DECLARATION OF MAILING: The undersigned, being first duly sworn upon oath, deposes and states that on the 4 day of June, 2009, (s)he deposited into the mails of the United States a properly posted and addressed envelope to the Atty Dave Nelson containing a copy of the document upon which this declaration appears. This declaration is made under penalty of perjury under the laws of the State of Washington.

Signed: Lisa Summers

FILED
COURT OF APPEALS
DIVISION II
09 JUN -8 PM 12: 11
STATE OF WASHINGTON
BY _____
DEPUTY

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

JAN K. KERBY and ILONA A. KERBY Husband and Wife, **APPELLENTS,** ***vs.*** **GEORGE AUTTELET and PATSY AUTTELET, Husband and Wife and the marital community thereof,** **APPELLANTS.**	**Case No: 37655-5-II** **APPELLANTS REPLY BRIEF Of George and Patsy Auttelet**

DENNIS G. OTT, P. S.
Attorney at Law
401 N. Pacific Avenue, Post Office Box 209
Kelso, Washington 98626
Telephone (360) 577-6500 Facsimile (360) 577-7719
Electronic Mail: dennisottlaw@pacifier.com

TABLE OF CONTENTS

	TITLES	PAGE No.
I.	INTRODUCTION	5
II.	STATEMENT OF CASE	5
III.	STATEMENT OF LAW	9
IV.	CONCLUSION	15

DENNIS G. OTT, P. S.
Attorney at Law
401 N. Pacific Avenue, Post Office Box 209
Kelso, Washington 98626
Telephone (360) 577-6500 Facsimile (360) 577-7719
Electronic Mail: dennisottlaw@pacifier.com

TABLE OF AUTHORITIES

CASES

Chaplin v. Sanders,
100 Wn. 2d 853 (1984)..... 9

Peeples V. Port of Bellingham,
93 Wn. 2d 766, 613 P.2d 1128 (1980)..... 9

Skansi v. Novak,
84,Wn.39, 149 P. 160 (1915)..... 9

RCW 4.16.020..... 9

King v. Bassingdale,
127 Wn. 189, 192, 220 P. 777 (1923)..... 10

Gazzam Co. V. Hogan,
22 Wn.2d 27, 154 P.2d 285 (1944)..... 10

O'Brien v. Schultz,
45 Wn.2d 769, 278 P.2d 322 (1954)..... 11

7 R. Powell, Real Property ¶1012 [3] (1982) 11

C. Callahan, Adverse Possession 91-94 (1961)..... 11

R. Powell, Real Property ¶1013 [2]..... 11

C. Callahan, Adverse Possession 40-50..... 11

3 Am. Jur. 2d Advancements §104 (1962)..... 11

Springer v. Surrett,
217 Or.196, 342 P.2d 132 (1959)..... 12

Agers v. Reynolds,
306 S.W. 2d 506 (Mo. 1957)..... 12

DENNIS G. OTT, P. S.
Attorney at Law
401 N. Pacific Avenue, Post Office Box 209
Kelso, Washington 98626
Telephone (360) 577-6500 Facsimile (360) 577-7719
Electronic Mail: dennisottlaw@pacifier.com

Fulton v. Rapp,
98 N.E. 2d 430 (Ohio Ct. App. 1950)..... 12

Stoebeck, The Law of Adverse Possession in Washington,
35 Wn. L. Rev 53, 76-80 (1960)..... 12

Dunbar v. Heinrich,
95 Wn. 2d 20, 622 P.2d 812 (1980)..... 12

Wickert V. Thompson,
28 Wn. App. 516, 624 P.2d 747 (1981)..... 12

Cf. RCW 7.28.070..... 13

RCW 7.28.080..... 13

Hovila v. Bartek,
48 Wn.2d 238, 242, 292 P.2d 877 (1956)..... 14

R. Powell Real Property ¶1013 [2] [b]..... 14

Just Dirt v. Knight,
138 Wn. App 409 (2007)..... 15

DENNIS G. OTT, P. S.
Attorney at Law
401 N. Pacific Avenue, Post Office Box 209
Kelso, Washington 98626
Telephone (360) 577-6500 Facsimile (360) 577-7719
Electronic Mail: dennisottlaw@pacifier.com

I. INTRODUCTION

Appellant's Brief misaddresses the issues of the case. The six issues raised in the Appellant having no answer to the issues raised re-attempts to re-characterize the issues in contention by so doing appellant underscores the weakness of the position.

