1-28-2014

Boyd-Davis v. Baker Respondent's Brief Dckt. 40438

IN THE SUPREME COURT OF THE STATE OF IDAHO

TERRI BOYD-DAVIS, an individual Plaintiff/Counter Defendant/ Respondent/Cross-Appellant, and BRIAN F. DAVIS, an individual; and JEAN L. COLEMAN, an individual, Plaintiffs/Counter Defendants/ Respondents, v. TIMOTHY BAKER and CAROL BAKER, husband and wife, Defendants/Counterclaimants/ Appellants/Cross-Respondents.	)	Supreme Court Docket No. 40438-2012 Bonner County Docket No. CV2010-703

RESPONDENT/CROSS-APPELLANT TERRI BOYD-DAVIS' BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT FOR BONNER COUNTY

HONORABLE STEVE VERBY, DISTRICT JUDGE PRESIDING

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I. STATEMENT OF THE CASE

A. Nature of the Case

This quiet title case arose when after nearly 40 years of enjoying the small piece of the family farm given to her by her parents, Jean Coleman was ousted from nearly all of her usable property by her new neighbors, Timothy and Carol Baker (collectively "Baker").

Terri Boyd-Davis, Brian F. Davis, and Jean L. Coleman (collectively "Coleman") are members of the Clark family. Jean is the eldest daughter of the eight children born to Harry and Edith Clark. Terri is Jean's niece and a granddaughter of the Clarks. Brian is Terri's husband. Together they own a piece of property located north of Sandpoint in the beautiful Selkirk Mountains adjacent to the Pack River. Although their property, barely an acre, is small in comparison to most properties in its rural location, as a part of the Clark family farm where Jean was raised in the 1940s and 1950s, they treasure it.

Prior to his death in 1975, Harry Clark ("Clark") along with his wife, Edith, had gifted to most of their children parcels of the property that made up their family farm. They gifted Coleman's property to her via two deeds, the first in 1966 and another in 1970. As he typically did, Harry Clark, though he had no formal training to do so, wrote the legal descriptions contained in the deeds.

In 1971, Clark moved a log cabin onto the Coleman property, and it remains on the property in the same spot today. Jean Coleman, along with her large extended family and friends, has over the years used the property primarily as a recreational property.

Access to the Coleman property is by way of a dirt road that enters the property from its northeast corner where it proceeds a short distance, then turns and continues south a couple hundred feet down an easement road along the bank of Pack River. Near the southwestern

portion of the Coleman property, the easement road forks and turns easterly, crossing over a gully, and then ends south of the Coleman cabin. Coleman's property has been accessed across the same gully since at least the 1950s when the property was still owned by her parents. The Coleman property is surrounded by wetlands on its northern, eastern and western sides, making the area south of the Coleman cabin the only usable portion.

From the early 1970s through 2007, the property adjoining Coleman's to the south, which consists of four separate parcels totaling nearly eight acres, was owned by Clifford and Joan Johnson ("Johnsons"), who were year-round residents of the property. The Johnsons had purchased their three northern parcels from the Clarks. The northernmost Johnson parcel, which the Johnsons purchased from the Clarks in 1971, adjoins Coleman's and it is this property that is the subject of this dispute.

In 1971, after purchasing their northernmost parcel, Clifford Johnson built a fence. He started the fence from the eastern edge of the property, where he believed the northern boundary line of his property was located and he extended it in a southwesterly direction the full width of the property to slightly past his western boundary. Over the years, Cliff Johnson repaired and maintained the fence. In the 1990s, the fence required replacement and he rebuilt it in the same location. Over the course of the 36 years that Coleman and the Johnsons were neighbors, the Johnsons used the property to the south of the fence and Coleman used the property to the north of the fence, believing that was the boundary. The Johnsons and Coleman never had a dispute concerning the location of the fence or the use and ownership of their properties.

In June 2007, the Johnsons sold their property to Baker. Shortly thereafter, a squabble over boundary lines arose between Baker and the owner of the property to the south of them. This caused Baker to commission a survey of their property in November 2007. Baker's survey indicated that their northern property line encompassed approximately half an acre north of

where the fence built by Cliff Johnson was located and it, in fact, showed Baker's northern boundary line running straight through the Coleman cabin. The fence built by Johnson was identified on the Baker survey as the "existing fence line." Baker's survey also revealed that their property consisted of 7.90 acres – not the 9.36 acres that Baker had believed they purchased from the Johnsons.

Harry Clark, who had written the legal descriptions contained in Coleman's deeds and in the Johnson's deeds, died in 1975. In the years following his death, at numerous times and in various situations affecting a number of different people, the legal descriptions contained in deeds written by the well-intentioned Clark had been found to be problematic, and this time turned out to be no exception.

Baker, armed with the unexpected findings from their survey, began making claims for damages. Apparently believing they had been cheated when they purchased their property, initially Baker pursued Johnson, while they at the same time also attempted to take control of the property used by Coleman north of the fence. In the summer of 2008, Baker tore down part of the fence that stood on the "existing fence line" and began driving vehicles onto the property north of the fence, using the driveway that leads to the Coleman cabin and across the gully that provides access to the Coleman property. Coleman repaired the torn down fence, only to have it torn down again.

Baker's aggressive actions began to make sense to Coleman when Baker's attorney wrote Jean Coleman a letter in the fall of 2008, which stated that Baker had had a survey done and now claimed ownership of the property north of the fence line. Baker demanded that Coleman move the cabin from where it had stood for the past 37 years. Coleman refused, also claiming ownership of the property. For nearly a year and a half from October 2008 through March 2010, Coleman and Baker's attorney attempted to resolve the issues related to the disputed property.

Baker eventually decided to forego their claims against the Johnsons and to instead solely pursue their claims against Coleman. In July 2009, Baker and the Johnsons entered into an agreement wherein Baker agreed to drop their claims again the Johnsons in exchange for the Johnsons agreeing to assist Baker in their claims against Coleman; and although no lawsuit had yet commenced, the agreement included the Johnson's agreement to testify at trial.

Coleman initially knew nothing of this agreement and thought progress was being made with Baker's attorney in resolving the dispute, when the battle over the property took a turn and reached its pinnacle in the spring of 2010. During the year's cooler months of March and April when Coleman's recreational property was typically not used, Baker and the other defendants[1] engaged in self-help when they came onto the disputed property with heavy equipment and proceeded to tear down an even greater section of the existing fence. They cut down trees, destroyed vegetation, and built an unsightly chainlink fence in a zig-zag fashion across the property, preventing Coleman's use of and access to much of the property. Baker placed locks on newly erected gates to prevent Coleman from entering most of the disputed property and placed "No Trespassing" signs on the newly erected fence.

It was Baker's aggressive attempt to wrest control of the disputed property that prompted Coleman to file the underlying action on April 20, 2010.

After a four-day trial was held in March 2011, wherein the deeds to the subject properties were found to be ambiguous, the District Court, after considering the descriptions contained in the deeds and all the surrounding facts and circumstances, determined that it was the intent of the Clarks to convey to Coleman the bulk of the property north of the "fence line." The Bakers,

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[1] All other defendants named in the underlying case were dismissed from the case prior to trial. Coleman resolved their easement claims in mediation with defendants James and Nellie Gilbertson, who own the property adjoining Coleman's to the west.

unhappy with the District Court's factual findings now ask this Court to reweigh the evidence and set the trial court's findings aside. Coleman asks this Court to quiet title in all the Disputed Property north of the fence to them. She asks this Court to do so by applying the correct legal standard to the District Court's findings of fact, which shows Coleman proved their boundary by agreement claim based on an implied agreement.

B. Course of Proceedings

Coleman filed their initial complaint on April 19, 2010 and filed an amended complaint on April 27, 2010. Therein, they made the following claims: 1) quiet title, 2) adverse possession, 3) boundary by agreement, 4) easement, 5) trespass, 6) timber trespass, and 7) injunction and order requiring removal of fence. (R., Vol. I, pp. 51-68). Although in their Brief, Baker claims Coleman pled "reformation of Coleman's warranty deed" (Appellant's Brief, p. 5), this is simply not true.

The District Court twice granted Coleman's motions to amend their complaint. On December 14, 2010, the District Court entered an Order Granting Plaintiffs Leave to Amend Their First Amended Complaint to Include Claims for Relief of Punitive Damages Against Defendants Timothy and Carol Baker. (R., Vol. III, pp. 420-422). Coleman filed their Second Amended Complaint to Quiet Title, for Damages for Timber Trespass and Common Law Trespass, for Injunctive Relief, Including Claim for Punitive Damages on January 21, 2011. (R., Vol. III, pp. 474-492). On February 23, 2011, Coleman filed their third amended complaint, in which they included one new claim, that of adverse possession based on written claim of title. (R., Vol. IV, pp. 679-697).

On June 7, 2010, Baker filed a Counterclaim against Coleman wherein they brought claims to quiet title and for trespass. (R., Vol. II, pp. 193-202).

A four day bench trial was held March 28 – 31, 2011. The Court announced during trial that it was bifurcating the issues and would limit the trial to a ruling on liability, reserving issues on damages to a later time. (Trial Tr., p. 220, L. 7-10).

On April 28, 2011, the District Court orally announced its findings of fact and conclusions of law. (Trial Tr., pp. 1020-1048). After its analysis of facts and law, which the Court meticulously enumerated, the District Court quieted title in the bulk of the Disputed Property to Coleman. Based on the undisputed fact that the deeds at issue in the case were ambiguous and subject to a variety of interpretations, the District Court based its ruling on what it found to be the intent of the grantor.

On September 2, 2011, the Court ordered Coleman "to conduct a survey consistent with the trial decision quieting title in the disputed property to them so that a proper legal description can be created and included in an appropriate judgment." The Court ordered that the survey and proposed judgment be delivered to the Court and opposing counsel by November 4, 2011. (R., Vol. 5, p. 886). Coleman complied with the Court's Order.

