boundary analysis.

¶32 In any event, the Larsens *can* prove ownership based on their own deed, and this case, therefore, does not involve an attempt to establish ownership through "weaknesses" in an adversary's title. **[LLHN4]** The object of all rules for the establishment of boundaries is to ascertain the actual location of the boundary as made at the time. *Karlson v. Rosich*, 2006 MT 290, ¶ 14, 334 Mont. 370, 147 P.3d 196. As to boundary disputes, the primary purpose is to track the footsteps of the original surveyor, to locate the survey as it was intended to be located on the ground by him. *Karlson*, ¶ 14; *see also Olson v. Jude*, 2003 MT 186, ¶ 39, 316 Mont. 438, 73 P.3d 809. Although, in the present case, the deeds to the Section 13 properties were prepared without the benefit of a proper field survey, we conclude that the foregoing principles nevertheless apply in determining the locations of the boundaries described in those deeds. In other words, the duty is to track the courses laid out by the deed writers in the boundary descriptions.

¶33 In the 2003 deed from Anderson to the Larsens, the boundary of the finger of land is described as starting at a point 588 feet east of Section 24's northwest corner (Point C on Diagram III below), and then proceeding through three courses:

Course 1. "thence continuing in a Northeasterly direction along a line of fence to a point near the center of Section 13 where said fence jogs to the East across [LaValle] Creek to the [LaValle] Creek road";

Course 2. "thence Easterly to a point 2880 feet West of the quarter corner of Sections 13 and 18";

Course 3. "thence in a Southwesterly direction along the East side of said [LaValle] Creek Road to a point 1403 feet West of the quarter corner of Sections 24 and 13" (Point D on Diagram III).

Regarding Course 2, note that the eastern boundary of Section 13 is also the western boundary of Section 18 in the neighboring township. Hence, "the quarter corner of Sections 13 and 18" is the quarter corner on the east side of Section 13.

¶34 Tracking these courses, there first is a fence running northeasterly from Point C to Point B. At that point, the northeasterly fence line ends. There is a fence from Point B to Point A, which is an ostensible easterly "jog," but this B-to-A fence is situated roughly halfway between Section 13's midsection line and southern boundary and, thus, cannot fairly be characterized as "near the center of Section 13." Moreover, the deed states that upon reaching the jog, the next courses are easterly across LaValle Creek to a point 2, 880 feet west of the quarter corner of Sections 13 and 18, and then southwesterly along LaValle Creek Road. These two courses indicate that the northeast corner of the jog is at the point where LaValle Creek Road crosses Section 13's midsection line (Point E) and that the jog begins somewhere westerly of that point. Accordingly, the language of the Larsens' deed establishes that the boundary line continues north from Point B, eventually reaching a point on the west side of LaValle Creek near Section 13's midsection line, and then proceeds easterly across the creek to Point E. This means that the corrals—which are located east of the creek, next to LaValle Creek Road, about 600 feet south of the midsection line—are undeniably on land owned by the Larsens.

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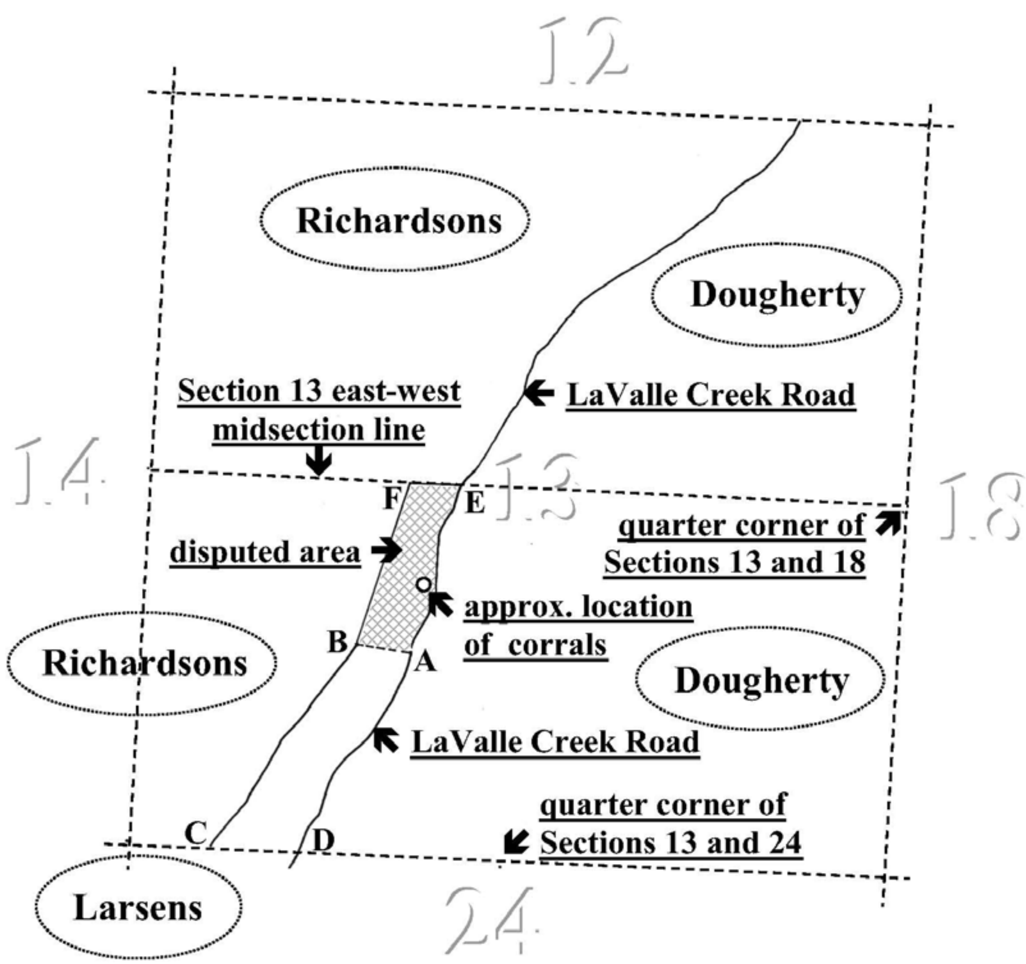
surveying: Curtis M. Brown, Walter G. Robillard, & Donald A. Wilson, *Evidence and Procedures for Boundary Location*; Walter G. Robillard & Lane J. Bouman, *Clark on Surveying and Boundaries*; and Walter G. Robillard & Donald A. Wilson, *Brown's Boundary Control and Legal Principles*. These treatises, therefore, offer helpful insights concerning the issues addressed herein and are cited as persuasive authority.

DIAGRAM III



¶35 The only matter left for determination is the precise location of the finger's western and northern boundary lines, which ran along a fence northeasterly from Point B and then easterly across the creek to Point E. [6] To that end, **[LLHN5]** for the proper construction of a deed, the circumstances under which it was made or to which it relates, including the situation of the subject of the deed and of the parties to it, may be shown so that the judge is placed in the position of those whose language the judge is to interpret. Sections 1-4-102, 70-20-202(2), MCA; *see also Mary J. Baker Revocable Trust v. Cenex Harvest States, Coops., Inc.*, 2007 MT 159, ¶¶ 41-55, 338 Mont. 41, 164 P.3d 851 (discussing § 1-4-102, MCA). When a property description "'alludes to facts beyond the deed, parol evidence may be offered, not to contradict the description, but to locate the deed upon the land.'" *Baker Revocable Trust*, ¶ 43 (quoting *Donnell v. Humphreys*, 1 Mont. 518, 526 (1872)). Here, the 2003 deed refers to a fence running northeasterly from Point C and then, near the center of Section 13, jogging easterly to the point where LaValle Creek Road crosses the east-west midsection line (Point E). However, while there is evidence of old fencing (posts and wire) north of Point B, this

[6] While the fence's location presumably was apparent in 1910 when it was first referenced for boundary purposes, the difficulty now, over 100 years later, is determining where the fence was, which prompted the trial judge in this case to remark: "I think that it ought to carry a term of imprisonment for any surveyor who uses a fence line in a deed." If there were a case justifying such a punishment, this would surely be it.

evidence is not sufficient to establish the route of the former boundary fence. [7] It thus is necessary and appropriate to examine other deeds in the Larsens' and the adjacent property owners' chains of title, and any other pertinent evidence, in order to locate the 2003 deed upon the land and to ensure that the retraced boundary line does not encroach upon the property of neighboring landowners. Doing so, the 1943 deed of the Richardson property states that the "jog" is 350 feet in length. Hence, Weatherly measured 350 feet west from Point E, set the resulting point (Point F) as the northwest corner of the finger, and then drew a straight line from Point B to Point F. [8]

¶36 In the absence of an ascertainable fence line on the ground north of Point B, the lines drawn by Weatherly from Point B to Point F and Point F to Point E are a reasonable course to follow in rounding out the western and northern boundaries of the finger, based on the evidence available. *See* Robillard & Bouman, *Clark on Surveying and Boundaries* § 15:08, 124 (Supp. 2010) **[LLHN6]** ("When a surveyor is unable to follow the precise 'footsteps' of his or her predecessor, then a surveyor must attempt to track the original surveyor's work using whatever recoverable evidence that exists."); Curtis M. Brown, Walter G. Robillard, & Donald A. Wilson, *Evidence and Procedures for Boundary Location* 42 (2d ed., John Wiley & Sons 1981) **[LLHN7]** ("Discovery of the original monument itself is not a necessity, since many types of evidence can be resorted to that will suffice as proof of the original location."). In fact, Milam followed the same course (B to F to E) when he drew the common boundaries of the Richardson, Dougherty, and Larsen properties on a topographic map of Section 13, based on his analysis of the deeds "as they are written." The Richardsons present no compelling argument to the contrary. Rather, they maintain that the boundary line simply does not continue north from Point B at all. They make several arguments in this regard.

¶37 First, the Richardsons seek to invalidate the 2,880-foot call in the Larsens' deed, which provides: "thence Easterly [along the jog in the fence] to a point 2,880 feet West of the quarter corner of Sections 13 and 18; thence in a Southwesterly direction along the East side of said [LaValle] Creek Road . . . ." This language is the basis for establishing Point E as the finger's northeast corner. The Richardsons point out that the distance from the quarter corner of Sections 13 and 18 (i.e., from Section 13's east quarter corner) to the point where LaValle Creek Road crosses the east-west midsection line (Point E) is actually 3,087 feet, not 2,880 feet, a discrepancy of 207 feet (*see* Diagram IV below). The Richardsons, therefore, characterize the 2,880-foot dimension as an "errant" call.

Notably, Weatherly and Milam offered several possible explanations for this discrepancy: (1) the deed writers measured the distance from Section 13's east quarter corner to the road incorrectly; [9] (2) the *original* monument at the east quarter corner, which the deed writers theoretically relied on,

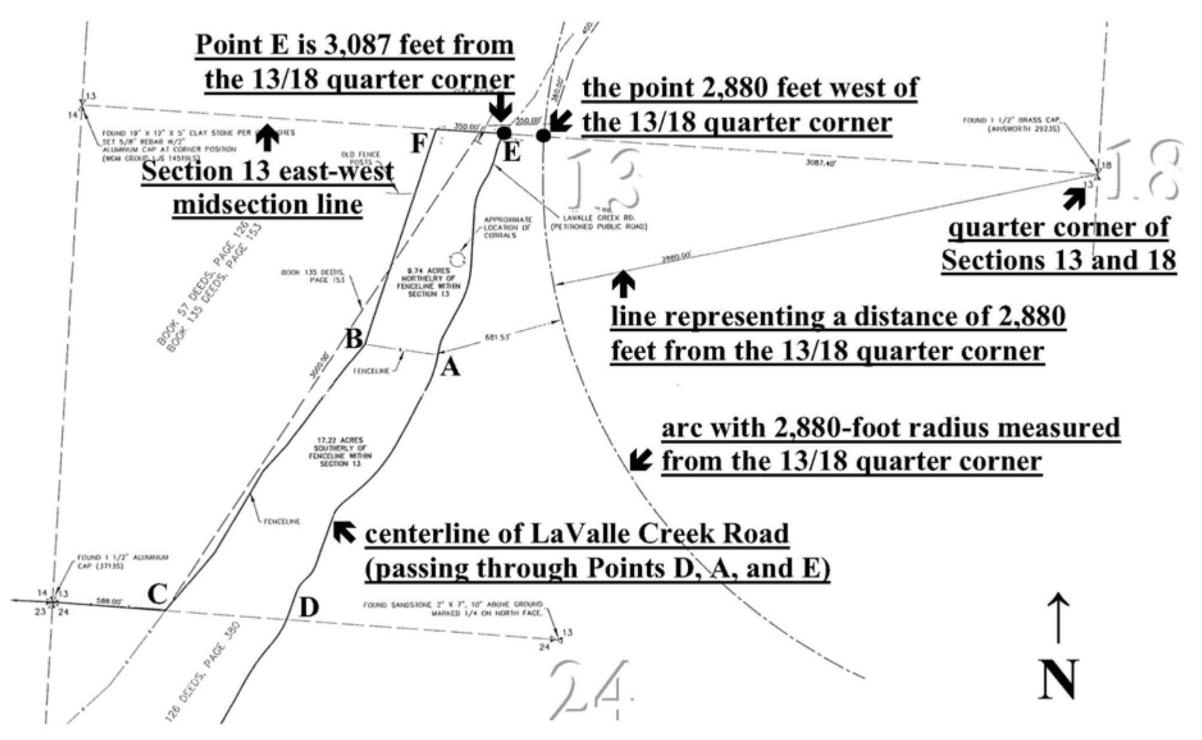
[7] According to a 2006 report issued by the Missoula County Survey Office (which is part of the record in this case), a "severe flood event" occurred in the LaValle Creek drainage some years ago due to an ice dam and subsequent sudden release of water. In light of this information, Weatherly opined that there may have been other fence posts in the vicinity of Points B and F that have since been washed out.

[8] There is no dispute that at the east end of the jog, whether Point E or Point A, the boundary of the finger then proceeds southwesterly along LaValle Creek Road through Point D. Dougherty and the Larsens executed an agreement establishing the boundary between their properties within Section 13 as LaValle Creek Road's centerline.

[9] *See* Robillard & Wilson, *Brown's Boundary Control and Legal Principles* 103 ("The retracing surveyor should realize that the referenced or recorded measurements probably were 'estimated.' The authors have no personal knowledge that the early surveyors carried tape measures to measure the length of posts or diameter tap or calipers to measure tree diameters. A surveyor's outstretched hand was considered as 6 inches from thumb to little finger, the width of the thumb nail was 1 inch, a step was 3 feet, a pace was 6 feet. Today these references do not translate to exact measurements.").

was situated 207 feet farther west (closer to the road) than the *second-generation* monument at the east quarter corner, which Weatherly and Milam relied on; [10] or (3) the 2,880-foot dimension was "an office calculation," rather than a ground measurement. [11] But regardless of the reason for the discrepancy, the deeds to the Larsen property (dating back to 1933) and the deeds to the Dougherty property (dating back to 1913) plainly contemplate being "along the east side of [LaValle Creek Road]" at the point 2,880 feet west of Section 13's east quarter corner. It is undisputed that the road

DIAGRAM IV



existed in 1913, and Weatherly's and Milam's research indicates that the road's location has not changed. The fact that the road is actually 3,087 feet from the quarter corner does not defeat the validity of the 2,880-foot call, or justify "disregarding" it entirely, when it is clear from surrounding language that the 2,880-foot measurement was understood to correspond with the point where the road crosses the midsection line. The 2,880-foot call was intended as a reference—albeit with an inaccurately measured or calculated distance—to the crossing point; and Point E, therefore, is a valid interpretation of the deeds.

¶38 Next, the Richardsons take the position that "near" is "a relative term without positive or precise meaning" and that the B-to-A fence "is more 'near' the mid-section line than it is to the south section line." This argument is absurd, and we reject it for the reasons given by the District Court. At trial,

[10] The 1870 surveyor of Section 13 placed stone monuments at the quarter corners. The original monument at the *west* quarter corner still exists; however, surveyors in 1972 were unable to locate the original monument at the *east* quarter corner. Thus, they established a second-generation monument at that quarter corner, which may be in the same exact location as the original monument, but more than likely is not.

