

2-25-2014

# Boyd-Davis v. Baker Appellant's Reply Brief 1 Dckt. 40438

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

---

## Recommended Citation

"Boyd-Davis v. Baker Appellant's Reply Brief 1 Dckt. 40438" (2014). *Idaho Supreme Court Records & Briefs*. 4493.  
[https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs/4493](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/4493)

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

TERRI BOYD-DAVIS,

Plaintiff-Counterdefendant-  
Respondent-Cross Appellant,

and

BRIAN F. DAVIS and JEAN L. COLEMAN,  
an individual,

Plaintiffs-Counterdefendants-  
Respondents,

vs.

TIMOTHY BAKER and CAROL BAKER,  
husband and wife;

Defendants-Counterclaimants-  
Appellants-Cross Respondents,

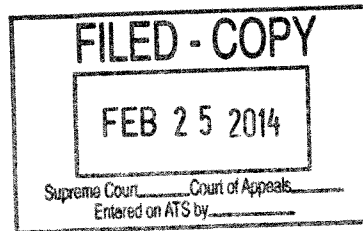
MARY PANDREA, an individual; JOHN  
PANDREA, an individual; and DOES 1-50,  
inclusive,

Defendants,  
and

JAMES GILBERTSON and NELLIE  
GILBERTSON, husband and wife,

Defendants-Counterclaimants.

Supreme Court Docket No. 40438-2012  
Bonner County Docket No. CV 2010-00703



**APPELLANT’S REPLY BRIEF AND RESPONSE TO CROSS-APPEAL**

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT FOR BONNER COUNTY  
HONORABLE STEVE VERBY PRESIDING

DANIEL TOBY McLAUGHLIN  
ANDRA L. NELSON  
Berg & McLaughlin, Chtd.  
414 Church Street, Ste 203,  
Sandpoint, ID 83864  
*Attorneys for the Defendant-Counterclaimant-  
Appellant-Cross Respondent*

TERRI BOYD-DAVIS  
Pro Se  
12738 North Strahorn Road  
Hayden, ID 83835  
*Pro Se Plaintiff-Counterdefendant-  
Respondent-Cross Appellant*

## **TABLE OF CONTENTS**

I. Table of Cases and Authorities	3
II. Statement of the Case	4-5
III. Argument – Reply to Respondent’s Brief	5-17
A. The District Court’s Finding that the Clarks intended to Convey to Coleman all of the Property up to the Fence Line is Not Supported by Substantial Evidence.	5-10
B. The Appellant is Not Asking the Court to Reweigh the Evidence; Rather, the Appellant is Asking the Court to Recognize the Lack of any Substantial Evidence Supporting the Court Legal Conclusion.	11
C. No Evidence was Admitted at Trial Supporting a Finding that the Fence Line Existed at the Time of Conveyance.	11
D. The Respondent’s Expert Opinion is Based Upon the Assumption that is Not Supported by the Evidence.	12-13
E. The Appellant’s Assertion that Baker Relies Upon an Incorrect Survey is Without Merit	13-15
F. The District Court’s “Alternative Decision” is Sound, and Should be Adopted, or the Case Remanded.	16-17
IV. Argument – Response to Cross Appeal	17-27
A. The District Court’s Finding that Coleman Failed to Prove her Claim of Boundary by Acquiescence is Supported by Substantial Evidence.	18
1. Standard of Review	18
2. Elements of the Claim of Boundary by Agreement/Acquiescence	18-19
3. The District Court Did not Fail to Consider Whether an Implied Agreement had Been Proven by Clear and Convincing Evidence	19-27
V. Conclusion	26-27

