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**A. Statement of the Issues**

1. Under adverse possession case law, did plaintiffs Marty and Mary Teel meet the element of open and notorious when they erected a boundary fence along the north disputed area and used the land up to the fence in ways the character of a true owner would assert in view of the condition and nature and location of the property by using the land to graze their horses and for raising pigs, and by hauling off old cars, clearing trees and blackberries, spraying and whacking weeds? (Appellant's Assignments of Error to Appellants Finding of Fact 1, 2 and Conclusion of Law 1, 4)

2. Under presumed permission and prescriptive easement case law and RAP 10.3(g) , did Marty and Mary Teel's use of the north disputed area involve an easement by prescription and meet the elements of unimproved, unenclosed, vacant land when there is no easement involved in the north disputed area and there is evidence of facts their use was not presumed permissive when they acted as a true owner would against the world and relied on past owner, Mr. Wheatley, to determine their north property line before enclosing the north disputed area with their boundary fence and improved the disputed area by clearing fallen trees, removing old cars, spraying and cutting weeds and blackberries and occupied the north disputed area with horses and pigs? (Appellant's Assignments of Error to Appellants Finding of Fact 1, 2 and Conclusion of Law 1, 3-4)

3. Under adverse possession case law, did respondents Stading forfeit their challenge to Assignment of Error to his Conclusion of Law 2 when he failed to cite any authority or specify in the record anything to support his assignment of error that Teel did not prove the use of the north disputed area was permissive. (Appellants Assignments of Error to Finding of Fact 1-2, Conclusion of Law 1, 4)

**B. Statement of the Case**

**Procedural History**

Plaintiffs Marty Teel and Mary Teel (Teel) filed a complaint based on adverse possession in Superior Court of Washington in Cowlitz County on

January 3, 2006 requesting among other issues to quiet title to portions of their approximate 5 acres they had owned since 1990. CP 1-2. Defendant, Stading answered and opposed Teel's claim for adverse possession and requested the court to enforce an easement on Teel's property. CP 41-43. Teel's motion for injunctive relief was granted. CP 20-22. Partial summary judgment was ordered in 2007, quieting title in the "lower meadow in Stading." CP 195-197.

Following a bench trial on May 23-24, June 13, 2007, the court ruled on December 24, 2007 in favor of Teel's adverse possession of the north disputed area and Teel's use of their west 30-foot road for any purpose not inconsistent with the Stading's use of their easement to support their access road. CP 214-225. Stading filed a motion for reconsideration February 4, 2008, but the motion was denied February 11, 2008 due to no new authority. CP 226-27. Stading then filed this appeal. CP 238-52.

### **Statement of Facts**

Teel's enclosed their property with a boundary fence in June of 1990, shortly after purchasing their five acres. CP 215; RP 4:16-19,11:9-17,12:24-13:2, 14:2-15:9, 43:20-22; Ex. 2. The fence ran along the top of the slope of the north disputed area starting close to the northeast "corner tree." CP 215; RP 75:25-76:21, 106:25-107:14. Teel's relied on the location of the "corner tree" pointed

out to them by a former owner of their property, Mr. Wheatley and their real estate agent. CP 215 RP 61:20-62:2, 90:13-17, 107:9-11, 108:11-17. Teel never had any discussion with Stading asking permission to fence the north line of the disputed area. RP 69:20-70:4, 115:7-11. Teel's north boundary line adjoins a portion of Stading's south boundary line. CP 215; RP 109:2, Ex. 2. After moving onto the property, Ms. Teel ran into Stading on the Stading property north of Teel and asked and was given permission to ride and graze horses on the Stading property. CP 215; RP 73: 4-13, 75:9-14. Stading did not know where his south boundary line was located because his side of the fence had been covered in blackberry bushes for the past thirteen years. CP 215-16, RP 80:21-81:9, 105:18-106:2, 117:12, Ex. 14J.

Between June 1990 and the date of the Complaint, January 3, 2006, Teel improved the north disputed area by removing thousands of pounds of garbage including old cars, taking out fallen trees, planting and mowing grass, plowing, spraying and whacking weeds and blackberries while the area remained in its natural park- like state allowing for use by livestock such as raising pigs and grazing horses. CP 216; RP 14:25-15:2, 62:25-64:6, 79:24-80:8, 88:2-20; Ex. 14A, JJ. Teel never had any conversations with Stading asking to graze horses in the north disputed area. RP 69:12-18.

