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DIVISION II  
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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II**

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GUY SODERLIND, individually and as Personal Representative of the  
Estate of Guy Egan Soderlind, deceased; and as Personal Representative  
of the Estate of Charlotte J. Soderlind,

Appellants,

v.

JEAN I. SIMMONDS, a married person as her separate estate,

Respondent.

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**BRIEF OF RESPONDENT JEAN I. SIMMONDS**

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## **I. INTRODUCTION**

After a four day trial and a view of the property, Jefferson County Superior Court Judge Craddock D. Verser found that Plaintiff Jean Simmonds (“Simmonds”) had adversely possessed and dispossessed Defendant Guy Soderlind and the Soderlind family estates (“Soderlind”) of a wedge-shaped parcel of shorelands near Port Ludlow, Jefferson County, Washington. Soderlind now appeals Judge Verser’s findings and judgement in favor of Simmonds. Because Judge Verser’s findings and conclusions are supported by substantial evidence, properly admitted into the trial record, this Court should affirm the Superior Court and deny this appeal.

## **II. RESPONSE TO ASSIGNMENTS OF ERROR**

Soderlind’s assignments of error are legion. Distilled, they challenge Judge Verser’s findings and conclusions that Jean Simmonds proved her ownership of a flat, triangular portion of Soderlind’s parcel, which ran from her woodshed along the edge of her yard to her boat platform, by adverse possession. Soderlind’s property directly to the north is sloped native brush and trees. Soderlind has failed to show any legal

error associated with these findings, the only question for this Court is whether substantial evidence supports Judge Verser's findings, conclusion and judgment.

Soderlind argues that transitory use of the disputed area, including some socializing between the Simmonds family and Guy Soderlind's father, negated the element of exclusive possession. Substantial evidence, including Appellant's Exhibit 54, show Simmonds firmly in control of the disputed area. Soderlind further argues that, if the yard was not consistently maintained even though a recreational property, Jean Simmonds use was not continuous and uninterrupted. He relied on a few recent photographs he introduced into evidence showing the yard had not been recently cut. Most of these were taken at the time of the Wood survey during the summer Simmonds traveled to South Africa.

Soderlind also assigns as error Judge Verser's admission into evidence of Exhibits 10 and 11. Soderlind's argument regarding the admission of Exhibits 10 and 11 is not supported by the case cited. First, Exhibit 10 was admitted solely for illustrative purposes. Exhibit 11 is relevant because it was the legal description of the disputed area later incorporated into the Court's adverse possession judgment.

Judge Verser had every right to admit Exhibits 10 and 11 because they did have probative value and provided him with data which helped him make a good decision. Soderlind is essentially arguing that Judge Verser's use of Exhibit 11 in describing the property adversely possessed by Simmonds was an abuse of discretion.

### **III. STATEMENT OF THE CASE**

#### **A. APPELLANTS' ERRORS**

Appellant erred when he identified the northwest corner of Soderlind's property as the disputed area. Appellants' Brief at 8 It is the southwest corner. EX 10 It was misleading to state that Jean recalls the Soderlinds parking their boats near the platform (Appellants' Brief at 15) without saying they parked their boats north of the disputed area near the platform without also stating that none was parked on the disputed area. RP 609 It was confusing to state that Jean Simmond's photographs reveal at least one of the Soderlind boats parked in the disputed area and that they never removed their boats after her request. Appellants' Brief at 15. She never saw a boat except her own on her property. RP 609-10

## B. FACTS

At issue is a wedge-shaped piece of no bank waterfront (“the disputed area”), with approximately twenty-nine feet of beach front located in Jean Simmonds’ yard, in front of her cabin and deck looking out on Port Ludlow Bay. EX 10

The Soderlind property was surveyed in the summer of 2006 by Wood Surveying, Inc., EX 47, and a steel fence post with lath attached, indicating “PROPERTY LINE, LOT 17”, EX 71, was driven inside what Jean Simmonds considered her property, in her yard. At the time of the survey. Jean Simmonds and her husband, Bob, had recently returned from a vacation in South Africa. EX 45, RP 591 It had taken “quite some time” for Jean Simmonds to get up to her Port Ludlow property after coming back from South Africa because she was taking care of things in Seattle that had gone on while she was gone. RP 593 Jean Simmonds was doing the lawn cutting in the summer of 2006. RP 592