[11] Regarding the third possibility, which Weatherly and Milam seemed to think was most likely, the perimeter dimensions of Section 13 vary from a standard 5,280-foot mile due to the equipment available in 1870 when the section lines were established, and thus office calculations based on record dimensions were not always accurate.

the Richardsons' counsel asked Milam whether "since 'near' is an imprecise term, isn't it also true that [the B-to-A fence] is closer to the midsection line than it is to the south section line?" Milam agreed with this statement, which prompted the trial judge to interject: "Do you believe that a land surveyor—registered land surveyor—would call [the B-to-A fence] near the center of that section?" (Recall that this fence is 1,150 feet south of the midsection line, nearly halfway between the midsection line and Section 13's southern boundary.) Milam responded, "It's near, yes. It's nearer to the center than it is to the [south] section line." The judge observed that this "defies logic." He pointed out that the B-to-A fence is "a long way from the center of that section, you know, and you would describe it some way else, if it's that far away. You would describe it in a measurement or something. But you can't just say, nearer the center of a section, when it's that far off."

¶39 It should also be noted that the term used in the deeds is "near" the center of Section 13, not "nearer" the midsection line than the southern boundary. This is not the only instance, however, in which Milam distorted deed language in order to prove the Richardsons' claim. The 1943 deed of the Richardson property describes the eastern boundary of that property as starting at Point C and then proceeding through five courses:

Course 1. "thence running in a Northeasterly direction along a line of fence bounding said tract on the East, North twenty-nine (29) degrees East, a distance of three thousand (3000) feet";

Course 2. "thence following along said fence where it jogs to the East across LaValle Creek, North Eighty-four (84) degrees East, a distance of three hundred and fifty (350) feet";

Course 3. "thence running North fourteen (14) degrees East, a distance of three hundred and sixty (360) feet along said fence";

Course 4. "thence running North thirty (30) degrees East along the fence on the Western Boundary of the County Road a distance of four hundred (400) feet";

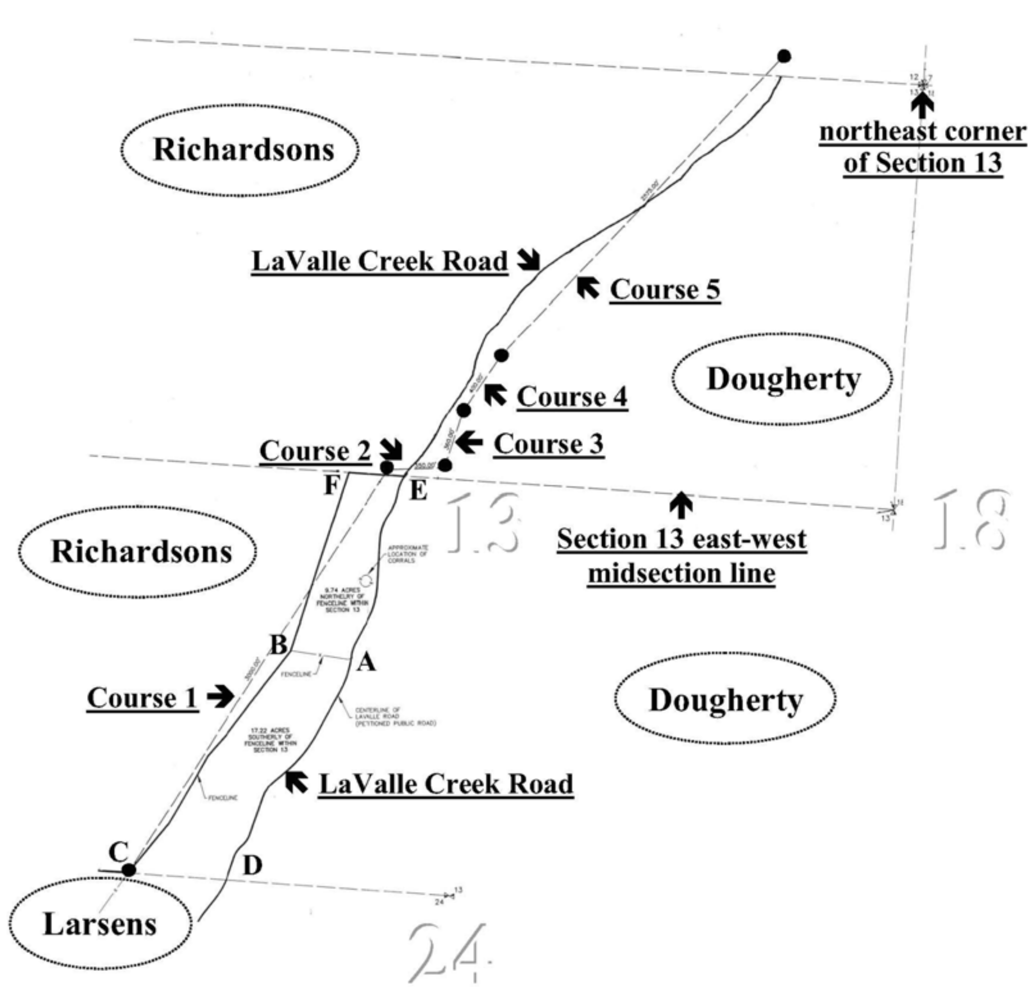
Course 5. "thence running North thirty-nine (39) degrees East in a Northeasterly direction along said fence on the Western Boundary of said County Road a distance of two thousand five hundred and seventy-five (2575) feet to a point on the North line of said Section Thirteen (13), a distance of nine hundred and ten (910) feet West of the Northeast corner of said Section Thirteen (13)."

Each course is shown below on Diagram V as a dashed line bounded by two black dots.

¶40 Milam asserted that Courses 2, 3, and 4 "closely fit" the B-to-A fence and the first two northerly courses along the existing westerly LaValle Creek Road fence line, which suggests that the "jog" (Course 2) is between Points B and A. He conceded, however, that in order to obtain this "close fit, " he disregarded the bearings (i.e., "north X degrees east") in Courses 2, 3, and 4, and he disregarded Courses 1 and 5 altogether (on the ground that the deed writers were mistaken as to the location of Section 13's midsection line). Milam also ignored the fact that the westerly LaValle Creek Road fence line has been moved and rebuilt twice since 1943, and he attributed no significance to the fact that the B-to-A fence is presently 361 feet, not 350 feet.

¶41 Obviously, boundary descriptions can be made to "closely fit" anything on the ground if some of the dimensions are disregarded and others are modified to achieve a preferred outcome. The fact is that none of the bearings and distances stated in the deeds to the Section 13 properties matches existing ground conditions exactly. As Milam and Weatherly explained, this could be due to a variety of factors such as measurement errors in the field and calculation errors in the office (by the deed writers). In any case, it is undisputed that the general path of the boundary described in the 1943 deed is consistent with the language of the other deeds placing the "jog" in the vicinity of Points F and E.

DIAGRAM V



¶42 As for Milam's proposition that the deed writers were mistaken as to the location of the midsection line, there is no evidence of this. Indeed, this theory is based entirely on supposition: the deeds refer to a jog; the only jog found is from Point B to Point A; Courses 2, 3, and 4 in the 1943 deed "closely fit" the B-to-A fence (when certain bearings and distances are ignored); and therefore the deed writers were confused. We refuse to adopt as a principal of law the rule that if a surveyor is unable to find conclusive physical evidence of a boundary fence at the location described in a 100-year-old deed, but is able to manipulate deed language to fit a fence at a different location, then the deed writers must have been confused and their bearings, distances, and other descriptive language can all be disregarded. Such a rule could potentially call into question the validity of countless land titles. To be sure, it might be shown in a particular case that the deed writer or surveyor was mistaken about the true location of a given line. But in the present case, Milam acknowledged that the deed writers knew where the perimeters of Section 13 were located on the ground. In fact, the 588-foot and 1,403-foot measurements in the deeds, describing the locations of Points C and D, respectively, on Section 13's southern boundary, are nearly exact. The notion that the deed writers then blundered dramatically concerning the location of the midsection line is implausible. As Weatherly observed, "[w]e certainly wouldn't expect them to be eleven hundred and fifty feet off of that line." Presuming such a gross error requires a much greater showing than Milam has proffered here.

¶43 Lastly, the Richardsons invoke the "priority of calls" mentioned above (*see* ¶ 13). Citing § 70-20-201(2), MCA, they assert that monuments are paramount and control over other evidence. They contend, therefore, that the 2003 deed of the Larsen property must be applied according to the monuments called for in the deed, which they list as a fence running northeasterly from Point C to a jog fence, the jog fence, and the fence along LaValle Creek Road. Applying this theory to presently existing objects in the field, they assert that the boundary is from Point C to Point B to Point A to Point D, notwithstanding the bearings, distances, acreages, and other descriptive language in the deeds indicating that the boundary is from Point C to Point F to Point E to Point D.

¶44 The Richardsons' approach is contrary to the law of surveying and without any evidentiary foundation. "If there were any principle that perhaps is misinterpreted and possibly misapplied by surveyors, attorneys, and courts, it is the priority of calls." Robillard & Wilson, *Brown's Boundary Control and Legal Principles* 92. **[LLHN8]** The priority of calls was developed through case law in the 1800s and is also governed by statutory law. The general hierarchy is as follows: lines actually run on the ground by the creating surveyor prevail over natural monuments (e.g., a tree), which prevail over artificial monuments (e.g., surveyor's stakes), which prevail over references to adjoining boundaries (e.g., "to Hunter's property line"), which prevail over directions (e.g., northwest), which prevail over distances (e.g., 30 feet), which prevail over area (e.g., 5 acres), which prevails over place names (e.g., "the Quinn farm"). Robillard & Bouman, *Clark on Surveying and Boundaries* § 14:21, 397 (1997), § 15:08A, 147 (Supp. 2010); Robillard & Wilson, *Brown's Boundary Control and Legal Principles* 121-23; *Pollard v. Shively*, 5 Colo. 309, 313 (1880); *Riley v. Griffin*, 16 Ga. 141, 147-48 (1854); *M'Clintock v. Rogers*, 11 Ill. 279, 296-97 (1849); *Tewksbury v. French*, 6 N.W. 218, 218-19 (Mich. 1880); *Hoffman v. Beecher*, 12 Mont. 489, 502, 31 P. 92, 96 (1892); *Lodge v. Barnett*, 46 Pa. 477, 484-85 (1864). These rules "gr[ew] out of the peculiar exigencies of the country, and were moulded by experience, to meet the demands of justice." *Riley*, 16 Ga. at 148; *see also Booth v. Upshur*, 26 Tex. 64, 70 (1861) (the rules are "founded on reason, experience and observation" and "pertain[ ], not to the admissibility, but to the weight of evidence"). The rationale is that that the lower-ranked calls are generally less reliable than the higher-ranked calls. As explained by the court in *Riley*, 16 Ga. at 148, **[LLHN9]** "any natural object, when called for distinctly, and satisfactorily proved—and the more prominent and permanent the object, the more controlling as a locator—becomes a landmark not to be rejected, because the certainty which it affords, excludes the probability of mistake," whereas "course and distance, depending, for their correctness, on a great variety of circumstances, are constantly liable to be incorrect. Difference in the instrument used, and in the care of surveyors and their assistants, lead to different results." *See also McCullough v. Absecon Beach Co.*, 21 A. 481, 487 (N.J. Ch. 1891).

¶45 **[LLHN10]** The priority of calls is not absolute, however, and a lower-ranked call may prevail over a higher-ranked call if the circumstances show that the lower-ranked call is the more reliable evidence of the boundary's true location. George W. Thompson, *Real Property* vol. 6, § 3044, 571-75 (1962) ("[M]onuments, as a general rule, prevail over courses and distances . . . unless the result would be absurd and one clearly not intended, or all the facts and circumstances show that the call for course and distance is more reliable than the call for monuments." (footnotes omitted)); *Booth*, 26 Tex. at 70 ("Still, the lowest grade, to wit, course or distance, is made to prevail over the highest grade, to wit, rivers, creeks, etc., when, upon applying the calls of the grant to the land, the surrounding and connected circumstances adduced in proof to explain the discrepancy, show that course or distance is the most certain and reliable evidence of the true locality of the grant."); Robillard & Bouman, *Clark on Surveying and Boundaries* § 15:08, 429 (1997) ("Although area is the lowest ranking element, if the instrument conveyed an exact area of one acre, then area would be the controlling element, and lines and monuments would probably yield . . . .").

¶46 As aptly stated by the Supreme Court of Tennessee:

[LLHN11] The general rule is that in determining boundaries resort is to be had, first, to natural objects or landmarks, because of their very permanent character, next, to artificial monuments or marks, then to boundary lines of adjacent owners, and then to courses and distances. But this general rule, as to the relative importance of these guides to the ascertainment of a boundary of land, is not an inflexible or absolute one.

The use of the rule is as a means to the discovery of the intention of the parties. To arrive at the intention of the parties to the instrument is the purpose of all rules of construction, and this applies to the description of premises conveyed as well as to other parts of the instrument.

[LLHN12] *It is not true, as appellant supposes, that there is such magic in a monument called for that it will be made to control in construction invariably. If it controls it is only because it is to be regarded as more certain than course or distance.*

"If it should in a given case be less certain, the rule would fail with the reason for it and the monument would yield to the course and distance and an artificial monument will yield more readily than a natural one." Note 30 Am. Dec. 734, 740.

Pritchard v. Rebori, 186 S.W. 121, 122 (Tenn. 1916) (emphasis added).

¶47 Likewise, it has been said that:

> **[LLHN13]** [t]he order of application a surveyor should consider and the attorney should apply is not an absolute rule of application to determine where the "true and correct" location of the disputed boundary line(s) was originally placed. If, in conducting a retracement, the surveyor encounters possibly conflicting interpretations of the evidence indicated and then recovered, preference should be towards that decision which best fits the majority of the recovered evidence—in other words the decision that has the fewest number of conflicting elements. The final decision accepted should then best reflect what the original intent was in the conveyance. This philosophy should not be a problem to either the surveyor, the attorney, or the court, even though it may be that an element lower in the scale is given preference over one placed in a higher ranking.

Robillard & Bouman, *Clark on Surveying and Boundaries* § 15:08A, 146 (Supp. 2010); *see also Stuart v. Coldwell Banker & Co.*, 552 S.W.2d 904, 909 (Tex. App.--Houston 1st Dist. 1977) **[LLHN14]** (In the construction of the property description, "the trial court was not bound to give controlling effect to every call in the field notes, or even to strictly follow the ordinary priority of calls. Circumstances may vary their usual order of dignity." (citations omitted)); *S.R.H. Corp. v. Rogers Trailer Park, Inc.*, 252 A.2d 713, 717 (N.J. 1969) ("'These preferences [for monuments over courses and distances] are merely constructional preferences and will yield to the manifest intent of the grantor if this can be ascertained.'" (quoting Thompson, *Real Property* vol. 6, § 3044, 575)).

¶48 Montana law governing the interpretation of contracts [12] similarly provides that **[LLHN15]** "[a] contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Section 28-3-301, MCA. Furthermore, "[t]he whole of a contract is to be taken together so as to give effect to every part if reasonably practicable, each clause helping to interpret the other." Section 28-3-202, MCA.

¶49 For these reasons, Milam and the Richardsons are incorrect in their contentions that monuments are always paramount. **[LLHN16]** A monument controls only if it can be regarded as more certain than other calls ranked lower in the hierarchy. Furthermore, a boundary determination should best reflect the original intent of the parties to the conveyance, and preference should be for the

[12] "Grants are to be interpreted in like manner with contracts in general, except so far as is otherwise provided in this part." Section 70-1-513, MCA.

determination that best fits the majority of the recovered evidence. In this regard, Weatherly testified that when a surveyor draws up a survey and puts it of record, it is "a compilation of all the evidence that's available to the surveyor at the time that the survey is completed," including the deeds, field observations, and interviews with persons having knowledge of the property. He acknowledged that there is a hierarchy of survey evidence, meaning that certain types of evidence generally carry more weight than other types, but he emphasized that this does not mean anything below the highest piece of evidence may be disregarded outright. More to the point, when asked whether fences, jogs, roads, and creeks have priority over bearings and distances, Weatherly stated: "If I have reason to believe that they were in the location where they may have been at the time the conveyance, or legal description, was prepared." Here, he observed, there is no evidence that the B-to-A fence existed in 1910.

