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No. 70815-5-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

CITY OF REDMOND, a Washington municipal corporation,

Appellant,

v.

BRIAN and MARILYN HOWE, husband and wife,

Respondents.

CITY OF REDMOND'S REPLY APPELLATE BRIEF

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ARGUMENT

A. Introduction

This case in the trial court turned on the trial judge's erroneous interpretation of *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984). The arguments presented by Respondents' Opening Brief ("Howes Brief") fail to address this central issue.

The Howes negotiated a purchase price for the parking parcel with BNR[1] and took the deal to their bank to obtain financing. As virtually all courts recognize, acknowledging the true owner's title by negotiating a purchase price with the true owner defeats an adverse possession claim.

Ultimately, the Howes repeatedly suggest that the Court should uphold their claim because they have established some of the elements of an adverse possession claim, namely their use of the parking parcel. To the contrary, the Howes' burden is to show that all elements of adverse possession are met concurrently for the required 10-year period. And contrary to the Howes' argument, "actual possession" of property is a different element of adverse possession than the "hostile and with a claim of right" element. Establishing "actual possession" does not establish that the claim is "hostile and with a claim of right." In short, the Howes'

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[1] The abbreviations used in Appellant's Opening Brief are also used herein.

adverse possession claim fails because the Howes cannot show they have satisfied the "adversity" (hostile and with a claim of right) element.

In addition, on many issues, the Howes' arguments either avoid material facts in the record or slant material facts and reasonable inferences in a light favorable to their position, contrary to the summary judgment rules. And contrary to the Howes' argument, the facts show that their initial entry into the property was permissive.

In sum, the trial court erred by failing to follow established law that the Howes' negotiation of a purchase of the parking parcel acknowledged BNR's superior title. *Chaplin* did not change the rule in Washington that doing so negates the element of adversity. The Howes have never established a 10-year period of adverse possession or prescriptive easement, and their complaint should have been dismissed.

B. The Howes Failed to Establish the Element of Adversity Because they Negotiated a Purchase of the Parking Parcel with the True Owner, BNR

In or about 1998/99, the Howes negotiated to purchase the parking parcel from BNR. The negotiations established a purchase price for the parking parcel, $111,600, and the Howes applied for a loan from their bank for this amount to finance the proposed purchase. Supplemental

Clerk's Papers ("SCP") 184-185 Brian Howe Dep.;[2] SCP 189-192 Howe Dep. Ex. 2.[3] Washington, like most states, has long held that "[w]here a claimant recognizes a superior title in the true owner during the statutory period, we have held the element of hostility or adversity is not established." *Peeples v. Port of Bellingham*, 93 Wn.2d 766, 775, 613 P.2d 1128 (1980) (emphasis added).[4] The act of negotiating or offering to purchase property is well established as an act recognizing the superior title of the true owner that defeats an adverse possession claim. *See* cases gathered at Appellant's Opening Brief at 15-17, 20 ftnte 8.

Throughout their brief, the Howes repeatedly point to the evidence showing their use of the parking parcel, and argue that this should be

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[2] For unknown reasons, the deposition testimony of Mr. Howe submitted to the trial court was unintentionally redacted in the copy of the trial court record sent to this Court by the King County Superior Court. *See e.g.*, CP 53, 55-57. When Redmond's counsel discovered this state of affairs, counsel caused an unredacted copy of the declaration containing Mr. Howe's testimony, including deposition exhibits, to be sent to this Court as SCP 174-194. Thus, SCP 174-194 contains the same declaration and the now unredacted deposition testimony of Mr. Howe. Citations in this brief to Mr. Howe's deposition testimony will be to SCP 182-186. For citations in Redmond's Opening Appellate Brief to Mr. Howe's deposition testimony, the Court is respectfully requested to refer to SCP 182-186.

[3] As the bank document shows, the Howes were seeking financing for improvements to their property in addition to the purchase of the parking parcel.