Appellants Brief argues not the nature of the fence line whether it is a livestock fence but rather the use of the land, but the defendants/appellants use of the land up to the fence line which memorializes the northern end of appellants occupation and use. The Appellants Brief addresses the issue of substantial fact to support the mis-characterization and mis-application of law on easement and permissive use.

The issue of law is not addressed in Appellants Brief.

II. STATEMENT OF CASE

It is undisputed that in 1980, George Auttelet purchased the land in question.

It is a fact that the Appellant restrung this fence with round wire in about 1986.

It is an unrefutted fact that horses were introduced in 1987.

It is a fact that in 1990, the fence was restrung with electrical tape.

It is an unrefutted fact that the Auttelet family has used the entire disputed property up to and including the fence and maintained the property.

The trial court was focused on the "notice" provided to the Kerbys of Appellants use. To satisfy the trial court, much evidence was generated showing that Kerbys saw the fence, had every reason to know that the fence was there and their actual knowledge and evaluation of the fence location, extent and direction, Kerby's are under

DENNIS G. OTT, P. S.
Attorney at Law
401 N. Pacific Avenue, Post Office Box 209
Kelso, Washington 98626
Telephone (360) 577-6500 Facsimile (360) 577-7719
Electronic Mail: dennisottlaw@pacifier.com

an obligation to see that which is there to be seen. Kerbys denial, they could see the entire fence from the road. It is an unrefutted fact, the Kerbys knew of the existence of the fence and saw at least 100 feet of fence line for 20+ years.

It is the Appellants position that whether the Kerbys recognized the fence as the boundary is irrelevant under the Chaplin v. Sanders and related cases.

It is undisputed that the fence existed since 1982 (to date) and memorialized the boundary between Auttelets and Kerbys.

It is an undisputed fact the fence wire was changed to round wire and tape on the fence.

It is an undisputed fact Kerby's saw the changing of the wire.

The Appellant Brief illustrates the courts erroneous ruling that the fence was a livestock retention fence. Whether, the fence is for livestock retention or not is irrelevant under the Chaplin case. That the Kerbys had a duty to see the fence and to at least inquire reasonably what the fence was as a direct result of the knowledge (the Kerby's had to wit the visual observations of 100 feet down the fence line from the road, the marked difference in vegetation styles and land uses, Kerby's 1992 acknowledgement of their tree falling over Auttelet's fence).

The trial court is in error when the trial court concluded that the running of chainsaws, the burning of brush, the rising of smoke, and the use of the property does not provide sufficient "notice" of a claim of ownership. It is the Appellants position that is an error of law that court's ruling is factually and is wrong as a matter of law.

DENNIS G. OTT, P. S.
Attorney at Law
401 N. Pacific Avenue, Post Office Box 209
Kelso, Washington 98626
Telephone (360) 577-6500 Facsimile (360) 577-7719
Electronic Mail: dennisottlaw@pacifier.com

The Kerbys position is that the roadway when used at some point the permissive use rises to ownership use. Appellants position is memorialized by trial with the statement of Kerbys attorney:

I think there clearly is detriment on reliance, if you look at that, and using it for thirty years – if this was in on:

> If this was put in temporarily, Mr. Auttelet said, sure, you can put it in for now, then it seems to me that there's some obligation to go back, in a reasonable to me frame, and say now you need to move it into the actual easement area. I don't think he can sit on it for twenty-seven years and then change it, and at some point in that time, if the permission was only temporary, the temporary placement – placing it there, I think that that expires, at some point. Once that expires, at that point, the adverse, or the prescriptive easement, starts – starts going. RP page 405. [1]

The trial judge supported this absurd proposition in his ruling in RP page 421 line 10 through page 423 line 11.[2]

[1] RP 405
[2] RP page 421 line 10 thru page 423 line 11

DENNIS G. OTT, P. S.
Attorney at Law
401 N. Pacific Avenue, Post Office Box 209
Kelso, Washington 98626
Telephone (360) 577-6500 Facsimile (360) 577-7719
Electronic Mail: dennisottlaw@pacifier.com

The court in its ruling states:

> I think that the road was intended for the exclusive use to serve the Kerby property. There's your exclusivity; okay? And by that, I mean sure they Auttelets could use it; sure my mailman who brought the express mail to my door can use it; sure someone who is visiting me can use it; that doesn't change the exclusive nature of what its purpose is. RP 419 Line 11 through 17.[3]

The standard of proof is <u>not</u> what was "intended", that is irrelevant. What is relevant is how the road was <u>used</u> and the Auttelets <u>used</u> this roadway continuously as their own.