Teel never had their property surveyed. CP 215 RP 79:15-16, 90:2-17. However, in the fall of 2000, Stading did survey his own land and then asked Teel to move their fence further south but Teel wanted to verify the location of Stading's survey so Teel never moved their fence. CP 216. RP 59:20-61:7, 105:2-106:18, 111:13-112:8. Instead, six years later in 2006 Stading removed the Teel's fence along the top edge of the north disputed area for them, putting Teel's horses in jeopardy. CP 217; RP 93:9-19. These facts established adverse possession of the north disputed area and quieted title in Teel. CP 217.

**C. Argument**

1. THE EVIDENCE DOES SUPPORT A RULING FOR ADVERSE POSSESSION.

The appellate court should affirm the trial court's ruling because the trial court met the requisite standard of review by finding substantial evidence in the record that was sufficient to persuade a fair-minded person of the truth of the declared premise that Teel adversely possessed the north disputed area. *Bryant v. Palmer Coking Coal Co.* 86 Wn.App. 204, 210, 936 P.2d 1163 (1997). It is the trial court's function, not the appellate courts, to weigh the evidence. *Bryant*, 86 Wn.App. 216. A finding of fact to which no error is assigned is a verity on appeal, so for Teel the adverse possession elements of exclusive, actual and uninterrupted and the possession continued for a period of ten years, have been

met and not challenged. *Id.* at 218. CP 217. Stading challenges the remaining elements of open and notorious and hostility, but the following accurate application of the case law, by Teel, support the trial courts finding of substantial evidence that Teel adversely possessed the north disputed area.

- A. Teel proved adverse possession of the north disputed area because their use was open and notorious when Teel used the area as a true owner would, considering the nature and character of the land by building a boundary fence, grazing livestock, clearing out old cars, spraying weeds, and whacking blackberries.

In *Chaplin v. Sanders*, the court not only held that the open and notorious element is met when the title holder has actual notice but also held the acts of the claimant are sufficiently open and notorious when the necessary use and occupancy are of the character that a true owner would assert in view of the disputed properties nature and location. *Chaplin v. Sanders*, 100 Wn.2d 853, 862, 676 P.2d 431 (1984). The Washington Supreme Court in *Chaplin* disagreed with the lower court and quieted all the disputed property to the Sanders, even the overgrown, undeveloped parcel because the Sanders occupied the drainage ditch area with the character of a true owner. *Id.* Therefore, a true owner would not need to develop or clear the overgrown area in the location of a drainage ditch because that is the natural state of the land and was deemed sufficiently open and notorious.

The appellate court decision in *Bryant v. Palmer Coking Coal Company*, established adverse possession in Bryant for both the surface and subsurface mineral rights to a predominantly agricultural and forested area. *Bryant v. Palmer Coking Coal Company*, 86 Wn.App. 204, 208, 219, 222, 936 P.2d 1163 (1997). It is well established in Washington case law that use must be such as an owner of the type of property in question would make depending on the nature, character and locality, and uses to which land of that type is ordinarily put. *Bryant*, 86 Wn. App. at 210. Open and notorious use is such use that would lead a reasonable person to assume that the claimant was the owner. *Id.* at 211-12. Bryant acted as a true owner would of agricultural and forested land when he put up fencing for grazing livestock, cleared the land of brush and blackberries, planted wheat, built various structures and stored vehicles. *Id.* at 208. In reference to the boundary, it can be defined by a fence and it is reasonable to project that line between objects as the character of the land and its use requires and permits. *Id.* at 212. The court determined that Bryant's use of the land was sufficiently obtrusive to establish it was open and notorious and an original owners land will be taken away if he should have been aware, from the claimant's visible actions, that his interest was challenged. *Id.* at 212.

In *Roy v Cunningham*, as in the case *supra*, the court again ruled the elements of adverse possession were met when the claimant constructed a fence

and used the enclosed land for grazing. *Roy v. Cunningham*, 46 Wn.App. 409, 411, 413, 731 P.2d 526 (1986). The *Roy* court answered the question of whether there is presumed permission when a fence is used to contain livestock by quoting the courts ruling in *Taylor v Talmadge*, that the building of a pasture fence on disputed land “would not militate against an adverse holding” if the use of the land was incident to a claim of right. *Taylor v Talmadge*, 45 Wn.2d 144, 149 273 P.2d 506(1954). Although *Roy* specifically addresses the element of hostility, there is some overlap in the definition of hostility with the element of open and notorious concerning the actions by the adverse possessor using the land as a true owner would. *Roy v. Cunningham*, 46 Wn.App. at 411-12. “The hostility/claim of right element requires only that the claimant “treat the land as his own as against the world throughout the statutory period. The claimants’ subjective belief and intent to dispossess or not dispossess another are not relevant...” *Id* at 412 as defined in *Chaplin*, 100 Wn.2d 860-61. In *Roy*, the court determined the essential fact that the claimant had treated the land up to the fence as their own, as against the world, and had therefore, met the element of hostility/claim of right and had adversely possessed the land. *Roy*, 46 Wn.App. at 413.