[4] *Chaplin* overruled *Peeples* only to the extent *Peeples* addressed a *subjective belief* of a superior title in another. *Chaplin*, 100 Wn.2d at 861 n.2 ("Accordingly, we overrule the following cases, and any other Washington cases, to the extent that they are inconsistent with this opinion[.]").

sufficient to satisfy all elements of adverse possession. The Howes argue that Redmond asks the Court to ignore their years of using the property.

To the contrary, Redmond simply asserts that the Howes must satisfy *all* the elements of adverse possession. To establish title by adverse possession, the Howes must show possession of the parcel for 10 years that was (1) exclusive; (2) actual and uninterrupted; (3) open and notorious; and (4) hostile and under a claim of right. *Chaplin*, 100 Wn.2d at 857. The burden to meet each element rests on the party claiming to have adversely possessed the property. *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989).[5] Each element must be concurrently met for the statutorily prescribed period of 10 years. *Id.*

Contrary to the Howes' argument, establishing "actual possession" does not establish that the claim is "hostile and with a claim of right." "Actual possession" of property is a different element of adverse possession than the "hostile and with a claim of right" element. *E.g., Chaplin*, 100 Wn.2d 853; *ITT Rayonier*, 112 Wn.2d 754. *Harris v. Urell*,

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[5] "As the presumption of possession is in the holder of legal title, *Peeples v. Port of Bellingham*, 93 Wn.2d 766, 773, 613 P.2d 1128 (1980), *overruled on other grounds in Chaplin v. Sanders, supra*, the party claiming to have adversely possessed the property has the burden of establishing the existence of each element. *Skansi v. Novak*, 84 Wn. 39, 44, 146 P. 160 (1915), *overruled on other grounds in Chaplin v. Sanders, supra*." *ITT Rayonier*, 112 Wn.2d at 757.

133 Wn. App. 130, 135 P.3d 530 (2006)[6] expressly recognized that use alone was not sufficient.[7] The use of the property cannot be considered in isolation, outside the full context of claimant's objective conduct. Where there is objective conduct acknowledging the superior title directly to the true owner, the use of the property by itself—no matter now extensive or "owner-like"—cannot establish adverse possession.

As the case law in Washington and across the country holds, the element of adversity is not established when the claimant negotiates to purchase the property. *See* cases gathered at Appellant's Opening Brief at 15-17, 20 ftnte 8. And that body of case law, as discussed in Appellant's Opening Brief at 15-17, recognizes the difference between the subjective belief of the claimant acknowledging a superior title and the objective

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[6] The Howes suggest that because the "true owner" in Harris became the true owner by virtue of adverse possession herself (*Harris* 133 Wn App 138-140), the holding of the case regarding the difference between use and adverse use is somehow colored by this fact. But once title is established by adverse possession, it is no different than title acquired by any other means. *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 855, 376 P.2d 528 (1963).

[7] For example, a tenant under a lease often uses the property in such a manner that it appears to the world that she is the owner. In fact, the Kelleys used the parking parcel in the same manner as the Howes did, as Mr. Howe testified. But such use did not go an inch toward establishing adverse possession. Why? Because the lease tenant has acknowledged the superior title of the true owner through a lease, eliminating the element of adversity. The notice to the true owner is that no adverse possession claim is being made. The courts correctly hold that the result is no different if the claimant acknowledges the true owner's superior title by negotiating to purchase the property.

conduct of negotiating a purchase. The trial court erred in this case by failing to recognize this difference.

The evidence before the Court in this case, unlike *Chaplin*, is objective evidence of the Howes' negotiation of a purchase price for the parking parcel. Because the Howes cannot establish the element of adversity (hostile and under a claim of right) for a concurrent 10-year period, their claims for adverse possession and prescriptive easement fail.

C. The Howes Negotiated a Purchase Price for the Parking Parcel

The Howes claim there was "no evidence of any offer to purchase nor any evidence of negotiations." Howes Brief at 8, 18. Notably, the trial court did not accept this assertion,[8] and the assertion is mind-boggling.