¶50 Milam also testified on this subject. He stated that a monument controls if it has been "undisturbed." He also conceded that if the B-to-A fence did not presently exist, "I would consider the east-west midsection line" as the northern boundary of the finger. His boundary determination, therefore, depends on the premise that the B-to-A fence existed in 1910 and was the intended "jog" across the creek (as opposed to another "jog" further north)—a premise for which there admittedly is no evidence. It is stated in Robillard & Bouman, *Clark on Surveying and Boundaries* § 15:10, 434 (1997), that "[i]n order to rely on a fence as the true and correct dividing line, the fence itself must be supported by testimony or parol evidence indicating the fence was built on the correct original line." Milam testified that he agreed with this rule, and when asked what testimony or parol evidence he was relying on for his conclusion that the B-to-A fence is the "jog," Milam stated: "It's been maintained as a property line, and observed by the adjacent landowners for many years." He admitted under further questioning, however, that there had been no testimony by any person that this fence was built "on the original correct line." Later, when asked again what corroborating evidence he had to establish that the B-to-A fence is anything other than a fence, Milam merely responded: "I have the deed." Yet, he acknowledged that the deeds, "as they are written," place the jog 1,150 feet north of the B-to-A fence, on or near the midsection line.

¶51 We addressed a similar situation in *Pilgrim v. Kuipers*, 209 Mont. 177, 679 P.2d 787 (1984), where the claim was that "the old 'fox farm' fence" was a monument that established the boundary. We disagreed, explaining:

[LLHN17] There is a critical distinction between a fence which establishes a boundary line, and a fence that merely separates one side of the fence from the other. The former is a monument as well as a fence, while the latter is merely a fence. Unlike the highway right-of-way and the Beaverhead River, there are no calls in the legal description to the "fox farm" fence. There is no evidence that the fence line was surveyed or that the fence was built to conform to a surveyed line. One witness testified that the fence was built zig-zag apparently around trees and without any pattern at all. Another said it "jogged" by as much as 20 feet. In contrast, the legal description calls for a straight line. There simply is no evidence to support the fence as a monument.

Nor does a fence establish a boundary line when it does not conform to the true line, even though the property owners thought it was the boundary. Where two adjoining properties are divided by a fence, which both owners suppose to be on the line, such fence is a division fence, as between them, until the true line is ascertained, when they must conform to the true line.

Pilgrim, 209 Mont. at 181-82, 679 P.2d at 790 (internal quotation marks omitted).

¶52 Likewise, here, the legal description in the 2003 deed of the Larsen property—and in all other deeds in the Larsens' and the Richardsons' chains of title—calls for a fence near the center of Section 13, not halfway between Section 13's midsection line and southern boundary. There is no language in any of the deeds indicating that a fence 1,150 feet south of the midsection line is the intended "jog." For that matter, there is no evidence that the B-to-A fence existed in 1910 or was built on the correct original line, and none of the lay witnesses called by the Richardsons had any actual knowledge of the correct boundary lines of the finger of land.

¶53 The fact is Milam had no evidentiary basis whatsoever for relying on the B-to-A fence as the true and correct dividing line. It was manifestly wrong, therefore, for him to treat this fence as a controlling monument called for in the deeds and, on this basis, [is] to negate the vast majority of descriptive language in the deeds. Application of the priority of calls is not one of "pick and choose" or "pick the one I want to suit the answer I need." Robillard & Bouman, *Clark on Surveying and Boundaries* § 15:08A, 148 (Supp. 2010). Unfortunately, however, that is what Milam did here.

¶54 The Richardsons' reliance on § 70-20-201, MCA, is, thus, misplaced. The statute lists rules of construction for resolving inconsistencies in the descriptive part of a conveyance of real property. *Pilgrim*, 209 Mont. at 180, 679 P.2d at 789; *cf.* Robillard & Wilson, *Brown's Boundary Control and Legal Principles* 121 (The priority of calls is a rule of construction that applies "only in cases of conflict between elements within a land description."). The rules apply "when the construction is doubtful and there are no other sufficient circumstances to determine it." Section 70-20-201, MCA. Here, however, the only doubtful aspect of the 2003 deed is the precise route of the fence line between Point B and Point E, which is resolved, under the authority of § 70-20-202(2), MCA, by the second course in the 1943 deed of the Richardson property defining the jog as 350 feet in length. Furthermore, the Richardsons rely specifically on the rule that boundaries and monuments are paramount. Section 70-20-201(2), MCA. Yet, this rule applies only "[w]hen permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces," § 70-20-201(2), MCA, and here, because the fence from Point B to Point A has not been established as a "monument" called for in the deeds, there is no "inconsistency" to be resolved by resort to the priority of calls, and the B-to-A fence cannot be "paramount."

¶55 In sum, the Richardsons have failed to show any error in the District Court's findings and conclusions concerning the ownership issue. Weatherly's survey is based on a correct application of the law and surveying standards. The Larsens demonstrated they own the disputed 9.74 acres. Milam's analysis, in contrast, is factually and legally unsupported, and the Richardsons have no basis for claiming ownership of that land.

¶56 ***Issue 2. Did the District Court err in determining that the Richardsons do not hold a prescriptive easement?***

¶57 **[LLHN18]** The burden at trial on a party seeking to establish an easement by prescription is to show, by clear and convincing evidence, open, notorious, exclusive, adverse, continuous, and uninterrupted use of the claimed easement for the full statutory period, which is five years. *Leichtfuss v. Dabney*, 2005 MT 271, ¶ 24, 329 Mont. 129, 122 P.3d 1220; *Hellerv. Gremaux*, 2002 MT 199, ¶ 12, 311 Mont. 178, 53 P.3d 1259. All elements must be proved because one who has legal title should not be forced to give up what is rightfully his without the opportunity to know that his title is in jeopardy and that he can fight for it. *Heller*, ¶ 15. If the claimant shows open, notorious, exclusive, continuous, and uninterrupted use, a presumption arises that the use was also adverse and the burden shifts to the landowner to establish that the claimant's use was permissive. *Heller*, ¶ 15; *Albert v. Hastetter*, 2002 MT 123, ¶ 20, 310 Mont. 82, 48 P.3d 749 (noting that this is the minority rule).

¶58 **[LLHN19]** The mere use of the land for the required statutory period, however, is generally insufficient to give rise to the presumption of a grant. *Heller*, ¶ 14; *see also Albert*, ¶ 20 (occasional recreational use is insufficient to raise the presumption of adverse use); *Leisz v. Avista Corp.*, 2007 MT 347, ¶ 16, 340 Mont. 294, 174 P.3d 481 (unexplained use cannot form a basis for a claim of prescriptive right). Generally some circumstances or act, in addition to the use, tending to indicate that the use was not merely permissive, is required. *Heller*, ¶ 14. To be adverse, the use of the alleged easement must be exercised under a claim of right and not as a mere privilege or license revocable at the pleasure of the owner of the land; such claim must be known to, and acquiesced in by, the owner of the land. *Kessinger v. Matulevich*, 278 Mont. 450, 457, 925 P.2d 864, 868 (1996). We have repeatedly held that a landowner should not be forced to give up title to his property without notice of the alleged adverse claim and the opportunity to know that his title is in jeopardy. *Amerimont, Inc. v. Gannett*, 278 Mont. 314, 324, 924 P.2d 1326, 1333 (1996).

¶59 **[LLHN20]** Use of a neighbor's land based on neighborly accommodation or courtesy is not adverse and cannot ripen into a prescriptive easement. *Heller*, ¶ 14. This Court has consistently reaffirmed this doctrine. *See Public Lands Access Assn. v. Boone and Crockett Club Found.*, 259 Mont. 279, 284, 856 P.2d 525, 528 (1993); *Lemont Land Corp. v. Rogers*, 269 Mont. 180, 186, 887 P.2d 724, 728 (1994); *Amerimont*, 278 Mont. at 324, 924 P.2d at 1333; *Kessinger*, 278 Mont. at 457, 925 P.2d at 869; *Tomlin Enters. v. Althoff*, 2004 MT 383, ¶ 18, 325 Mont. 99, 103 P.3d 1069. Neighborly accommodation, express or implied, is a form of permissive use which, by custom, does not require permission at every passing. *Heller*, ¶ 14; *Kessinger*, 278 Mont. at 457, 925 P.2d at 868-69. If a use begins as a permissive use, it is presumed to continue as such, and periodic express grants of permission are not required to maintain the permissive character of the use, especially where the use remains essentially the same. *Rettig v. Kallevig*, 282 Mont. 189, 196, 936 P.2d 807, 811 (1997); *Rathbun v. Robson*, 203 Mont. 319, 322-24, 661 P.2d 850, 852 (1983).

¶60 In the present case, the District Court found that the Richardsons' use of the corrals and surrounding area was permissive. While the Richardsons contend there is no testimony substantiating this determination, we conclude the District Court's finding is supported by substantial evidence in the record. The testimony of Judith Anderson, Alex Polakow, Cliff Larsen, and Lorna Richardson, as well as the correspondence between the Larsens and the Richardsons prior to the filing of this lawsuit, indicate that Pope accommodated the Richardsons by giving them permissive use of his property for the ingress and egress of their cattle and by allowing the Richardsons to use the corrals located on his property. This use began as a neighborly accommodation in the 1940s because it was more convenient for the Richardsons to load and offload cattle at that location and it would have been "very expensive" for the Richardsons to create an access point to their property along LaValle Creek Road north of the corrals. The record further reflects that Anderson allowed this permissive use to continue while she owned the property (until 2003). The Richardsons admittedly viewed the corrals as "community corrals" used by themselves, Dougherty, and others.

¶61 The Richardsons' challenges to the District Court's analysis boil down to simple disagreement with the court's credibility determinations and their view that the testimony at trial supports a finding of adverse use. As we have said, however, we review a trial court's findings "to determine whether substantial evidence supports those findings, *not contrary findings*." *Montanans for Justice v. State ex rel. McGrath*, 2006 MT 277, ¶ 78, 334 Mont. 237, 146 P.3d 759 (emphasis in original). Moreover, it is the province of the trial court to weigh the evidence and resolve any conflicts between the parties' positions, and this Court will not second-guess the court's determinations regarding the strength and weight of conflicting testimony. *Montanans for Justice*, ¶ 78. Due regard must be given to the opportunity of the trial court to judge the credibility of the witnesses. M. R. Civ. P. 52(a). Here, the District Court evaluated the strength and weight of the conflicting testimony, judged the credibility of the witnesses, and determined that the Richardsons' use was permissive. Substantial evidence supports this determination.

¶62 We accordingly hold that the Richardsons do not hold a prescriptive easement over any part of the Larsens' 9.74 acres north of the B-to-A fence.

¶63 ***Issue 3. Did the District Court err in denying the Larsens' request for attorney's fees?***

¶64 Following the District Court's entry of its Findings of Fact and Conclusions of Law and Order, the Larsens filed a motion to assess attorney's fees under § 25-7-105, MCA. This statute provides, in pertinent part, that at any time more than 60 days after service of the complaint and more than 30 days before the trial begins, any party may serve upon the adverse party a written offer to settle a claim for the money or property or to the effect specified in the offer. An offer not accepted is considered withdrawn. If the final judgment is less favorable to the offeree than the offer, then the offeree shall pay the costs, including reasonable attorney's fees, incurred by the offeror after the offer was made. The statute applies to an action or claim which involves real property and for which the amount contained in a pleading is $50,000 or less, exclusive of costs, interest, and service charges. Section 25-7-105(1), (3), (4)(b), MCA.

¶65 In September 2008, well over 60 days after service of the Larsens' complaint, the Larsens served upon the Richardsons a written offer to settle. They offered to create an agricultural easement over a 73-foot-wide strip of land, approximately 0.62 acres in size, along the north side of the B-to-A fence. The easement would "allow the Richardsons access from LaValle Creek Road to their property to the west of Larsens" and would "allow egress and ingress for livestock and equipment in support of raising livestock." The Richardsons rejected the offer. The case proceeded to trial in September 2009, after which the District Court ruled that the Richardsons neither own the disputed 9.74 acres nor hold an easement over any part of that property. Accordingly, the Larsens argued in their motion to assess attorney's fees that the final judgment was less favorable to the Richardsons than the offer of a 0.62-acre agricultural easement and that the Larsens, therefore, were entitled to recover their attorney's fees incurred after the offer was made.

¶66 It is important to note the factual circumstances which existed at the time the Larsens offered to settle. They commenced this lawsuit on July 10, 2007, seeking to quiet title to the 26.96-acre finger of land. On August 3, 2007, the Richardsons filed their Answer and Counterclaim, requesting a declaration of prescriptive easement "over that portion of the subject property which includes the corrals, fences, and adjacent grounds." On February 7, 2008, the Richardsons filed a motion to amend the scheduling order to give their recently retained expert (Milam) time to analyze COS 5900 and the property at issue. On June 25, 2008, Milam issued his report, concluding that the Richardsons own the northernmost 9.74 acres. On September 10, 2008, the Larsens made their offer to settle, which the Richardsons rejected five days later. On September 17, 2008, the Richardsons filed a motion to amend their Answer and Counterclaim to include a claim of ownership. The District Court granted the motion. On December 2, 2008, the Richardsons filed an Amended Answer and Counterclaim, asserting ownership of the 9.74 acres and, in the alternative, a prescriptive easement over the entire 9.74 acres.

¶67 The only claims existing when the Larsens made their offer were the Larsens' request that title to the 26.96 acres be quieted in their names and the Richardsons' counterclaim for a prescriptive easement "over that portion of the subject property which includes the corrals, fences, and adjacent grounds." Accordingly, in their reply brief in support of their motion to assess attorney's fees, the Larsens stated that their offer was directed at the Richardsons' prescriptive easement counterclaim. In the motion itself, however, the Larsens sought to recover attorney's fees "arising in the case after the Defendants' rejection of the Offer of Settlement." Neither their motion nor their attached affidavit distinguishes, in any apparent fashion, between the attorney's fees incurred with respect to the prescriptive easement counterclaim and the attorney's fees incurred with respect to the subsequently filed ownership counterclaim. Yet, the Larsens' offer did not apply to the ownership counterclaim, since that counterclaim had not yet been alleged.

¶68 These factual circumstances raise some important questions concerning the proper application of § 25-7-105, MCA. Is a party entitled to recover attorney's fees incurred in the litigation of a claim or counterclaim that is added to the case *after* the settlement offer is made? In other words, may the Larsens recover attorney's fees incurred on the ownership counterclaim, even though their offer did not pertain to this claim (since it did not exist at the time the offer was made)? Does it depend on whether the original claim (the one for which the offer was made) and the later-added claim (the one added after the offer was made) are of such nature that all of the attorney's fees would have been incurred regardless of whether the later claim had been added? What if, in their Amended Answer and Counterclaim, the Richardsons had dismissed their prescriptive easement claim and pursued only their ownership claim? Is the dispositive fact the fact that this litigation, at its core, has always been about the Larsens' attempt to disperse any and all clouds upon their title to the 26.96-acre property, whatever form that cloud might take (an easement claim, a possessory claim, or some other encumbrance)?

¶69 The parties have not briefed these questions. The Larsens assume they are entitled to *all* attorney's fees incurred after September 10, 2008, while the Richardsons argue that the Larsens' claim fails for another reason. Because we agree with the Richardsons' argument, we leave resolution of the foregoing questions to another case in which they have been properly argued and briefed. We shall assume, for purposes of the present case, that the Larsens may be entitled to recover attorney's fees incurred litigating both the prescriptive easement issue and the ownership issue.

¶70 There is no question that the claims in this case involve real property. Section 25-7-105(4)(b), MCA. There also is no question that the offer to settle otherwise satisfies the criteria of the statute, with the exception of the amount in controversy. By its terms, the statute "applies only to an action or claim for which the amount contained in a pleading is $50,000 or less, exclusive of costs, interest, and service charges." Section 25-7-105(4), MCA. As an initial matter, we agree with the Larsens and the Richardsons that parties cannot be allowed to manipulate the application of § 25-7-105, MCA, by stating in their pleadings an amount above or below $50,000 (regardless of the true value of the property at issue), or by not stating an amount at all, in order to avoid the statute's application or in order to apply it to situations that the Legislature never intended. The statute is designed to encourage the settlement of lawsuits involving real property [13] where the amount in controversy is not more than $50,000. Hence, "the amount contained in a pleading"—to which the $50,000 limit applies—refers to the value of the real property interest that is at issue in the particular claim or claims to be settled.