Phyllis Blum and Jane Pingrey were walking down the beach in the summer of 2006 and were “shocked” to see a survey stake in Jean Simmonds’ yard. They called Jean immediately. RP 406 The lawn was not as trimmed as usual. RP 408-409

## **EXCLUSIVE USE**

The disputed area was cleared by the Simmonds family in the 1950's, EXS. 12 and 13; and a cabin was assembled and sited on Lot 16. Dr. Bryant's Testimony RP 26 Its undisputed that the Simmonds' cabin had power, water and septic for decades.

Jane Pingrey, Soderlind's neighbor directly to the north who had her summer home for 57 years until 2006, testified that no dwelling was ever built on the Soderlind property. Guy Soderlind, Sr., for a while, took his water through a hose from Jane Pingrey's house and used the Pingrey outhouse. She could see right into the Soderlind property. RP 196 Nobody ever lived on the Soderlind property; there was no power, water or bathroom on the Soderlind property. RP 199 Jane Pingrey visited the property almost every weekend in the 1980's. RP 203

Bob Fish built the boat platform or dock near the north boundary of the disputed area on the waterfront at the direction of Jean Simmonds. Jane Pingrey knew Bob Fish and believed he was working for Jean Simmonds because "she owned the property" where the boat platform was located. RP 204 She never saw any tents near the boat platform and didn't have any specific recollection of ever seeing any Soderlind or

anybody who was a guest of Soderlinds on the boat platform. RP 206

The only photograph showing a Soderlind or any Soderlind guest on or near the disputed area showed Guy Soderlind Sr. next to the boat platform. EX 54 (also EX 79) Those images show Guy Soderlind Sr. standing on the beach right in front of the boat platform, black rocks (riprap), Jean Simmonds' mowed yard, Jean Simmonds, and Bob Fish (who built the boat platform). RP 600-602

Guy Soderlind, Sr. saw Bob Fish build the dock, accepted it as on Simmonds' property and "never violated that point". RP 601 The dock was built in July of 1990 and Jean Simmonds paid Bob Fish on a running account for his work. EX 6, RP 491

In Exhibit 54, the second photograph, Dr. Bryant is seen sitting on the boom log he installed just behind the riprap he installed that ran along the beach through the disputed area and just to the north of the boat platform. RP 40, 190 These photos were taken before Bob Fish died in 1996. RP556 The same photograph shows Jean Simmonds' boat and wheels on the boat platform next to where she is sitting. Jean purchased blue wheels to get her boat out for crabbing over the very long beach. RP 489

This same riprap is visible in a photo of the boat platform taken during the time of trial. EX 84 The same boom log Dr. Bryant is seen sitting on in the earlier photo is depicted in EX 85 taken during the trial. RP 602

Dr. Bryant planted trees in the disputed area, along its north boundary; put in the boom log described above; cut down the trees he planted along the northern boundary because they were becoming unwieldy; planted a redwood tree in the disputed area; cut salmonberry along the edge of the disputed area encroaching into the yard that Jean mowed. The disputed area today has the same lay out as it did in the 1980's. RP 43-49, 70, EX 80, 35 and 36

Karen Jensen testified that her neighboring property has been in her family since 1948, RP 230, and during her visits to the property she observed the Simmonds property on her walks in the summers and saw the grass area or lawn, in a line with the platform going back to the left side of the shed and house. Karen Jensen and her husband were very aware of changes in the neighborhood. RP 235 She never noticed a difference in that line for as long as she can remember. RP 234-35 She met Jean Simmonds in 1958. RP 237

Elizabeth Bryant, Jean Simmonds' daughter, testified that the family had a fire pit where the redwood is currently located through the 1970's and the "salmonberries were cut back". RP 263-64 The redwood was planted by Dr. Bryant in the 1980's and he was also working on the creek and putting in a lot of rocks. RP 264-65