On November 15, 2011, Baker filed Defendant Bakers' Objection to Plaintiffs' Proposed Judgment. (R., Vol. V., pp. 900-911). On December 28, 2011, Boyd-Davis filed a response to Baker's objection. (R., Vol. V, pp. 939-948). On January 20, 2012, Baker filed a Supplemental Brief to Objection to Plaintiffs' Proposed Judgment. (R., Vol. VI, pp. 958-974) and Boyd-Davis filed her response to Baker's supplemental brief (R., Vol. VI, pp. 1000-1024). On March 28, 2012, the Court ordered a further hearing on Baker's objection to the proposed judgment and ordered Coleman's surveyor and expert witness, Robert Stratton to appear at the hearing. (R., Vol. VI, pp. 1025-1028).

On April 30, 2012, Baker filed a Post-Trial Brief in which Baker had made known their intent to appeal the case. Because Baker intended to appeal, they asked the Court to issue a

ruling on all the legal theories for which it had not previously issued findings of fact and conclusions of law after trial, including adverse possession and boundary by agreement. Baker also asked the Court to rule on their affirmative defense of laches. (R., Vol. VI, p. 1040-1074). Boyd-Davis also filed a Post-Trial Brief, in which she requested the Court find Coleman had proven their boundary by agreement claims based on an implied agreement. (R., Vol. VI, 1030-1039).

On July 13, 2012, the District Court issued its "Memorandum Decision RE: Defendants' Objection to Plaintiffs' Proposed Judgment" (R., Vol. VI, pp. 1075-1084). In its decision, the District Court agreed that there were errors in the survey. The Court ordered Coleman to prepare a new survey consistent with its ruling and to submit the new survey to the Court "on or before Friday, September 7, 2012." (Id. at 1082-1083). Coleman filed a "Notice of Submission of Survey, Legal Description, and Letter from Surveyor Robert Stratton" with the Court on September 7, 2012 (Id. at 1129-1131). The new survey was attached as Exhibit "A."

On September 13, 2012, the Court entered its Partial Judgment Quieting Title in Disputed Parcel of Real Property to Plaintiffs Terri Boyd-Davis, Brian F. Davis and Jean L. Coleman. (R., Vol. VI, pp. 1133-1135).

In its Memorandum Decision Re: Remaining Liability Causes of Action in Plaintiff's Third Amended Complaint, which the Court had also issued on July 13, 2012, the Court altered its previous position, finding that the grantor did not intend to convey a small portion of the Disputed Property located on its west side to Coleman and therefore, found it to belong to Baker. It also found that Coleman had not proved their boundary by agreement claims. (R., Vol. VI, pp. 1085-1100).

This change in ruling necessitated a ruling on Coleman's easement claims because the road leading to the Coleman Property cut through the small section of property the Court had

now quieted in Baker. Thus, on September 26, 2012, Boyd-Davis filed a Motion for Reconsideration of Memorandum Decision RE: Remaining Causes of Action in Plaintiffs' Third Amended Complaint, wherein she requested the Court rule upon Coleman's easement claims and reconsider its ruling denying Coleman's boundary by agreement claims. (R., Vol. VII, pp. 1139-1162). On November 29, 2012, the Court entered its Supplemental Decision RE: Remaining Liability Causes of Action in Plaintiffs' Third Amended Complaint and Order RE: Plaintiffs' Motion for Reconsideration of Rule 54(b) Certificate, in which the Court found Coleman had prevailed on their easement claims. (R., Vol. VII, pp. 1182-1199).

On November 29, 2012, the Court amended its previously entered partial judgment to include the easement to Coleman. It, thus, on that date entered the "final" Partial Judgment Quieting Title in Disputed Parcel of Real Property to Plaintiffs Terri Boyd-Davis, Brian F. Davis and Jean L. Coleman. (R., Vol. VII, pp. 1200-1203).

Baker filed their Amended Notice of Appeal from the November 29, 2012 Partial Judgment on January 9, 2013. (R., Vol. VII, pp. 1204-1223). Respondent Terri Boyd-Davis filed her Amended Notice of Cross Appeal on January 25, 2013. (R., Vol. VII, pp. 1226-1233).

C. Statement of Facts

1. Respondents Jean L. Coleman ("Ms. Coleman"), Terri Boyd-Davis ("Boyd-Davis"), and Brian Davis ("Davis") (collectively "Coleman") jointly own a parcel of real property of slightly over an acre located in a rural area of Bonner County, Idaho along the Pack River in the Selkirk Mountains.

2. Ms. Coleman acquired this parcel of property from her parents, Harry and Edith Clark ("Clarks") by way of two conveyances, the first on October 17, 1966 (Ex. D), which contained the northern part of the property and the latter on December 23, 1970 (Ex. F), which contained the southern part of the property ("Coleman Property"). On June 11, 2009, Ms.

Coleman placed her niece and her niece's husband, Boyd-Davis and Davis, on title to the property. (Ex. 5).

3. The Clarks owned a great deal of property in this area of Bonner County ("Pack River Valley"), which they first acquired in the 1940s. (Trial Tr., p. 144, L. 6-14; Ex. 1). The Clarks farmed their land and raised cattle and other animals. (Trial Tr., P. 147, L. 15-16).

4. Ms. Coleman had grown up in the Pack River Valley along with her many siblings. The Clarks had a total of eight children. When their children were adults, the Clarks began gifting parcels of their land to them. (Trial Tr., p. 145, L. 24-25; p. 146, L. 1-13) Although Harry Clark was not a surveyor or engineer, he wrote the legal descriptions contained in his deeds. (Trial Tr., p. 147, L. 17-18). In 1975, Harry Clark died. (Trial Tr., p. 715, L. 13-14).

5. At the time when Ms. Coleman's parents deeded her the Coleman Property, the parcel adjoining hers to the south and the parcel adjoining hers to the west were still owned by the Clarks. (Trial Tr., p. 154, L. 9-12). After deeding the property to Coleman, her father showed Coleman the location of the property described in the deed. (Trial Tr., p. 147, L. 19-25; p. 148, L. 1-17). The Coleman Property is surrounded by wetlands on its northern, eastern and western sides. (Trial Tr., p. 163, L. 12-21).

6. The log home where Ms. Coleman had grown up and where her parents still resided ("Homestead") was located just north of Coleman's Property across Upper Pack River Road. (Trial Tr., p. 148, L. 3-6). The Clarks had a road that led from their Homestead to Coleman's Property that they had used for many decades before gifting the Coleman Property to Ms. Coleman. (Trial Tr., p. 746, L. 16-25, p. 744, L. 1-3). The wetland gully located on the western side of Coleman's Property contained a culvert to allow vehicles to gain access to the property. (Trial Tr., p. 180, L. 4-10).

7. On September 3, 1971, the Clarks sold the parcel adjoining the Coleman Property on the south to Clifford and Joan Johnson ("Johnsons"). (Ex. 7). The Johnson's property was made up of a total of four parcels, three of which they had obtained from the Clarks. (Ex. 6, 8, 9).

8. Shortly after the Johnsons acquired the parcel adjoining the Coleman Property, Mr. Johnsons built a wooden fence on the north end of his property. He started the fence on the eastern side from where he believed his property line was. (Trial Tr., p. 385, L. 12-23; p. 416, L. 5-15). He also placed a gate on the fence. The Johnsons only drove through the gate, drove across the road and across the culvert when they purchased hay from the Clarks, who had a hay field on the property that adjoined the Coleman Property on the western side. At some point prior to Harry Clark's death in 1975, the Johnsons quit buying hay from the Clarks, and Clifford Johnson closed up the gate on the fence. After that time, the Johnsons never drove across the fence line. In the 1990s, Clifford Johnson replaced the wooden fence with a metal fence. (Trial Tr., p. 391, L. 11-25; p. 291, L. 1-20; p. 396, L. 7-10). The Johnsons did not use the property north of the fence. Joan Johnson believed the property on the north side of the fence belonged to Ms. Coleman. (Trial Tr., p. 355, L. 10-20).

9. Clifford Johnson had been a good friend of Harry Clark's. Ms. Coleman and the Johnsons had a friendly relationship. (Trial Tr., p. 187, L. 6-12). During the 36 years that they owned their adjoining properties, they never had a dispute or any discussion at all over the boundary lines. (Trial Tr., p. 190, L. 3-7; p. 191, L. 1-14).

10. In 1971, Harry Clark and a friend moved a log cabin onto the Coleman Property. The cabin has remained in the same location ever since and is still on the property today. (Trial Tr., p. 165, L. 2-19).

11. From the early 1970s, Coleman used the property as a recreational property. She also allowed her siblings and extended family to use the property. Over the years, it was used for camping and summer recreation. (Trial Tr., p. 146, L. 25; p. 147, L. 1-4; p. 164, L. 21-25; p. 165, L. 1, 20-25; p. 166, L. 1-25; p. 167, L. 1-25; p. 168, L. 1-25). Coleman allowed her sister, Mary Pandrea, to use the cabin as a summer home from 2003 through 2008. (Trial Tr., p. 183, L. 11-25; p. 184, L. 1-20). During the 1990s, Coleman allowed a friend, Bob Camp, to reside on the property year-round. (Trial Tr., p. 171, L. 20-24). Coleman did not use the property south of the fence. (Trial Tr., p. 223, L. 8-13; p. 224, L. 24-25; p. 225, L. 1-5).

12. On June 1, 2007, the Johnsons sold their property to Appellants Timothy and Carol Baker. (Ex. 10). After purchasing the Baker Property, a squabble over boundary lines arose between Baker and the neighbor to the south of the Baker property, prompting Baker to get their property surveyed. (Trial Tr., p. 907, L. 12-25). As a result of the survey, they discovered that their property contained 7.9 acres rather than the 9.38 acres they believed they had purchased. Their survey indicated that their northern boundary line dissected Coleman's cabin. (Ex. C, Trial Tr., p. 363, L. 7-20).

13. Prior to the 2007 survey by the Bakers, no one including the Johnsons, were aware of where the exact boundary lines of the properties were. (Trial Tr., p. 349, L. 17-25).