However, Stading’s argument misused the *Roy* case that addresses the element of hostility when trying to apply it to the element of open and notorious when he tries to distinguish some difference in the use of Teel’s fence from the

use of Teel's land. Just because the court in *Roy* says the nature of the use of the land rather than the original purpose of the construction of a fence is controlling does not mean that the purpose of the construction of the fence can not point to the claimant acting as a true owner as well. Teel was acting as a true owner when he used a fence to mark a boundary and enclose his land and he was acting as a true owner when he used the land with in the fence to pasture his animals. The undisputed findings show both uses are of the type a true owner would make for land of its nature, character, and locality. CP 215-16. As in *Roy*, Teel's fence for grazing livestock did not militate against an adverse holding because Teel was treating the land up to the fence as his own as against the world (claim of right) by keeping the pasture clear and enclosed for his horses and pigs.

In this case, Teel is like the claimants with the broad spectrum of facts in the cases supra. They and Teel meet the element of open and notorious and adversely possessed the disputed land because their use of the land or anything on the land, was of the character a true owner would assert in view of the nature and location of their property. Teel wanted to move from the city to the country so they could raise horses. RP 4:16-19, 5:15-25. In 1990 Teel bought a piece of property that had the nature, character and locality that would ordinarily be used to raise horses. As in *Bryant*, Teel went about acting like a true owner would who wanted to have a pasture for his livestock. Due to the unenclosed condition of the

time of purchase Teel asked the previous owner to point out the north property line so Teel could erect a boundary fence and when the time came he would have pasture for his own livestock on his property. RP 91:22-92:9, 150:6-18. Like in *Bryant* whose boundary was a road, Teel's well defined boundary fence reasonably projected a line between objects as the character of the land and its use required and permitted. Teel's fence meandered along the top of the slope of the north disputed area using trees where convenient, old existing fence posts and replacing or installing with some new posts. RP 14:2-15:9, 77:2-22.

After installing the fence, over the next two years Teel cleared out the weeds, blackberries and cars from the north disputed area. RP 86:7-87:17, 124:5; Ex. 14HH. The blackberries change with the seasons and when they would start to grow it was difficult for Teel to keep up with them but he would get it completely clear of blackberries on his side of the fence. Ex. 14, RP 127:13-16. Then the next year it would take Teel several months to get back up there again because he had to walk up the steep slope and they would be overgrown again but only along a portion of the fence and only for a short time. RP 83:1-84:14, 88:22-89:6, 127:17-20, Ex. 14J-K, NN. Teel's actions are consistent with the character that a true owner would assert in view of the nature of fast growing blackberries on a steep slope.

Witnesses testified they knew the fence was there and that Teel was caring for the property up to the fence in a manner fitting of an owner of livestock. Mr. Ordear a long time family friend for over thirty years testified he had been in the Teel's back yard over forty times and described the north fence enclosing the Teel property for the horses and pigs. RP 140:1-21, 143:1-146:6. Ordear described the look of the Teel property at purchase was overgrown with brush and then the look after the Teels were living there a couple of years and clearing the north disputed area was opened up under the trees you could see all the way up to the crown of the hill. RP 147:1-149:15. Leifson grew up with the Teel's son and was on the property from day one visiting countless times over the years. RP 153:1-13. Leifson describes how Teel's cleared the north disputed property of nine foot blackberry bushes so thick you couldn't get through and old cars by using a CAT, weed whacker, sprayed, burnt and cleared the whole property so the horses and pigs could go up even as steep as the ground gets. RP 156:1-157:24.

All these acts of use by Teel were deemed by the trial court to be sufficiently obtrusive, open and notorious such that would lead a reasonable person to assume that Teel was the owner and Sanders should have been aware his interests were challenged.

B. Teel's use of the north disputed area is not presumed permissive because Teel acted as a true owner would as against the world when he built a boundary line pasture fence and Teel does not met the elements

of a prescriptive easement because the north disputed area is not an easement and Teel developed, enclosed, and improved the area as a true owner would who owned pasture land.