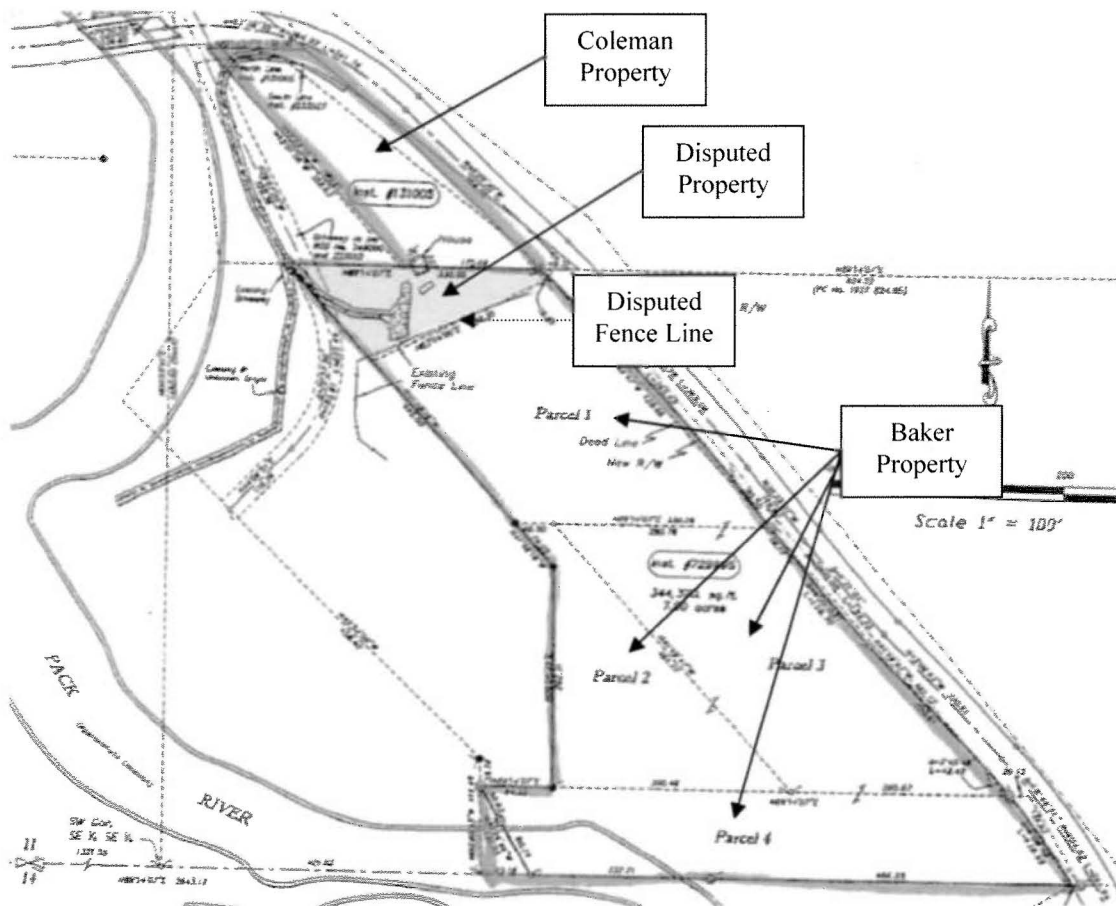
## TABLE OF CASES AND AUTHORITIES

I. CASES	PAGE
<i>Bolger v. Lance</i> , 137 Idaho 792, 53 P.3d 1211, 1213 (2002).	18
<i>City of Manhattan Beach v. Superior Court</i> , 13 Cal. 4th 232, 238, 914 P.2d 160, 164 (1996)	10
<i>Conley v. Whittlesey</i> , 133 Idaho 265, 269-70, 985 P.2d 1127, 1131-32 (1999).	11
<i>Cox v. Clanton</i> , 137 Idaho 492, 494-95, 50 P.3d 987, 989-90 (2002).	18, 20, 21,22
<i>Downey v. Vavold</i> , 144 Idaho 592, 595, 166 P.3d 382, 385 (2007)	24
<i>Flying Elk Inv., LLC v. Cornwall</i> , 149 Idaho 9, 13, 232 P.3d 330, 334 (2010).	18, 19
<i>Griffin v. Anderson</i> , 144 Idaho 376, 378-79, 162 P.3d 755, 757-58 (2007),	24
<i>Huskinson v. Nelson</i> , 152 Idaho 547, 272 P.3d 519 (2012).	21
<i>In re Williamson v. City of McCall</i> , 135 Idaho 452, 454, 19 P.3d 766, 768 (2001).	18
<i>Luce v. Marble</i> , 142 Idaho 264, 271, 127 P.3d 167 (2005)	19, 23
<i>McCray v. Rosenkrance</i> , 135 Idaho 509, 513, 20 P.3d 693, 697 (2001)	18
<i>Miller v. Bay City Prop. Owners Ass'n, Inc.</i> , 393 Md. 620, 637, 903 A.2d 938 (2006)	10
<i>Sun Valley Shamrock Res., Inc.</i> , 118 Idaho at 120, 794 P.2d at 1393	10,15

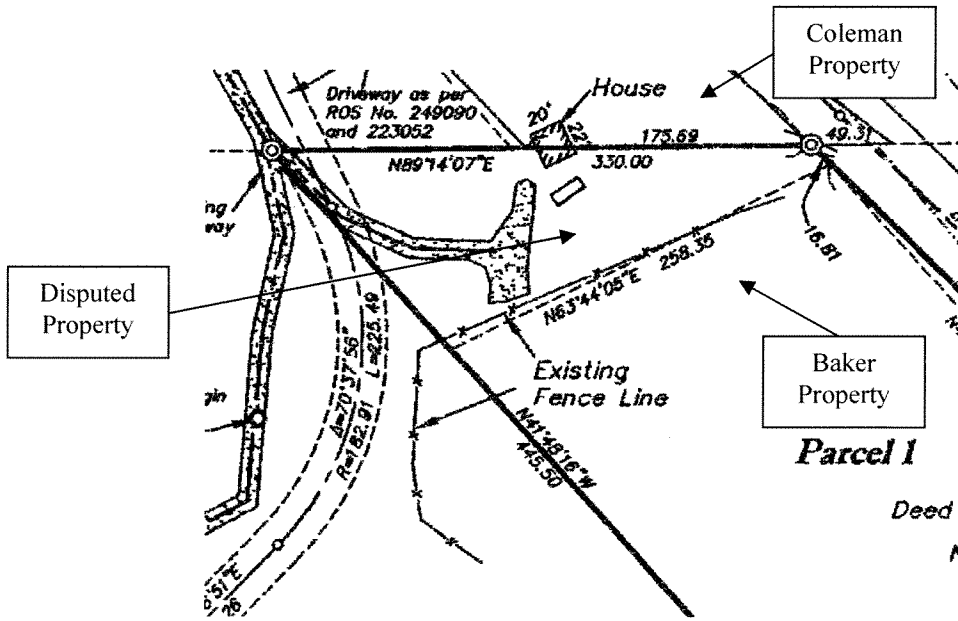
## II. STATEMENT OF THE CASE.

This case involves a boundary line dispute in Bonner County, Idaho. On April 19, 2010, The Plaintiffs/Respondents Jean Coleman, Terri Boyd-Davis, and Brian Davis (hereinafter collectively referred to as “Coleman”) pled ownership of a portion of the Appellant/Defendants Tim and Carol Baker’s property (hereinafter collectively referred to as “Baker”) up to a fence line based upon claims of adverse possession, boundary by acquiescence, and reformation of Coleman’s warranty deeds.

The following are depictions of the parcels and the “Disputed Property:”



(Ex. C, enhanced).



(A portion of Ex. C).

Baker has filed this Appeal requesting that the Supreme Court scrutinize the District Court’s finding that in conveying the property to Coleman, her predecessor’s in interest, Harry and Edith Clark, intended to convey up to the fence line identified in the above survey. Baker contends that this finding is clearly erroneous, as it is not based upon competent evidence admitted at trial.

Coleman has cross-appealed, asserting that the District Court erred by finding that she had failed to prove her claim of boundary by agreement/acquiescence by clear and convincing evidence.

### III. ARGUMENT - REPLY TO RESPONDENT’S BRIEF

#### A. The District Court’s Finding that the Clarks intended to Convey to Coleman all of the Property up to the Fence Line is Not Supported by Substantial Evidence.