14. In approximately the spring of 2008, a portion of the metal fence located on the "Existing Fence Line" was torn down by the Bakers or their agents. In the fall of 2008, a dispute over the boundaries arose between Coleman and Baker. (Trial Tr., p. 197, L. 11-22). Coleman rebuilt the fence. (Trial Tr., p. 209, L. 10-24).

15. Coleman first discovered Baker made claims to the Disputed Property when she received a letter from Baker's attorney in September 2008. (Trial Tr., p. 196, L. 19-25; p. 197, L. 1-4). In the fall of 2008 through early 2010, Coleman was in communications with

defendants' counsel in attempts to reach a resolution of the boundary dispute. (Trial Tr., p. 568, L. 19-25; p. 569, L. 1-25; p. 570, L. 1-21).

16. Baker and their agents trespassed upon Coleman's property and caused damage to it. In March and April 2010, Baker, Mary Pandrea, Nellie Gilbertson and John Pandrea conspired together to engage in self-help activities on the Disputed Property. They removed much of the remaining metal fence and erected a chainlink fence throughout much of the Disputed Property. They brought heavy equipment onto the property, tore out and cut down trees and other vegetation. They tore up the land and made changes to the private road that serves the Coleman Property. (Ex. 27; Trial Tr., p. 212, L. 5-11; p. 213, L. 2-16).

II. STANDARD OF REVIEW

If an instrument is reasonably subject to conflicting interpretations, it is ambiguous, and its construction is a question of fact. *Rutter v. McLaughlin,* 101 Idaho 292, 612 P.2d 135 (1980). Inconsistencies in a deed may throw a shadow of ambiguity over an instrument, thereby warranting the introduction of parol evidence as an aid to discovering the intention of the parties. *Gardner v. Fliegel,* 92 Idaho 767, 770, 450 P.2d 990, 993 (1969). Where an instrument is ambiguous, interpretation of that instrument is a matter of fact for the trier of fact. *Latham v. Garner,* 105 Idaho 854, 673 P.2d 1048 (1983).

The standard of review of a trial court's findings of fact is set forth in Idaho Rule of Civil Procedure 52(a). A trial court's findings of fact will not be set aside on appeal unless they are clearly erroneous." *Farr West Inv. V. Topaz Mktg. L.P.,* 148 Idaho 272, 275, 220 P.3d 1091, 1094, (2009). The appellate court's review of findings of fact is limited. The appellate court does not weigh the evidence as the district court did; instead it inquires whether the findings of fact are supported by substantial and competent evidence and therefore not clearly erroneous. *Viebrock v. Gill,* 125 Idaho 948, 951, 877 P.2d 919, 922 (1994). By its own terms, Rule 52(a) is

strengthened, but not limited, by regard for a trial court's special opportunity to evaluate the credibility of witnesses who appear and testify. *T-Craft Aero Club, Inc. v. Blough*, 102 Idaho 833, 837, 642 P.2d 70, 74 (Ct.App. 1982). A trial court resolves conflicting evidence and determines the weight, credibility and inferences to be drawn from the evidence. *Angleton v. Angleton*, 84 Idaho 184, 370 P.2d 788 (1962). Upon appellate review, the findings of fact of the trial court will be accepted if they are supported by substantial, competent though conflicting evidence, however meager. *Jensen v. Bledsoe*, 100 Idaho 84, 593 P.2d 988 (1979). Evidence is regarded as substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven." *Argosy Trust v. Wininger*, 141 Idaho 570, 572, 114 P.3d 128, 130 (2005). The appellate court will not substitute its view of the facts for the view of the district judge. *Carney v. Heinson*, 133 Idaho 275, 281, 985 P.2d 1137, 1143 (1999).

Whether or not a party is guilty of laches primarily is a question of fact and therefore its determination is within the province of the trial court. It is reviewed under the abuse of discretion standard. *Huppert v. Wolford*, 91 Idaho 249, 420 P.2d 11 (1966).

Review of the lower court's decision is limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. *Alumet v. Bear Lake Grazing Co.,* 119 Idaho 946, 812 P.2d 253 (1991). The appellate court exercises free review over the lower court's conclusions of law to determine whether the court correctly stated the applicable law, and whether the legal conclusions are sustained by the facts found. *Burns v. Alderman*, 122 Idaho 749, 752-53, 838 P.2d 878, 881-82 (Ct. App. 1992).

III. ISSUE PRESENTED ON CROSS-APPEAL

1. Does the evidence in the record support the conclusion of law reached by the District Court that Coleman had not proven their claims of boundary by agreement/acquiescence?

IV. ARGUMENT TO DISPUTE APPELLANT BAKER'S CONTENTION THAT THE DISTRICT COURT'S DECISION WAS CLEARLY ERRONEOUS

A. The District Court's findings of fact are supported by substantial and competent evidence and should not be disturbed on appeal.

In this case, the District Court quieted title in the bulk of the property in dispute to Coleman. It reached its decision by determining what the intent of the grantor of the ambiguous deeds in question were. Baker admits that the Coleman deeds are ambiguous and concurs that the District Court was thus tasked with the duty of determining the intent of the grantor. Because Baker does not have a valid attack on the legal standard applied by the District Court in reaching its decision, Baker defaults to attacking the District Court's decision by asserting its findings of fact are "clearly erroneous," knowing that without such a finding, the appellate court will not set the District Court's decision aside.

Within their brief, Baker reargues their version of the facts of the case to this Court, apparently hoping the appellate court will reweigh the evidence, adopt Baker's arguments, and set aside the trial court's findings of fact. This, however, is not the mission of the appellate court.

> Our review of findings of fact is limited. We do not weigh the evidence as the district court did; instead we inquire whether the findings of fact are supported by substantial and competent evidence and therefore not clearly erroneous. I.R.C.P. 52(a); *State ex rel. Haman v. Fox,* 100 Idaho 140, 144, 594 P.2d 1093, 1097 (1979). In reviewing the record, we are mindful that the district court possesses the unique opportunity to assess the credibility of the witnesses appearing before

it. I.R.C.P. 52(a); *Glenn v. Gotzinger,* 106 Idaho 109, 110-11, 675 P.2d 824, 826-27 (1984).

Viebrock v. Gill, 125 Idaho 948, 951, 877 P.2d 919, 922 (1994).

The proper inquiry to be undertaken by this Court in response to Baker's allegation that the District Court's findings of fact are "clearly erroneous" is to determine whether the findings of fact are supported by substantial and competent evidence. A review of the record confirms that they are. A review of the record further confirms that Baker's analysis is fatally flawed because the bulk of Baker's Brief is devoted to pointing out what Baker claims are "clearly erroneous" errors on a survey that is not a part of the record on appeal and is not the one adopted by the District Court.

During the four-day trial, the District Court heard and considered the testimony of both the plaintiffs' and the defendants' expert witnesses, both surveyors. It heard and considered the testimony of fact witnesses of both parties, which included the testimony of the Baker's predecessors, Clifford and Joan Johnson, as well as testimony from persons familiar with the history and use of the disputed property, among them three of the Clark's other children (Jean Coleman's sisters), and testimony from the parties themselves. The District Court reviewed extensive exhibits, including numerous deeds, surveys, and photographs.

One month after trial when the District Court announced its decision in open court, it stated: "My decision today that is going to be announced is based on the law, the facts as presented through the testimony, and the exhibits and the interpretations of both the law and the facts by way of logic and common sense." (Trial Tr., p. 1020, L. 22-25; p. 1021, L. 1).

The District Court cited a variety of reasons why it determined that the Clarks intended to convey the property north of the fence line to Coleman. Because the deeds were ambiguous and the District Court understood its task was to construe the deeds to give effect to the intent of the

parties, it discussed applicable case law, including *Porter v. Bassett*, 146 Idaho 399 (2008), quoting from that case: "'The trier of fact must then determine the intent of the parties according to the language of the conveyance and,' and this is the important part as it related to my decision, 'and the circumstances surrounding the transaction.'" (Trial Tr., p. 1035, L. 4-8).

It considered the testimony of Jean Coleman, stating "[t]he gist of Jean Coleman's testimony was that after she received the real property, her father walked the property with her and showed her the boundary lines[2]." (Trial Tr. p. 1025, L. 5-8).

It considered the testimony of Clifford Johnson, predecessor to the Bakers, who had built the fence that stood on the "fence line." Though Mr. Johnson, who was a premier witness for the defense, denied that he believed the fence marked the boundary between the properties, the District Court found it "telling" that he referred to the property south of the fence as "*my* side of the fence.[3]" (Trial Tr., p. 1028, L. 5). The District Court also found that Clifford Johnson's "testimony... was impeached" and that "[h]e was shown to have a bias," stating:

> This court does not accept his statement that he would have begun the fence at what he thought was the northeast corner of his property and then go willy-nilly off what he believed to be the line which then would conveniently fit the theory of the defense[4]. Further, the use as evidenced by the parties reflect that they treated the fence line as the boundary line. The Johnsons never used the property north of the line and they shut off the gate so as to preclude them from having access, at least by vehicle, to the northern portion of what is now claimed to have been their piece – their portion of property[5]. They also rebuilt the fence in the same position[6].

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[2] This finding is supported by the evidence. See Trial Tr., p. 147, L. 19-25; p. 148, L. 1-17; p. 150, L. 9-19.
[3] This finding is supported by the evidence. See Trial Tr., p. 421, L. 3-4. See also Trial Tr. p. 403, L. 16-17.
[4] This finding is supported by the evidence. See Trial Tr., p. 385, L. 12-23; p. 416, L. 5-15.
[5] This finding is supported by the evidence. See Trial Tr., p. 391, L. 11-25; p. 291, L. 1-10.
[6] This finding is supported by the evidence. See Trial Tr., p.396, L. 7-10.

(Trial Tr., p. 1040, L. 2-15).

The District Court considered the improvements made to the property, the topography of the property, and the use made of the property and how that related to the grantor's intent. It noted "[e]vidence... ha[d] been presented show[ing] that cars were parked, there was a placement of the clothes line, there was testimony concerning the use of the property south of the cabin towards the fence line, there were camp fires that had been made.[7]" (Trial Tr., p. 1029, L. 19-23).