It is disputed that the road way was ever intended for the exclusive use to serve the Kerbys property.

Furthermore the argument raised by counsel at time of trial that the at some point in time an adverse use begins to run for Kerbys illustrates a fatal defect in Kerbys adverse use. The problem is the Kerby's have not established when that adverse use began to run. Thus that is the second failure in their adverse claim.

The trial court judge ruled (RP 421)[4], the trial court did not know the limits of permissive use at the time of the ruling, the court had not read the memorandum, the court did not hear the argument of counsel, the court at motion for reconsideration

[3] RP page 419 line 1 thru 17
[4] RP page 421

DENNIS G. OTT, P. S.
Attorney at Law
401 N. Pacific Avenue, Post Office Box 209
Kelso, Washington 98626
Telephone (360) 577-6500 Facsimile (360) 577-7719
Electronic Mail: dennisottlaw@pacifier.com

deferred to the court of appeals on the issue. The trial court failed in its duty to 1) learn the law, 2) understand the law, and 3) properly apply it.

There is no legal theory upon which the Kerby Respondents based their case for detrimental reliance/equitable principle.

It is an undisputed fact that George Auttelet granted permission to use the property. Permissive use can never ripen to adverse use and the Appellants constant continuous use of the road, improvement, maintenance, interrupts any and all exclusivity claimed by Kerbys.

III. STATEMENT OF LAW

Chaplin v. Sanders 100 Wn. 2d 853 (1984)[5] provides the standards.

> In order to establish a claim of adverse possession, the possession must be: (1) exclusive, (2) actual and uninterrupted, (3) open and notorious and (4) hostile and under a claim of right made in good faith. Peeples v. Port of Bellingham, 93 Wn.2d 766, 613 P.2d 1128 (1980)[6]; Skansi v. Novak, 84 Wn. 39, 149 P. 160 (1915)[7]. The period throughout which these elements must concurrently exist is 10 years. RCW 4.16.020 [8]. Hostility, as defined by this court,

[5] Chaplin v. Sanders 100 Wn. 2d 853 (1984)
[6] Peeples v. Port of Bellingham, 93 Wn.2d 766, 613 p.2d 1128 (1980)
[7] Skansi v. Novak, 84 Wn.39, 149 P. 160 (1915)
[8] RCW4.16.020

DENNIS G. OTT, P. S.
Attorney at Law
401 N. Pacific Avenue, Post Office Box 209
Kelso, Washington 98626
Telephone (360) 577-6500 Facsimile (360) 577-7719
Electronic Mail: dennisottlaw@pacifier.com

> "does not import enmity or ill-will, but rather imports that the claimant is in possession as owner, in contradistinction to holding in recognition of or subordination to the true owner." King v. Bassingdale, 127 Wn. 189, 192, 220 P. 777 (1923)[9]. We have traditionally treated the hostility and claim of right requirements as one and the same. Bowden-Gazzam Co. v. Hogan, 22 Wn.2d 27, 154 P.2d 285 (1944)[10].

Continuing on in the Chaplin v. Sanders case, the issue of whether there was intention was good toward possession of the property or intention was bad or based on good faith or bad faith on possession of the land is clearly addressed in the Sanders case.

> Thus, in Bassingdale we required the claimant to possess a good faith belief that the land possessed was his own, in Hogan we deemed the claimant's belief irrelevant and in Hubbard we required the claimant to possess the unrighteous intent to deprive the true owner of his land. Shortly after Hubbard we set forth a test for hostility which took much of the emphasis off of the claimant's subjective

[9] King v. Bassingdale, 127 Wn. 189, 192, 220 P. 777 (1923)
[10] Gazzam Co. V. Hogan, 22 Wn.2d 27, 154 P.2d 285 (1944)

DENNIS G. OTT, P. S.
Attorney at Law
401 N. Pacific Avenue, Post Office Box 209
Kelso, Washington 98626
Telephone (360) 577-6500 Facsimile (360) 577-7719
Electronic Mail: dennisottlaw@pacifier.com

intent. O'Brien v. Schultz, 45 Wn.2d 769, 278 P.2d 322 (1954)[11].