Respondent Coleman’s primary argument in response to the Baker’s appeal is to contend that the District Court’s decision is supported by substantial evidence. This argument, however, ignores a fundamental and inescapable conclusion – at the time that Harry and Edith Clark gifted

the property to Coleman, they could not have intended to convey up to the fence, because the fence did not yet exist. Although the District Court recognized that the fence had not yet been built at the time of the conveyance, it nevertheless ruled that the Clarks intended to convey up to the fence. That finding is not supported by any competent evidence admitted at trial, and is clearly erroneous.

It is undisputed that Coleman acquired her Southern parcel by Warranty Deed from her parents, Harry and Edith Clark, which was executed on December 23<sup>rd</sup>, 1970. (Ex. 3; Tr., p. 1022, L.7- L.16) (hereinafter “Coleman Deed”). Unfortunately, the Coleman Deed, which was drafted by Harry Clark who was not a surveyor, is ambiguous, in that it contains a call to the “Boundary of Highway 130,” which cannot be reconciled with the distance and bearing call identified in the Coleman Deed as “the point of true beginning.”

The District Court properly recognized that its role in interpreting an ambiguous deed is to attempt to ascertain the intent of the grantors – in this case, Harry and Edith Clark. One of the questions before the District Court, therefore, was what the Clarks intended to convey to Jean Coleman when they gifted her the property on December 23<sup>rd</sup>, 1970.

At the conclusion of trial in this matter, the District Court found that Harry and Edith Clark intended to convey to Jean Coleman land up to a fence line, even though the Coleman Deed contains no reference to any fence. This legal conclusion, however, is not supported by the evidence admitted at trial, or even by the District Court’s own findings of fact.

The crux of the District Court’s error is in its conclusion that the Clarks could have intended to convey up to a fence that had not yet been built at the time of the conveyance. As the District Court found, the subject fence was not built until approximately a year after the property

was gifted by the Clarks to Coleman. (Tr., pp. 1040-1041). This finding of fact by the District Court is not seriously in dispute, with the Respondent having conceded that it was, in fact, Cliff Johnson who built the fence, and that Johnson did not build the fence until after he purchased the property adjoining Coleman's parcel on September 3, 1971. (Ex. 7; Tr., pp. 1040-1041; R., Vol. V., Bates 884-885; Respondent's Brief, p. 2 ("In 1971, after purchasing their northernmost parcel, Clifford Johnson built a fence.")).

Having established that the fence had not yet been built at the time that the Clarks conveyed Coleman's property to her, how could the Clarks have intended to convey up to a non-existent fence line? There are only two ways in which this could have occurred: (1) if the Clarks had some part in determining where Cliff Johnson would eventually construct the fence; or (2) if Cliff Johnson knew where the Clarks had intended the boundary line to be located, and he chose to install the fence on exactly that location.

As to the first possibility, there was no evidence admitted at trial that either Harry or Edith Clark participated in any manner in the construction of the fence. Moreover, Cliff Johnson testified at trial that he *never* discussed with the Clarks either the location of the Northern boundary of the property, or the location of the fence that Mr. Johnson subsequently constructed. (Tr., p. 385, L. 9-23, p. 392, L. 18-22). Thus, there is no evidence in the record which would support a finding that the Clarks had any role in establishing the location of the fence line.

This leaves only the possibility that Cliff Johnson knew where Harry Clark intended the boundary line to be, and so built the fence in that location. Again, however, no evidence to support such a finding was admitted at trial. Cliff Johnson testified that he located the fence based upon the topography of the land, which was wet, marshy, and contains a gully, and for the



sole purpose of penning the Johnson's horses. (Tr., pp. 385-386, 390, 395-396, 413-416). The fence is indisputably not located in the location described in the deeds drafted by Harry Clark as the boundary line to be. The deeds describe a boundary that runs due west. The fence, on the other hand, runs in a Southwesterly direction, more than 23 degrees counterclockwise from due West. Moreover, the fence does not follow a straight line, but turns in a fish hook pattern, defying any description to be found in either deed, and demonstrating clearly that the fence was not intended to mark a boundary line.

Perhaps most importantly, the District Court made findings of fact that the Johnsons were unaware of the location of the boundary at the time that the fence was being constructed. (R.Vol. VI., Bates 1097). If Cliff Johnson did not know the location of the boundary, had never discussed the location with the Clarks, and could not derive the location from reviewing either his deed or the Coleman deed, **then Cliff Johnson could not have constructed the fence line along the exact location of where Harry Clark intended the boundary to be located.** Mr. Johnson was not a clairvoyant, and simply did not have any information that would have allowed him to construct the fence precisely along what the District Court found to be the Clarks' intended boundary line. This finding simply does not withstand scrutiny, and is not supported by the evidence admitted at trial

Despite these facts, the District Court nevertheless concluded that the Clarks intended to convey up to the fence line – a conclusion which is not supported by the evidence admitted at trial, and is clearly erroneous. To put it succinctly, the Clarks could not have intended to convey up to a fence that did not exist at the time of the conveyance.

In fact, in response to the Bakers' Motion for Reconsideration, the District Court recognized that its legal conclusion was problematic in light of its finding that the fence was not constructed until approximately a year after Coleman acquired her property. In response to Baker's first Motion for Reconsideration, the District Court made the following findings:

With these ambiguities in place, this Court is required to decipher the intent of the grantor, Harry Clark. The starting point is the deeds. **The Bakers are correct in their analysis that it would not have been Harry Clark's intent to establish a boundary line to a fence that was not in place at the time of the conveyance.** They are also correct that the driveway and parking area adjacent to the cabin were similarly not in existence at the time the conveyances were made.

(R., Vol. V, pp. 884-885).

Despite these findings, the District Court nevertheless erroneously concluded:

[O]n a more probable than not basis, it was Harry Clark's intention to convey property *at least to the fence line that was later placed by Cliff Johnson*. This fence line resulted in the Johnsons using the property up to the fence line to the North and Jean Coleman similarly limiting her use of the real property up to the fence line on the South.

(*Id.*, at p. 885) (*emphasis added*).