Stading's argument for presumed permission starts by quoting Finding of Fact 14 "The north disputed area remaining in its natural condition during the Teel's ownership," CP 217, but he does not connect the "natural condition" in any way to his following quote from *Roy* about permission negating the element of hostility nor is there an explanation of how this "natural condition" creates a presumption of permissive use. *Roy*, 46 Wn.App. at 411. The *Roy* case mentions nothing about the "natural condition" of the land nor does *Roy* mention the quality or quantity of the use overcoming the presumption.

In order to prove adverse possession the court in *Roy* asked the question, "whether a presumption of permissive use arises where a fence is used to contain livestock." *Id.* The court in *Roy* answers yes, but not with a holding of its own, instead with a ruling from the Washington Supreme Court in *Taylor* stating that a claimant can still adversely possess land fenced for containing livestock if that action is what a true owner would take as against the world. *Taylor*, 45 Wn.2d at 149. Therefore, the application of the analysis of *Roy*, from the argument under open and notorious *supra*, still works to defeat the claim of presumed permission against Teel because Teel built a pasture fence and used it to contain his livestock, which is treating the land as his own as against the world.

Stading next quotes from three cases (*Standing Rock Homeowner's Association v. Misich*, 106 Wn.App. 231 (2001); *State v. Blue Ridge Club*, 22 Wn.2d 487 (1945); and *Northwest Cities Gas Co. v Western Fuel* 13 Wn.2d 75 (1942)) involving facts about prescriptive easements to prove unimproved land is presumed permissive but the north disputed area does not involve an easement and the Conclusion of Law, CP 219, that does address an easement has not been challenged in his Assignment of Errors. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto. RAP 10.3(g). Neither does Stading quote any references to the trial court record concerning an easement. The north disputed area is not even a vaguely associated issue because an easement is not clearly disclosed in any of the other assignment of errors listed by Stading pertaining to the north disputed area. Therefore, Stading's argument using these cases goes with out merit and the court should not consider this easement analysis.

Again Stading's quotes from three cases, *Chaplin, Anderson and Otto*, but never cites a reference from them to the "thread" that mentions or limits establishing adverse possession to the use "that creates a positive and unmistakable mark on the land that is readily observed to the true owner" nor does he cite from these cases where they mention that is the criteria to prove

presumed permission. *Chaplin*, 100 Wn.2d 853; *Anderson v. Hudak*, 80 Wn.App. 398, 907 P.2d 305 (1995); *Otto v. Cornell*, 119 Wis. 2d 4, 349 NW 2d 703 (1984). *Otto* is a case from Wisconsin and therefore has no authority in Washington and should not be considered by this court. Instead more correctly, *Chaplin* and *Anderson* do list two ways to satisfy the element of open and notorious, 1) if the true owner has actual knowledge of another's possession, or 2) if the claimant uses and occupies the land in such a manner that, in the light of the character of the land, a reasonable person would assume him to be the true owner. *Chaplin*, 100 Wn.2d at 862; *Anderson*, 10 Wn.App. at 404-05. Stading misapplies *Chaplin* when he says the court uses the contrast between the fully developed parcel and the overgrown underdeveloped parcel to show adverse use. As stated supra, under the first argument where Teel met the element of open and notorious, the *Chaplin* court quieted title in all of the disputed property by determining the overgrown undeveloped area by the drainage ditch met the element of open and notorious just like the fully developed parcel because the use need only be of the character that a true owner would assert in view of the areas nature and location. *Chaplin*, at 863-64. A true owner would not need to develop or clear the overgrown area in the location of a drainage ditch because that is the nature of the land and was deemed sufficiently open and notorious.

Since *Chaplin* and *Anderson* do not mention presumed permission, and Teel has met the element of open and notorious *supra*, when he acted as a true owner, then Teel need not argue further. However, if you look at the requirements in the prescriptive easement cases, vacant, unenclosed and unimproved land is not presumed permissive nor adversely possessed unless there is evidence the use was adverse and not permissive. *Standing Rock Homeowner's Assn.*, 106 Wn.App. at 238-39. Again the north disputed area is not an easement and Stading assigns no error to the easement Conclusion of Law. CP 219. Nevertheless, Teel meets the adverse use that would not be presumed permissive when he enclosed the north disputed area by building a pasture boundary fence on land that is of the character and nature for that use. Then Teel improved the area when he cleaned up the land, to that fence, by removing blackberries, weeds, fallen trees, old cars, and then occupied the vacant land with his livestock.