The Howes' conclusory assertion flies in the face of the summary judgment record, including Mr. Howes' deposition testimony, and the bank document for a loan to the Howes to purchase the parking parcel. SCP 189-192 Howe Dep. Ex. 2. The bank document demonstrated that a purchase of the parking parcel had been negotiated by the Howes; that the

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[8] CP 121; Court's Summary Judgment Ruling at paragraph 6. Not surprisingly, given the evidence, the trial court recognized that negotiations to purchase the parking parcel by the Howes defeated their adverse possession claim under the case law submitted by Redmond—but then decided, based upon an erroneous interpretation of *Chaplin*, that the trial court was required to disregard this evidence. *Id.*

Howes and BNR had agreed on a purchase price, $111,600; and that the purchase agreement was firm enough for the Howes to seek financing.

The bank document states in the first box at the very top of the page that the "purpose" of the loan is for "$111,600 to acquire additional land for a parking lot." SCP 189 Howe Dep. Ex. 2.[9] At the bottom of the same page, the bank document states that "[i]ncluded in the total amount request is financing to secure additional land the Howe's[sic] will use as a parking lot." *Id.* At the top of page 4, the bank document states that "[t]he land contiguous, not the Sportees location, is being sold by Burlington Northern/Santa Fe Railroad as part of a new company policy to sell excess holdings." SCP 192.

This uncontradicted evidence shows an agreement to purchase between the Howes and BNR. Banks ordinarily do not write up loan proposals for approval without the existence of an actual negotiated deal.

The Howes suggest that they were entirely passive in these actions, and argue that BNR cannot approach them and unilaterally "change the nature of the claimant's use." Howes Brief at 19. But that argument simply contradicts the facts. A "passively listening" party does not agree

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[9] The Howes try to suggest that it was unclear what property was being offered for sale by BNR, but the bank document shows that the Howes knew exactly what they were purchasing when they submitted the deal to the bank for financing.

to a purchase price and submit their deal to purchase to their bank for loan approval. The Howes and BNR established a purchase price—BNR did not unilaterally accomplish that. The Howes took that purchase price to their bank and sought financing for a purchase. BNR did not take those actions.

It is equally important to note that this evidence established that the Howes did not tell BNR of their adverse claim when presented with the most obvious opportunity to give BNR notice that they were claiming the parking parcel "hostile and under a claim of right made in good faith." *Chaplin*, 100 Wn.2d at 857. Striking an agreement to purchase the property gives exactly the opposite notice: the Howes are *not* making an adverse claim to the property or treating it as a true owner would. A claimant must give actual notice to the true owner, and cannot keep secret her real intentions:

> The acts constituting the warning which establishes notice must be made with sufficient obtrusiveness to be unmistakable to an adversary, not carried out with such silent civility that no one will pay attention. . . . Real property will be taken away from an original owner by adverse possession only when he was or should have been aware and informed that his interest was challenged.

Hunt v. Matthews, 8 Wn. App. 233, 236-37, 505 P.2d 819 (1973), *overruled on other grounds by Chaplin*, 100 Wn.2d 853 (Emphasis added). The rule the Howes advance would permit the pernicious

mischief of a claimant, intentionally or not, deceiving the true owner by negotiating to purchase the property when she also purports to be making an adverse possession claim. The true owner has no notice that the claimant is making an adverse possession claim when the claimant agrees to purchase the property.

The Howes were not merely silent or passive listeners. They struck an agreement on the purchase price and presented the deal to their bank for financing. A true owner does not negotiate to purchase his own property or agree to a purchase price. The courts hold that the adverse possession element of adversity cannot be established under such facts.