¶71 As the moving party, therefore, it was incumbent on the Larsens to show that the value of the subject property (the 9.74 acres), the value of the prescriptive easement claimed by the Richardsons, or the value of both (given that the Larsens claim attorney's fees for litigating both the ownership claim and the easement claim) was not more than $50,000. As the Richardsons point out, however, and as the District Court observed in denying the Larsens' motion, the parties "provided no evidence establishing the market value of their claimed property rights in the disputed parcel of land." Accordingly, we hold that the Larsens did not meet their burden under § 25-7-105(4), MCA, and that the District Court correctly denied their motion for attorney's fees due to a failure of proof.

¶72 ***Issue 4. Did the District Court err in denying the Larsens' request for certain costs?***

¶73 Following the District Court's entry of its Findings of Fact and Conclusions of Law and Order, the Larsens filed a Bill of Costs. The District Court granted some of the requested costs and denied others. The Larsens' arguments on appeal relate to the costs associated with preparing maps and surveys.

¶74 Section 25-10-201(8), MCA, provides that a party is entitled to include in their bill of costs "the reasonable expenses for making a map or maps if required and necessary to be used on trial or hearing." This Court has held repeatedly that expenses incurred in preparing maps, surveys, and

[13] It also applies to contract claims. Section 25-7-105(4)(a), MCA.

charts for the purpose of explaining the factual situation to the court are allowed as recoverable costs. *See Johnson v. Jarrett*, 169 Mont. 408, 417, 548 P.2d 144, 149 (1976); *Funk v. Robbin*, 212 Mont. 437, 449, 689 P.2d 1215, 1222 (1984); *Goodover v. Lindey's Inc.*, 255 Mont. 430, 443-44, 843 P.2d 765, 773 (1992).

¶75 The District Court denied costs for maps and surveys in this case for two reasons. First, the court observed that COS 5900 was prepared prior to the filing of this lawsuit and, thus, the costs related to the preparation of COS 5900 were not recoverable. Second, citing *Witty v. Pluid*, 220 Mont. 272, 714 P.2d 169 (1986), the court observed that expert witness fees are limited to $10.00 per day for each day the expert testifies.

¶76 The error in this analysis, as the Larsens point out, is that they are not claiming costs for the preparation of COS 5900 and are not claiming expert witness fees. Rather, they are claiming costs for the preparation of additional and supplemental maps for purposes of trial. They note that the bills submitted by WGM Group (Weatherly's firm) include charges for additional survey work and for preparing additional maps to explain to the court the facts at issue. While the Richardsons submit that none of these maps were required or necessary to be used at trial, the record belies this contention. The transcript is replete with references by counsel, various witnesses, and the trial judge to points on the supplemental maps prepared by Weatherly. These maps were introduced into evidence; in fact, one of them is included among the Richardsons' own trial exhibits. Furthermore, this case revolved around two surveyors' contradictory conclusions about the location of the boundary line at issue. To explain how they reached their respective conclusions, numerous maps, diagrams, and photographs were introduced at trial. There was exhaustive testimony regarding deeds that refer to fences, jogs, and roads and that contain bearings and distances which do not precisely line up with existing ground conditions. The maps and surveys created by Weatherly provided important details not included in COS 5900, were critical for an understanding of Weatherly's and Milam's differing interpretations of the deeds, and assisted the court in determining the existence and location of the boundary line at issue.

¶77 Accordingly, pursuant to § 25-10-201(8), MCA, the Larsens are entitled to costs for the reasonable expenses incurred in preparing the additional maps and surveys for purposes of trial. The District Court's June 9, 2010 Opinion and Order re: Attorney's Fees and Costs is reversed to this limited extent, and the case is remanded to the District Court for further proceedings on this one issue.

¶78 The Richardsons contend that some of the charges included in the WGM Group invoices do not relate specifically to the preparation of maps. We agree that any charges which were not incurred specifically in making the additional maps and surveys are not recoverable under § 25-10-201(8), MCA. But this is a factual matter to be resolved by the District Court on remand.

CONCLUSION

¶79 The District Court did not err in determining that the Larsens own the disputed 9.74 acres and that the Richardsons do not hold a prescriptive easement over the property. The District Court also did not err in denying the Larsens' request for attorney's fees under § 25-7-105, MCA. The District Court did err, however, in denying the Larsens' request for costs under § 25-10-201(8), MCA. The case is remanded for further proceedings on that issue--specifically, for a determination and award of the reasonable expenses incurred in the preparation of supplemental maps and surveys (i.e., other than COS 5900 itself) for purposes of trial. As a final matter, we hold that the Larsens are entitled to costs on appeal pursuant to Rule 19(3)(a) of the Montana Rules of Appellate Procedure, which the District Court is directed to determine on remand.

¶80 Affirmed in part, reversed in part, and remanded for further proceedings.

LINDA S. BECKHAM/TILLMAN as sole beneficiary of the ESTATE OF GROBER NELL BECKHAM, Appellant,

v.

STEVEN R. BENNETT, Appellee.

No. 1D12-2879

Florida Court of Appeals, First District

118 S.3d 896; 38 Fla.L.Weekly D1555

July 19, 2013

LUCAS LETTER HEAD NOTES [LLHN]:[i]

Civil Procedure; Appeals; Standards of Review; Presumption of Correctness:
Civil Procedure; Appeals; Standards of Review; Conclusions of Law:
[LLHN1] The trial court's decision carries a presumption of correctness unless it misapplied the law or did not base its decision on competent, substantial evidence.

Civil Procedure; Appeals; Standards of Review; Presumption of Correctness:
Civil Procedure; Appeals; Standards of Review; Credible Evidence:
[LLHN2] When the trial court's determination turns upon the meaning of depositions and other documents which are presented in essentially the same form to the appellate court, the trial court does not have a special vantage point in such cases. When the trial court acted on the same pleadings and depositions which make up the record on appeal, the presumption of correctness is not as strong, since the trial court did not hear any testimony or make credibility determinations.

Real Property Law; Boundaries; Evidence of Boundaries; Original Survey:
Real Property Law; Boundaries; Evidence of Boundaries; Following in the Footsteps:
[LLHN3] A surveyor cannot set up new points and establish boundary lines unless he is surveying unplatted land or subdividing a new tract. Subsequent surveyors may only locate the points and retrace the lines of the original survey; they cannot establish new lines or corners.

Real Property Law; Boundaries; Surveys; The Survey Method:
Real Property Law; Boundaries; Evidence of Boundaries; Original Survey:
Real Property Law; Boundaries; Evidence of Boundaries; Following in the Footsteps:
[LLHN4] The surveying method is to establish boundaries by running lines and fixing monuments on the ground while making field notes of such acts. From the field notes, plats of survey or "maps" are later drawn to depict that which was done on the ground. In establishing the original boundary on the ground the original surveyor is conclusively presumed to have been correct and if later surveyors find there is error in the locations, measurements or otherwise, such error is the error of the last surveyor. Likewise, boundaries originally located and set (right, wrong, good or bad) are primary and controlling when inconsistent with plats purporting to portray the survey and later notions as to what the original subdivider or surveyor *intended* to be doing or as to where later surveyors, working, perhaps, under better conditions and more accurately with better equipment, would locate the boundary solely by using the plat as a guide or plan. Written plats are not construction plans to be followed to correctly reestablish monuments and boundaries. They are "as built" drawings of what has already occurred on the ground and are properly used only to the extent they are helpful in finding and retracing the original survey which they are intended to describe; and to the extent that the original surveyor's lines and monuments on the ground are established by other evidence and are inconsistent with the lines on the plat of survey, the plat is to be disregarded. When evidence establishes a discrepancy between the location on the ground of the original boundary survey and the written plat of that survey the discrepancy is always resolved against the plat.

An appeal from the Circuit Court for Okaloosa County. William F. Stone, Judge.

John R. Dowd, Jr., of the Dowd Law Firm, P.A., Fort Walton Beach, for Appellant.

Richard P. Petermann and Jeffrey L. Burns of Anchors Smith Grimsley, P.L., Fort Walton Beach, for Appellee.

PER CURIAM.

In this boundary line dispute, appellee, Steven R. Bennett, sued for a permanent injunction, seeking to enjoin appellant, Linda S. Beckham/Tillman, from trespassing upon his property by way of maintaining a fence along the disputed boundary. Prior to trial, the parties entered into a stipulation, agreeing that (1) the matter would proceed to trial in a summary fashion; (2) the dispute over the boundary line was the sole issue before the trial court; and (3) the depositions of the parties' respective surveyors, along with any attachments, would provide the sole factual record for the trial court to consider. In its Amended Final Judgment, the trial court confirmed the boundary line as established by Bennett's 2001 survey and, consequently, permanently enjoined Beckham/Tillman from trespassing upon Bennett's land. For the following reasons, we reverse.

In essence, we are asked to decide which of two surveyors properly located the correct boundary line between two parcels of property. Bennett's property lies in the southwest corner of a subdivision that originally was surveyed and platted in 1929. Beckham/Tillman's property abuts Bennett's from below and lies in the northwest corner of a newer subdivision surveyed and platted in 1965. Beckham/Tillman's fence lies between. Two general considerations inform our analysis of the issue. On the one hand, **[LLHN1]** the trial court's decision carries a presumption of correctness unless it "misapplied the law or did not base its decision on competent, substantial evidence." *Collier v. Parker*, 794 So.2d 616, 618 (Fla. 1st DCA 2001). On the other hand, **[LLHN2]** "when the trial court's determination turns upon the meaning of . . . depositions [and] other documents . . . which are presented in essentially the same form to the appellate court . . . the trial court does not have a special vantage point in such cases." *State v. Sepanik*, 110 So.3d 977, 978 (Fla. 2d DCA 2013) (citing *Almeida v. State*, 737 So.2d 520, 524 n. 9 (Fla. 1999)). In short, because in the present case the trial court acted on the same pleadings and depositions which make up the record before us, the presumption of correctness is not as strong, since the trial court did not hear any testimony or make credibility determinations. *See Suarez v. Benihana Nat'l of Fla. Corp.*, 88 So.3d 349, 353 n. 7 (Fla. 3d DCA 2012) (citing *W. Shore Rest. Corp. v. Turk*, 101 So.2d 123, 126 (Fla. 1958)). In addition, we are guided in our decision by the following undisputed, controlling legal rule:

> **[LLHN3]** A surveyor cannot set up new points and establish boundary lines unless he is surveying unplatted land or subdividing a new tract. *See Willis v. Campbell*, 500 So.2d 300, 302 (Fla. 1st DCA 1986); *Tyson v. Edwards*, 433 So.2d 549, 552 (Fla. 5th DCA 1983). *Subsequent surveyors may only locate the points and retrace the lines of the original survey; they cannot establish new lines or corners. See Tyson*, 433 So.2d at 552. *Collier*, 794 So.2d at 618 (emphasis added).

After carefully reviewing the deposition testimony of each surveyor, we conclude that only Beckham/Tillman's surveyor conducted a proper retracement utilizing the original monuments. As it was explained in *Tyson v. Edwards*:

> **[LLHN4]** The surveying method is to establish boundaries by running lines and fixing monuments on the ground while making field notes of such acts. From the field notes, plats of survey or "maps" are later drawn to depict that which was done on the ground. In establishing the original boundary on the ground the original surveyor is conclusively presumed to have been correct and if later surveyors find there is error in the locations, measurements or otherwise, such error is the error of the last surveyor. Likewise, boundaries originally located and set (right, wrong, good or bad) are primary and controlling when inconsistent with plats purporting to

> portray the survey and later notions as to what the original subdivider or surveyor *intended* to be doing or as to where later surveyors, working, perhaps, under better conditions and more accurately with better equipment, would locate the boundary solely by using the plat as a guide or plan. Written plats are not construction plans to be followed to correctly reestablish monuments and boundaries. They are "as built" drawings of what has already occurred on the ground and are properly used only to the extent they are helpful in finding and retracing the original survey which they are intended to describe; and to the extent that the original surveyor's lines and monuments on the ground are established by other evidence and are inconsistent with the lines on the plat of survey, the plat is to be disregarded. When evidence establishes a discrepancy between the location on the ground of the original boundary survey and the written plat of that survey the discrepancy is always resolved against the plat. 433 So.2d at 552-53 (emphasis in original). *See also Rivers v. Lozeau*, 539 So.2d 1147, 1151 (Fla. 5th DCA 1989).

Thus, we hold the trial court misconstrued both the evidence and controlling precedent when it held the testimony of Bennett's surveyor "properly" and "convincingly" located the southern boundary of his township, and that there was "no credible evidence" that the monument drawn on Beckham/Tillman's survey was the original monument.

The Amended Final Order is REVERSED and the cause is REMANDED for entry of a final judgment in favor of appellant.

PADOVANO, WETHERELL, and SWANSON, JJ., CONCUR.

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[i] All head notes in this opinion provided by the Editor of TLL for the convenience of our readers. JNL.

GENEIL HAILEY DILLEHAY

v.

VELMER JEAN GIBBS

No. M2010-01750-COA-R3-CV

Court of Appeals of Tennessee, Nashville

June 16, 2011

LUCAS LETTER HEAD NOTES [LLHN]:

Civil Procedure; Appeals; Standards of Review; De Novo Review:
Civil Procedure; Trials; Bench Trials; Presumption of Correctness:
[LLHN1] Appellate courts conduct a *de novo* review of the trial court's decision with a presumption of correctness as to the trial court's findings of fact, unless the evidence preponderates against those findings. For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect.

Civil Procedure; Trials; Trier of Facts; Credibility of Witnesses:
Evidence; Testimony; Credibility; Generally:
[LLHN2] In resolving a boundary line dispute, it is the role of the trier of fact to evaluate all the evidence and assess the credibility of the witnesses. Where there is a conflict in testimony, the trial court is in a better position than an appellate court to observe the demeanor of the witnesses and evaluate their credibility. Thus, we will give great weight to a trial court's determinations as to the credibility of witnesses. This deferential standard specifically applies in a boundary dispute where a trial court must choose between two competing surveys.

Real Property Law; Deeds; Legal Descriptions; Calls:
Real Property Law; Deeds; Legal Descriptions; Descriptive Elements:
Real Property Law; Deeds; Legal Descriptions; Priority of Calls:
[LLHN3] When determining a boundary line that is in dispute, the court must look first to the natural objects or landmarks on the property, then to the artificial objects or landmarks on the property, then to the boundary lines of adjacent pieces of property, and finally to courses and distances contained in documents relevant to the disputed property.

OPINION: J. STEVEN STAFFORD, JUDGE.

This is a boundary line dispute between the owners of two farms in the hollows of Smith County. Plaintiff-Appellant, Mrs. Geneil Hailey Dillehay, filed her complaint in the chancery court on January 20, 2007, seeking to establish the boundary line between the two farms. [1] In addition to declaratory relief, Mrs. Dillehay also requested a temporary restraining order enjoining Defendant-Appellee, Ms. Velmer Jean Gibbs, from trespassing upon the disputed land or altering its physical characteristics.

On February 23, 2007, Ms. Gibbs filed her answer. She asserted that her farm had been in her

[1] Mrs. Dillehay's complaint was submitted by attorney Tecia Puckett Pryor. On May 15, 2007, attorney Gary Vandever was substituted as counsel, and he served as her attorney at trial. Mrs. Dillehay's attorney on appeal is John D. Kitch.

family for many years with no dispute as to the boundary line. Ms. Gibbs averred that she had a valid recorded survey depicting the true property lines in her favor. She also claimed ownership of the disputed area by virtue of adverse possession.

A hearing on Mrs. Dillehay's request for a temporary injunction was held on February 6, 2007. By order entered June 8, 2007, *nunc pro tunc*, the trial court enjoined both parties from "altering, removing, or damaging the physical and natural evidence and timber located in the disputed area between the parties' farms." The court permitted the parties to flag or stake the disputed area to the extent such markings did not otherwise violate the injunction.

A bench trial was held on June 8, 9, and 10, 2010. Both parties introduced the deeds in their respective chains of title, the testimony of expert land surveyors, the testimony of persons familiar with the properties, and their own testimony. The disputed area lies on the western boundary of Ms. Gibbs's farm and the eastern boundary of Mrs. Dillehay's. It encompasses approximately thirty acres, more or less.