It found that "Mr. Clark would not have moved a cabin for his daughter so that it sat on the boundary line of the real property that... he and his wife conveyed to her.[8]" (Trial Tr., p. 1038, L 17-20). It noted that Coleman's parents would have intended to convey usable property to her, stating:

> When consideration is given to the topography, the fact that a substantial amount of Jean Coleman's real property to the north and west of the cabin was wet, it would make sense that Jean Coleman would receive property that was not wet for purposes of use, thus, the road, the parking area and the dryer area approaching where the then existing fence was as shown on the surveyor's – on the surveys demonstrates the intent of Mr. Clark. And by that I mean demonstrates the intent of Mr. Clark to convey usable property to Ms. Coleman[9].

(Trial Tr., p. 1038, L. 21-25; p. 1039, L. 1-7).

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[7] This finding is supported by the evidence. All of the fact witnesses testified about the use of the property south of the fence. Additionally, this finding is supported by multiple exhibits in evidence, including Defendants' Exhibits HH, NN, LLL, MMM and Plaintiffs' Exhibits 24, 29-30, 34-36, 39, 45.

[8] This finding is supported by the evidence. See Trial Tr., p. 165, L.4-15; p. 747, L. 19-25; p. 748, L. 1-8.

[9] This finding is supported by the evidence. See Trial Tr., p. 163, L. 12-21; p. 755, L. 21-25; p. 756, L. 1-8.; p. 843, L. 7-15.

The District Court considered, discussed, and compared the testimony of the expert witnesses of both sides and discussed the many surveys that had been made of the property over the years and how they all interpreted the ambiguous deeds differently, stating:

> As testified to by both Mr. Stratton and to a certain extent by concessions of Mr. Evans, the other surveyor who testified, that both of the – the Deeds to both Ms. Coleman and Mr. and Mrs. Johnson had legal descriptions that were prepared by a lay person, that is not by a civil engineer, not by a surveyor, and not by someone with expert training in writing or preparing legal descriptions[10]. As I mentioned earlier, both surveyors agreed that the Deeds that were given were ambiguous and needed to be interpreted[11]. Both surveyors agreed that the senior Deeds, which are recorded earlier, take precedence over later descriptions[12]. And both surveyors agreed that all four surveys: The 1979, the 1981, the 2007, and the unrecorded Tucker plat of the survey as set forth in Exhibit 23 all are different interpretations of the same set of Deeds[13].

(Trial Tr., p. 1035, L. 15-25; p. 1036, L. 1-5)

It discussed the various possible interpretations of the Coleman deeds that Coleman's expert had come up with, stating, "In addition, I do find that Mr. Stratton, whose [*sic*] also a surveyor, also did field work and came up with different examples of how the legal descriptions would or could lay on the ground[14]." (Trial Tr., p. 1031, L. 21-24).

It evaluated the testimony of Baker's expert witness:

> I do also want to comment as to Mr. Evans. Although he believes his survey is a reasonable interpretation, he unequivocally stated during the course of the trial, "I based my survey on the Tucker surveys[15]." We know, as has been outlined, that

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[10] This finding is supported by the evidence. See Trial Tr., p. 48, L. 25; p. 49, L. 1-8; p. 866, L. 14-17.
[11] This finding is supported by the evidence. See Trial Tr., p. 42, L. 16-25; p. 43, L. 1-5; p. 864, L. 17-25.
[12] This finding is supported by the evidence. See Trial Tr., p. 68, L. 6-12; p. 892, L. 13-24.
[13] This finding is supported by the evidence. See Trial Tr., p. 64, L. 13 through p. 68, L. 9; p. 936, L. 15-24.
[14] This finding is supported by the evidence. See Trial Tr., p. 44, L. 2-3; p. 137, L. 1-6.
[15] This finding is supported by the evidence. See Trial Tr., p. 880, L. 20-21.

> the Tucker surveys had the starting point of the Coleman property on the north side of the Pack River Road. And when I say the Tucker surveys, I'm talking about the '79 and '81 surveys that were recorded which doesn't make sense[16].
>
> In addition, Mr. Evans began with the legal description of the conveyance from Clark to the Johnsons and then went from the Johnsons to the Bakers. While he may accurately have prepared a survey showing what those Deeds reflected, such an interpretation ignored the potential senior – the potentially senior rights of Ms. Coleman and ignored some of the notes of Mr. Tucker that showed the problems with the overlap. And when I say "ignored," that's not exactly accurate. I say he ignored because he didn't have them. He hadn't seen them[17].
>
> On cross examination, Mr. Evans conceded that he had not seen the note of Mr. Tucker, specifically Exhibit 24 nor Exhibit 23, and that would cause him to re-think his survey[18]. Simply stated, Mr. Evan's testimony was impeached.

(Trial Tr., p. 1041, L. 7-25; p. 1042, L. 1-7).

In announcing its decision and stating its findings of fact and conclusions of law, the District Court stated:

> In determining the intent of the grantors, the interpretation of the senior Deeds [the Coleman deeds] as made by Mr. Stratton and as depicted in figure 6 seems most consistent with the intent of the Clarks as followed through with by the placement of the fence and thus of the property by the adjacent owners thereafter; therefore, as a conclusion of law, I do find and do conclude that the real property north of the fence line is quieted in the plaintiffs. This decision is based on the reasoning set forth today and the evidence submitted at the time of trial."

(Tr., Court Trial, p. 1043, L. 2-12).

The District Court's decision is sound. Its findings of fact are supported by substantial and competent evidence and its decision should be upheld.

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[16] This finding is supported by the evidence. See Trial Tr., p. 42, L. 20-25; p. 43, L. 1-5.
[17] This findings is supported by the evidence. See Trial Tr., p. 891, L. 19-25; p. 892, L. 1-24.
[18] This finding is supported by the evidence. See Trial Tr., p. 924, L. 19-25; p. 925, L. 1-13.

1. The District Court's finding that Clark intended to convey to Coleman the property north of the line upon which the fence was built is supported by substantial and competent evidence.

The essence of Baker's argument is found in their claim that "the Court's trial decision is clearly erroneous, because it is based upon a finding that the Clark's intended to convey *up to a fence* that did not exist at the time of the conveyance." (Emphasis added.) When the District Court found that Clark intended to convey to Coleman the property north of the "*fence line*," this was not based on the fact that a fence existed on the line at the time of the conveyance; rather, it found that the reason the fence was built and later rebuilt *upon that line* was because that was where Clark intended the boundary line between the properties to be. (Trial Tr., p. 1029, L. 4-16; p. 1040, L. 4-15; 24-25, p. 1040, L.1-6).

Throughout their brief, Baker confuses and interchanges "fence line" for "fence." It is one thing to argue the fence did not exist at the time of conveyance. It is another to argue the *fence line* did not exist. Of course, the fence line existed at the time of conveyance. It is, afterall, simply a location on the ground on which a fence was built.

Baker argues that the District Court "erroneously relied upon features that did not exist at the time the Clarks conveyed the property." Baker disputes that there was a driveway leading into the disputed property but his own witness, Clifford Johnson, testified that there was a driveway that went into the Coleman Property in the early 1970s. (Trial Tr., p. 386, L. 24). Additionally, Baker uses his own exhibit, Exhibit NN (a photograph), to prove that there was no "parking area" on the disputed property in the early 1970s while this very photograph shows a truck in the background parked in the "parking area."

Baker also claims the shape of the fence contradicts a finding that it was intended to mark a boundary line. The shape of the fence from the eastern to western boundary of the Coleman property, however, is a straight line as is obvious from Baker's own survey (Ex. C). When

Baker claims the fence turns twice and "lies in a fish hook pattern," they are referring to the fence that lies outside of the western boundary of the Baker property and extends over into the Gilbertson property. The property where that fence is located is not in dispute in this case. Addtionally, the fence was built where it was because, as the District Court found, that was where Clark intended the boundary to be and not vice versa. Thus, this argument is irrelevant and misleading.

Baker also would like this Court to rely on Cliff Johnson's testimony despite the fact that the District Court found his testimony to be biased. (Trial Tr., p. 1040, L. 2-3). Evidence was admitted at trial that showed the Johnsons had agreed to testify in support of Baker's claims against Coleman in exchange for the Baker's agreement to dismiss claims they had initially pursued against the Johnsons. (Trial Tr., p. 361 L. 16-25; p. 362, L. 1-25; p. 363, L. 1-16; Ex. 59).

Baker attempts to convince this Court that what happened after Clark conveyed the properties is not relevant to Clark's intent but the line the parties treated as the boundary is relevant because it sheds light on what Clark intended to convey and what the grantees believed he had conveyed.

The District Court findings were made by considering *all the facts and circumstances*, and the fact that Johnson built and later rebuilt the fence on this line was but one piece of evidence that supports the finding that this was the grantor's intended boundary line. (Trial Tr., p. 396, L. 3-10).

2. The District Court's weighing of the testimony of the expert witnesses was within its purview and its reliance thereon was proper.

Baker also takes issue with the District Court's reliance upon the testimony of Coleman's expert witness, surveyor Robert Stratton and the District Court's finding that Stratton's "figure 6

seems most consistent with the intent of the Clarks." In claiming that this is "clearly erroneous," Baker again puts forth their version of the facts and makes argument as to why they disagree with the District Court's analysis and findings in apparent expectation that this Court will reweigh that evidence.

The District Court, in applying the correct legal standard for interpreting the ambiguous deeds by taking into consideration all the surrounding facts and circumstances, relied in part on the testimony of the expert witnesses. This was proper.

In addition to the various surveys prepared by other surveyors, including Baker's expert, Dave Evans, all of which contained different interpretations of the ambiguous deeds, Stratton additionally created a number of possible drawings showing various possible interpretations of the ambiguous legal descriptions contained in Clark's deeds. (Ex. 16, Figures 1-8).