And finally, having given notice in 1999 that they were not making an adverse claim against BNR's legal title, the Howes did nothing in the following years to change the notice they had given. They did not inform BNR that "its interest was being challenged." After the 1999 negotiation to purchase, the Howes testified they had no further contact with BNR. Appellant's Opening Brief at 6. But having established by their own objective conduct that they were not adversely claiming the parking parcel, the Howes were required to take some action to give clear notice to re-start an adverse possession time period. The rule requires that a party must make "a distinct and positive assertion of a right hostile to the owner" to overcome an initial permissive use and trigger the running of

the adverse possession period. *Crites v. Koch*, 49 Wn. App. 171, 177, 741 P.2d 1005 (1987); *Hunt* 8 Wn. App. at 236-37.[10]

Regardless of whatever conclusion the trial court reached with respect to the ecology blocks in 1993,[11] the "ecology blocks" argument is a red herring, because in 1998 or 1999 the Howes acknowledged BNR's superior title, and never thereafter gave BNR notice that the Howes were challenging BNR's interest. Accordingly, because the trial court misapplied *Chaplin*, the summary judgment rulings should be reversed.

D. The Trial Court Erroneously Applied *Chaplin*

The trial court initially agreed with the majority of courts that the objective act of negotiating with the true owner breaks the 10-year statutory period of adverse possession, but wrongly interpreted *Chaplin* to conclude that the trial court was required to ignore this objective conduct. *See* Appellant's Opening Brief. In other words, but for its erroneous

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[10] "[C]ourts will not permit the "theft" of property by adverse possession unless the owner had notice and an opportunity to assert his or her right." *Herrin v. O'Hern*, 168 Wn. App. 305, 310, 275 P.3d 1231 (2012) (footnote omitted).

[11] The Howes assert that their removal of one or two ecology blocks in 1993, leaving in place most of these blocks, establishes hostile use. Howes Brief at 7,16. But the rule requires that a party must make "a distinct and positive assertion of a right hostile to the owner" to overcome the initial permissive use and trigger the running of the adverse possession period. *Crites* 49 Wn. App. at 177. The Howes did not remove all of the ecology blocks, which would have been a "distinct and positive" assertion as required by the Washington rule. By removing only several blocks, the Howes left the circumstances vague and unclear. Notably, two random aerial photos of the parking parcel taken after 1993 show no vehicles parked in the parking parcel. *See* CP 100, 101.

interpretation of *Chapin*, the trial court would have ruled in Redmond's favor.

Chaplin removed the "subjective belief" component from the "adversity" element of adverse possession, and joined the majority of courts in doing so. But the trial judge went much further and erected an artificial distinction in a claimant's "treatment of the property," erroneously concluding that *Chaplin*'s elimination of the subjective belief element of "adversity" required the trial court to disregard the claimant's objective "treatment of the property" in his dealings with the true owner.[12]

But the objective act of negotiating to purchase the property with the true owner is as much the claimant's "treatment of the property" as is putting up a fence or parking cars. If anything, negotiating to purchase the property gives even more direct notice to the true owner that the claimant's use is not "adverse."

The great majority of courts agree. *See* Appellant's Opening Brief at 15-17, 20 ftnte 8 (gathering cases).[13] These courts also recognize that a subjective acknowledgement of the true owner's superior title is not the same as objective conduct acknowledging the true owner's superior title.

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[12] There was no "act of recognition through contract" in either *Chaplin* or in this case. *See* Appellant's Opening Brief at 23-24.

[13] The Howes submitted no cases to the contrary.

Id. at 15-17. There is no suggestion in *Chaplin* that the Supreme Court was changing this settled law and *sub silento* adopting a new and unsupportable legal position.

In a later case, the Washington Supreme Court again made it clear that *Chaplin* eliminated the subjective belief element from adverse possession, quoting Professor Stoebuck. *ITT Rayonier*, 112 Wn.2d at 761 ("'Whatever the reason, the court could yet perform a service by doing away with any requirement of subjective intent, negative or affirmative.'" (quoting Stoebuck, *The Law of Adverse Possession in Washington*, 35 Wash. L. Rev. 53, 80 (1960)). There is no suggestion in *ITT Rayonier* that objective conduct was eliminated in *Chaplin*.

The central problem with the Howes' interpretation of *Chaplin* is that it would tell the courts to ignore a claimant's objective conduct. Not only is such a position contrary to the long history of adverse possession, it is squarely contrary to the purpose and operation of the rules of adverse possession. To adopt the trial court's rule would reverse the burdens of adverse possession that require the claimant to clearly establish that she is making a claim adverse to the true owner's title and instead require a true

owner to be on "constant patrol" to protect his title.[14] Such a rule would inject substantial uncertainty if not outright deception into a process that requires the claimant to leave no doubt that her claim is adverse.