To reach this conclusion, the District Court relied upon improvements that were constructed subsequent to the conveyance by the Clarks to Coleman, which is indicative of the error in the District Court's reasoning. (R., Vol. V, pp. 884-885). The intent of the grantor must be determined from what the grantor could have known at the time of the conveyance. An exception to this might be found in actions taken by the grantors themselves after the conveyance, but no such evidence was admitted at trial.

The District Court repeatedly conflates the proof required for a boundary by agreement/acquiescence claim, with evidence relevant to the interpretation of an ambiguous deed. What Jean Coleman or her invitees may have done with regard to her property in the years following her acquisition thereof is simply not relevant to what Harry and Edith Clark intended. The District Court erroneously relied upon evidence which is relevant in its analysis of Coleman's boundary by agreement/acquiescence claim – i.e. the use of the property by subsequent owners – in analyzing what the Clarks intended to convey on December 23, 1970, when they deeded the property to Coleman.

The analysis of the grantor's intent must begin with the language in the deed itself, and adhere as closely as possible to the calls in the deed. *Sun Valley Shamrock Res., Inc.*, 118 Idaho at 120, 794 P.2d at 1393 (“When construing a deed description, effect must be given, if possible, to all of the language contained in the description.”); *Miller v. Bay City Prop. Owners Ass'n, Inc.*, 393 Md. 620, 637, 903 A.2d 938 (2006) (“In determining the intent of the parties we must begin with the actual language used in the deed[.]”); *City of Manhattan Beach v. Superior Court*, 13 Cal. 4th 232, 238, 914 P.2d 160, 164 (1996) (“Extrinsic evidence is admissible to interpret the instrument, but not to give it a meaning to which it is not susceptible, and it is the instrument itself that must be given effect.”). Parole evidence can be considered, but only such evidence that was available to the Clarks at the time of the conveyance, or perhaps evidence of actions taken by the Clarks thereafter. The District Court is not at liberty to completely redefine the boundaries of the Coleman parcel, simply because the deed contains a conflicting call. That is precisely what the District Court did here, and this error requires the reversal of the District Court's original decision.

**B. The Appellant is Not Asking the Court to Reweigh the Evidence; Rather, the Appellant is Asking the Court to Recognize the Lack of any Substantial Evidence Supporting the Court Legal Conclusion.**

The Respondent Boyd-Davis contends that Baker is asking the Court to “reweigh the evidence.” (Respondent’s Brief, p. 34). This is not the case. Baker readily acknowledges that the reviewing Court will not overturn the decision of a District Court where the findings of fact are based on substantial evidence. However, the 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.**” *Conley v. Whittlesey*, 133 Idaho 265, 269-70, 985 P.2d 1127, 1131-32 (1999). The District Court’s legal conclusion that the Clarks intended to convey up to a non-existent fence is not sustained by the facts found, and must be overturned.

**C. No Evidence Was Admitted at Trial Supporting a Finding that the Fence Line Existed at the Time of Conveyance.**

The Respondent Boyd-Davis argues that “the fence line existed at the time of the conveyance.” (Respondent’s Brief, p. 20). Yet, she fails to provide any citation to the record, and this argument directly contradicts the District Court’s findings. (Tr., pp. 1040-1041; R.Vol. V., Bates 884-885). In fact, in the brief she submitted in this appeal, Ms. Boyd-Davis concedes that it was Mr. Johnson that built the fence. (Respondent’s Brief, p. 16)(“[The District Court] considered the testimony of Clifford Johnson, predecessor to the Bakers, who had built the fence that stood on the ‘fence line’”).

**D. The Respondent's Expert Opinion is Based Upon the Assumption that is Not Supported by the Evidence.**

Boyd-Davis also contends that the District Court's decision is supported by the testimony of Coleman's surveyor, Robert Stratton. (Respondent's Brief, p. 18). Yet, as Mr. Stratton testified at trial, his opinion as to the intent of the Clarks is based upon evidence that did not exist at the time that the Clarks conveyed the property to Coleman. (Ex. 16; Tr., pp.79 – 80, 85). This includes the cabin, which by all accounts was not located on the property until after Coleman acquired it (Respondent's Brief, p. 9), the parking lot for the cabin, and the road leading to the cabin. Mr. Stratton's opinion was also based upon the location of the Pack River Road. However, the evidence admitted at trial proved that this road had moved, having washed out on numerous occasions (Tr., pp. 112, 151, 258, 259, 312, 313, 741, 742, 800-801), been widened, paved and realigned (Tr., pp. 800-801, 871, L. 11-15) in the years between 1970 when the Coleman deed was drafted, and 2010. In fact, Mr. Stratton admitted that the location of the road in 2010 was "definitely" different than where it was located at the time the Clarks conveyed the property to Coleman. (Tr., p. 97).

Nevertheless, Stratton's Figure 6 is based upon his decision to "arbitrarily" locate the edge of the Pack River Road 30 feet from its current center line. (Tr., p. 55, L. 2-21). Stratton's reliance upon features that existed in 2010, but did not exist in 1970, are, therefore, clearly erroneous if the goal is to derive what was the intent of the grantor in 1970. That intent must be derived solely from what the grantor knew at the time, or the grantor's subsequent actions, not the actions of others, or improvements that were later constructed.

Most importantly, Stratton's Figure 6, which was adopted by the District Court, which required Mr. Stratton to, in his own words, "arbitrarily" rotate the entire legal description 23

degrees counterclockwise, so that the southern boundary of Coleman's parcel would fall "roughly" along the fence line. (Tr., pp. 107-108). Thus, Stratton's opinion is based upon an assumption that the Clarks knew where the fence was located. That assumption is erroneous, as the fence was not built until after the conveyance. The Clarks simply could not have known where Mr. Johnson was going to build it, and therefore could not have intended that the fence mark the boundary. Consequently, Mr. Stratton's opinion does not provide a valid evidentiary basis for upholding the decision of the District Court.