Ms. Gibbs purchased her farm in 1993, and her deed conveys 159 acres. Tax records admitted into evidence show that, from at least 2003-2005, Ms. Gibbs was assessed property taxes on 127 acres. However, in 2006, the year after Mrs. Dillehay purchased her farm, Ms. Gibbs was assessed taxes on 182.4 acres. Ms. Gibbs introduced the deeds in her chain of title dating back to 1920. When she purchased the property, Ms. Gibbs was returning to her "old home place" as her family had previously owned the farm from 1941 until 1954. [2] Ms. Gibbs was born in 1943 and lived and worked with her family on the farm until they moved when she was eleven years old. Ms. Gibbs, as well as four of her siblings, testified that, during the time they lived and worked on the farm, a two-strand barbed-wire fence marked the farm's western boundary line.

Mrs. Dillehay purchased her farm in December of 2005, from the cousin of her husband, Mr. Stanley Dillehay. [3] She described the seller as an absentee landowner. Her deed conveyed two tracts; tract one contained sixty-five acres and tract two contained sixty-nine acres. Mrs. Dillehay testified that she and Mr. Dillehay rode four-wheelers on the farm when they were dating in the late seventies or early eighties, but that she was otherwise unfamiliar with the property. Prior to closing on the purchase of the farm, sometime in late November or early December of 2005, Mr. and Mrs. Dillehay were touring the property when they happened upon Ms. Gibbs working in her barn. The barn is located on the western portion of Ms. Gibbs's farm, near the now disputed area. The three chatted awhile and eventually the Dillehays asked Ms. Gibbs where the boundary line was located. Ms. Gibbs indicated that the boundary line was a "fence down in the hollow" west of the barn. Mrs. Dillehay testified that Ms. Gibbs described the boundary fence as a woven-wire fence; Ms. Gibbs maintains that it is a barbed-wire fence. Because the disputed area is littered with remnants of old fences, the location of the correct fence line later became the subject of great contention and

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[2] Ms. Gibbs's father, Henry Sircy, purchased the farm in four tracts. He purchased the first tract of 75 acres in 1941; the second tract of 68 acres in 1944; the third tract of 10 acres in 1946; and the fourth tract of 6 acres in 1952. Mr. Sircy then sold the farm, with a total of 159 acres, in 1954.

[3] Mr. Stanley Dillehay is not an owner of any disputed property and is not a party to this suit.

paramount importance.

After this conversation, and without further inquiry into the whereabouts of the boundary line, Mrs. Dillehay purchased her farm. Afterward, the Dillehays again inquired with Ms. Gibbs as to the correct boundary line. On one occasion, Ms. Gibbs and one of her brothers walked the disputed area with the Dillehays. The Dillehays testified that, when walking the approximate boundary line, they located certain monuments called for in old deeds in Mrs. Dillehay's chain of title. For instance, they found remnants of a fence, an old stump, and an old beech tree marked with an "X." Mrs. Dillehay testified that she asked Ms. Gibbs whether this tree marked the boundary line and Ms. Gibbs answered that it did not. Ms. Gibbs maintained that the boundary line was "a fence down in the hollow" west of this location and that these monuments were located on her property.

Eventually, the parties discovered that they disagreed as to the correct boundary line. Both parties hired licensed land surveyors to establish the boundary line. Mrs. Dillehay hired Mike Holland and Richard Puckett; Ms. Gibbs hired Carroll Carman. All three testified at trial.

Both Ms. Gibbs's and Mrs. Dillehay's deeds are boundary deeds. As described at trial, a boundary deed essentially depicts a given property as being bounded on each side by its adjoining landowners. [4] However, the deeds do not give calls and distances necessary to place the exact location of the boundary line between the two properties. Consequently, the three surveyors resorted to other, varied means to locate the boundary line. Each surveyor suggested a different line established from different methods with differing degrees of certainty. Generally, Mr. Holland's and Mr. Puckett's lines follow a woven-wire fence and the monuments found by the Dillehays, and are set further east than Mr. Carman's. Mr. Carman's line is set well to the west and is shot on the remnants of a barbed-wire fence.

Mr. Holland testified that, after being contacted by Mrs. Dillehay, he researched the land records at the courthouse, collected data in the field, and spoke with both parties. Mr. Holland described the inherent difficulties in establishing a boundary line from boundary deeds. He stated that he was able to establish the boundary lines for all of Mrs. Dillehay's property, except the disputed boundary line between Mrs. Dillehay's and Ms. Gibbs's farms. Mr. Holland stated that he did not feel comfortable establishing the boundary line at that time. Thus, he did not perform a mathematically closed survey of Mrs. Dillehay's farm.

However, at trial, Mr. Holland did present a line representing the calls and distances

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[4] Ms. Gibbs's deed describes her property as being "[b]ounded on the North by Lester Jenkins and Bennie Sutton; East by Raymon West; South by Raymon West and Robert Russell and West by Leslie Oldham and Walter Petty containing One Hundred Fifty-Nine (159) Acres, more or less."

Mrs. Dillehay's deed describes her property as being bounded as follows:

Tract No. 1: North by the lands of Walter Petty; South by the land of Henry Hall Brown and the lands of Henry Brooks; East by the home place of Genie Sircy; and West by the lands of Walter Petty, containing sixty-five (65) acres, more or less.

Tract No. 2: Bounded on the East by Lum Russell, Raymond West, and Arville West; North by Walter Petty; South by Henry F. Brown; and West by Robert Russell, containing 69 acres, more or less.

extrapolated from old deeds in Mrs. Dillehay's chain of title, i.e., the "Boze deeds," dated 1919, and the "Richardson deed," dated 1920. These deeds contained calls and distances from monuments that Mr. Holland maintained could be plotted. [5] Mr. Holland surmised that, while Mrs. Dillehay's boundary deed omitted such calls and distances, the Boze and Richardson deeds reflected the boundary line as it was understood at the time of their making. Mr. Holland provided a trial exhibit showing the Boze deed line, which generally extends north-south along the woven-wire fence and monuments that the Dillehays found in the disputed area. However, there was some dispute at trial as to whether the monuments the Dillehays located were the same as called for in the Boze and Richardson deeds, given those deeds' ancient origins. Moreover, Mr. Holland never shot the line from the ground and, instead, only drew it on a map.

Because Mr. Holland's line was taken from the calls and distances in the Boze and Richardson deeds and set to match certain monuments, but never shot on the ground, it only travels in cardinal directions and does not necessarily follow the contours of the land. Moreover, while Mr. Holland stated that his exhibit at trial represented the Boze deed line to a reasonable degree of surveying certainty, he refused to call it the boundary line. He explained that he did not know where

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[5] Mrs. Dillehay introduced the handwritten Boze and Richardson deeds into evidence at trial. In her appellate brief, Mrs. Dillehay attached as appendices transcribed versions of the legal descriptions contained in the deed. Without making any finding as to the veracity of her transcription, we have reproduced Mrs. Dillehay's appendices below:

First Tract [Boze]

Beginning on a chestnut on top of [the] ridge Smith and Climer corner. Thence north 120 poles to a beach [sic]. Thence East 56 poles to a stake. Thence South 56 poles to a stake on the east side of the branch. Thence East 36 poles to an oak stump. Thence South 57 poles to a Sourwood—East 26 poles to a stake. Thence South 45 poles to a Beech on the south side of the branch in the head of the Hollow. Thence down the hollow with its meanderings. West 39 poles to a rock on the west side of the branch. Thence north 5° west 6 poles near a rock spring. Thence north 78° west 26 poles to a sugar tree. Thence with the right hand brink of the hill with a marked line northwardly, in all 130 poles to a stake. Thence north 82° west 5 poles to a stake. Thence south 37 1/4° west, 11 poles to the beginning containing by actual survey. 119 acres, 3 rods x 34 poles.

Second Tract [Boze]

Beginning on a maple on the point of a hill, on the said Yeamans east boundary line or in other words, the east boundary line of the above described tract of 119 acres, 3 rods 34 poles. Thence, south with said line 79 poles to a beech near a spring a corner of the above tract. Thence south 83° east, 22 3/4 poles to a poplar. Thence with a marked line around on the brink of the hill in a northward direction in all at the 90 poles to the beginning containing by estimation or actual survey, 10 acres, 3 poles. Both tracts together contain [by the same] 131 acres, more or less.

[Richardson Deed]

Beginning in the survey in the Boze line in the bottom of the hollow and trees as follows: S. 89 E. 8.60 up the hollow with the branch, S. 73-1/2E. 7P. with the hollow up the branch; S. 67-1/2 E. 16 P. with the hollow up the branch; S. 65 E. 12 P. with the hollow up the branch; N. 74E 4.60 P. passing a structure at 1.2 poles to an elm; S. 2-1/4 E. 4.84 P. to a walnut; S. 45-1/4 W. 4.64 P. to a Sycamore; S. 43-3/4E. 10.24 P. to a stake; S. 55-1/4 E. 41.36 P. to a sugartree near the road S. 85-1/4 E. 20.48 P. to a stake 30 links of two black gum pointers; S. 20-1/2 E. 20.20 P. to a chestnut; S. 18-3/4 E. 20.60 P. to a small hickory bush in or near the Kittrell line with locust, redbud and sugartree pointers. This deed of conveyance is subject to life estate of my mother, Mandy Frances Jenkins, and contains by estimation seventy five acres, be the same more or less.

the boundary line was and that he would "not force a line."

After Mr. Holland would not definitively establish a boundary line, Mrs. Dillehay hired Mr. Puckett to survey the boundary line. However, it does not appear from the record that Mr. Puckett established a line either. He testified that he was hired to prepare a survey showing where previous owners and surveyors had placed the boundary line. Mr. Puckett stated that, essentially, he had prepared a court exhibit illustrating the various lines as drawn by Mr. Carman and Mr. Holland. As monuments, Mr. Puckett's suggested line used the woven wire fence, the "X" marked beech, and an iron pin set at a fence corner. His line generally followed Mr. Holland's line, except that it was contoured to the shape of the land and extended slightly east of Mr. Holland's line. Consequently, Mr. Puckett's line was well to the east of Mr. Carman's line and drew the boundary most in Mrs. Dillehay's favor. Although he was aware that Mr. Carman also based his line on an old fence, Mr. Puckett testified that he had not walked Mr. Carman's line. Mr. Puckett further indicated that, because the two properties only had boundary deeds, mathematical closure of the boundaries was not possible and that he did not, in fact, know where the boundary line was. He explained that, "if you're going to survey a complete farm, you've got to have where it's been surveyed before . . . where you can check where the pins were, corners were, and . . . those old deeds just didn't have enough to do that."

The third land surveyor to testify was Mr. Carman. A licensed surveyor since 1977, Mr. Carman was hired by Ms. Gibbs, and his survey showed the furthest western extension of her boundary line. He testified that his survey accurately reflected the boundary line between Ms. Gibbs and Mrs. Dillehay to a reasonable degree of surveying certainty. Mr. Carman discussed his methodology in great detail. After researching the deeds and interviewing adjoining landowners and other knowledgeable persons, he attempted to plot the boundary line from the ground. He described the disputed area as being challenging terrain in which to work. After finding the woven-wire fence on which the Holland and Puckett lines were shot, Mr. Carman spoke with Ms. Gibbs's brothers and sisters, who told him that the boundary line was past that point "down yonder." While conceding that this information was not particularly helpful, Mr. Carman went searching for the boundary line so described. While searching, he found many fence remnants, which he surmised had been used for containment of farm animals due to their somewhat arbitrary locations.

Mr. Carman testified that eventually, after using a metal detector, he stumbled upon the remnants of a barbed-wire fence. According to Mr. Carman, the terrain on which the barbed-wire fence was located was "very hilly"; "very tough and rough"; "heavily wooded"; and at a steep incline. Mr. Carman said that, in his expert opinion, a containment fence would not be placed in such difficult terrain and that the location of the fence "indicate[d] that a lot of effort at one day was put into placing the fence to mark between two farms." Mr. Carman explained:

> It took a tremendous amount of labor. I have fenced before and in situations like this, and it took a tremendous amount of labor to bring wire in and put posts in and nail to trees and to do all that was done along that boundary line in years gone by. And since we had no evidence in Ms. Gibbs' deed or the new Dillehay deed, I deemed that the decision to run with this fence that was there was the only option that I had as a land surveyor at the time.

On cross-examination, Mr. Carman admitted that the deeds from which he established his line were boundary deeds without reference to monuments or calls and distances. He stated that he did not know who installed the fence upon which he shot his line or their purpose in installing the fence. While he attested to the barbed-wire fence as being the boundary line within a reasonable degree of surveying certainty, Mr. Carman admitted that he could not confirm the line to an absolute certainty. Mr. Carman further admitted that he did not use the Boze deeds in completing his survey. When presented with the Boze deeds at an earlier deposition, Mr. Carman stated that they could have had an impact on his survey. However, by the time he saw the Boze deeds, Mr. Carman testified that he had already completed his survey and been paid. He did not resurvey the line after learning of their existence, explaining that:

> Not until two years after [my] rendered survey and the conclusion of the work that had been done and at the end of the deposition [the Boze deed] was handed to me. [6] If it had been handed to me before and we had looked at this, there would have been a potential, a possibility that it would have changed some things at least in discussions. However, the larger view here is that there is a fence that shows continuity from south all the way to the north along the Dillehay line.

When asked whether he had seen or heard anything at trial that would change his opinion as to the veracity of his survey, Mr. Carman replied that, "I still stand by my survey" and further stated that "[t]he Boze survey, in my mind, is very—how shall I say—not credible, because practically every bearing on that deed is either a generalization of east, west, north or south and the property has never been utilized, nor possessed."

Mr. Carman was asked to explain why Ms. Gibbs's acreage, as measured by her property tax assessment, would increase from 127 acres to 182.4 acres in the year after Mrs. Dillehay purchased her farm. He stated that:

> Boundary deeds in this part of the country are notoriously twenty, thirty, forty percent high or low. We use the term more or less, and in those days it was true, an emphasis on more or less. And it's been . . . not uncommon in my thirty-five years of land surveying to see twenty and thirty percent moves on bounded deeds. And so I was not surprised in the least.

The trial court also heard lay testimony regarding the boundary line. A former owner in Mrs. Dillehay's chain of title, Robert Russell, testified that the boundary was east of Mr. Carman's line. Mr. Russell owned roughly the western portion of Mrs. Dillehay's farm from 1968 until 1977, while Mr. Russell's father owned roughly the eastern portion now in controversy. Mr. Russell testified that he and his father grew tobacco and raised cattle on the properties and that they ran a two-strand barbed-wire fence to contain cattle. Mr. Russell was unclear as to where the exact boundary line was located; however, he maintained that, during the time he lived on the farm, the boundary line was east of Mr. Carman's line.

Ms. Gibbs's siblings, each of whom lived on the farm in their youth, testified regarding the boundary line as understood at that time. Ms. Gibbs's sister, Maime Kitrrell, age 80, lived on the

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[6] The attorneys and witnesses generally referred to the Boze deeds in the singular.

farm from 1941 until her marriage in 1947. She averred that the barbed-wire fence, as reflected by Mr. Carman's survey, served as the boundary line during the time she lived on the farm. Ms. Gibbs's brother, Herbert Sircy, age 60, presently owns the western adjoining farm to Mrs. Dillehay's. He stated that he had cut timber on Ms. Gibbs's farm twice in his life for previous owners. According to Mr. Herbert Sircy, both times he timbered to the barbed-wire fence depicted in the Carman survey because it was the recognized boundary. Ms. Gibbs's brother, John Sircy, age 71, testified that he lived on the farm ten years in his youth and was fifteen when his father sold the farm. He indicated that, for as long as he could remember, the fence, as depicted by Mr. Carman's survey, was in existence and served as the boundary line between the two farms. Ms. Gibbs's brother, Ray Sircy, age 73, lived on the farm for thirteen years and was approximately twenty when his father sold the farm. He testified that when he worked on the farm, a net-wire fence was used to contain hogs. He indicated that the boundary fence was part net-wire and part barbed-wire and that remnants of it still existed.

