

No. 42666-8-II

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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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MICHAEL O. MATTHEWS and DIANE M.,  
MATTHEWS, husband and wife, and  
the marital community thereof,

Appellants.

vs.

T. & T. LARSON, a partnership TERRY V. LARSON,  
TRACY V. LARSON, single men,

Respondents,

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**APPELLANTS' OPENING BRIEF**

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I. INTRODUCTION.

The question in this case is whether the Appellants established adverse possession as a matter of law where they consistently used and occupied the property between the survey line and old barb wire fence (“disputed property”) by planting rhododendrons, creating two compost piles, clearing the property, storing a vehicle on the property, constructing a chicken coop on part of the property and regularly mowed and maintained the property as an extension of their back yard. The trial court entered summary judgment for the Respondents, holding there was no adverse possession, except for the encroachment of the chicken coop. Appellants request the court reverse the trial court and find there was adverse possession to an old barb wire fence as a matter of law and remand the case to the trial court for an assessment of damages under the trespass claim, and attorney fees under RCW 4.24.630.

II. ASSIGNMENTS OF ERROR.

Appellants appeal from the Order Granting Defendants’ Motion for Summary Judgment dated May 23, 2011, except for the portion of the judgment dealing with the encroachment of Plaintiffs’ shed, and from the Order Denying Plaintiffs’ Motion for Reconsideration dated

September 14, 2011.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Did the trial court err when it failed to enter summary judgment in favor of Appellants finding they established adverse possession to an old fence when the undisputed evidence shows the Appellants made regular and consistent use of the disputed property by planting various plants, maintaining a lawn, storing a vehicle, maintaining two compost piles, building a dog house, constructing a chicken coop on part of the property and maintaining a kitchen drain line over the property?

2. Does the Appellants' use of the disputed property satisfy the open and notorious, and hostile use elements of adverse possession as a matter of law?

IV. STATEMENT OF THE CASE.

The facts are not in dispute. The Appellants, Michael O. Matthews and Diane M. Matthews ("Matthews") acquired their property at 247 Altoona Pillar Rock Road, Rosburg, Washington, from Carol Ann Larson and Dennis R. Larson on July 9, 1980 (CP 7). Prior to the sale, Carol Larson and

her family used the property to a barbwire fence in the woods, where her children were allowed to play (CP 137). After the Matthews purchased the property Michael Matthews observed the fence, located approximately 50 feet from the lawn (CP 104). Based on Mr. Matthew's description, Cal Hampton, a licensed surveyor, prepared a diagram showing the approximate location of the fence (CP 203).

From 1980 until the trespass by the Respondents in 2006, the Appellants made regular and consistent use of the property between the survey line and the barbwire fence. They created two compost piles (CP 105 and CP 188), planted and transplanted rhododendrons (CP 119, CP 162, CP 207), stored a vehicle (CP 111, CP 188), cleared an area to be used for sunbathing (CP 105), planted numerous plants, including crocosmia, hostas, lilies and azaleas (CP 189), regularly mowed within the area (CP 184, CP 210, 214), built a dog house (CP 68), maintained a grey water kitchen drain in the area (CP 186) and constructed part of a chicken coop into the area (CP 67). The use was so intense and so obvious that it was noted by the Respondents' surveyor, Karl Germunson, as the "edge of mowed area" on his diagram (CP 67). In his declaration, Mr. Germunson

stated:

“During the course of my survey, I installed survey stakes marking the correct boundary lines. In the area where the Plaintiffs’ property and the Larsons’ property meet, I found a shed and chicken coop that partially encroached on the Larsons’ surveyed property. I also found some shrubs and lawn extending onto the Larson property” (CP 65).

Before the trespass, Respondent Terry Larson also observed the Matthews’ use of the property.

Q. When you did go to the disputed boundary line, did you see any encroachments on what you believed to be your property?