Starting in the 1980's Jean Simmonds changed the natural field by "mowing very assiduously" ... "down to the embedded log on the sand." RP 265 The lawn ran from the north edge of the boat platform up to the woodshed. RP 268 Jean never saw any ingress or egress points on the Soderlind property anywhere from the woodshed to the boat platform. RP 269 She never saw anybody come off of Lot 17 onto the disputed area. Beginning in 1997, after Jean's marriage to Bob Simmonds, the "maintenance of the lawn" increased more. RP 273 Soderlind's photo of the disputed area showing the lawn area overgrown was "extremely unusual". RP 296- 297

Jean Simmonds testified that she resided at the Port Ludlow property often, but that she found records showing 911 Ludlow Bay Road as her address in 1986 when she pulled one year of records. RP 474, 477 The encroaching woodshed never moved from when it was built sometime

after 1980. RP 481 She hired Bob Fish on an on-going basis to work on the property during the 1980's and early 1990's. RP 485 Bob Fish trimmed brush around the woodshed in 1989. RP 486, EX 4

Fish installed a pulley system in the disputed area so Jean Simmonds could launch and retrieve her Livingston boat. RP 490, EX 6 This is depicted in Exhibit 21, covered with a bucket to keep the rain out. RP 538

He also built the boat platform in the disputed area which is depicted in many of the photographs in evidence. RP 491, EX 6 Her 1987 calendar documents her use of the cabin and the disputed area during that year. EX 9, RP 509-10 A series of photographs taken from the 1980's on introduced by Jean Simmonds show the yard, the boat platform and other evidence of use up to the north line of the area claimed by Jean Simmonds. EX 14, 15, 16, 17, 18, 19, 21, 24, 25, and 31 Jean Simmonds maintained and used lawnmowers, "a blow dryer", a whip stringer and motors kept at the cabin to maintain the disputed area. EX 31, EX 8, RP 494

Jean Simmonds' Livingston boat (EX 7) was the only Livingston boat ever seen in the disputed area and was not used by Guy Soderlind, Sr. RP 609-10 Soderlind's boat was kept north of the disputed area. EX 21,

25, RP 540, 551

Soderlind's only trail down to the beach was north of the disputed area. EX 86, RP 607, EX 23, RP 545, 547

The line of occupation was approximately four feet (4') north of the boat platform at its westerly point. RP 618-19

### **HOSTILE USE**

Jean Simmonds communicated with the Jorays, who owned Lot 17 until their death in July, 1984. EX 3 Jean Simmonds removed "danger trees" located north of the disputed area, but likely to blow down on the Simmonds' property including the disputed area. RP 479, EX 80

Jean Simmonds knew Guy Soderlind, Sr., who accepted the disputed property as belonging to the Simmonds and "never violated that point". RP 601 Jean Simmonds had seen Guy Soderlind, Jr. rarely, perhaps three or four times, prior to a tree branch falling on the Simmonds' woodshed on June 28, 2002. RP 583-84 Because the ground north of the disputed area was undeveloped and close to Ludlow Bay, it "threatened" the Simmonds' yard and home including the disputed area. Jean Simmonds was vigilant in protecting her yard from dangerous trees north of the disputed area, including the "Bat Tree". RP 477-79, EX 80

Benjamin Bryant, Jr. testified that he came back from three years in Africa in 1984 and his mother's property was transformed. RP 311-12  
There was a lawn in the disputed area and just brush on the hillside north of the disputed area. RP 314 The only trail he knew coming off the Soderlind property came out by the spring to the north of the disputed area. There was no trail by the woodshed off the Soderlind hill side. RP 323

The neighbors never saw anyone but the Simmonds family and their guests using the disputed area. RP 231, 235, 415

#### **OPEN AND NOTORIOUS USE**

Phyllis Blum walked the beach from 1984 until 2006 and in her walks by Lot 16 on an almost daily basis she observed the installation of the boat platform, the woodshed, and the grassy flat area and from the north side of the boat platform back to the woodshed to Jean Simmonds' cabin. RP 395-415