At the conclusion of the trial, the trial court issued its findings of fact and conclusions of law from the bench. After summarizing the evidence adduced, the trial court found: (1) that Mr. Carman's survey established the boundary line between the two farms; (2) that Ms. Gibbs had adversely possessed the disputed area; and (3) that Mrs. Dillehay's predecessors in title had acquiesced in the boundary line as set by the barbed-wire fence. The trial court dismissed Mrs. Dillehay's complaint and assessed costs against her. The trial court adopted these oral findings by final judgment entered July 1, 2010.

Mrs. Dillehay timely appealed and raises the following issues for our review, as restated from her brief.

> 1. Whether the trial court erred by accepting Mr. Carman's survey to establish the boundary line?
>
> 2. Whether the trial court erred by determining that Ms. Gibbs adversely possessed the disputed property?
>
> 3. Whether the trial court erred by determining that Mrs. Dillehay acquiesced in the location of the boundary line?

The usual standard of review applicable to bench trials applies in boundary disputes. *Jackson v. Bownas*, No. E2004-01893-COA-R3-CV, 2005 WL 1457752, at *6 (Tenn. Ct. App. June 21, 2005). **[LLHN1]** This Court conducts a *de novo* review of the trial court's decision with a presumption of correctness as to the trial court's findings of fact, unless the evidence preponderates against those findings. *Wood v. Starko*, 197 S.W.3d 255, 257 (Tenn. Ct. App. 2006). For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *Walker v. Sidney Gilreath & Assocs*., 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000); *The Realty Shop, Inc. v. R.R. Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999).

[LLHN2] "In resolving a boundary line dispute, it is the role of the trier of fact to evaluate all the evidence and assess the credibility of the witnesses." *Mix v. Miller*, 27 S.W.3d 508, 514 (Tenn. Ct. App. 1999) (citing *Norman v. Hoyt*, 667 S.W.2d 88, 91 (Tenn. Ct. App. 1983)). "Where there is a conflict in testimony, the trial court is in a better position than this Court to observe the demeanor of the witnesses and evaluate their credibility." *Jackson*, 2005 WL 1457752, at *6. Thus, we will give great weight to a trial court's determinations as to the credibility of witnesses. *Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997). This deferential standard specifically applies in a boundary dispute where a trial court must choose between two competing surveys. *Jackson*, 2005 WL 1457752, at *6 (citing *Mix*, 27 S.W.3d at 514; *Stovall v. Bagsby*, No. M2002-01901-COA-R3-CV, 2003 WL 22768677, at *2 (Tenn. Ct. App. Nov. 24, 2003); *Edwards v. Heckmann*, No. E2002-02292-COA-R3-CV, 2003 WL 21486987, at *4-5 (Tenn. Ct. App. June 25, 2003)).

[LLHN3] "When determining a boundary line that is in dispute, the court must look first to the natural objects or landmarks on the property, then to the artificial objects or landmarks on the property, then to the boundary lines of adjacent pieces of property, and finally to courses and distances contained in documents relevant to the disputed property." *Mix*, 27 S.W.3d at 513 (citing *Franks v. Burks*, 688 S.W.2d 435, 438 (Tenn. Ct. App. 1984); *Thornburg v. Chase*, 606 S.W.2d 672, 675 (Tenn. Ct. App. 1980)).

After reviewing the record, the appropriate standards of review, and the rules governing boundary disputes, we conclude that the evidence does not preponderate against the trial court's finding that Mr. Carman's survey establishes the boundary line between the parties' farms.

The evidence on either side was problematic and not particularly compelling. [7] All three surveyors were reluctant to establish an exact boundary line and noted the inherent difficulties in doing so based on boundary deeds. Mr. Holland used the old Boze and Richardson deeds to draw a line. However, Mr. Holland refused to call his line the boundary line. Moreover, he never shot his line from the ground, and his straight, compass-point lines do not appear to match the contours of the properties. Mr. Puckett, although his line more closely followed the natural contours of the land, testified that he did not survey the line himself but rather prepared a trial exhibit showing where everyone else had purported the line to be. Mr. Carman's line appears to be based largely on the location of the barbed-wire fence.

Mrs. Dillehay contends that the trial court erred by accepting Mr. Carman's survey, which relies upon an artificial object, i.e., the barbed-wire fence, over Mr. Holland's survey, which relies upon natural objects, i.e., the beech tree and old stump. *See Mix v. Miller*, 27 S.W.3d 508, 513 (Tenn. Ct. App. 1999). We are not persuaded for several reasons. First, we reiterate that Mr. Holland did not purport to establish a boundary line and, in fact, expressly refused to do so. Second, the Boze and Richardson deeds, upon which Mr. Holland's survey relied, were dated 1919 and 1920, and we need not unduly stress the difficulty of matching present trees and stumps to such ancient descriptions. Third, to the extent the Boze and Richardson deeds relied on boundary lines of adjacent properties and courses and distances, these markers are inferior to artificial ones. *See Mix*, 27 S.W.3d at 513. Finally, Mr. Holland's replication of the Boze line relied on a woven-wire fence, itself an artificial

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[7] We note that our review was hampered by the appellate record. In addition to referring to trial exhibits which were omitted from the appellate record, the witnesses and attorneys would often refer and point to locations on surveys or maps without sufficient description for a reviewing court to identify the precise location under discussion.

marker, at least as much as the natural markers called for in the Boze and Richardson deeds.

This case essentially boils down to which of two flawed surveys the trial court most credited—Mr. Holland's, cobbled together from ancient deeds with little apparent connection to the land and a disclaimer as to its veracity, or Mr. Carman's, shot from the ground on an old fence with slight support from the underlying deeds. It appears from the record that Mr. Carman was the only surveyor to establish a boundary line within a reasonable degree of surveying certainty. He provided detailed reasons supporting his decision and extensive critiques of the other surveyors' methods. In his expert opinion, Mr. Carman believed that the location of the barbed-wire fence on a steep, wooded slope indicated that it was placed there to serve as a boundary line. He testified that the other fences in the disputed area, including the woven-wire fence upon which the Holland and Puckett lines relied, were in locations indicating their service as containment fences for farm animals.

This conclusion was corroborated by the testimony of Ms. Gibbs and her siblings. They each testified that the barbed-wire fence served as the boundary line when they lived on the farm from 1943 until 1954, and that the woven-wire fence was used for containment purposes. Further, Ms. Gibbs's farm was cut twice for timber, and testimony indicated that both times it was timbered to the barbed-wire fence. While Mr. Russell testified that he and his father constructed a two-strand barbed-wire containment fence, we cannot discern from the record the location of this fence. *See* note 6. The trial court, having seen and heard the witness, determined that the fence Mr. Russell referred to was not located in the disputed area. Moreover, Mr. Russell could not conclusively establish where the boundary line was located during the time he lived and worked on the farm.

From our review of the record, the trial court was intensely engaged in trying this matter. It thoroughly questioned the surveyors' methods and conclusions. It ultimately concluded that Mr. Carman's survey was the most reliable and established the boundary line accordingly. We will give great deference to a trial court's decision between competing surveys. *See, e.g., Jackson v. Bownas*, No. E2004-01893-COA-R3-CV, 2005 WL 1457752, at *7 (Tenn. Ct. App. June 21, 2005) (citing *Mix*, 27 S.W.3d at 514; *Stovall v. Bagsby*, No. M2002-01901-COA-R3-CV, 2003 WL 22768677, at *2 (Tenn. Ct. App. Nov. 24, 2003); *Edwards v. Heckman*, No. E2002-02292-COA-R3-CV, 2003 WL 21486987, at *4-5 (Tenn. Ct. App. June 25, 2003)). Based on our review, we cannot say that the trial court's findings of fact preponderate against the record. Rather, ample evidence in the record supports the trial court's finding that the barbed-wire fence was historically considered the boundary between the two farms. *See, e.g., Jackson*, 2005 WL 1457752, at *6; *Collins v. Collins*, No. 03A01-9708-CH-00326, 1998 WL 227778, at *2 (Tenn. Ct. App. May 8, 1998).

Because we have determined that the trial court did not err in establishing the boundary line in accordance with Mr. Carman's survey, it is not necessary to address whether Ms. Gibbs acquired title to the disputed area by virtue of adverse possession or acquiescence. Consequently, these issues are pretermitted.

For the foregoing reasons, the judgment of the trial court is affirmed. Costs of this appeal are assessed against the Appellant, Mrs. Geneil Hailey Dillehay, and her surety.

VAYLEN and LORI MCGLOTHLIN, Husband and Wife, Plaintiffs/Appellees,

v.

RUBY LIVINGSTON, JOHN LIVINGSTON, and DAWN LIVINGSTON, Defendants/Appellants.

No. 107144

Court of Appeals of Oklahoma, Division IV

2012 OK CIV APP 48

November 9, 2011

LUCAS LETTER HEAD NOTES [LLHN]:

Real Property Law; Boundary Establishment; Doctrine of Acquiescence:
Real Property Law; Boundaries; Adverse Possession; Burden of Proof:
[LLHN1] A property owner is not required to place a fence on the property line and does not give up any rights by placing a fence off the property line and along some line within the property. For purposes of boundary by acquiescence and adverse possession, claimant has the additional burden of showing who built the fence.

Civil Procedure; Appeals; Standards of Review; De Novo Review:
[LLHN2] The issue presented is the application of law to facts. An appellate court reviews this *de novo*. Appellate courts claim plenary, independent and non-deferential authority to examine a trial court's legal rulings.

Real Property Law; Boundaries; Adverse Possession by Prescription:
Real Property Law; Boundaries; Adverse Possession; Burden of Proof:
[LLHN3] All presumptions are in favor of the record title holder. Prescriptive title is disfavored and not to be made out by inference. The party seeking prescriptive title have the burden of proving every element by clear and positive proof..

Real Property Law; Boundary Establishment; Doctrine of Acquiescence; Elements:
[LLHN4] Since plaintiff pitches his claim to the boundary upon acquiescence, he thereby eliminates agreement in the sense of a contract and relies wholly upon the acts of the various actors. Thus the elements of boundary by acquiescence are (1) the division of a unit of land; (2) the running of a fence between the divided portions of the unit deviating from the true line as established by government survey; (3) the continued maintenance of the fence for 27 years; and (4) the use by the respective parties of the land lying on their respective sides of the fence.

Real Property Law; Boundary Establishment; Doctrine of Acquiescence:
[LLHN5] the doctrine of boundary by acquiescence applies only where there is uncertainty or doubt as to the true boundary line, or where no surveyed or recognized boundary line existed when the fence was erected. Boundary by acquiescence does not apply when the deed clearly described the true boundary and there was no evidence that the location of the true boundary was unknown.

Real Property Law; Boundary Establishment; Doctrine of Acquiescence:
Real Property Law; Boundary Establishment; Boundary by Oral Agreement:
[LLHN6] if both landowners agree to erect a fence or marker in an effort to establish the boundary between their properties, where the true boundary is unknown or in dispute, a boundary by agreement is established. If the fence was erected by remote predecessors in title of the current owners to establish the boundary between the properties, where the true boundary is unknown or in dispute, and has been regarded by all subsequent owners as the boundary for at least 15 years, the

courts infer the parties agreed, or acquiesced to, the fence representing the boundary between the properties. In short, the doctrines are identical in concept and application, differing only when answering the question, who built the fence?

Real Property Law; Conveyances; Statute of Frauds:
Real Property Law; Boundary Establishment; Boundary by Oral Agreement:
[LLHN7] The Statute of Frauds states in part that an agreement for the sale of real property, or of an interest therein is invalid, unless the same, or some note or memorandum thereof, be in writing. Establishing a boundary by agreement does not violate the Statue of Frauds. Where the boundary line between joint owners of realty is in dispute, a parol agreement between them locating such boundary line is not within the statute of frauds.

Real Property Law; Conveyances; Statute of Frauds:
Real Property Law; Boundary Establishment; Boundary by Oral Agreement:
[LLHN8] The statute is a rule of conveyance. It requires a writing to create an interest in lands. But adjoining owners who adjust their division line by parol do not create or convey any estate whatever between themselves. No such thought or intention influence their conduct. After their boundary is fixed by consent, they hold up to it by virtue of the title deeds, and not by virtue of a parol transfer. Generally, indeed, they feel that their rights as defined in the title papers have been abridged rather than enlarged by the agreed line; and this because their treaty proceeds on the basis that the exact right between them is doubtful. Out of the doubtfulness of the right springs the consideration which binds parties to such agreements.

Real Property Law; Conveyances; Statute of Frauds:
Real Property Law; Boundary Establishment; Boundary by Oral Agreement:
[LLHN9] the doctrines of boundary by agreement or boundary by acquiescence do not violate the Statute of Frauds because their application does not transfer title or an interest in property. Rather, these doctrines are the means by which two property owners, or their assigns, establish a boundary line between properties they own, the actual boundaries of which are unknown. The doctrines are applied to recognize that which has been already established, *i.e*., the boundary, not to add or subtract land that is already owned.

Real Property Law; Boundaries; Adverse Possession by Prescription:
Real Property Law; Easements; Prescriptive Easements; Permissive Use:
[LLHN10] A mere permissive use of a way over the land of another, however long indulged in, will not ripen into an easement. Where it appears that the original use of a road was permissive, the burden of proving that such permissive use had ceased and had become adverse is thrown upon the party asserting same.

Real Property Law; Easements; Prescriptive Easements; Permissive Use:
Real Property Law; Easements; Prescriptive Easements; Burden of Proof:
[LLHN11] If the use originates by permission or license and an easement by prescription is claimed, the burden of proving that the permissive use had ceased and that the use for the necessary period had been adverse under claim of right is on the party asserting the fact of adverse user, and in case of doubt, such fact will be resolved against him.

Real Property Law; Boundaries; Adverse Possession:
[LLHN12] The moment the adverse possession is broken it ceases to be effectual, because as soon as, and as often as, a break occurs the law restores the constructive possession of the owner.

Real Property Law; Boundaries; Adverse Possession by Prescription:
[LLHN13] To acquire possession by prescription the possession must be open, visible, continuous, and exclusive, with a claim of ownership, such as will notify parties seeking information upon the

subject that the premises are not held in subordination to any title or claims of others, but against all titles and claimants. Furthermore, the possession must also be actual, notorious, and hostile. If the owner acquiesces in or consents to the use of the land, then the use is not adverse and title by prescription cannot be acquired.

Real Property Law; Easements; Easement by Implication:
Real Property Law; Easements; Prescriptive Easements:
[LLHN14] Where during the unity of title an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which, at the time of the severance of title, is in use, and is reasonably necessary for the fair enjoyment of the other, then upon a severance of such ownership, whether by voluntary alienation or by judicial proceedings, there arises by implication of law a grant or reservation of the right to continue such use. While the mere permissive use of a way over the land of another will not ripen into an easement, yet one who joins his adjacent landowner in the construction of a paved private way over and along the medial line has given such adjacent owner more than a mere license. Each owner, by use of the driveway, is continuously asserting an adverse right to use the portion of the way on the other's lot. And from such use for 15 years the law raises a presumption of the grant of an easement.

APPEAL FROM AN ORDER OF THE DISTRICT COURT OF DELAWARE COUNTY, OKLAHOMA HONORABLE BARRY V. DENNEY, TRIAL JUDGE.

Counsel: K. Ellis Ritchie, David F. DuVall, K. ELLIS RITCHIE, P.C., Pryor, Oklahoma, for Appellants

Tommy R. Dyer, Jr., DAVIS & THOMPSON, Jay, Oklahoma, for Appellees

JERRY L. GOODMAN, PRESIDING JUDGE

OPINION

¶1 Defendants Ruby, John, and Dawn Livingston (Collectively, West Landowners), appeal the trial court's April 30, 2009, order which granted prescriptive title to property taken from them and granted to Plaintiffs Vaylen and Lori McGlothlin (East Landowners) when the trial court moved the true boundary line between their respective properties by holding that a fence of unknown origin and purpose had become the boundary between the properties. Based on our review of the facts and applicable law, we reverse the trial court's order.

FACTS

¶2 East Landowners and West Landowners own adjoining properties divided by a north-south boundary line. East Landowners' son shot West Landowners' dog. As a result, criminal charges were filed against the son. After these events, East Landowners wrote a letter to West Landowners telling them to stop using the north-south roadway between the parties' adjoining properties, roughly paralleling the boundary line, apparently believing the roadway was wholly on their property. [1] West Landowners had obtained a survey in 1992 to reconfirm the legal boundary between the adjoining properties, as described in their respective deeds. The survey showed that the entrance to the roadway was on West Landowners' property. Relying on the survey, West Landowners parked a truck across the entrance to block East Landowners' use of it.