In one of Stratton's drawings (Figure 6), he rotated the legal description to fit the fence line. Contrary to Baker's assertion, by doing this, Stratton did not "assume that Harry Clark could have known where the fence would be located." Rather, Stratton rotated it so that it would fit better with the road and once he did so, he found it to be the best fit with the deeds. (Trial Tr., p. 55, L. 5-21; p. 108, L. 21-24; p. 117, L. 1-4).

a) Baker makes a serious error by referencing and analyzing in their Brief an earlier Stratton survey that was rejected by the District Court and is not in the record rather than referring to the correct Stratton Survey that the Court accepted.

To support their statement that "while extrinsic evidence can be considered to resolve an ambiguity in the deeds, such evidence cannot completely supplant the deeds themselves," Baker cites to a foreign case. Their attempt to claim the District Court's interpretation of the ambiguous deeds "supplanted" the deeds is misleading. According to the *Merriam-Webster Dictionary*, the definition of "supplant" is "to eradicate and supply a substitute for."

("supplant." *Merriam-Webster.com.* 2014. http://www.merriam-webster.com (17 January 2014). This is not the same as interpreting an ambiguous deed and it is not what the District Court did.

In Baker's defense, however, their belief that Stratton's Figure 6 somehow "supplants" the deed is based on two significant errors Baker makes. First, instead of referencing the survey prepared by Stratton that was adopted by the District Court and submitted to the court on September 7, 2012 ("Stratton Survey") (R., Vol. VI, pp. 1129-1131, Exhibit A), Baker references and analyzes the wrong survey – one that was rejected by the District Court – and even includes a drawing of the wrong survey on Page 28 of their Brief. The survey Baker references was submitted to the court on November 4, 2011 and was rejected by the court it its July 13, 2012 decision. (R., Vol. VI, p. 1075-1084).

Baker's second serious error, which is undoubtedly a result of their first error in referencing the wrong survey is that they fail to properly construe Stratton's Survey, at least the correct version of Stratton's Survey – the one adopted by the District Court.

Baker's error is this. On November 15, 2011, Baker filed Defendant Bakers' Objection to Plaintiffs' Proposed Judgment. (R., Vol. V., pp. 900-911) and he filed a supplemental brief objecting to the survey on January 20, 2012. (R., Vol. VI, pp. 958-974). On December 28, 2011, Boyd-Davis filed a response to Baker's objection (R., Vol. V, pp. 939-948), and also filed a response to Baker's supplemental brief. (R., Vol. VI, pp. 1000-1024). On March 28, 2012, the Court ordered a further hearing on Baker's objection to the proposed judgment and ordered Coleman's surveyor and expert witness, Robert Stratton to appear at the hearing. (R., Vol. VI, pp. 1025-1028).

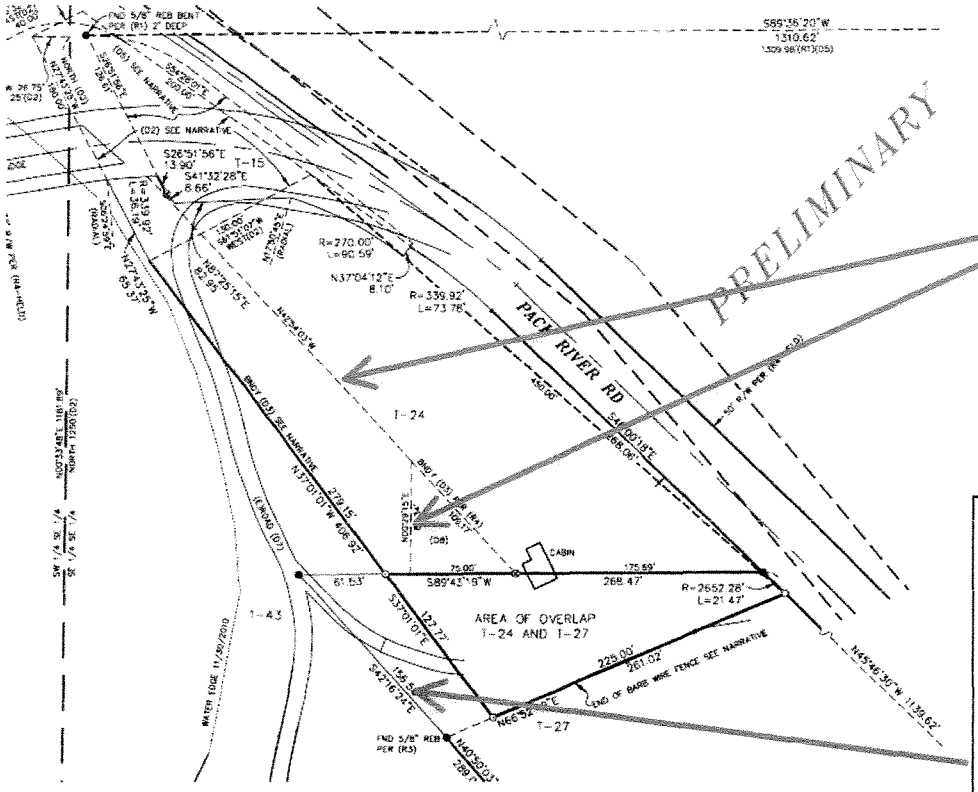
In the objection and supplemental objection filed by Baker, they made the same arguments about errors in the survey they make now before this Court. But the District Court has already addressed this issue and made the corrections that Baker now complains about again

to this Court. On July 13, 2012, the District Court issued its "Memorandum Decision RE: Defendants' Objection to Plaintiffs' Proposed Judgment" (R., Vol. VI, pp. 1075-1084). In its decision, the District Court agreed that there were errors in the survey. It found that:

> [T]he legal description in the proposed judgment does not reflect a reasonable interpretation of the western boundary of the disputed property. Because a finding was made in the trial decision that it was Harry Clark's intent to convey land up to the fence line, as reflected by Mr. Stratton's Figure 6, it is now determined that the western boundary line of the disputed parcel is also in accord with Mr. Stratton's interpretation of the Coleman deeds, as reflected by Figure 6.

(R., Vol. VI, p. 1082).

The District Court ordered "that the plaintiffs shall have a new survey performed forthwith, reflecting the finding made in this decision as to the land to the north of the 1970 Fence Line and consistent with the finding as to the western boundary." (Id. at 1082-1083). The Court ordered the plaintiffs to submit the new survey to the Court "on or before Friday, September 7, 2012." (Id. at 1083). Coleman submitted their new survey as ordered by the Court on September 7, 2012 (Id. at 1129-1131). The new survey (Exhibit "A") is a part of the Record before this Court as shown on the "Clerk's Certificate of Exhibits," on page 8 (R., Vol. VII, unnumbered but found after p. 1233). The survey drawing in Baker's Appellant's Brief on page 28 is taken from the survey that was rejected by the District Court in its July 13, 2012 decision. Below is the correct drawing taken from the correct survey adopted by the District Court and attached as Exhibit A to "Notice of Submission of Survey, Legal Description, and Letter from Surveyor Robert Stratton." (R., Vol. VI, pp. 1129-1131).



The survey drawing on page 28 of Appellant's Brief shows both of these dotted lines as solid lines. To correspond with Stratton's Figure 6, this drawing shows the western boundary further west (as indicated by the solid line).

The survey drawing on page 28 of Appellant's Brief shows the Disputed Property quieted in Coleman to extend to this line. To correspond with Stratton's Figure 6, this drawing moves the western boundary further east (as indicated by the bold solid line).

A comparison of the above drawing to the one shown on page 28 of the Appellant's Brief reveals a number of significant differences between the two surveys:

- The heaviest dark lines in a triangular shape on the above drawing designated "Area of Overlap T-24 and T-27" show the "Disputed Property" that was quieted in Coleman by the District Court. The legal description of this parcel is contained in the Partial Judgment Quieting Title in Disputed Parcel of Real Property to Plaintiffs Terri Boyd-Davis, Brian F. Davis and Jean L. Coleman entered on November 29, 2012. (R., Vol. VII, pp. 1200-1203).

- The western boundary line of the Coleman deed as interpreted by Stratton in his Figure 6 is shown as a solid line on the above drawing, while it is shown as a dotted line in the survey drawing in Baker's Brief.
- The lines that are now dotted lines (that were solid lines on the previous survey) do not indicate Stratton's interpretation of the Coleman deeds but rather reflect "BNDY (D3) PER (R4)" and "(D8)." Stratton explains on page 2 of the Stratton Survey the documents these abbreviations refer to. D3 is the Deed from Clark to Coleman 12/23/1970. R4 is Record of Survey by Evans 11/26/2007. D8 is Deed from Gilbertson to Boyd-Davis, 1/11/2012.
- With the rearrangement of the solid lines from those shown in the rejected survey, the correct survey shows the shape of the parcel is clearly a quadrilateral – NOT the "oddly-shaped" parcel Baker alleges it is (as shown in a drawing on page 33 of Appellant's Brief).

The changes made on the corrected survey take the wind out of the sails of Baker's arguments. Much of Baker's argument is based on their analysis of the wrong survey. Baker begins with a wrong premise and from there reaches faulty conclusions, which are found in their claims that: 1) the Stratton Survey shows the shape of the Coleman parcel as being something other than a quadrilateral; and 2) their claim that the District Court ignores virtually all of the distance and bearing calls in the deeds. A proper reading of the *correct* Stratton Survey, the one adopted by the District Court, shows neither of these claims is valid.

The table contained on page 29 of the Appellant's Brief wherein Baker attempts to show error in the "Disputed Parcel per Partial Judgment," is completely flawed because it is based on the wrong survey.