A. Yeah, there was some activity.

Q. What did you see?

A. Chicken coop on the wrong side of the fence, and that’s the one that the attorney sent them a letter about.

Q. What else?

A. Maybe some grass.

Q. You mean lawn?

A. Could be.

Q. What else?

A. A couple of rhododendrons. (CP 178)

In November 2004, the Respondents purchased the property adjacent to the Matthews. The Respondents are professional loggers and intended to log the property. Prior to conducting logging activities, they hired Karl Germunson,

a professional surveyor, to locate the property line. Mr. Germunson noted several encroachments in the Larson property that are discussed above (CP 65). Also, Terry Larson observed the Matthews' use of the property (CP 178). Further, both Terry Larson (CP 180) and Tracey Larson (CP 95) observed the wire from the wire fence the Matthews used as their boundary since 1980.

Despite the clear evidence of the Matthews' use of the property, and without any attempt to discuss the boundary with the Matthews (CP 68), in 2006 the Respondents logged past the wire fence and beyond the mowed grass. The photographs submitted with the motions for Summary Judgment show the Respondents' equipment destroying the manicured grass, tearing out a rhododendron, cutting trees past the barb wire fence and depositing debris on the disputed area (CP 212, 213, 214, 215 and 216). Following the logging activity, the Matthews brought a claim to quiet title based on adverse possession, and for damages for trespass.

The Respondents brought a motion for Summary Judgment seeking an Order that the Appellants could not establish adverse possession as a matter of law (CP 142).

The Plaintiffs responded and brought a counter-motion

seeking an Order that there was adverse possession of the disputed property as a matter of law. Both motions were heard by Judge Michael J. Sullivan. Without explaining his reasoning, Judge Sullivan granted the Respondents' motion except for the encroachment by the chicken coop.

“I granted the Defendants' motion for Summary Judgment, excepting the encroachment of Plaintiffs' quote 'shed'” (RP 48).

The Appellants timely appealed the court's denial of a Motion to Reconsider and seek a ruling that they have adversely possessed the disputed property as a matter of law and a remand to the trial court to determine damages under the trespass claim, and attorney fees under RCW 4.24.630.

V. ARGUMENT.

A. Standard of Review.

A party is entitled to summary judgment when there is no genuine issue of material fact. When reviewing a summary judgment order, the appellate court engages in the same inquiry as the trial court and considers all facts submitted and reasonable inferences from them in the light most favorable to the

non-moving party.<sup>1</sup>

Adverse possession is a mixed question of law and fact: Whether the essential facts exist is for the trier of fact, but whether the facts constitute adverse possession is for the courts to determine as a matter of law.<sup>2</sup> Where, as in this case, the facts are not in dispute, the court may find adverse possession as a matter of law. “Adverse possession does not require establishing a clearly demarcated line... The court need not find a blazed or manicured trail establishing a disputed boundary; rather the court may project a line between objects where it is reasonable and logical and the claimant’s use of the land was open and notorious.”<sup>3</sup> The burden of proof to establish adverse possession is by a preponderance of the evidence.<sup>4</sup> As set forth below, the Appellants established adverse possession as a matter of law.

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1 Timberlane Homeowners Association, Inc. v. Brame, 79 Wash. App. 303, 307-308, 901 P.2d 1074 (1995).

2 Lingvall v. Bartmess, 97 Wash. App. 245, 253, 982 P.2d 690 (1999).

3 Riley v. Andres, 107 Wash. App. 391, 396, 27 P.3d 618 (2001).

4 Teel v. Stading, 155 Wash. App. 390, 394, 228 P.3d 1293 (2010).

B. The Appellants Have Adversely Possessed the Disputed Area as a Matter of Law.

1. Elements of Adverse Possession.

To successfully establish an adverse possession claim, a party must show the possession was (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile for the statutory 10-year period.<sup>5</sup> At the hearing below, the Respondents presented no evidence to dispute that Appellants' use of the disputed property was actual, uninterrupted and exclusive between 1980 and 2006, more than the statutory ten-year period. The Respondents argue that the Appellants' use was not open and notorious, and was not hostile.