Appellant introduced a photo of Guy Soderlind, Sr. standing at the boat platform in front of the black rocks (riprap) and in sight of the boom log. EX 54, RP 601

#### **CONTINUOUS OR ACTUAL AND UNINTERRUPTED USE**

Jane Pingrey testified that there was a distinct line where the hill

side was covered with brush and then there was grass. This line between the brush and the grass never changed in the last twenty (20) years. RP 204, 210 Soderlind showed Jane Pingrey Exhibit 70 allegedly taken June 8, 2006. When asked if the photo accurately showed the depiction of the yard on that date, she answered that she did not remember it being that long or that tall. RP 215

#### **IV. SUMMARY OF ARGUMENT**

At trial Jean Simmonds, her ex-husband, Dr. Benjamin Bryant, her son, Benjamin Bryant, and her daughter, Elizabeth Bryant all testified in support of Jean Simmonds' claim of adverse possession. The only neighbors to testify were called by Jean Simmonds and they included Phyllis Blum, Jane Pingrey, Karen Jensen and Robert Bradley. None of these people reported ever seeing Guy Soderlind, Jr. in the disputed area. They saw no evidence of the Soderlind's use of the disputed area.

It is clear that the neighbors who testified, all knew Jean Simmonds, walked the beach in front of her home, and were aware of the dramatic difference between the Simmonds' yard (including the disputed area) and the Soderlind brushy and wild ground to the north. It would

have been impossible for the Soderlinds not to know the Simmonds were using the disputed area given its boat platform, winch, riprap along the beach, boom log, redwood tree and yard demarcating the disputed area.

## **V. ARGUMENT**

### **A. Standard of Review**

Adverse possession involves mixed questions of fact and law. Proof of the elements necessary to establish adverse possession is a question of fact, which, if supported by substantial evidence, should not be overturned. *Diel v. Beekman*, 7 Wn. App. 139, 149, 499 P.2d 37 (1972), *overruled on other grounds*, *Chaplin v. Sanders*, 100 Wn.2d 853, 852, 676 P2d 431 (1984). “Whether use is adverse or permissive is a question of fact.” *Miller v. Anderson*, 91 Wn. App. 822, 828 (1998) (quoting *Miller v. Jarman*, 2 Wn. App. 994, 997 (1970) (citing *Northwest Cities Gas Co. V. Western Fuel Co.*, 13 Wn.2d 75, 84 (1942), *review denied*, 78 Wn.2d 995 (1970)). The Court of Appeals thus “review[s] whether substantial evidence supports the trial court’s challenged findings and, if so, whether the findings in turn support the trial court’s conclusions of law and judgment.” *Harris v. Urell*, 133 Wn. App. 130, 137, 135 P.3d

530 (2006)

Therefore, if the Superior Court applied the correct legal elements of adverse possession, its findings regarding whether Simmonds met her burden of proof as to each element must be sustained if supported by substantial evidence in the trial record. Because there is simply no question that Judge Verser employed the correct legal framework for proof of adverse possession, this Court should affirm his findings if they are supported by substantial evidence.

Soderlind's claim that this Court should conduct *de novo* review is simply wrong. Such a standard of review would be applicable only if an undisputed record was submitted to the trial judge. Appellant cites *Happy Bunch, LLC v. Grandview North, LLC*, 142 Wn. App. 81, 88, 173 P.3d 959, *review denied*, 164 Wn.2d 1009 (2008) to support *de novo* review, but that case involved no verbatim report of proceedings. The appellate court was unable to review the evidence produced at trial. That is not the case here. Both the nature and character of each party's use and possession were disputed. Judge Verser resolved those disputes, and his decision should be affirmed if supported by substantial evidence in the record.