The doctrine of adverse possession was formulated at law for the purpose of, among others, assuring maximum utilization of land, encouraging the rejection of stale claims and. Most importantly, quieting titles. 7 R. Powell, Real Property ¶ 1012 [3] (1982)[12]; C. Callahan, Adverse Possession 91-94 (1961)[13]. Because the doctrine was formulated at law and not at equity, it was originally intended to protect both those who knowingly appropriated the land of others and those who honestly entered and held possession in full belief that the land was their own. R. Powell, at ¶ 1013 [2][14]; C. Callahan, at 49-50[15]; 3 Am. Jur. 2d Advancements § 104 (1962)[16]. Thus, when the original purpose of the adverse possession doctrine is considered, it becomes apparent that the claimant's motive

[11] O'Brien v. Schultz, 45 Wn.2d 769, 278 P.2d 322 (1954)
[12] 7 R. Powell, Real Property ¶1012 [3] (1982)
[13] C. Callahan, Adverse Possession 91-94 (1961)
[14] R. Powell, Real Property ¶1013 [2]
[15] C. Callahan, Adverse Possession 40-50
[16] 3 Am. Jur. 2d Advancements §104 (1962)

DENNIS G. OTT, P. S.
Attorney at Law
401 N. Pacific Avenue, Post Office Box 209
Kelso, Washington 98626
Telephone (360) 577-6500 Facsimile (360) 577-7719
Electronic Mail: dennisottlaw@pacifier.com

in possessing the land is irrelevant and no inquiry should be made into his guilt or innocence. Accord, Springer v. Durette, 217 Or.196, 342 P.2d 132 (1959)[17]; Agers v. Reynolds, 306 S.W. 2d 506 (Mo. 1957)[18]; Fulton v. Rapp, 98 N.E. 2d 430 (Ohio Ct App. 1950)[19]; see also Stoebeck, The Law of Adverse Possession in Washington, 35 Wn. L. Rev. 53, 76-80 (1960)[20].

For these reasons, we are convinced that the dual requirement that the claimant take possession in "good faith" and not recognize another's superior interest does not serve the purpose of the adverse possession doctrine. See Dunbar v. Heinrich, 95 Wn.2d 20, 622 P.2d 812 (1980)[21]; Wickert v. Thompson, 28 Wn. App. 516, 624 P.2d 747 (1981)[22]. The "hostility/claim of right" element of adverse possession requires only that the claimant treat the land as his own as against the world throughout the statutory period. The nature of his possession will be determined solely on the basis of the manner in which he treats the

[17] Springer v. Surrett, 217 Or.196, 342 P.2d 132 (1959)
[18] Agers v. Reynolds, 306 S.W. 2d 506 (Mo. 1957)
[19] Fulton v. Rapp, 98 N.E. 2d 430 (Ohio Ct. App. 1950)
[20] Stoebeck, The Law of Adverse Possession in Washington, 35 Wn. L. Rev 53, 76-80 (1960)
[21] Dunbar v. Heinrich, 95 Wn. 2d 20, 622 P.2d 812 (1980)
[22] Wickert V. Thompson, 28 Wn. App. 516, 624 P.2d 747 (1981)

DENNIS G. OTT, P. S.
Attorney at Law
401 N. Pacific Avenue, Post Office Box 209
Kelso, Washington 98626
Telephone (360) 577-6500 Facsimile (360) 577-7719
Electronic Mail: dennisottlaw@pacifier.com

> property. His subjective belief regarding his true interest in the land and his intent to dispossess or not dispossess another is irrelevant to this determination.
>
> Cf. RCW 7.28.070[23] and 7.28.080[24]. Under this analysis, permission to occupy the land, given by the true title owner to the claimant or his predecessors in interest, will still operate to negate the element of hostility. The traditional presumptions still apply to the extent that they are not inconsistent with this ruling.

It is argued therefore that it is irrelevant whether the fence line was intended to be used as a livestock fence or intended to be used as a boundary line fence. The undisputed fact is the fence existed in 1982 and the Auttelets used up to that fence which has always existed in the same location as their property conducting their business as though this was their property.

The trial court erroneously ruled that "notice" needs to be provided. Twenty plus years of intensive occupation and use of the property provides the "notice" and the Kerbys in spite of their reported ignorance are under a duty to see that which was there to be seen.

The Sanders case resolves this issue of "open and notorious" in favor of the Appellants.