¶3 East Landowners then obtained a temporary injunction keeping the road open, claiming the fence on the western side of the roadway was in fact the true boundary line between the properties and further requesting the court quiet title in them to that portion of the land on East Landowners'

---

[1] The road is used by both East and West Landowners, and other property owners to the south for access to their respective homes.

side of the fence. The fence is not on the surveyed boundary line. It runs across the adjoining properties in a northwest-to-southeast direction. According to the survey, the northwest portion of the fence is on West Landowners' property and the southeast portion is on East Landowners' property. This fence has been in place at least since the 1940s and its origin and purpose is unknown. Previous adjoining landowners have worked on and maintained the fence during their ownership of the respective properties.

¶4 A section line road runs east-west on the northern boundary of both properties. An "old trail" provided access from the section line road to the parties' adjoining properties and to several properties adjoining East Landowners on the south. The subject fence was originally on the west side of the "old trail" and ran somewhat parallel to it.

¶5 In 1981, East Landowners stopped the owner of the property adjoining theirs on the South from using the "old trail" to gain access to his property. This owner, together with other owners of property next to East Landowners' southern boundary (Southern Landowners) filed suit against East Landowners to condemn a way of necessity across East Landowners' property because theirs was landlocked.

¶6 This suit was settled among the parties by East Landowners' predecessor in title granting to the landlocked South Landowners a thirty-three foot right of way across the west side of East Landowners' property. In consideration for the grant, South landowners agreed to improve the existing road and enclose East Landowners' property with a fence. South Landowners, believing the existing fence marked East Landowners' western boundary, improved the road on the east side of and substantially parallel to the existing fence and essentially over the "old trail." As part of the agreement, they then built a new fence along the east side of the new road and along the south boundary of East Landowners' property in order to enclose the road.

¶7 As previously stated, West Landowners had their property surveyed in 1992 to determine the true record title boundary line of their property. [2] According to the survey, the north entry point from the section line road and a portion of the new road is on West Landowners' property; the road then runs southeasterly intersecting the surveyed boundary line deep into East Landowner's property, then continues to the south and southeast.

McGlothlin I

¶8 This is the second time this case has been before us. We will refer to the previous appeal as *McGlothlin I* (Appeal, No. 104, 126, *McGlothlin v. Livingston*) and this appeal as *McGlothlin II.*

¶9 East Landowners sued West Landowners, claiming the existing fence line had become the true boundary line. West Landowners disagreed, contending the true boundary line was that revealed in the descriptions contained in the deeds and confirmed by the survey. Of critical importance is the fact that neither party disputed the boundary line described in the deeds or survey. Rather, East Landowners seek to move that boundary to match the existing fence line, while West Landowners seek to maintain the legally described boundary intact. East Landowners were granted summary judgment determining the fence to be the boundary, by acquiescence of the parties, and prescriptive title was given to East Landowners to those portions of West Landowners' property lying beyond the surveyed boundary. West Landowners appealed in *McGlothlin I.*

¶10 In *McGlothlin I*, which is now the law of the case, this Court held the fence did not create a

[2] The boundaries of East and West Landowners' lots had been surveyed many years earlier and were described in their respective deeds. The 1992 survey was merely to confirm the boundary lines in the deeds, which were never in dispute.

boundary by acquiescence because there was no evidence yet produced to prove that the fence was built to divide a commonly owned unit of real property; further, that "No boundary dispute was being settled by the erection of the fence." Rather, there was "some implication in this record that the fence was erected and maintained to enclose cattle, not to delineate a boundary." Finally, Judge Reif, now Justice Reif, specially concurred for the purpose of emphasizing:

> **[LLHN1]** "… a property owner is not required to place a fence on the property line and does not give up any rights by placing a fence *off* the property line and along some line *within* the property. In my opinion, East Landowners have the additional burden of showing who built the fence for purposes of boundary by acquiescence and adverse possession." (Emphasis in original.)

¶11 A Petition for Certiorari filed in *McGlothlin I* was denied by the Oklahoma Supreme Court by a vote of nine to zero and mandated December 14, 2007. Therefore, *McGlothlin I* is now the law of the case.

McGlothlin II

¶12 After remand, a non-jury trial was held. The same trial court once again determined the doctrine of boundary by acquiescence applied to establish the boundary between the parties' land, and additionally found the doctrine of adverse possession applied, giving prescriptive title of portions of West Landowners' property to East Landowners. West Landowners once again appeal.

¶13 In *McGlothin II*, to its credit, the trial court made extensive, carefully written findings of fact and conclusions of law. In doing so it fashioned a remedy providing ingress and egress on the current roadway, holding the original fence between the properties is the new boundary line, and giving each party some of the other's property under the theory of adverse possession.

¶14 We reverse the trial court's order. We hold under these facts the doctrine of boundary by acquiescence does not apply, and there is insufficient proof that the doctrine of adverse possession applies.

STANDARD OF REVIEW

¶15 **[LLHN2]** The issue presented is the application of law to facts. We review this *de novo*. *Villines v. Szczepanski*, 2005 OK 63, ¶ 8, 122 P.3d 466, 470; *Booth v. McKnight*, 2003 OK 49, ¶ 12, 70 P.3d 855, 860. We claim plenary, independent and non-deferential authority to examine a trial court's legal rulings. *Manley v. Brown*, 1999 OK 79, ¶ 22 n.30, 989 P.2d 448, 456 n.30.

Presumptions in Favor of Record Title Holder

¶16 **[LLHN3]** All presumptions are in favor of the record title holder, here, the West Landowners. *Francis v. Rogers*, 2001 OK 111, ¶13, 40 P.3d 481, 486; *Willis v. Holley*, 1996 OK 107, ¶ 5, 925 P.2d 539, 540; *Tindle v. Linville*, 1973 OK 64, ¶ 8, 512 P.2d 176, 178. Prescriptive title is disfavored and not to be made out by inference. *Francis, supra.; Willis*, *supra*., at ¶ 5, at 540; *Tindle,* supra., at ¶ 8, at 178. The party seeking prescriptive title, East Landowners, have the burden of proving every element by clear and positive proof. *Willis, supra*.

ANALYSIS

¶17 The context for the analysis in *McGlothlin II* must include established principals of law concerning record title, proper application of the doctrines of prescriptive title, boundary by acquiescence, boundary by agreement, and the Statute of Frauds. Moreover, statutory amendments to Title 4, Animals, Restraint and Enclosures (4 O.S.Supp. 2007, § 150.1) relating to the erection and maintenance of fences between property owners, should be included in such context, because of the light it sheds on the subject of fences, their origins and purposes, and the rights and duties of the adjoining landowners who create them. [3]

I. DOCTRINE OF BOUNDARY BY ACQUIESCENCE

¶18 *Lewis v. Smith*, 1940 OK 276, 103 P.2d 512, sets out the elements of the doctrine of boundary by acquiescence:

> **[LLHN4]** Since plaintiff pitches his claim to the boundary upon acquiescence, he thereby eliminates agreement in the sense of a contract and relies wholly upon the acts of the various actors. Thus we have (1) the division of a unit of land; (2) the running of a fence between the divided portions of the unit deviating from the true line as established by government survey; (3) the continued maintenance of the fence for 27 years; and (4) the use by the respective parties of the land lying on their respective sides of the fence only. Is this sufficient to establish title by acquiescence?
>
> We think it is. … *Id.*, at ¶¶ 8, 9, at 514.

¶19 These elements have been examined and applied where appropriate, both before *Lewis* was pronounced (*see Roetzel v. Rusch,* 1935 OK 405, ¶ 18, 45 P.2d 518, 522; *Rocher v. Williams*, 1938 OK 376, ¶ 15, 80 P.2d 649, 651) and afterwards (*see Lamm v. Hardigree,* 1940 OK 494 , ¶ 9, 109 P.2d 225, 226; *Piquet v. Piquet*, 1964 OK 26, ¶ 5, 165 P.2d 622, 624; *Kinkade v. Simpson*, 1948 OK 186, ¶ 8, 197 P.2d 968, 970; and *Francis v. Rogers*, 2001 OK 111, ¶ 18, n.17, 40 P.3d 481, 487, n.17). Indeed, there are numerous cases addressing this doctrine, many of which have no precedential value. Moreover, the facts in many of those cases are not set out in sufficient detail to determine exactly under what circumstances the doctrine applies.

¶20 We will not re-examine the *Lewis* elements here. The trial court, in its efforts to resolve the matter equitably between the parties, spent considerable time in analyzing *McGlothlin I* and providing its interpretation of the cases on which it relied. This is reflected in its detailed order of judgment. However, no doubt influenced by the arguments of the parties and the desire to reach an equitable result, the trial court once again found the doctrine of boundary by acquiescence applied even though no proof existed as to the origin and purpose of the fence in question. Moreover, neither the trial court nor the parties followed the law of the case doctrine. We have re-examined the relevant

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[3] Recognizing that many of these disputes could be resolved in their infancy by full disclosure and open communication between the adjoining landowners, the Oklahoma Legislature enacted § 150.1, effective November 1, 2007. This section states, in relevant part:

A. If a survey obtained by a property owner reflects a property line across an existing boundary or division line fence, said property owner shall not damage or remove the existing fence … until the adjacent property owner has been given notice. The notice shall include a copy of the survey, the nature of the relief requested, and notice that the court may award attorney fees and costs to the prevailing party if an action to establish title is filed by the requestor against the recipient. …

B. If no agreement has been reached by the adjoining property owners within thirty (30) days from receipt of the notice sent pursuant to subsection A of this section, the property owner may cause an action to be filed against the adjacent property owner in the district court in the county where the property is located to establish title to the parcel of property at issue. …

This is a well-intended and purposeful law which has the potential to resolve most of these disputes by agreement of the parties before such disputes ripen into litigation. Indeed, this statutory procedure, had it been followed, could well have resolved the case before us, which has once before been tried, appealed, considered and decided by the Court of Civil Appeals, then denied certiorari by the Supreme Court of Oklahoma, and is now back again for a second review. Obviously, untold judicial resources at both the trial and appellate level have been consumed by the dispute between these parties.

cases and remain convinced the doctrine of boundary by acquiescence does not apply here.

¶21 A careful reading of the cases set out above reveals **[LLHN5]** the doctrine of boundary by acquiescence applies only where there is uncertainty or doubt as to the true boundary line, or where no surveyed or recognized boundary line existed when the fence was erected. [4] *See* Lewis, *supra.* at ¶ 7, at 514; [5] *Rocher, supra. at* ¶ 15, at 651; [6] *Piquet*, *supra*. at ¶¶ 0, 2, at 622, 623; [7] *Lamm*, *supra*. at ¶ 8, at 226; [8] *Kinkade, supra.* at ¶ 2, at 969; [9] *Bucknerv. Russell,* 1958 OK 237, ¶¶ 9, 13, 331 P.2d 401, 403-04; [10] and *Patterson v. Meyer*, 1910 OK 355, ¶¶ 0, 2, 114 P. 256, 256-57. [11] See also, *Francis,* supra. at ¶¶ 11, 21, at 485, 488, which held boundary by acquiescence did not apply because the deed clearly described the true boundary and there was no evidence "that the location of the true boundary was unknown."

¶22 East and West Landowners took title to their respective properties by written deed with full knowledge of the legally-described boundaries of their property. Later surveys confirmed the boundary lines. Thus, there is no dispute, no mistake, and no ignorance regarding the true boundary line dividing East and West Landowners' properties. Because of this certainty of the true boundary line, East Landowners are not attempting to enforce an agreement by which the fence establishes a boundary with their neighbor because of uncertainty regarding the true boundary; rather, they are claiming land belonging to another. As discussed below, this may only be accomplished by deed or by adverse possession. It cannot be accomplished by the doctrine of boundary by acquiescence or the doctrine of boundary by agreement. [12] To apply the doctrine of boundary by acquiescence in this

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[4] In this opinion, we use the term "boundary" to mean the legally-described line, set out either in a deed or by survey, separating two parcels of real property. The term "partition" describes the subdivision of a parcel of real property into smaller parts. Fences are often erected to memorialize a boundary line or partition line. In some instances, but not all, the fence may serve a dual role. It may mark both a partition and a boundary. In short, every boundary fence is also a partition fence, but not every partition fence is a boundary fence.

These terms should not be confused with the equitable action of partition, wherein owners in common may petition the court to divide, or partition, the commonly held land into smaller parcels to be held in severalty.

[5] "It does not appear that the true boundary was known or unknown to them … until the true line could be located later."

[6] "Where, as in this case, the exact location of a common boundary line is unknown to the owners of the adjacent …."

[7] "never been any dispute … until … a new local survey [was] made."

[8] "[i]information recently acquired from a surveyor..."

[9] "At that time the exact location of the line … was not definitely known or established …."

[10] "[t]hree different surveys which varied widely..." "Surveyor admitted there are 'numerous errors in government surveys.'"

[11] "Where the boundary line between joint owners of realty is in dispute, a parol agreement between them locating such boundary line is not within the statute of frauds."

[12] Boundary by Agreement is closely related to, though distinct from, the doctrine of boundary by acquiescence. It is defined as:

[w]herein the exact location [of the true boundary] is unknown but the owners mutually agree on the location of their boundary line though it may vary from the description in their conveyances.... *Lake; For Use Of Benton v. Crosser,* 1950 OK 49, ¶ 9, 216 P.2d 583, 585; *Francis v. Rogers*, 2001 OK 111, ¶ 19, 40 P.3d 481, 487.

In short, **[LLHN6]** if both landowners agree to erect a fence or marker in an effort to establish the boundary manner violates the Statute of Frauds.

The McGlothlin II Court's Order Violates the Statute of Frauds

¶23 **[LLHN7]** The Statute of Frauds, 15 O.S.2001, § 136, states in part:

> The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing …
>
> 4. An agreement … for the sale of real property, or *of an interest therein*; (emphasis added).

¶24 Establishing a boundary by agreement does not violate the Statue of Frauds. *Rocher v. Williams*, 1938 OK 376, ¶ 15, 80 P.2d 649, 651. In *Patterson v. Meyer*, 1910 OK 355, 114 P. 256, the Oklahoma Supreme Court held in its syllabus:

> Where the boundary line between joint owners of realty is in dispute, a parol agreement between them locating such boundary line is not within the statute of frauds. *Id.* at ¶ 0, at 256.

The *Patterson* Court explained:

> **[LLHN8]** The statute is a rule of conveyance. It requires a writing to create an interest in lands. But adjoining owners who adjust their division line by parol do not create or convey any estate whatever between themselves. No such thought or intention influence their conduct. After their boundary is fixed by consent, they hold up to it by virtue of the title deeds, and not by virtue of a parol transfer. Generally, indeed, they feel that their rights as defined in the title papers have been abridged rather than enlarged by the agreed line; and this because their treaty proceeds on the basis that the exact right between them is doubtful. Out of the doubtfulness of the right springs the consideration which binds parties to such agreements. … *Patterson, supra.* at ¶ 2, at 257.

¶25 Thus, **[LLHN9]** the doctrines of boundary by agreement or boundary by acquiescence do not violate the Statute of Frauds because their application does not transfer title or an interest in property. Rather, these doctrines are the means by which two property owners, or their assigns, establish a boundary line between properties they own, the actual boundaries of which are unknown. The doctrines are applied to recognize that which has been already established, *i.e.*, the boundary, not to add or subtract land that is already owned.

¶26 By erroneously applying the doctrine of boundary by acquiescence, and using this as a basis to transfer ownership of an estate in real property, the trial court's order in *McGlothlin II* created a new interest in the taken property and transferred it without a writing, violating the Statute of Frauds.

Purpose of the Fence

¶27 We reverse the order for an additional reason: the record suggests the purpose of the fence was not to establish a boundary, but was merely a partition fence. [13] Knowing the purpose for the fence is an important factor in applying the doctrine of boundary by acquiescence. In *Kinkade*, the Court held:

> [i]t clearly appears that the fence was not erected as a boundary fence, but simply for the purpose of enabling the builders of the fence to serve their own purposes. *Id*. at ¶ 6, at 969-970.