**B. The Trial Court Correctly Found that the Respondent Acted as the True Owner of the Disputed Area and that Appellants' Use Was Transitory.**

The “ultimate test” of possession is whether the person claiming to have adversely possessed the property exercised dominion and control over the land in the same manner as would a true owner. *ITT Rayonier*, 112 Wn.2d 754, 774 P.2d 6 (1989). The quality of these actions “... necessarily depends to a great extent upon the nature, character, and locality of the property involved and the uses to which it is ordinarily adapted or applied.” *Frolund v. Frankland*, 71 Wn.2d 812, 817, 431 P.2d 188 (1967), overruled on other grounds, *Chaplin*, 100 Wn.2d at 861. Thus, “the claimant need only demonstrate use of the same character that a true owner might make of the property considering its nature and location.” *Heriot v. Lewis*, 35 Wn. App. 496, 504, 668 P.2d 589 (1983).

Judge Verser correctly found that:

“The property at issue is recreational, beach front property. The testimony establishes that Ms. Simmonds and her family made such use of the property as would be expected of a property owner given the characteristics of that property.” CP 46 (Mem. Decision at 4)

The photographs admitted into evidence taken beginning in the 1980's through to the time of trial and the testimony of the neighbors established

that the disputed area was low, flat, cleared along the line that ran from Jean Simmonds' woodshed to a few feet north of her boat platform. This is the northern edge of the disputed area claimed by Jean Simmonds.

Farther north was native salmonberry and other brush and trees going up a slope. Any reasonable property owner would have noticed the substantial difference between the property claimed by Jean Simmonds and the brushy hillside that marked the edge of the disputed area.

The only photograph admitted into evidence showing any of appellants' family or friends using the disputed area was a photograph showing Jean Simmonds, her boat platform, her boat, her yard, and black rock (riprap) placed by Dr. Bryant to hold the log and protect the yard. Guy Soderlind, Sr. is standing on the beach, clearly a visitor. EX 54, EX 79, RP 601 Bob Fish, shown in the picture, died in 1996. RP 556

To prevail in an adverse possession claim 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. The period throughout which these elements must concurrently exist is 10 years. RCW 4.16.020.

### **1. Respondent's Uses Were Exclusive**

The disputed area was cleared by the Simmonds family in the 1950's along the current line of occupation claimed by Jean Simmonds. Projection was made of the property line (mistaken) behind the woodshed and out to just north of where the dock is presently located. Ex 12 and 13, RP 26-27 While Jean Simmonds father was alive, her ex-husband, Dr. Bryant, moved a boom log to where it stands now. He staked or chained it down and built a row of rocks along the beach side to keep the boom log in place. That log defined the beach limits of the front yard. RP 28-29, EX 80 The boat platform between the boom log and the north line of the disputed area was built by Jean Simmonds handyman and neighbor, Bob Fish, in July of 1990. EX 6 and 80, RP 491

While Soderlind contended at trial that he and his friends camped in the disputed area, no neighbors saw them camping or saw evidence of their camping. RP 231, 235, 415 Jean Simmonds did testify that she observed Guy Soderlind, Sr. lean against the platform several time when they chatted around the beach and the lawn area, but she never saw him fishing or crabbing in front of the disputed area.. She didn't see Sheila Miller ever use the platform except possibly to take a picture. RP 709-

The Court did find that Guy Soderlind's father and his guests occasionally used the platform when socializing with the Simmonds family. While adverse possession must be exclusive as one would expect of a titled property owner under the circumstances, *Crites v. Koch*, 49 Wn. App. 171, 174, 741 P.2d 1005 (1987), an occasional, transitory use by the true owner will not usually prevent ownership transfer by adverse possession if the adverse possessor permits the use as a "neighborly accommodation." *Lilly v. Lynch*, 88 Wn. App. 306, 313, 945 P.2d 727 (1997).

Judge Verser correctly held:

From the evidence the Court concludes this [neighborly accommodation] is the type of use the Simmonds family afforded the Soderlind family with reference to the disputed area. The evidence does not show that the Soderlind family used the property as if they were the title owner or in any manner that indicates ownership, which would possibly defeat the Simmonds claim to exclusivity. *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 217, 936 P.2d 1163 (1997).  
CP 46 (Mem. Decision at 5)

This sort of neighborly accommodation of a neighbor is not sufficient to defeat Simmonds' claim, as a true owner normally would act in the same manner under the circumstances. *Harris v. Urell*, 133 Wn.