2. The Appellants' Use of the Disputed Property Was Open and Notorious.

Numerous Washington cases have addressed the quality of use that meets the open and notorious requirement of adverse possession. As explained below, adverse possession is found where the property in dispute is put to more than one use.

In Selby v. Knudsen,<sup>6</sup> the Plaintiff sought

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<sup>5</sup> Maier v. Giske, 154 Wash. App. 6, 18, 223 P.3d 1265 (2010).

<sup>6</sup> 77 Wash. App. 189, 890 P.2d 514 (1995).

adverse possession of a strip of land where she and her husband “made use of the strip of land for parking their car, gathering and burning wood, as a play area for their children and planting flowers.”<sup>7</sup> In addition, they maintained the strip and cut the grass. In affirming the trial court’s finding of adverse possession, the appellate court observed:

“Likewise, their possession was open, notorious and visible. The owner of the property had notice of the adverse use throughout the statutory period.”<sup>8</sup>

In Riley v. Andres<sup>9</sup>, the Plaintiffs claimed adverse possession to a triangular piece of land where they “planted several rhododendrons and other bushes, and they installed a sprinkler system in the disputed area. Four of the Rileys’ sprinkler heads were in the disputed area: two heads were near the original boundary line and two were near the claimed boundary line.”<sup>10</sup> In addition, “The Rileys watered and pruned the plants, spread beauty bark, pulled weeds, and stored wood on the land. Also, their children

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7 77 Wash. App. at 193.

8 77 Wash. App. at 196-197.

9 107 Wash. App. 391, 27 P.3d 618 (2001)

10 107 Wash. App. at 394.

played there.”<sup>11</sup>

The Defendant argued that the Rileys did not possess the disputed strip in an open and notorious manner. The Court of Appeals held their use was sufficient.

Planting trees without maintaining or cultivating them is not open and notorious use...But, according to the Rileys, they did more than plant trees and shrubs. After planting several rhododendrons and other bushes in 1968, the Rileys maintained the landscaping on the strip, at least until 1993. They watered and pruned the plants, spread beauty bark, and pulled weeds.<sup>12</sup>

The court further found the landscaping was a typical use for land of the character where the parties lived.

In Lingvall v. Bartmess,<sup>13</sup> the Plaintiffs claimed adverse possession to a triangular piece of property where they planted two flowering plums and later cleared brush and wild shrubbery and mowed and maintained the area since.<sup>14</sup>

The Defendant argued that the use was not sufficiently obtrusive (open and notorious), so as to put the true owner on notice of the adverse claim,

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11 107 Wash. App. at 394.

12 107 Wash. App. at 397.

13 97 Wash. App. 245, 982 P.2d 690 (1999).

14 97 Wash. App. at 248-249.

given that the claim was to vacant land. The court found that was not a concern in Lingvall because the owner had numerous opportunities to challenge Lingvall's possession, but did not. Importantly, the court did not hold the use by Lingvall, even on unimproved land, was insufficient as a matter of law.

In Teel v. Stading,<sup>15</sup> the court held that the Defendant's grant of permission precluded the hostility element of adverse possession. The Dissenting opinion, however, indicated that absent permissive use, the court would find adverse possession based upon the trial court's finding that:

“...the Teels fenced the disputed property, cleaned it up by paying to have old cars removed, sprayed and cut weeds, and used the property to graze horses and raise pigs.”<sup>16</sup>

The cases that find no open and notorious use are those where the Plaintiff puts the property to a solitary use, such as only planting trees or shrubs. In Anderson v. Hudak,<sup>17</sup> the Plaintiff planted a row of trees and claimed possession up to the tree line. The Court of Appeals reversed a trial court's judgment in

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15 155 Wash. App. 390, 228 P.3d 1293 (2010).

16 155 Wash. App. at 398 (Dissenting opinion by Judge Armstrong).