To the contrary, BNR could properly conclude, when the Howes *negotiated a purchase price to buy the parking parcel from BNR*, that the Howes were not claiming adverse possession of the parking parcel. Any other conclusion is nonsensical. A claimant who gives notice that she acknowledges the superior title of the true owner is not claiming adversely to the true owner.

A ruling of adverse possession takes away the true owner's title to property. The courts permit legal title to be taken away only when a claimant give clear notice of the adverse claim, and fully satisfies all of the adverse possession elements. *Hunt* 8 Wn. App. at 236-37; *Herrin* 168 Wn. App. at 310. Because the Howes acknowledged BNR's superior title in 1998/99, no matter how extensive their use of the property, they cannot establish adverse possession. The trial court's artificial distinction is contrary to *Chaplin* and established Washington precedent, as well as rulings from jurisdictions across the country. *Chaplin* did not change

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[14] "The presumption is in the holder of the legal title. He need not maintain a constant patrol to protect his ownership. 5 G. Thompson, *Real Property* § 2544 (1957)." *Hunt*, 8 Wn. App. at 238.

Washington law governing objective acknowledgement of the true owner's superior title.

E. The Record at Summary Judgment Shows That the Howes Entered the Parking Parcel Permissively

The Howes also assert that their initial entry onto the property was not permissive. This argument ignores the contrary facts in the record.

This case was decided on cross-motions for summary judgment. Because the trial court ruled in favor of the Howes, the well-established rules of summary judgment require that all evidence, and reasonable inferences therefrom, be considered in the light most favorable to the non-moving party, Redmond. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

The Howes assert that "to their knowledge" there was no existing lease between their predecessor, the Kelleys, and BNR. Howes Brief at 2. But the facts in the record before the trial court at summary judgment show was that there was an existing parking parcel lease between BNR and the Kelleys, that the Howes were fully aware of the existing parking parcel lease, and that as part of their negotiations to purchase the Kelleys' property they were negotiating with BNR for the continuation of the parking parcel lease.

> The bottom line is that if the railroad land is priced fairly, say $150-175 per month, our prospective buyer [Mr. Howe] *will probably continue the lease*.

CP 59; Howe Dep. Ex. 1 (emphasis added). Given this evidence, submitted to the trial court by the Howes themselves, the Howes cannot make arguments based upon the assertion that there was no parking parcel lease in existence.

The Howes also assert that they did not "assume" any lease with BNR or enter into a new lease with BNR. Howes Brief at 6. But the very letter that sets forth the negotiations over continuing the lease sets forth the terms under which the Howes *would continue* the lease—and the Howes thereafter took the steps identified in the letter (continued use of the parking parcel) that signified continuation of the parking parcel lease.[15]

Moreover, the Howes' legal argument is a red herring. The applicable rule does not require that the claimant "assume" the predecessor's lease. Instead, the rule states that "'permission to occupy the land, given by the true title owner to the claimant or *his predecessors*

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[15] "If it is priced too high at $365 per mo plus taxes as you have suggested, he will elect to reconfigure the existing parking and lawn areas of the building in keeping with the reduced parking requirements in the City of Redmond and do without the Railroad land." CP 59 Howe Dep. Ex. 1. Not paying rent is not sufficient to give adverse notice. Appellant's Opening Brief at 27.

in interest, . . . operate[s] to negate the element of hostility.'" *Miller v. Anderson*, 91 Wn. App. 822, 828, 964 P.2d 365 (1998) (emphasis added) (quoting *Chaplin*, 100 Wn.2d at 861-62).[16] The Howes' predecessors-in-interest had permission to occupy the parking parcel in the form of a lease.[17] There was no evidence before the trial court that the parking parcel lease had been cancelled when the Howes first entered the parking parcel. BNR read the same letter that the Howes read, and the only reasonable inference is the Howes' conduct signified that they were continuing the parking parcel lease. To start a period of adverse possession, it was the Howes' burden to show that they entered making an adverse claim. The evidence before the trial court showed otherwise.