App.130, 138, 135 P.3d 5304 (2006) (“an occasional, transitory use by the true owner usually will not prevent ownership transfer by adverse possession if the adverse possessor permits the use as a ‘neighborly accommodation’”) (citing *Lilly*, 88 Wn. App. 306, 313).

## **2. Respondent’s Uses Were Hostile**

The hostility requirement to establish adverse possession does not require enmity - - only that the claimant simply possesses the property in such a way as the true owner would possess the property. A true owner’s subjective thought process does not constitute a grant of permission which would defeat the hostility requirement of adverse possession. *Harris v. Urell*, 133 Wn. App. 130, 140, 135 P.2d 530, (2006), citing *Chaplin v. Sanders*, 100 Wn.2d 853, 860, 676 P.2d 431 (1984).

There is no evidence that the Simmonds family ever asked permission to build the boat platform, the extension of the woodshed, the placement of the boat pulley, and the planting of the redwood and alder trees. “When a claimant does everything a person could do with a particular property, it is evidence of the open hostility of the claim.” *Anderson v. Hudak*, 80 Wn. App. 398, 403, 907 P.2d 305 (1995).

Soderlind's alleged occasional use of the disputed area to camp, to picnic, barbeque or to sun bathe were not such uses as would negate the "hostility" element necessary for adverse possession. As the Court observed in *Frolund v. Frankland*, 71 Wn.2d 812, 818-819, 431 P.2d 188 (1967):

...that the parties themselves occasionally, socially and casually visited back and forth, and sometimes assisted one another in the performance of various work projects, e.g., beaching the swimming raft for winter storage. Such conduct, under the circumstances, denotes neighborliness and friendship. It does not amount to a subordination of defendant's adverse claim to the disputed wedge, for, as we have often observed, hostility under the law of adverse possession does not connote animosity. [Citations Omitted].

### **3. Respondent's Use was Open and Notorious**

To meet this requirement Simmonds must show that the true owners, the Soderlinds, had actual notice of the Simmonds family's use of the disputed area or that they used the disputed area so that any reasonable person would assume that they were the true owner. *Anderson v. Hudak*, 80 Wn. App. 398, 404-405, 907 P.2d 305 (1995), citing *Chaplin*, supra., 100 Wn.2d 863.

Every neighbor of petitioner and respondent who testified knew Jean Simmonds and her cabin and boat platform. For example, Phyllis

Blum testified that from 1984 until 2006 she walked by Lot 16 almost daily, observed the dock or platform being built, the encroaching woodshed and grassy flat area in between; saw Mrs. Simmonds maintaining the property and always believed that the disputed area was part of the Simmonds' property. RP 395-415

The difference between the Simmonds' property, including the disputed area, and the undeveloped bushy grade belonging to the Soderlinds is substantial. The Simmonds woodshed encroached across the survey line. The beach log which was held in the Simmonds yard by cables, the riprap along the front of the beach log up to and beyond the boat platform, the boat platform, the post and pulley behind the platform to bring in the Simmonds dinghy and the redwood growing in the disputed area add up to open and notorious use. Photos of Simmonds' yard equipment and of the maintained yard provide more than substantial evidence to satisfy this element of adverse possession. It is obvious that Guy Soderlind, Sr. knew of the encroaching boat platform, boom log and riprap extending into Lot 17. EX 54

**4. Respondent's Use was Continuous or Actual and Uninterrupted**

The evidence was overwhelming that the Simmonds have used the disputed area continuously since at least the early 1980's and that their use has not been interrupted.

“Continuous and uninterrupted use” does not, however, require [the claimant]...to prove constant use.... Instead “the claimant need only demonstrate use of the same character that a true owner might make of the property considering its nature and location.” *Lee v. Lozier*, 88 Wn. App. 176, 185, 945 P.2d 214 (1997); citing *Double L. Properties, Inc. v. Crandall*, 51 Wn. App. 149, 158, 751 P.2d 1208 (1988).