To properly construe Stratton's Survey (the correct one) it is necessary to read the Surveyor's Narrative on page 2 of the survey. Therein, Stratton explains why the rotation of the property made the most sense in interpreting the ambiguous deeds. It states:

> At the core of the court case was the location of those parcels described in (D2)[19] and (D3) which have senior title over the parcel described in (D4). The descriptions in (D2) and (D3) were prepared by Harry Clark, a property owner and have several contradictions that needed to be resolved in order to determine the location of the parcels. (R1), (R3) and (R4) all offered similar but different interpretations of the location of these parcels. I disagreed with the locations shown on these surveys because they ignored calls to the west boundary of Highway 130, they used a different right-of-way alignment for (D2) and (D3) than they did for (D4) and they attempted to hold bearings over distances, which excessively distorted the shape of the parcels. I have shown my interpretation of the deeds on this survey. I held the call to the right-of-way over the point of commencement and distances over bearings. By doing so, the closure of (D2) was maintained and the parcels better fit roads and usage. **The justification for this is that a layperson can better determine distances than they can determine a remote point of commencement or bearings and calls to natural monuments (the road) over measurements.**

(Emphasis added.)

Baker's argument that Stratton ignores virtually every call in the deeds drafted by Harry Clark and that this results in an oddly-shaped parcel are based on the wrong survey. A review of the correct survey shows neither of these allegations is correct. Thus, it is not the District Court's findings that are "clearly erroneous" but rather Baker's argument based on a survey not adopted by the court.

Additionally, when Baker makes the hypothetical argument that the "logical extent of Mr. Stratton's theory would require that all parcels for which Harry Clark drafted the deeds would need to be rotated 23 degrees counterclockwise, down to the section line," he raises a non-issue.

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[19] All of Stratton's references in parentheses that contain either a D or an R followed by a number refer to either a Deed or Record of Survey as defined in his "Records Reviewed" section of the survey on page 2.

The only issue before the District Court was the ownership of the Disputed Parcel – not other parcels that may contain legal descriptions authored by Harry Clark. Baker thus puts forth another fallacious argument that should be ignored.

Despite the fact that Baker's arguments have no merit due to their failure to analyze the correct survey, Baker's argument that the District Court's reliance on surveyor Robert Stratton's opinions is clearly erroneous ignores the fact that it is within the sound discretion of the trial court to accept or reject the experts' opinions. In *Rueth v. State,* 103 Idaho 74, 644 P.2d 1333 (1982), this Court was faced with a similar assertion. In *Rueth*, the Appellants "asserted that the testimony [of one of the experts was] inherently improbable" and the Appellant listed a number of reasons why it believed that was so. *Id.* at 78, 1337.

In that case, the Court explained that the Appellant's "argument overlooks the fact that weighing the testimony of expert witnesses is uniquely within the competence of the trier of fact." *Id.* The Supreme Court additionally explained in that case that although the district court's decision not to follow the testimony of the Appellant's expert witness completely was disappointing to the Appellant, it did not render its findings of fact clearly erroneous noting that "[s]imply stated, each side's expert presented differing opinions to the district court based on differing methodologies, and it was within the sound discretion of the district court to accept or reject each expert's opinions."

In this case, the District Court accepted Stratton's Figure 6 as being the most consistent with the intent of the Clarks. Its decision is supported by substantial and competent evidence and should not be disturbed.

B. The District Court's "Alternative Decision" was issued solely in response to Baker's request that the Court rule on Coleman's alternative claims of relief.

The District Court's "Alternative Decision" was issued in response to the post-trial briefs filed by Baker and Boyd-Davis. In Defendant Bakers' Post-trial Brief, they asked the Court to "quiet title to that portion of the Disputed Property which is reflected as the 'Overlap' in the Plaintiffs' Trial Exhibit 23 to the Plaintiffs, and quiet title in the remainder of the Disputed Parcel to the Defendant's [*sic*] Baker." (R., Vol. VI, p. 1043, L. 17-19). Boyd-Davis, in her post-trial brief, requested the Court find Coleman had proved their boundary by agreement claims. (R., Vol. VI, p. 1030-1039).

Prior to these requests, the Court had not ruled on either the boundary by agreement or adverse possession claims since it had quieted titled in the Disputed Property to Coleman under the theory of the intent of the grantor. As the Court stated in its "Alternative Decision," it "address[ed these two] remaining causes of action because the Bakers wish to appeal." (R., Vol. VI, p. 1086). But the Court also noted that the "Alternative Decision" would be "moot if the trial decision on the quiet title claim is upheld on appeal." (R., Vol. VI, p. 1087).

With no evidence in the record to support their assertion, Baker claims in their Appellate Brief, that the Tucker surveyors "[r]ecognize[ed] that the call to the highway trumps the distance and bearing calls to the point of true beginning." The fact is – the reason why Tucker decided to place the boundary lines where he did is unknown. The record provides no evidence as to what Tucker's thought process was. What the record does reflect, however, is that Tucker created at least three surveys of the Coleman property (Ex. A, B, and 23), all of which vary in significant ways from the others, further proof of the difficulties involved in interpreting these ambiguous deeds. Baker's own expert, David Evans testified that he couldn't "say one way or the other whether [Tucker] held bearings over distances." (Trial Tr., p. 877, L. 5-12).

Oddly, the survey Baker would like this court to adopt as the best reflection of Clark's intent is the only one of the three Tucker surveys in the record that Tucker did not record for reasons unknown. Baker claims: "Doing this [accepting the unrecorded Tucker survey] allows the Coleman deed to fit the road, while maintaining all of the remaining calls in the 1970 Coleman Deed." There is no support in the record for this statement. In fact, both parties' experts agreed that deeds were vague, hard to interpret, and could not close. (Trial Tr., p. 72, L. 2-5; p. 864, L. 17-25).

In asking this Court to adopt the District Court's "Alternative Decision," Baker repeats their faulty argument that the calls in the 1970 Coleman Deed are abandoned in the Court's partial judgment. Unfortunately, Baker's faulty conclusions as a result of their failure to properly construe the correct Stratton Survey permeates their brief.

C. Baker's argument raised for the first time on appeal that the District Court reformed the Coleman deed has been brought improperly and should not be considered.

Baker's argument that determining the District Court's interpretation of the ambiguous deeds is instead a reformation of the deed is a red herring. And it, like Baker's other arguments, is based on their faulty conclusions reached as a result of analyzing the wrong survey.

Reformation of the deed is a legal theory that was never raised at the trial level and it does not apply to this case. Thus, there is no validity to this argument and no need to refute it.

"It is well established that in order for an issue to be raised on appeal, the record must reveal an adverse ruling which forms the basis for an assignment of error." *Whitted v. Canyon County Bd. Of Comm'rs.* 137 Idaho 118, 121, 44 P.3d 1173, 1176 (2002). "An issue not raised below will not be considered when raised for the first time on appeal." *Post Falls Trailer Park v. Fredekind*, 131 Idaho 634, 637, 962 P.2d 1018, 1021 (1998).

Since this argument has been raised for the first time on appeal and the record reveals no adverse ruling, it need not and should not be considered.

V. ARGUMENT TO AFFIRM THE DISTRICT COURT'S FINDING THAT BAKER DID NOT PROVE THEIR LACHES DEFENSE

A. The District Court properly rejected Baker's affirmative defense of laches because it found that Coleman had timely asserted their rights once invaded by Baker.

The district court correctly found that the Bakers did not prove their affirmative defense of laches. In the Idaho Court of Appeals case of *Landis v. Hodgson*, the Court explained the defense of laches as follows:

> Whether or not a party is guilty of laches is a question of fact determined from all the evidence and circumstances adduced at trial. *Huppert v. Wolford*, 91 Idaho 249, 420 P.2d 11 (1966). To invoke the defense of laches, Idaho requires the following elements to be proven: (1) defendant's invasion of plaintiff's rights, (2) delay in asserting plaintiff's rights, the plaintiff having had notice and an opportunity to institute a suit, (3) lack of knowledge by defendant that plaintiff would assert his rights, and (4) injury or prejudice to defendant in event relief is accorded to plaintiff or the suit is not held to be barred.

109 Idaho 252, 259, 706 P.2d 1363, 1370 (Idaho App. 1985)

Once again, Baker begins with a wrong premise resulting in a faulty conclusion. His premise is that Coleman, the party in possession of the disputed property – or as Baker puts it the one who was "utilizing a portion of the Johnson's property which she did not own" – had a duty to assert a claim to the property. Baker's conclusion is that Coleman's alleged failure to do so for "almost 30 years," bars her under the doctrine of laches from doing so now.

While Baker claims the district court's "analysis is clearly erroneous," it is Baker's analysis that is in error as is shown by Baker's statement that "Coleman invaded the rights of the Johnsons." Baker has turned this defense on its head. If Coleman had, in fact, "invaded the rights of the Johnsons" for some 30 years and the Johnsons had failed to assert *their* rights for all

those years, then it would be Coleman who could claim the defense of laches if the Johnsons had finally brought a quiet title action against them, but this is not the case.

In this case, Coleman was in peaceable possession of the disputed property from 1970 through 2008, when Baker first invaded Coleman's rights. Coleman was first made aware that Baker made a claim to the disputed property in the latter part of 2008 when Coleman discovered that Baker had torn down a portion of the fence that had divided Coleman's property from Baker's property. Coleman immediately asserted rights to the property, ultimately filing suit in April 2010 after the dispute escalated when Baker erected the chain link fence across the disputed property.

Whether or not a party is guilty of laches primarily is a question of fact and therefore its determination is within the province of the trial court. It is reviewed under the abuse of discretion standard. *Huppert v. Wolford*, 91 Idaho 249, 420 P.2d 11 (1966).

In this case, the determination of whether Coleman was guilty of laches was within the province of the District Court. The court's finding that Baker had invaded Coleman's rights when they tore down a portion of the fence in 2008 and its finding that there was no material delay by Coleman in asserting their rights is supported by substantial and competent evidence.

Baker claims the Court's analysis is clearly erroneous, stating that Coleman invaded the rights of Baker's predecessors "by knowingly utilizing a portion of the Johnsons' property which she did not own." Baker claims the Court erred by failing to consider this defense from the standpoint of the Bakers. It is Baker's analysis that is clearly erroneous – not the Court's. This is demonstrated by a holding in a recent Idaho Supreme Court case.