**E. The Respondent's Assertion that Baker Relies Upon an Incorrect Survey is Without Merit.**

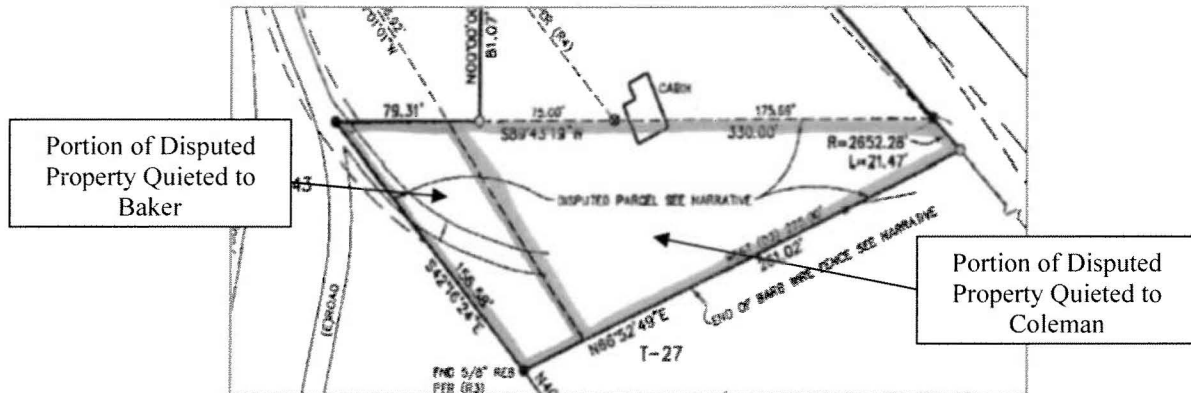
The Respondent Boyd-Davis argues repeatedly that Appellant Baker has erroneously based its argument on the wrong survey. (Respondent's Brief, p. 21-30). This is incorrect.

Ironically, the survey that Boyd-Davis asserts is the correct survey is not part of the Record for this appeal. In her brief, she contends that two surveys were submitted to the District Court by her expert, Robert Stratton. (*Id.*, at 22-24). She asserts that the "new survey" is part of the Record at "R., Vol. IV, pp. 1129-1131, Exhibit A." However, the Record at Vol. IV, pp. 1129-1131, contains neither a survey nor an Exhibit A. Rather that part of the Record contains only a Notice filed by Ms. Boyd-Davis and a letter to the District Court from the surveyor. The survey to which Boyd-Davis apparently references is not otherwise found in the Record.

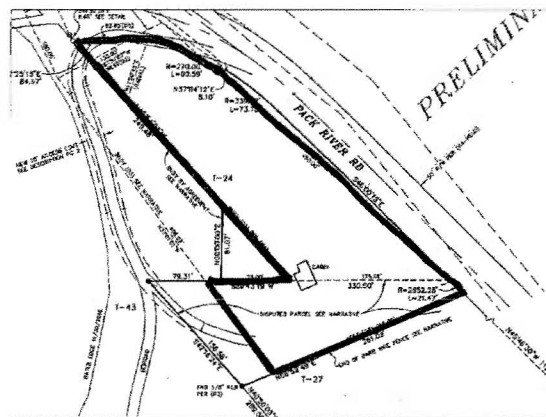
Despite not being included in the Record, Ms. Boyd-Davis includes what she contends to be a depiction of this "new survey" in her brief. (Respondent's Brief, pp. 25, 35). It is, of course, improper for a party in an appeal to include evidence which is not part of the Record.

However, whether the Court considers the depiction contained within Ms. Boyd-Davis' brief, or the Stratton Survey that is actually part of the record (R., Vol. VI, Bates 971), it is clear

that the District Court’s conclusion that the Clarks intended to convey up to the fence line is erroneous. As Ms. Boyd points out, the District Court rejected certain portions of the Stratton survey in its Memorandum Decision re: Defendant’s Objection to Plaintiff’s Proposed Judgment (R., Vol. VI, pp. 1075-1084), the effect of which was to remove the western portion of the Disputed Property from its original award to Coleman, and quiet title to this western portion of the Disputed Property to the Bakers, as follows:



Even without this western portion of the Disputed Property, the resulting parcel of property quieted to Coleman remains a bizarrely shaped parcel, albeit extending only 225 feet along the southern Boundary, rather than the 261.02 feet as shown on Stratton’s survey, with the resultant Coleman property still shaped as follows:



Absolutely nothing in the language of the Coleman Deeds gives any indication that such an oddly shaped property was being conveyed, and no evidence at trial was admitted which supports a finding that Harry Clark intended to convey a property of this shape.

Although the survey referenced by Ms. Boyd-Davis is not contained in the record, the legal description of the property quieted to Coleman is found in the Partial Judgment issued by the District Court. (R., Vol. VI, Bates 1129-1132; R. Vol. VII., Bates 1200-1203). A direct comparison of the deed drafted by Harry Clark with the legal description contained in the Partial Judgment reveals that the District Court's interpretation of Harry Clark's intent abandons nearly every call in the deeds drafted by Harry Clark, in favor of arbitrarily rotating the legal description to fit a fence line that did not exist at the time the Clarks conveyed the property to Coleman.

While the Coleman Deeds are admittedly ambiguous because the call to the point of true beginning conflicts with the call to the highway, this does not justify the complete abandonment of nearly every call in the deed. Any interpretation of the deeds must give effect to as many of the calls in the deeds as is reasonably possible. *Sun Valley Shamrock Res., Inc.*, 118 Idaho at 120, 794 P.2d at 1393 (“When construing a deed description, effect must be given, if possible, to all of the language contained in the description.”). It is simply not reasonable to find that the deed contains an implied call to a fence line, when no such call is indicated, the fence did not exist at the time of the conveyance, and the location of the fence constitutes a radical departure from the actual calls in the deeds. The District Court's findings in this regard are therefore, clearly erroneous.





instrument the portion of the Disputed Property which is depicted as the overlap, but not the remainder of the disputed property. (R. Vol. VI., Bates pp. 1091-1097).