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between their properties, where the true boundary is unknown or in dispute, a boundary by agreement is established. If the fence was erected by remote predecessors in title of the current owners to establish the boundary between the properties, where the true boundary is unknown or in dispute, and has been regarded by all subsequent owners as the boundary for at least 15 years, the courts infer the parties agreed, or acquiesced to, the fence representing the boundary between the properties. In short, the doctrines are identical in concept and application, differing only when answering the question, who built the fence?

[13] See n.2, *supra*.

¶28 There is evidence in this case that as early as 1963, West Landowners knew the fence they maintained with East Landowners was not on the true boundary line, but enclosed less than the whole. West Landowners maintained the fence to contain their cattle and not to establish a boundary. Because the road beyond their fence was used by both parties and their neighbors needing access from the section line road to property to the south, West Landowners chose not to move the fence across the road and place it on the boundary line because to do so would require opening and closing a gate each time for access to the road.

¶29 This analysis comports with the concerns expressed in *McGlothlin I* that an owner is not required to place a fence on the boundary line and does not run the risk of losing his property to a neighbor simply because he chooses to enclose less than all his property with a fence. [14]

¶30 Therefore, for the reasons set out above, we hold the trial court misapplied the doctrine of boundary by acquiescence. The true boundary line between the properties was known and not disputed or questioned; therefore, the doctrine does not apply. Because East Landowners sought by their quiet title action to take property legally belonging to West Landowners, they are confined to doing so either by written agreement between the parties, *i.e*., a deed, or by adverse possession.

II. TITLE BY ADVERSE POSSESSION

¶31 The trial court also found that the same facts supported the grant of prescriptive title under the theory of adverse possession. West Landowners argue that East Landowners did not meet their burden by clear and positive proof to show continuous and exclusive use. *Willis, supra.* at ¶ 5, at 540. We agree.

¶32 We cite the following cases at length because the facts in them are similar to those before us. The Oklahoma Supreme Court ruled in *Irion v. Nelson*, 1952 OK 331, 249 P.2d 107, that:

> **[LLHN10]** [ ]A mere permissive use of a way over the land of another, however long indulged in, will not ripen into an easement.
>
> And
>
> [ ]Where it appears that the original use of a road was permissive, the burden of proving that such permissive use had ceased and had become adverse is thrown upon the party asserting same. *Id*. at ¶ 0, at 108 (syllabus by the court).
>
> The *Irion* Court went on to state:
>
> The evidence in the present case fails to show that the defendant or the former owners of his land ever made any objection to the use of the road over said land. Our remarks in *Friend v. Holcombe* [1945 OK 267, 162 P.2d 1008], in speaking of a pass-way over grazing lands in Osage county are therefore applicable to the road in question as it originally existed. There we said:
>
>> "In the present case the evidence disclosed that no objection was ever made by the defendants or their predecessors in title to people crossing their lands. No doubt they and their predecessors in title were following the 'good neighbor' policy, ... and defendants' attention was never called to the fact that plaintiff or others using the roadway were claiming such use

[14] For example, a person fencing in 9 acres of his 10-acre tract should not run the risk of losing the unfenced acre to a neighbor simply because it is not fenced. That fence, while it is a partition fence, is not a boundary fence. Put simply, if a landowner approaches a fence from his side of the property and passes through a gate to the other side, upon whose property is he now standing? If the property he is standing on is his, the fence is a partition fence; if his neighbor's, it is a boundary fence.

> as a right or adversely to defendants, nor was there any testimony in the record that would impute to defendants that the use by plaintiff and others was adverse."

We think, therefore, that under the evidence of this case, the original use of the road was not hostile but by permission of the owners. That being true, when, if at all, did it become adverse? The rule seems to be well established that where the use was originally permissive, the burden of proving that such permissive use had ceased and had become hostile in character is thrown upon the party asserting same. In 17 Am.Jur. 981-982, it is said:

> **[LLHN11]** If the use originates by permission or license and an easement by prescription is claimed, the burden of proving that the permissive use had ceased and that the use for the necessary period had been adverse under claim of right is on the party asserting the fact of adverse user, and in case of doubt, such fact will be resolved against him. *Id.* at ¶¶ 12, 13, at 110-11.

¶33 In *Kinkade*, *supra.*, 1948 OK 186, 197 P.2d 968, the defendants, who claimed prescriptive title to portions of the plaintiff's property laying on defendants' side of a fence argued the plaintiff was estopped from denying title to the defendants for the reason that the defendants had mowed the lawn, trimmed the shrubs, and planted grass on their side of the fence. The *Kinkade* Court rejected this argument, stating the plaintiff's failure to object to such activity did not operate as an estoppel. *Kinkade*, *supra*. at ¶ 11, at 970.

¶34 We recently reviewed this issue on similar facts. In *Hernandez v. Reed*, 2010 OK CIV APP 65, 239 P.3d 186, the parties owned adjacent lots. When Hernandez bought the property in 2001, a chain link fence was located 8.4 feet inside the true boundary line. He maintained the fence in that location. The unfenced property was used since 1974 by his neighbor, Reed, for various purposes. *Hernandez* states:

> Appellants assert they maintained the area on the east side of the chain-link fence, treating it as their yard …. Reed cleared the disputed area, mowed, cleaned up the trees, and maintained a garden for several years. He also constructed a dog pen in the disputed area, which was dismantled and rebuilt on several occasions as needed. …. Many … photos showed how Appellants used the disputed area, several pictures showed playground equipment, Appellants' children playing and flower beds maintained around trees with the lawn neatly mowed. *Id.* at ¶ 8, at 189.

¶35 In 2006, Hernandez notified Reed to stop using the 8.4 feet of property and filed suit to quiet title. Reed countersued on the theories of boundary by acquiescence and adverse possession. Various witnesses testified that the contested area was used as an alleyway and access route by different persons, including school children walking to school, neighbors, and the public at large. The trial court denied Reed's claim of adverse possession, finding no proof of exclusive control over the disputed strip of land. Quiet title was granted to Hernandez, the owner of record. In analyzing the resulting appeal, we stated:

> Ultimately, Appellants' 1989 ownership claim does not reconcile with their ever-changing ebb and flow of influence over this eight-foot strip, with fixtures that came and went and pieces of fence that never quite encircled the disputed property. In this case, open, notorious, exclusive and hostile possession was not supported by clear and positive proof. *Francis,* 40 P.3d at 486. **[LLHN12]** "The moment the possession is broken it ceases to be effectual, because as soon as, and as often as, a break occurs the law restores the constructive possession of the owner." *Mason,* 410 P.2d at 541. It was Appellants' burden to satisfy each element of possession in support of their claim. *Mason,* 410 P.2d at 540. Appellants presented evidence they treated and thought of this area as their own yard. However, the boundaries were porous and Appellants' actions were at

times ambiguous, clear and positive proof was lacking.

> Appellants presented evidence they cared for the disputed tract as if it was their own. However, Appellees presented evidence of their own use of the disputed area and claimed Appellants' use was only by virtue of their permission and good graces. At the same time, there was evidence the disputed area was never enclosed by Appellants and a constant stream of access to the area was available throughout Appellants' ownership of lot nine. Therefore, Appellants needed to cobble together fifteen years of evidence that they and owners of lot fourteen acquiesced in the chain-link fence boundary for a consecutive fifteen year period. Based on the record available, Appellants failed to do this. *Id*. at ¶¶ 19, 23, at 190, 191.

¶36 The Oklahoma Supreme Court in *Willis v. Holley,* 1996 OK 107, 925 P.2d 539, an easement by prescription case, set out the following facts, similar to those now before us.

> The plaintiffs … own the land adjacent to that of the defendant, Wanda J. Holley (Holley). About 1949, plaintiffs' predecessor, Mr. Martin, began using a roadway over the Holly farm to access what is now the Willises' farm. … The Willises and their predecessors have used the roadway continuously to access the Willises' farm.
>
> [] Wanda J. Holley moved onto the farm. She fenced the previously unenclosed farm and put up a gate. After the Willises refused to close the gate, Holley refused the Willises permission to use the property.
>
> The Willises filed a quiet title action and requested an injunction. The trial court granted the injunction and quieted title to the roadway in the Willises giving them an easement. … *Id*. at ¶¶ 2, 3, 4, at 540.
>
> The *Willis* Court reversed the trial court, stating:
>
> **[LLHN13]** To acquire possession by prescription the "possession must be open, visible, continuous, and exclusive, with a claim of ownership, such as will notify parties seeking information upon the subject that the premises are not held in subordination to any title or claims of others, but against all titles and claimants." *Id*. Furthermore, the possession must also be actual, notorious, and hostile. *Id*. 249 P.2d at 109-10. If the owner acquiesces in or consents to the use of the land, then the use is not adverse and title by prescription cannot be acquired. *Board of County Comm'rs of Jackson County v. Owen,* 196 Okla. 538, 166 P.2d 766, 767 (1946).
>
> All the evidence presented in the present case is that the use of the road was permissive and not adverse to the owner. In fact, no evidence was introduced which would even suggest that the use of the road was adverse. However, the Willises posit that the use of the road for many years creates a presumption that the use was adverse and that the burden is on Holley to show otherwise. We do not agree. *Id*. at ¶¶ 6, 7, at 541.

¶37 Applying the reasoning of *Hernandez* and *Willis* to the facts presented, once West Landowners showed the use of those portions of the road which lay on their property was permissive, the burden shifted to the East Landowners to show such permission had been revoked and was no longer in effect.

¶38 We find merit to West Landowners' contention that East Landowners have failed to prove exclusive use. There is considerable testimony from both parties, as well as a finding of fact in the trial court's order, that the road in question was used by many people, including West Landowners, Delaware County employees who graded the road; public school buses, GRDA utility service employees, and other members of the public, all of whom have used the road for various purposes during the previous fifty years. Further, there is undisputed testimony that West Landowners knew the actual boundary line of their property encompassed a portion of the disputed road, but chose not to extend a fence to enclose the road, instead maintaining the fence short of the boundary line and permitting East Landowners and others to use the road to access their respective properties. Certainly, they did not treat the fence as a boundary.

¶39 As the record now stands, there is no dispute about the ownership of the tracts, the location of the fence and road relative to the true boundary line, that various people used the road, and that East Landowners used the property up to the fence, believing the fence was the boundary. However, belief in an erroneous boundary line does not make it so. As our case law clearly demonstrates, the taking of another's unfenced property by prescription requires strong proof. Acts such as using the roadway (*Willis* at ¶ 2, at 540) or even gardening, installing playground equipment, mowing, or maintaining the area up to the fence, (*Hernandez* at ¶ 16, at 190) do not overcome the presumption in favor of the record landowner that such use is permissive. It therefore cannot be adverse. The trial court's finding that the doctrine of adverse possession operated to grant prescriptive title by adverse possession to East Landowners is reversed.

III. OTHER ORDERS

West Landowners

¶40 Though not directly raised as an issue, the trial court also quieted title in West Landowners to a small portion of East Landowners' property under the theory of adverse possession. For the same reasons set out above, we find the elements of adverse possession are not met and the trial court's order on this issue is likewise reversed. In short, we find the surveyed boundary line remains intact as the true boundary between the parties and determines their ownership. No portion of either party's land is subject to adverse possession by the other.

¶41 West Landowners requested a prescriptive easement over the road in the event prescriptive title was granted to East Landowners. The trial court denied this request, finding West Landowners did not meet the elements of prescriptive easement. We agree West Landowners are not entitled to an easement but for the reason that the property belongs to them so no easement is necessary.

Jury Trial

¶42 West Landowners' appellate argument that the trial court erred in not granting them a jury trial on their claims for recovery of the disputed real property and for damages to timber, is moot.

Status of the Roadway

¶43 Regarding the disputed roadway, though we hold neither party has proven the requisite elements of an exclusive easement by prescription against the other, we find the principles set out in *Cookson v. Duke*, 1952 OK 169, 243 P.2d 706, and *Nokes v. Padgett*, 1953 OK 296, 262 P.2d 423, apply.

¶44 In *Cookson*, the Court stated in its syllabus:

> **[LLHN14]** Where during the unity of title an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which, at the time of the severance of title, is in use, and is reasonably necessary for the fair enjoyment of the other, then upon a severance of such ownership, whether by voluntary alienation or by judicial proceedings, there arises by implication of law a grant or reservation of the right to continue such use.
>
> While the mere permissive use of a way over the land of another will not ripen into an easement, yet one who joins his adjacent landowner in the construction of a paved private way over and along the medial line has given such adjacent owner more than a mere license. Each owner, by use of the driveway, is continuously asserting an adverse right to use the portion of the way on the other's lot. And from such use for 15 years the law raises a presumption of the grant of an

easement. *Id*. at ¶0, at 707.

¶45 In *Nokes v. Padgett*, 1953 OK 296, 262 P.2d 423, the Court stated:

> Where a concrete driveway constructed over and along a property line was continuously used by adjoining owners and tenants, such use constituted a continuing assertion of an adverse right in that portion of the common driveway existing upon the other's property. Such use for the prescriptive period is sufficient to establish an easement by prescription, and authorizes the presumption of a grant unless controlled or explained.
>
> While the mere permissive use of a way over the land of another will not ripen into an easement, yet one who joins his adjacent landowner in the continued use of a paved private way over and along the medial line has given such adjacent owner more than a mere license. Each owner, by use of the driveway, is continuously asserting an adverse right to use the portion of the way on the other's lot. And from such use for 15 years the law raises a presumption of the grant of an easement. *Id.* at ¶¶ 0, at 423, 424 (syllabus by the court).

¶46 In this case there is evidence both of unity of title until 1913 and that the "old trail" road has been used by Landowners and the public in the area for a period of more than 70 years. During that time, no one has attempted to prohibit its use or given express or implied consent to its use. Recognition of the existence of such an easement is not only consistent with the evidence but is mandated by equitable considerations.

¶47 We hold that East and West Landowners have each asserted and proven a continuous adverse right for at least 15 years over those portions of the roadway laying on each others' property. While neither is entitled to claim each others' subservient property as their own, they are each entitled to continued, unfettered access over those portions of the road on the property of the other. In short, the parties are placed in a condition of *status quo ante* regarding the access and use of the road. Neither party may prohibit the others' access to the road.

Easement Given by East Landowners to Southern Property Owners.

¶48 The record shows that although the East Landowners gave an easement to the westernmost 33 feet of their property to those property owners south of them, when the road was constructed, it was done so by measuring from the existing fence line rather than the actual boundary line. Thus, a portion of the improved road lies on West Landowners' property. It is axiomatic that to the extent East Landowners granted easement rights over those portions of West Landowners' property, that grant is void. However, rather than require the East Landowners and the Southern landowners to re-grade a new road or rebuild the fence in conformity with the easement, we again apply *Cookson* and *Nokes* and hold the written easement remains in force as to all parties.

Permanent Injunction Dissolved

¶49 The trial court granted a permanent injunction in favor of East Landowners enjoining West Landowners from blocking the road to prevent East Landowners access to their property. We reverse and vacate the injunction.

Attorney's Fee

¶50 The trial court's award of an attorney's fee and costs to East Landowners is reversed.

CONCLUSION

¶51 We hold that unless a boundary line created by deeds or according to a survey is disputed or uncertain, the doctrines of boundary by acquiescence or boundary by agreement are inapplicable. Where, as here, there is no dispute regarding the boundary line created by the deeds and confirmed by a survey, the only way to acquire the property lying beyond that boundary line is either by deed or by prescriptive title obtained by adverse possession. To allow otherwise, *i.e.*, to acquire property beyond that described by the undisputed surveyed boundary line using the doctrines of boundary by acquiescence or of boundary by agreement, violates the Statute of Frauds. A landowner does not risk losing portions of his property simply because he chooses to enclose less than all of it with a fence. Finally, the origin and purpose of a fence is a significant factor in determining whether the fence is meant to establish a boundary or is merely a partition fence.

¶52 The record contains official surveys showing the true boundary line between the parties. That boundary remains intact and defines the parties' property lines and their respective estates in their real property. Neither party is entitled to prescriptive title to any portion of the other's property. Unfettered use of those portions of the access road lying on each party's respective property shall be permitted by each party pursuant to the implied right of continued use recognized and established herein.

¶53 REVERSED.

RAPP, J., and THORNBRUGH, J., concur.