In the matter of *Peterson v. Gentillon*, 296 P.3d 390 (2013), this Court considered similar claims. In that case, the Appellant argued that the district court erred in dismissing its claim for specific performance on an agreement because the five-year statute of limitations had not yet run

against the claim. The Appellant urged the Supreme Court to adopt a rule that the statute of limitations does not begin to run against actions for specific performance of a contract where the claimant or vendee is in possession of the property. This Court reasoned:

> Indeed, because a claimant in possession of property has little reason to bring a specific performance claim as to that property, many states have adopted a rule that statutes of limitations do not run against a claimant in possession until that possession is interrupted. *See, e.g., Richards v. Richards,* 209 Ga. 839, 76 S.E.2d 492, 497 (1953) ("**It is well settled that neither laches nor the statute of limitations will run against one in peaceable possession of property under a claim of ownership for delay in resorting to a court of equity to establish his rights.**"); *Dotson v. Aldridge,* 246 Ark. 456, 438 S.W.2d 464, 466 (1969) (noting rule that "**there is no necessity for resorting to legal remedies until there is an interference with possession**"); *Withroder v. Wiederoder,* 156 Kan. 570, 134 P.2d 381, 385 (1943) (holding that the statute of limitations did not bar a quiet title action commenced eight years after execution of contract for exchange of interests because the plaintiff was in possession and could bring the action at any time at his convenience); *Martinez v. Archuleta-Padia,* 143 P.3d 1112, 1115 (Colo.App.2006) (noting that "the general rule is that those in actual possession of real estate are never barred by any statute of limitation from seeking to quiet their title"); *Clary v. Stack Steel & Supply Co.,* 611 P.2d 80, 83 (Alaska 1980) ("Normally no statute of limitations applies to a quiet title action brought by a person in possession of real property."); *Viersen v. Boettcher,* 387 P.2d 133, 138 (Okla.1963) (recognizing that "an action to quiet title, where the plaintiff has been in continuous possession of the property, claiming ownership therein, can be maintained at any time, and no statute of limitation bars his right to the relief sought").

Id. at 395-396. (Emphasis added.)

This Court found "these authorities persuasive" and concluded "that the statute of limitations does not bar a claimant who has purchased real property and is in possession of that property from asserting a claim for specific performance. A claim for specific performance does not begin to run against a claimant in possession until the claimant's possession is interrupted." *Id.* at 396.

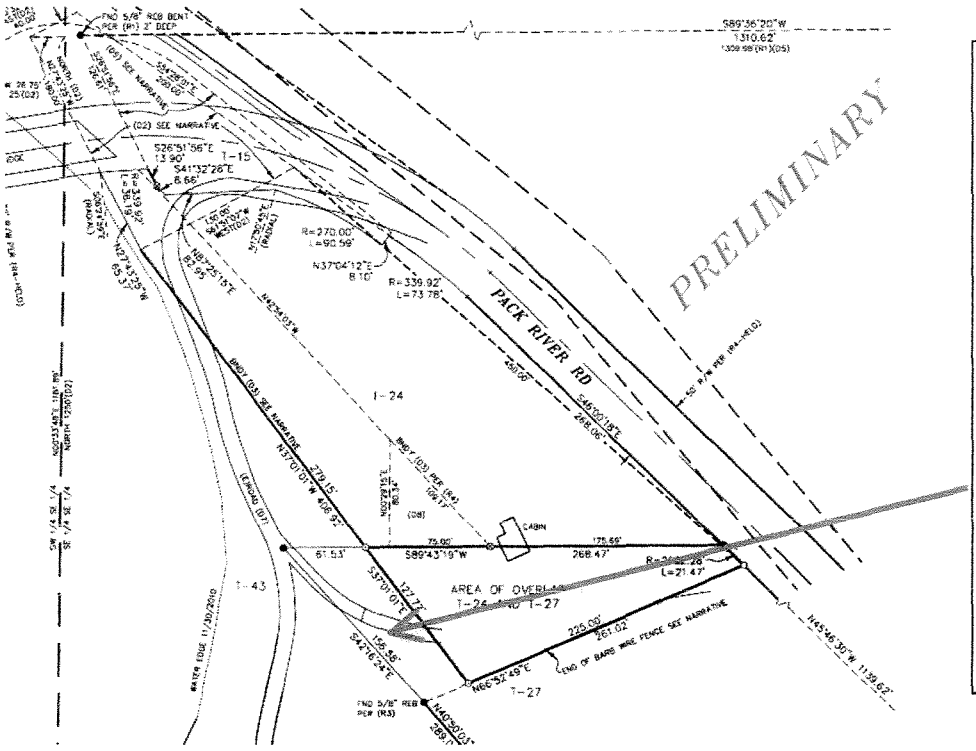
In the same way, Coleman, who was in peaceable possession of the disputed property from 1970 through 2008, was not barred by the defense of laches from seeking to quiet title to the property.

VI. CROSS APPEAL ARGUMENT

A. The District Court applied the wrong legal standard in determining whether Coleman had proved they had established a boundary based on an implied agreement.

In denying Coleman's boundary by agreement claim, the District Court erred in applying the standard applicable to determining whether a boundary has been established pursuant to an *express* agreement when the proper inquiry would have been whether Coleman had proven whether an agreement was established by an *implied* agreement.

While it may appear unnecessary to rule on this issue on cross-appeal if the Court rejects the issues raised by the Appellants, this issue remains significant because in determining that the Clarks intended to grant the property north of the "fence line" to Coleman, it was still necessary in interpreting the ambiguous deeds that the Coleman parcel retain its quadrilateral shape pursuant to the calls in the deed. This resulted in a small portion of the "Disputed Property" on its western side not being quieted in Coleman (see figure below for clarification). Thus, the court found that this small portion of the Disputed Property is owned by Baker although it is north of the "fence line."



The District Court quieted title to Coleman under the theory of intent of the grantor. It also found that the ambiguous deed described a parcel with a quadrilateral shape. Because this small section on the western side of the Disputed Property falls outside the quadrilateral shape, the Court found it was not contained in the Clark to Coleman deed. Thus, the Court found that Coleman had not proved their quiet title claims to this portion of the Disputed Property under that theory. (R., Vol. VI, pp. 1080-1081).

A finding that the parties had established a boundary by agreement would result in all of the property north of the fence line being quieted in Coleman. In light of the fact that the District Court made findings that the parties treated the fence line as the boundary throughout their 36 years of ownership, this makes the most sense and is legally sound as argued below.

"Review of the lower court's decision is limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law." *Alumet v. Bear Lake Grazing Co.*, 119 Idaho 946, 812 P.2d 253 (1991). "We exercise free review over the lower court's conclusions of law to determine whether the court correctly stated the applicable law, and whether the legal conclusions are sustained by the facts found. *Conley v. Whittlesey*, 133 Idaho 265, 269-270, 985 P.2d 1127, 1131-1132 (1999).

It is proper for this Court to review the District Court's conclusions of law to determine whether its conclusion that Coleman had not proven her boundary by agreement claim based upon an implied agreement was in error.

One month after trial on April 28, 2011, the District Court announced its findings of fact and conclusions of law. Having found that the disputed property was quieted in Coleman based upon a theory of the grantor's intent, the Court did not, at that time, announce its conclusions of law relative to Coleman's boundary by agreement claim. The Court did at that time, however, announce as one of its findings of fact pertinent to Coleman's boundary by agreement claim "that as to the use of the real property by the Johnsons and Ms. Coleman that the fence line was treated as the boundary line." (Trial Tr., p. 1029, L. 13-19, see also Trial Tr., p. 1030, L. 19-20).

The District Court did not make its conclusions of law related to Coleman's boundary by agreement claim until 15 months after trial had ended on July 13, 2012, and it did so then after both Coleman and Baker filed post-trial briefs on April 30, 2012. Baker had made known their intent to appeal the case and although the Court had quieted title in Coleman under the theory of the grantor's intent, Baker wanted the Court to issue its ruling on all the theories pled by the parties, including adverse possession and boundary by agreement. (R., Vol. VI, p. 1086).

In its Memorandum Decision Re: Remaining Liability Causes of Action in Plaintiff's Third Amended Complaint issued on July 13, 2012, the Court found that "because of the ambiguous nature of the deeds and because the respective parcels had not been surveyed at the time the fence was built, the first element of proof of boundary by agreement, that 'there must be an uncertain or disputed boundary,' is met." (R., Vol. VI, p. 1097). In considering the second element of boundary by agreement, that there was an agreement fixing the boundary, the Court addressed the testimony of Clifford Johnson, stating:

> In the trial decision, the Court found that the testimony of Cliff Johnson was impeached, which implies that his testimony was unreliable. The Court did not believe that Mr. Johnson would start building a fence at what he believed to be the corner of his property, and then proceed randomly, not following what he believed to be the boundary line. Rather, it appeared that in the hypercharged atmosphere surrounding these proceedings, Mr. Johnson felt pressure to testify in a manner consistent with the position put forth by his co-defendants[20], the Bakers. Nonetheless, Mr. Johnson's testimony was contrary to the plaintiffs' assertion of a boundary by agreement/acquiescence.

(R., Vol. VI, p. 1097-1098).

The Court then applied its conclusions of law to its findings of fact as follows:

> The only way a decision can be rendered that an agreement was made between Jean Coleman and the Johnsons that the fence line was the boundary line is to accept an "implied easement[21]" or acquiescence version of the facts. Even if such a finding is made, as set forth in *Flying Elk Investment, LLC v. Cornwall*, acquiescence alone is not enough to establish a boundary by agreement. **In light of the denial by Cliff Johnson that there was an agreement between the neighbors that the fence line was to be the property line, and little or no corroboration that an agreement was made to treat the fence line as the boundary, the conclusion is reached that the plaintiffs did not prove a necessary material element of this claim.**

(Emphasis added). (R., Vol. VI, p. 1098).

Earlier, in its findings of fact, the Court had stated that found it "telling" that during his trial testimony, Clifford Johnson referred to the property south of the fence as "*my* side of the fence." (Trial Tr., p. 1028, L. 5).