---

[23] Cf. RCW 7.28.070
[24] RCW 7.28.080

DENNIS G. OTT, P. S.
Attorney at Law
401 N. Pacific Avenue, Post Office Box 209
Kelso, Washington 98626
Telephone (360) 577-6500 Facsimile (360) 577-7719
Electronic Mail: dennisottlaw@pacifier.com

The trial court errors in finding that the parcel was not possessed in an open and notorious manner. The Sanders trial court resolves this issue definitively by stating:

> In Hovila v. Bartek, 48 Wn.2d 238, 242, 292 P.2d 877 (1956)[25], we stated that the requirement of open and notorious is satisfied if the title holder has actual notice of the adverse use throughout the statutory period. This is consistent with the purpose of the requirement, which is to ensure that the user makes such use of the land that any reasonable person would assume he is the owner. R. Powell, at ¶1013 [2] [b][26]. For this reason the owner is held to constructive notice of the possession. When the owner has actual knowledge of the possession, the requirement's purposed has been satisfied.

The trial court has in fact abused its discretion in applying the law and abused its discretion by not reading or educating itself on the proper standard of law which was briefed and argued.

The trial court abused its discretion by not even addressing the issue of reconsideration but deferred to the Court of Appeals.

Within the United States there is a principle of fairness. The trial court abused its discretion by not being fair and by not applying the law and by not seriously considering

[25] Hovila v. Bartek, 48 Wn.2d 238, 242, 292 P.2d 877 (1956)
[26] R. Powell Real Property ¶1013 [2] [b]

DENNIS G. OTT, P. S.
Attorney at Law
401 N. Pacific Avenue, Post Office Box 209
Kelso, Washington 98626
Telephone (360) 577-6500 Facsimile (360) 577-7719
Electronic Mail: dennisottlaw@pacifier.com

the unrefutted arguments. If the court was ignorant, the court should have researched the matter or read the memorandums that addressed the issues.

The trial court stated that it did not understand the concept of permissive use.

The trial court asked for briefing on these points and the court ignored that briefing.

Court costs and attorney fees should be awarded to the Appellants in this matter. The claim that has been raised the Kerbys in this action regarding their adverse claim over and across the easement based on the new proposed equitable theory, court costs and attorney fees should be awarded.

In the Just Dirt v. Knight 138 Wn. App 409 (2007)[27], the court required that there be some substantiation legal basis upon which to raise legal theories. The Respondent Kerby's have not justified the establishment of their legal theory. There is no basis in law and as such the theory should be dismissed an argument that was raised with the trial court and which was raised on Motion for Reconsideration. This provides further evidence of the Trial Courts abuse of its discretion. In supporting, the Kerbys in a position that is not recognized by law. The Trial Court has a duty to follow the law not create new law.

IV. CONCLUSION

The trial court committed reversible error by not applying the Sanders v. Chaplin legal standard. This means the trial court finding that there was not "notice" of the use

[27] Just Dirt v. Knight 138 Wn. App 409 (2007)

DENNIS G. OTT, P. S.
Attorney at Law
401 N. Pacific Avenue, Post Office Box 209
Kelso, Washington 98626
Telephone (360) 577-6500 Facsimile (360) 577-7719
Electronic Mail: dennisottlaw@pacifier.com

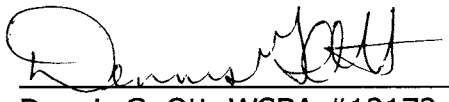
of a period of 25+ year's founders on the facts and on common sense. The trial court is in error by establishing an undocumented legal theory that permissive use ripens into prescriptive use. The trial court is factually incorrect and legally incorrect in concluding in accepting the argument that at some point in time the permissive use changes to adverse use and at the same time requiring no fact. At the same time having no claim of fact by the Kerbys as to when their adverse "use" began.

The trial court is in error by finding the intent of the easement establishes exclusivity. There is no basis in fact nor in law for the trial courts conclusions.

Therefore it is respectfully concluded by the Appellants herein that the Kerby's are entitled to the property up to the fence line which area has been indisputably used solely by the Kerbys from 1982 to date.

Further the Appellants asks this court reverse the finding made by the trial court without remand and further to reverse the trial court on Kerbys prescriptive easement over and across the permitted driveway.

RESPECTFULLY SUBMITTED this 4th day of June, 2009.



Dennis G. Ott, WSBA #12172
Attorney for Appellants

DENNIS G. OTT, P. S.
Attorney at Law
401 N. Pacific Avenue, Post Office Box 209
Kelso, Washington 98626
Telephone (360) 577-6500 Facsimile (360) 577-7719
Electronic Mail: dennisottlaw@pacifier.com