**5. Exhibits 10 and 11 Were Properly Admitted**

Soderlind's argument regarding the admission of Exhibits 10 and 11 is not supported by the case cited. First, Exhibit 10 was admitted solely for illustrative purposes. Exhibit 11 is relevant because it was Simmonds' offered legal description of the disputed area.

The trial court did not abuse its discretion here. “Even if the court had denied the Huntington's equitable relief, they were entitled to ask for the relief and to present evidence to support it.”

*Proctor v. Huntington*, 146 Wn. App. 836, 967, 192 P.3d 958 (2008).

Judge Verser had every right to admit Exhibits 10 and 11 because they did have probative value and provided him with data which helped him make his decision.

Soderlind would have the Court limit a trial judge's discretion in establishing a boundary in an adverse possession case. Soderlind tries to limit *Lloyd v. Montecucco*, 83 Wn. App. 846, 924 P.2d 927 (1996), to its facts. The evidence at trial and as viewed by Judge Verser when he visited the property clearly established that there was cleared ground to the north of the boat platform. The yard and the flat terrain were encompassed by Arnold Wood's legal description. The brushy, undeveloped ground that sloped upwards and was clearly part of Soderlind's property is not included in Exhibit 11.

As Judge Verser noted in his Order on Motion for Reconsideration, CP 52, *Montecucco* stands for what he did. The Court held that 853:

“ Noting that there is no direct evidence the Montecucco's actually possessed every square yard of the disputed tract, we conclude nonetheless that the trial court's demarcation was proper. Courts may create a penumbra of ground around areas actually possessed when reasonably necessary to carry out the objective of settling boundary disputes. Stoebeck, § 8.9, at 495.”

In *Montecucco* there was not such a clear line as between Simmonds' lawn/yard and the undeveloped property Soderlind owned. On urban property, the placement of structures on another's land, or encroaching partially on another's land, amounts to possession not only of the land covered by the structure but of a reasonable amount of the surrounding territory. *Shelton v. Strickland*, 106 Wn. App. 45, 51, 21 P.3rd 1179 rev. denied, 145 Wn.2d 1003 (2001). This is not an urban area, but it was reasonable for Judge Verser to infer that Jean Simmonds would have made use of the ground around the boat platform.

#### **VI. RESPONDENT'S COSTS ON APPEAL**

Pursuant to RAP 14.2, in the event that Jean Simmonds substantially prevails on appeal, she requests an award of costs.

#### **VII. CONCLUSION**

The Trial Court's Findings of Fact, Conclusions of Law, Judgment and Order on Reconsideration should be affirmed based on the tremendous amount of photographic and other documentation admitted at trial proving Respondent's dominion and control over the disputed area

for well over twenty (20) years. Although Appellant and his witnesses claimed use and occupation of the disputed area, none of the neighbors, including two long-time neighbors directly to the north of Appellant who kept an eye on Jean Simmonds' property, verified Appellants' claim. Those neighbors knew of the boat platform, a line running back from the boat platform to Jean Simmonds' woodshed. One side was brushy and native, Soderlind's, and on the other side was Jean Simmond's yard.

Respectfully Submitted,



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Richard L. Shaneyfelt, WSBA #2969  
Attorney for Respondent, Jean I. Simmonds

**CERTIFICATE OF FILING AND SERVICE BY MAIL**

The undersigned hereby certifies that on the 25<sup>th</sup> day of March, 2009, I filed by the mails of the United States of America, postage prepaid, in an envelope properly addressed to the following person(s):

Clerk, Washington State Court of Appeals, Division II  
950 Broadway, Suite 300 MS TB-06  
Tacoma, WA 98402-4427

BRIEF OF RESPONDENT JEAN I. SIMMONDS with Division II of the Court of Appeals of the State of Washington. I further certify that I caused a true and correct copy of the same to be served upon all parties entitled to notice through their counsel of record, by depositing the same in the United States Mail, First Class postage prepaid, to the address shown below:

Christopher M. Constantine  
Attorney at Law  
PO Box 7125  
Tacoma, WA 98417-0125

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