Ms. Boyd-Davis does not address the legal basis adopted by the District Court in this Alternative Decision, in which the District Court found that:

The Court finds and concludes in this alternative decision that the legal descriptions overlap, as depicted in Plaintiffs' Trial Exhibit 23 . . . [and that] the evidence and testimony presented provides clear and convincing proof that the 'overlap' portion of the disputed property was adversely possessed by the plaintiffs under a written claim of title, and this Court so finds and concludes. The Court further finds and concludes that all of the material elements necessary to establish a claim of adverse possession involving the area of overlap were proven with clear and convincing evidence.

(R. Vol. VI., Bates pp. 1092-1093).

Ms. Boyd-Davis provides no argument to refute these findings of the District Court, and points to no evidence from which the Supreme Court could find that the District Court erred in reaching this conclusion. Ms. Boyd-Davis' lack of any legal challenge to the Alternative Decision is indicative of its soundness. The Appellant Baker respectfully submits that this Court should adopt this Alternative Decision, rather than remand the case for a retrial. Unless this Alternative Decision is adopted, however, this matter must be remanded for further proceedings.

#### **IV. ARGUMENT - RESPONSE TO CROSS APPEAL**

##### **A. The District Court's Finding that Coleman Failed to Prove her Claim of Boundary by Acquiescence is Supported by Substantial Evidence.**

The Cross-Appellant Boyd-Davis appeals the District Court's finding that Coleman had failed to prove her claim of boundary by agreement/acquiescence. (Respondent's Brief, p 34-43). Boyd-Davis argues that the District Court failed to recognize that a claim for boundary by agreement can be based upon an implied agreement, and erroneously rejected the claim solely

based on the lack of evidence of an express agreement between Coleman and the Johnsons. (*Id.*). In so arguing, Boyd-Davis grossly misconstrues the District Court's ruling, ignoring the District Court's express findings, and citing only to a portion of the District Court's decision.

### ***1. Standard of Review***

This Court will only set aside a trial court's findings of fact if they are clearly erroneous. I.R.C.P. 52(a) (2002); *McCray v. Rosenkrance*, 135 Idaho 509, 513, 20 P.3d 693, 697 (2001); *In re Williamson v. City of McCall*, 135 Idaho 452, 454, 19 P.3d 766, 768 (2001). In deciding whether findings of fact are clearly erroneous, this Court determines whether the findings are supported by substantial, competent evidence. *In re Williamson*, at 454, 19 P.3d at 768. Evidence is substantial if a reasonable trier of fact would accept it and rely on it. *Id.* Findings based on substantial and competent evidence, although conflicting, will not be disturbed on appeal. *Bolger v. Lance*, 137 Idaho 792, 53 P.3d 1211, 1213 (2002).

### ***2. Elements of the Claim of Boundary by Agreement/Acquiescence.***

Boundary by agreement or acquiescence has two elements: (1) there must be an uncertain or disputed boundary and (2) a subsequent agreement fixing the boundary. *Luce v. Marble*, 142 Idaho 264, 271, 127 P.3d 167 (2005), *citing Cox v. Clanton*, 137 Idaho 492, 494-95, 50 P.3d 987, 989-90 (2002). "Idaho case law demonstrates that an agreement, either express or implied, **must** exist to establish a boundary by agreement or acquiescence." *Cox*, 137 Idaho at 495 (*emphasis added*). "Since there must be an agreement, acquiescence 'is merely regarded as competent evidence of the agreement,' and alone is not enough to establish a boundary by agreement." *Flying Elk Inv., LLC v. Cornwall*, 149 Idaho 9, 13, 232 P.3d 330, 334 (2010). The party seeking

to establish boundary by agreement has the burden of proving these elements by clear and convincing evidence. *Luce*, 142 Idaho at 270-71, 127 P.3d at 173-74.

**3. *The District Court Did not Fail to Consider Whether an Implied Agreement had Been Proven by Clear and Convincing Evidence.***

In finding that Coleman had failed to prove her claim of boundary by agreement/acquiescence, the District Court explicitly and repeatedly recognized that a claim for boundary by agreement/acquiescence may be established by proof of *either* an express agreement or an implied agreement. In the District Court's first of two written decisions on the issue, it quoted, in bold, the Idaho Supreme Court's decision in *Flying Elk Investment, LLC, v. Cornwall*, 149 Idaho 9, 232 P.3d 330 (2010), recognizing that "[t]he agreement may be either express ***or implied by the landowner's conduct.***" (*emphasis added*). (R. Vol. VI., Bates pp. 1096-1097). It is clear, therefore, that the District Court was not under the mistaken belief that Coleman could only prove this claim with proof of an express agreement.

In analyzing whether Coleman had proven the elements of this claim, the District Court found:

[W]hile Cliff Johnson's testimony is not totally believable, many portions of it were accepted by the Court. **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 [agreement]" 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, **and little to 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 and material element of this claim. Therefore, due to the presence of contrary testimony and evidence, the conclusion is reached that *the*

*plaintiffs did not prove by clear and convincing evidence that a boundary by agreement/acquiescence resulted.* Therefore, the second element of proof is not met.

(R., Vol. VI, Bates 1098) (*emphasis added*).

The District Court explicitly considered whether Coleman had proven that an implied agreement to treat the fence as the boundary line existed. The District Court found that Coleman had failed to prove the claim by clear and convincing evidence. Contrary to the contentions of Ms. Boyd-Davis, this conclusion was not based upon an erroneous understanding of the law.

In response to the District Court's ruling, Coleman filed a Motion for Reconsideration, in which she set forth precisely the same arguments that she includes as the basis for this cross appeal – namely, her contention that the District Court erroneously based its decision solely upon the lack of evidence of an express agreement, while ignoring evidence of an implied agreement.

In its second written decision on this issue, the District Court again expressly recognized that under Idaho law, a claim for boundary by agreement/acquiescence may be established with sufficient proof of an implied agreement:

**To prove boundary by agreement, there must be an uncertain or disputed boundary and a subsequent agreement fixing the boundary. The agreement need not be express, but may be implied by the surrounding circumstances and conduct of the parties.**

**Idaho case law demonstrates that an agreement, either express or implied, must exist to establish a boundary by agreement or acquiescence.**

(R., Vol. VII, Bates 1192-1193) (*emphasis in original*)(*quoting Cox*, 137 Idaho at 494-95, 50 P.3d at 989-90 (2002)).