The District Court erred in its analysis by basing its decision on "the denial by Cliff Johnson that there was an agreement between the neighbors that the fence line was to be the property line," despite the fact that it was quite apparent, as even the Court itself noted, that Cliff

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[20] It should be pointed out that the Johnsons were not parties to this case but were, rather, Baker's precedessors in interest. The Court mistakenly referred to Clifford Johnson as a co-defendant.

[21] It is apparent that the Court mistakenly used the word "easement" here when it meant "agreement."

Johnson "felt pressure to testify in a manner consistent with the position put forth by [Baker]." While this would be the proper analysis to undertake if Coleman claimed an agreement by an *express* agreement, this is not the proper analysis to undertake when considering whether an *implied* agreement had been made to treat the fence line as the boundary line.

The proper analysis can be found in a review of the case of *Edgeller v. Johnston*, 262 P.2d 1006 (1953) where, like the instant case, there was "no direct evidence in the record of a mutually agreed boundary." *Id.* at 1009. The defendants in the case appealed "contend[ing] that there [was] no evidence to support an agreed boundary between the conterminous owners and for this reason [they asked the appellate court to reverse] the finding that the plaintiff and her predecessors in interest held the disputed area adversely." *Id.* **Because of the lack of evidence that there was a mutually agreed boundary, the Idaho Supreme Court set forth the proper analysis to be undertaken to determine if an implied agreement had been reached. It stated that "[a]determination of this question must necessarily be made from the acts and conduct of the parties and their predecessors in interest, evaluated in the light of the surrounding circumstances**." *Id.* (Emphasis added).

The *Edgeller* Court confirmed that "[a]n agreement, fixing a boundary line, need not be shown by direct evidence but may be inferred from acts and conduct and especially from long acquiescence." *Id.* at 1010. It further confirmed that "[s]uch an agreement may be presumed to arise between adjoining landowners where such right has been definitely defined by erection of a fence or other monument on the line followed by such adjoining landowners treating it as fixing the boundary for such length of time that neither ought to be allowed to deny the correctness of its location." *Id.* The *Edgeller* Court upheld the trial court's finding because "the parties, by their acts and the circumstances surrounding such, recognized and agreed upon the location of

the boundary line and acquiesced in such location for a period of time in excess of the requirements of the statute." *Id.*

These facts, nearly identical to ours, warrant a similar finding. The District Court erred in its application of the law when it determined that an agreement needed to be shown by direct evidence (i.e. the testimony of Cliff Johnson) rather than from the acts and conduct and the long period of acquiescence.

The Court made the following specific findings of fact as to the Johnson's conduct and beliefs concerning the fence:

> I do want to further address the testimony of Cliff [Johnson]. As I mentioned earlier, he is a nice person. His testimony, however, was impeached. He was shown to have a bias. This court does not accept his statement that he would have begun the fence at what he thought was the northeast corner of his property and then go willy-nilly off what he believed to be the line which then would conveniently fit the theory of the defense. Further, the use as evidenced by the parties reflect that they treated the fence line as the boundary line. The Johnsons never used the property north of the line and they shut off the gate so as to preclude them from having access, at least by vehicle, to the northern portion of what is now claimed to have been their piece – their portion of property. They also rebuilt the fence in the same position...
>
> In looking and evaluating all of the testimony, all of the facts and all of the evidence that has been submitted, *despite his statement, it makes more sense that – and I do find on a more probable than not basis that he built the balance of the fence on what he thought was the boundary line.* That doesn't mean that that was specifically the boundary line but it does appear and I do find that that was what the parties thought the boundary line to be.

(Trial Tr., p. 1039, L. 25; p. 1040, L. 1-15, 21-25; p. 1041, L. 1-4). (Emphasis added).

In the case of *Weitz v. Green*, 230 P.3d 743 (2010), one of the issues on appeal was whether the district court's evidence supported its conclusions of law that the Appellants had

failed to prove their claims of boundary by agreement/acquiescence[22]. The *Weitz* case is helpful to our case because it found that the "district court's analysis as to the second element of boundary by agreement or acquiescence was erroneous," stating that "the appropriate inquiry would have been whether Appellants submitted sufficient evidence from which the fact-finder, here the district court, should have inferred that an agreement to treat the fence as a boundary was made during [the relevant time period]." *Id.* at 752. This is exactly the inquiry the District Court should have made in the instant case – was there sufficient evidence from which the District Court *should have inferred* that an agreement to treat the fence as a boundary was made? The inquiry as to whether Clifford Johnson admitted there was an agreement was improper.

There was overwhelming evidence to infer that Coleman and the Johnsons had an agreement to treat the fence as the boundary. This is evidenced from the District Court's stated findings of fact that "the use as evidenced by the parties reflect that they treated the fence line as the boundary line" and that Clifford Johnson "built the balance of the fence on what he thought was the boundary line." (Trial Tr., p. 1040, L. 8-10, 25; p. 1041, L. 1).

The case of *Wells v. Williamson*, 794 P.2d 626, 118 Idaho 37 (1990) also speaks to the issue we face. In that case, the Appellant claimed the district court had wrongly concluded that a boundary by agreement had been established for a number of reasons – one being, that he, like Cliff Johnson, claimed "he never agreed to treat the southern fenceline as the boundary between the properties" and his claim that the fence "was constructed by his predecessor in interest as a

[22] While in that case, the Supreme Court ultimately determined that the district court had rightly determined that the Appellants had not proved their boundary by agreement claims, it made this determination based upon the fact the Respondents were bonafide purchasers for value and thus they had purchased the property without notice of a boundary by agreement. This set of facts does not apply to our case.

barrier to keep cattle from wandering into the river and that he, Williamson, regards the fence in the same manner, *i.e.,* as a *barrier* but not as a boundary." *Id.* at 630.

In that case, the Supreme Court found that the first element for establishing a boundary by agreement had been met. It then addressed the second element and the Appellant's "argument that he never agreed to treat the southern fenceline as a boundary." The facts are nearly identical to ours: 1) The Appellant claimed there was never an agreement regarding the boundary; 2) The Respondents had used the disputed property for nearly 20 years[23] and during that time the Appellant had never registered a complaint or made a claim that the property was actually his. (Trial Tr., p. 392, L.18-22) 3) It appeared from the Appellant's testimony that before the survey was done, he did not even believe the disputed property was his. (Trial Tr., p. 355, L. 10-20).

> [I]t is true that no "express" or "mutual" agreement was ever reached between the parties. However, we have already noted that an express agreement is not a prerequisite to a finding of a boundary by agreement. We were aware in *O'Malley v. Jones* that "there [was] no direct evidence of any mutual agreement ...," so that the question of the agreed upon boundary "must therefore be determined from the conduct of the parties, viewed in light of the surrounding circumstances." 46 Idaho at 140, 266 P. at 798. We went on to state that "[a]n agreement fixing the boundary line need not be shown by direct evidence, but may be inferred from conduct, and especially from long acquiescence." 46 Idaho at 141, 266 P. at 798.
>
> Similarly, in *O'Malley v. Jones,* 46 Idaho 137, 266 P. 797 (1928), the appellant had completely acquiesced to respondent's possession of the disputed property for over thirty-two years, a fact which we found to be of "impelling force against the contentions of the appellant." 46 Idaho at 141, 266 P. at 798.
>
> In conclusion, we think the facts necessary to a finding of boundary by agreement are present on the record before us and that those facts remain undisputed. We also find no error on the part of the district court when **it inferred from those facts an implied agreement to treat the southern fenceline as the boundary because that inference was reasonably supported by the record** and thus

[23] In our case, Coleman used the property north of the fence line for over 36 years before Baker invaded their rights.

consonant with the standards set forth in *Riverside v. Ritchie*, 103 Idaho 515, 650 P.2d 657 (1982).

Finally, in *Flying Elk Investment, LLC v. Cornwall*, 149 Idaho 9, 232 P.3d 330 (2010), the appellant, Flying Elk, the party in the position of the Bakers (i.e. the party who had the property surveyed and whose survey revealed the fence intruded onto his deeded property), like Baker, attempted to disprove the boundary by agreement by emphasizing that the son of the previous property owner had testified that he and his father had believed the fence was a temporary restraint kept in place until a survey could be completed. However, the Supreme Court stated that "the Court can only evaluate the parties' conduct, not their 'mental operations.'" (citing *Bayhouse v. Urguides*, 17 Idaho 286, 294 (1909)). *Id.* at 11. **The court can only evaluate the conduct of the parties.** And this is where the District Court erred. It erred because it based its decision on the testimony of a witness it found to be biased. It simply applied the wrong standard. Therefore, the decision of the District Court as it relates to Coleman's boundary by agreement claim should be set aside, and based on the findings of fact made by the District Court, this Court should apply the proper legal standard and find that Coleman proved there was a boundary by agreement based upon an implied agreement.

VII. CONCLUSION

The findings of the District Court are supported by substantial and competent evidence. Therefore, its findings are not clearly erroneous, and Appellant Baker's request that this Court set the findings of the District Court aside should be rejected. Baker's assertion that the District Court's findings are clearly erroneous is largely based on Baker's fatal error in analyzing the survey rejected by the District Court rather than the correct survey the District Court adopted after ordering that the errors it found in the previous survey be fixed.

The District Court erred in its application of the legal standard appropriate to determining if Coleman had proven their boundary by agreement claims based on an implied agreement. Because the District Court's findings of fact support their claim that an implied agreement had been reached, this Court should overturn the District Court's decision on this claim and quiet title to Coleman in all the Disputed Property north of the fence line.

Respectfully submitted,

DATED: 1-23-2014

Terri Boyd-Davis
Respondent/Cross-Appellant
In Pro Se

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of January 2014, I caused to be served two true and correct copy of the foregoing document on the parties listed below in the manner indicated.

Toby McLaughlin Andra Nelson Berg & McLaughlin, Chtd. 414 Church Street, Ste 203 Sandpoint, ID 83864 *Attorney for Appellant/Cross Respondents Bakers*	[X] U.S. Mail, Postage Prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] **Facsimile: 208-263-7557**
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