Regardless of the Howes' own conduct, the rule is clear: because the Howes' predecessors-in-interest (the Kelleys) had permission to occupy the parking parcel (*via* the parking parcel lease), the Howes are deemed to have entered permissively and therefore the adverse possession

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[16] The Howes also seem to assume that because they did not ask BNR for permission to enter that their entry was not permissive. But "[i]t is not necessary that permission be requested." *Granston v. Callahan*, 52 Wn. App. 288, 294, 759 P.2d 462 (1988). "Permission can be express or implied . . . ." *Id.*

[17] In adverse possession, permission is presumed only where the initial use was permissive. *Miller*, 91 Wn. App. at 825. With respect to prescriptive easement claims, the rule is different: at its inception, the use of a property is presumed to be permissive. *Petersen v. Port of Seattle*, 94 Wn.2d 479, 486, 618 P.2d 67 (1980). Here, by virtue of their predecessor's permission, or their own conduct at the time of entry, the Howes took no objective action to show that their entry was not permissive.

period does not commence. They *could* subsequently take actions to show that they were changing the initial character of their possession to establish the element of adversity. But to do so, the rule requires that a party must "make a distinct and positive assertion of a right hostile to the owner" to overcome the initial permissive use and trigger the running of the adverse possession period. *Crites v. Koch*, 49 Wn. App. 171, 177, 741 P.2d 1005 (1987). And until at least 1993, the Howes took no actions to change that permissive entry. And in 1998/99, the Howes again showed, by objective conduct, that they were not claiming adversely and under a claim of right when they negotiated to purchase the parking parcel.

In sum, the evidence before the trial court showed that the Howes' initial entry onto the parking parcel was with permission, based either upon their predecessor-in-interest or upon their own conduct pursuant to the real estate agent's letter of negotiation with BNR.

F. A Prescriptive Easement Also Requires Adverse Use

The Howes' prescriptive easement claim fails for the same reason their adverse possession claim fails. The burden of proving the existence of a prescriptive right, including adversity, rests upon the one benefited by the easement. *Anderson v. Secret Harbor Farms, Inc.*, 47 Wn.2d 490, 288 P.2d 252 (1955). The rule presumes that the use of another's property is permissive. *Kunkel v. Fisher*, 106 Wn. App. 599, 602, 23 P.3d 1128

(2001). Prescriptive easements are not favored. *Roediger v. Cullen*, 26 Wn.2d 690, 706, 175 P.2d 669 (1946).

"Adverse use" for prescriptive easements means use that the property owner himself would exercise, entirely disregarding claims of others, asking permission from no one, and using property under claim of right. *Crites*, 49 Wn. App. 171; *Malnati v. Ramstead*, 50 Wn.2d 105, 309 P.2d 754 (1957). *See* Howes Brief at 13. Accordingly, the Howes must show that they "entirely disregarded" the claim of BNR, and used the property "under claim of right." *Dunbar v. Heinrich*, 95 Wn.2d 20, 22, 27, 622 P.2d 812 (1980). The Howes failed to do so. Striking a deal to purchase the parking parcel with the true owner is not "entirely disregarding" the claim of the true owner and using the property "under a claim of right."

G. Conclusion

The trial court misinterpreted *Chaplin*. The Howes' objective conduct acknowledging BNR's superior title by negotiating a purchase price for the parking parcel defeats their adverse possession and prescriptive easement claims. Moreover, the Howes' initial entry upon the parking parcel was permissive, and the Howes never made a "distinct and positive assertion" to terminate their permissive use. The only notice the Howes ever gave BNR was that they were not challenging BNR's interest.

The Court is respectfully requested to reverse and deny the trial court's order granting summary judgment to the Howes and to reverse and grant Redmond's summary judgment motion dismissing the Howes' complaint.

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