Stading's brief even lists these same undisputed findings that Teel used the north disputed area south of the steep slope by occupying it with grazing horses, and raising pigs. CP 216. Teel improved the north disputed area when he removed old cars and fallen trees, and sprayed and whacked weeds. CP 216; RP 131:9-14. Unlisted by Stading is the undisputed finding that Teel fenced the north disputed area. CP 215. Despite the fact this usage parallels the usage list in *Anderson* that proves the element of open and notorious when the claimant clears

land, mows grass, maintains shrubs and plants, Stading still tries to conclude the aerial and ground photos show the disputed area is undeveloped. *Anderson*, 10 Wn.App. at 404. After listing Teel's acts of development of the north disputed area, Stading makes the conclusion that Teel has left the north disputed area undeveloped and unchanged over the years and that the Stadings would have gained actual knowledge of adverse possession from aerial photos with a tree cover blocking the ground, coupled with the attempt to make a legal argument from cases that never mention overcoming the presumption of permissive use, is laughable. RP 76:2-6. Also, it is not believable because the ground photos show otherwise and again, Stading makes no reference to the trial court record testimony to dispute these findings. Ex.14 JJ.

It is easy to make the only conclusion possible, from Stading's unsupported argument for presumed permission and a prescriptive easement, that the facts listed do prove Teel acted as a true owner would, who owned land he wanted to use for pasturing his livestock, when he built a fence, cleared the land and used it to raise his horses and pigs.

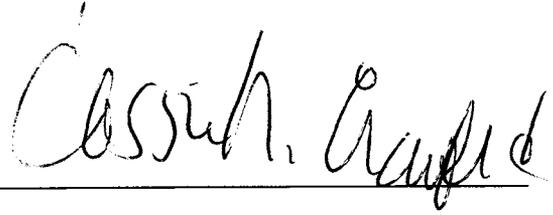
C. Stading forfeited his challenge to Assignment of Error to his Conclusion of Law 2 when he failed to cite any authority or specify in the record anything to support his assignment of error that Teel did not prove the use of the north disputed area was permissive.

In *Bryant*, the appeals court did not consider the argument Palmer offered when he assigned error to findings that state that the trial court concluded that Bryant's use of the property was "hostile" and without permission because Palmer cited no authority and failed to specify in the record anything to support its assignment of error. *Bryant*, 86 Wn. App. at 216. Like in *Bryant*, this court should not consider Stading's Appellant Opening Brief argument "C. The Respondents Used the North Disputed Area With the Express Permission of the Appellants" because Stading cites no authority and fails to specify in the record anything to support his Assignment of Error Conclusion of Law 2. CP 218 COL 3 (The Defendants did not prove that Teel's use of the north disputed area was permissive.)

#### **D. Conclusion**

For the reasons set out above, Teel respectfully requests the Court of Appeals find the trial court found substantial evidence in the record that was sufficient to persuade a fair-minded person of the truth that Teel adversely possessed the north disputed area when 1) Teel openly and notoriously used the area as a true owner would considering the nature and character of the land, and

2) Teel did not presume permission or prescription of an easement, and 3) Stading forfeited his challenge to prove the use of the north disputed area was permissive.

A handwritten signature in black ink, appearing to read "Cassie N. Crawford", written over a horizontal line.

Cassie N. Crawford

WSBA#26241

Attorney for Marty Teel and Mary Teel

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**CERTIFICATE OF SERVICE**

State of Washington )  
  ) ss.  
County of Clark        )

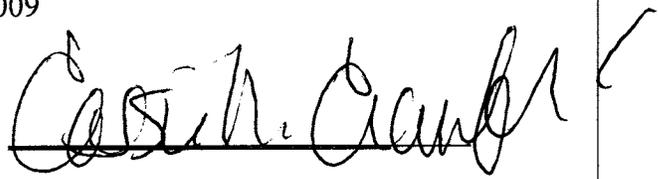
THE UNDERSIGNED hereby certifies:

On the date set forth below, I caused to be delivered by the method indicated below, a true and correct copy of **Court of Appeals Div. II State of Washington Brief of the Respondent** properly addressed to each of the following:

David A. Nelson  
Nelson Law Firm, PLLC  
1516 Hudson Street, Suite 204  
Longview, WA 98632-3046

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

DATED this 12<sup>th</sup> day of February, 2009



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