In denying Boyd-Davis' Motion for Reconsideration, the District Court again found that Coleman had failed to prove the elements of a claim for boundary by agreement/acquiescence. In doing so, the District Court analyzed the Idaho Supreme Court's decisions of *Cox, supra*, and *Huskinson v. Nelson*, 152 Idaho 547, 272 P.3d 519 (2012). (R. VII., Bates 1191-1196). As noted by this Court in *Cox*, "the long existence and recognition of a fence as a boundary, in the absence of any evidence as to the manner or circumstances of its original location, strongly suggests that the fence was located as a boundary by agreement." *Cox*, 137 Idaho at 495, 50 P.3d at 990. However, where, as here, the circumstances surrounding the creation of the fence are known, this presumption does not arise. As explained by the Supreme Court in *Cox*, and quoted by the District Court in its decision:

In the present case, the district court found that, prior to the survey, none of the parties or their predecessors in interest knew the exact location of the boundary lines. Although the first element necessary to prove boundary by agreement was met, **the district court found that there was no evidence in the record to support the appellants' contention that the fence line constituted a subsequent agreement or acquiescence by the parties or that there was an absence of evidence regarding the circumstances of the fence's original location. In fact, the opposite was true—a previous owner, Nina, provided evidence of the circumstances surrounding the erection of the fence, which demonstrated that the fence was hastily put up to contain cattle. Her testimony showed that the purpose of the fence was not to establish a boundary between the properties. She stated that no agreement existed between the Anderson family and the neighboring landowners to treat the fence line as the boundary.**

Appellants urge this Court to adopt the theory of boundary by acquiescence as a separate theory that does not require the element of an agreement. However, Idaho case law demonstrates that an agreement, either express or implied, must exist to establish a boundary by agreement or acquiescence. Although the actual boundary was uncertain, appellants are unable to establish the

existence of an express or implied agreement to treat the fence as the boundary. Appellants' testimony shows that, even during the time they were making the improvements, the fence was still being used to contain cattle; appellants knew this because they damaged the fence while working, allowing cattle to escape. Nina testified that her family used the land outside the fence to access recreation areas and that her family never treated the fence as the boundary to the property. Affidavits from predecessors in interest submitted by the appellants also do not reveal any express or implied agreement to treat the fence as a boundary.

The district court found that the appellants had not established that an express or implied agreement existed or that the parties or their predecessors in interest had acquiesced to the fence representing the boundary between the properties. We affirm the district court's decision.

(R., Vol. VII, Bates 1192-1193) (*emphasis in original*)(*quoting Cox* 137 Idaho at 494-4955, 50 P.3d at 989-990).

The District Court held that *Cox* is “directly on point,” and found:

Here, Clifford Johnson testified at trial that the fence was erected to contain horses and the shape of the fence was based upon the topography of the land, which contained a gully. He also testified that the fence was never intended to mark a boundary line. This evidence as to the manner and circumstances of the fence’s original location is the only testimony addressing the purpose of the fence. Even though Mr. Johnson’s testimony was impeached at trial, this Court does not reject his entire testimony. The fact that Mr. Johnson testified as to his version of how the fence was placed leads to the conclusion that it is uncertain as to whether there was indeed a “boundary by agreement.” **As stated in *Huskinson*, acquiescence for a long period of time “does not necessarily tip the scales in favor of the encroaching party.”** 152 Idaho at 443, 272 P.3d at 525. **It was the plaintiffs’ burden of proof to establish all of the material elements of boundary by agreement. They did not sustain the required burden that there was a boundary by agreement according to Idaho law.**

In light of Clifford Johnson’s testimony, the earlier finding that the plaintiffs did not prove by clear and convincing evidence that the fence line was erected as boundary remains in effect.

(R., Vol. VII, Bates 1195-1196, *emphasis added*).

The case of *Luce v. Marble*, 142 Idaho 264, 271-72, 127 P.3d 167, 174-75 (2005) is also instructive on this issue. In *Luce*, the Idaho Supreme Court explained the doctrine of boundary by acquiescence as the application of two presumptions.

For nearly a century it has been the law of this state that evidence of a long established fence creates two presumptions. First, when a fence line has been erected, and then coterminous landowners have treated that fence line as fixing the boundary between their properties “for such a length of time that neither ought to be allowed to deny the correctness of its location” the law presumes an agreement fixing that fence line as the boundary. (*Internal citations omitted*).

Second, coupled with the long existence and recognition of a fence as a boundary, “*the want of any evidence as to the manner or circumstances of its original location*, the law *presumes* that it was originally located as a boundary by agreement because of uncertainty or dispute as to the true line.” *Beneficial Life Ins. Co.*, 75 Idaho at 241, 270 P.2d at 835.

Here, the specific facts of the case prevent this presumption from operating in Luce's favor. ***The doctrine of boundary by agreement or acquiescence is based on a reasonable assumption implied from the surrounding circumstances. See Griffel, 136 Idaho at 400, 34 P.3d at 1083. In our prior cases, we have applied the presumption when it was reasonable to assume from the facts on the ground that at some prior point landowners agreed or acquiesced to a certain location as the boundary between their properties. However, the shape of Parcel A is so irregular and encompasses such a large portion of the Marble property that such an assumption would be unreasonable. Therefore, since Luce cannot rely on this presumption and failed to present any evidence the fence lines surrounding Parcel A settled an actual disagreement or uncertainty, she cannot establish her right to Parcel A through boundary by agreement or acquiescence.***

*Luce*, 142 Idaho at 271-72, 127 P.3d at 174-75 (emphasis added).



Similarly, in *Griffin v. Anderson*, 144 Idaho 376, 378-79, 162 P.3d 755, 757-58 (2007), the Idaho Supreme Court relied upon its decision in *Cox* in affirming the district court's finding that evidence that a fence was built to contain livestock, rather than as a boundary marker, defeats a claim for boundary by agreement.

As *Cox* demonstrates, a period of long acquiescence is not sufficient to overcome clear evidence of a lack of agreement. Like *Cox*, this case does not suffer from an absence of evidence as to how the fence came to be located in the first place. The trial court heard evidence on the circumstances of the fence's construction; indeed, the Andersons constructed the fence themselves, and testified that they were prompted to erect their fence as a barrier for their livestock and not to mark the boundary of their land. **While the evidence suggests that the fence acted as both a barrier and a boundary, there is substantial and competent evidence to support the district court's finding that the fence served as a barrier first and foremost. Consequently, we agree with the district court that the parties did not form an agreement by acquiescence and that the doctrine of boundary by agreement does not apply.**

*Griffin*, 144 Idaho at 378-79, 162 P.3d at 757-58 (*emphasis added*).

Because the Johnsons established the circumstances surrounding the creation of the fence (R., Vol. VII, Bates 1196; Tr., pp. 385-386, 390, 395-396, 413-416, 1029), and testified that it was installed to pen the Johnson's horses, rather than to mark a boundary line, no presumption arises that would support the finding that the fence was originally located as a boundary by agreement. See also *Downey v. Vavold*, 144 Idaho 592, 595, 166 P.3d 382, 385 (2007) ("The mere act of erecting the fence inside his boundary line did not constitute an abandonment of his land lying outside the fence, nor did it constitute an agreement that the adjoining landowners can have that land."). Lacking any presumption that the fence was intended to mark a boundary, it was Coleman's burden to establish from the evidence an agreement between the parties, either

implied or express. The District Court found that Coleman failed to meet this burden. (R., Vol. VII, Bates 1195-1196). This finding is supported by substantial and competent evidence admitted at trial.

Evidence admitted at trial demonstrated that the fence was, in fact, used to pen the Johnsons' horses. (T. pp. 385-386, 390, 395-396, 413-416). There was a picture admitted at trial which shows an adolescent Terry Boyd-Davis and the Johnsons' daughter with the horses, up against the subject fence, demonstrating that, in fact, the fence did pen the Johnson's horses.



(See D's Ex. NN). Consequently, the Court's findings are supported by substantial evidence.

Moreover, the evidence admitted at trial demonstrated only sporadic use of the cabin. The oldest pictures available, (Ex. 34), which were taken in the 1970's, show parking and camping next to the cabin, but no evidence that Ms. Coleman or her guests used any of the property near the fence line. The field between the cabin and the fence does not appear to have been mowed or otherwise cultivated, and no improvements were made in that area. In fact, the only pictures

which show any use of the property near the fence are clearly very recent, as is obvious from the vehicles pictured therein. (*Ex. 35, 36*).

Coleman's other evidence as to the use of the Disputed Property consists primarily of conclusory statements of Coleman's witnesses, to the effect that they have "always" visited the property, and that the fence "was always used as a boundary." (Tr. pp. 439, L. 6-10; 458, L. 5-13). Such testimony is of no evidentiary value, as it lacks foundation. Moreover, this testimony was directly contradicted by the Bakers' witnesses. For example, Mary Pandrea confirmed that when Bob Camp moved onto the Coleman property in the mid-1990's, the cabin was in a state of utter disrepair. (Tr. pp. 805-807). Mr. Camp's pictures, admitted as Plaintiff's Exhibits 44 and 45, confirm this. Ms. Pandrea further testified that after the death of Mr. Camp, the property sat unused for many years, until she moved onto the property for a brief period. (Tr. pp. 805-807). She testified that the cabin had rotten meat in the refrigerator left by Bob Camp, a rat's nest in the oven, and rat feces throughout the cabin. (*Id.*). This unrefuted testimony directly contradicts the conclusory statements of Coleman's witnesses who claim to have used the cabin and the Disputed Property frequently throughout the years.

Consequently, the District Court's finding that Coleman failed to prove her claim of boundary by agreement/acquiescence by the requisite clear and convincing evidence is supported by substantial evidence. The District Court's ruling, in this regard, should be affirmed.

## **V. CONCLUSION.**

For the foregoing reasons, the Bakers respectfully submit that the decision of the District Court is clearly erroneous and not based upon substantial evidence. Consequently, the Bakers request that the Supreme Court reverse that decision and either adopt the District Court's

Alternative Decision, or remand with instructions to the District Court to make a determination of the Grantor's intent based only upon evidence that the Clarks could have considered when drafting the deeds by which they conveyed the property to Coleman.

Appellant/Cross-Respondent Baker requests that this Court affirm the District Court's findings that Coleman failed to prove by clear and convincing evidence her claim of boundary by agreement/acquiescence. These findings are supported by substantial evidence admitted at trial.

DATED this 25<sup>th</sup> day of February, 2014.

BERG & McLAUGHLIN, CHTD.

By: 

Toby McLaughlin, Attorneys for  
Appellants/Cross-Respondents Baker

**CERTIFICATE OF SERVICE**

On February 25, 2014, I caused copies of the foregoing document to be served by the following methods on the parties listed below as follows, which is the last known address for the listed party:

Terri Boyd-Davis 12738 N. Strahorn Rd. Hayden, ID 83835 <i>Plaintiff</i>	<input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By U.S. Mail <input type="checkbox"/> By Overnight Mail <input type="checkbox"/> By Facsimile Transmission <input type="checkbox"/> Other _____
Brian F. Davis 12738 N. Strahorn Rd. Hayden, ID 83835 <i>Plaintiff</i>	<input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By U.S. Mail <input type="checkbox"/> By Overnight Mail <input type="checkbox"/> By Facsimile Transmission <input type="checkbox"/> Other _____
Jean L. Coleman 2902 N. 5 <sup>th</sup> Ave., Coeur d'Alene, ID 83814 <i>Plaintiff</i>	<input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By U.S. Mail <input type="checkbox"/> By Overnight Mail <input type="checkbox"/> By Facsimile Transmission <input type="checkbox"/> Other _____