17 80 Wash. App. 398, 907 P.2d 305 (1995).

favor of the Plaintiff, noting the Plaintiff “produced absolutely no evidence that she even sporadically maintained and cultivated the trees or the land immediately surrounding the trees throughout the statutory period; the record indicates that she merely planted the trees.”<sup>18</sup>

In Maier v. Giske,<sup>19</sup> Giske claimed adverse possession to an area she referred to as a “mountain ash triangle”, where Giske had planted several plants. But, the trial court did not find the notoriety element satisfied because “It is not clear that she [Giske] had maintained the plants in the area in a way that would be recognized by others.”<sup>20</sup> The Court of Appeals upheld the trial court’s decision observing that “she gave no indication that she did anything other than plant a tree and some other vegetation in the area.”<sup>21</sup>

These cases show that open and notorious use is found where the party claiming adverse possession does something in addition to planting a tree or shrubs. That use may be parking cars, mowing a

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18 80 Wash. App. at 404.

19 154 Wash. App. 6, 223 P.3d 1265 (2010).

20 154 Wash. App. at 19.

21 154 Wash. App. at 20.

yard, maintaining a sprinkler system, or allowing children to play in the area.

In this case, the Appellants established the multiple uses sufficient to establish the open and notorious element. They transplanted rhododendrons, planted numerous plants, maintained a yard that was noted by the Respondents' surveyor, created two compost piles, stored a vehicle, cleared an area to sunbathe, built a dog house, built a chicken coop and maintained a drain line across the area. The photographic evidence shows the Respondents' equipment tearing out the manicured grass comprising the back yard of the Appellants' property and tearing out a rhododendron in the middle of the manicured yard. This use is significantly more than mere planting of trees or shrubs as was the case in Anderson or Maier. The Plaintiffs have established open and notorious use as a matter of law.

3. The Appellants' Use of the Disputed Property Was Hostile.

The element of hostility requires that a party claiming adverse possession treat the property as their own.

Hostile possession is defined as possession ‘that is opposed and antagonistic to all other claims, and which conveys the clear message that the possessor intends to possess the land as his own...Hostile possession does not import enmity or ill-will, but rather imports that a claimant is in possession as owner, in contradistinction to holding in recognition of or in subordination to the true owner.’<sup>22</sup>

In Selby, the use of the property for a tent, playground, storage of cars, wood and bees “conveyed ‘the clear message’ they possessed the land as their own.”<sup>23</sup>

When evaluating the adverse possessor’s use of the disputed property:

Possession is established if it is of such a character as a true owner would exhibit considering the nature and location of the land in question.<sup>24</sup>

Moreover, the nature of the possession is determined on the basis of the manner in which the adverse possessor treats the property. The adverse possessor’s subjective beliefs regarding their true interest in the land and their intent to dispossess the true owner of title are irrelevant.<sup>25</sup>

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22 Selby v. Knudsen, *supra*, 77 Wash. App. at 197.

23 77 Wash. App. at 197.

24 Shelton v. Strickland, 106 Wash. App. 45, 50, 21 P.3d 1179 (2001).

25 106 Wash. App. at 51.

In Lingvall, the court observed: “And we recognized in Anderson that claiming, maintaining, and occupying the land around trees is evidence of hostility.”<sup>26</sup> In Lingvall, the Plaintiffs planted trees, landscaped, mowed and maintained the area around those trees. The Court of Appeals concluded that “the trial court did not err in concluding that her possession of the triangle was hostile.”<sup>27</sup>

In evaluating the hostility element in this case, the first issue is what is the nature of the property. The Appellants own a developed lot immediately adjacent to Altoona Pillar Rock Road in rural Rosburg (CP 67, 210, 211 and 216). Their property is well manicured and includes a house, a garage and a chicken coop. The use of the disputed property was directly adjacent to their back yard and had the appearance of being an extension of their back yard. The nature of the property is such as would be used for gardening, landscape, and storage adjacent to a back yard in a rural community.

The Appellants’ use of the disputed property is

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<sup>26</sup> Lingvall v. Bartmess, supra, 97 Wash. App. at 254.

<sup>27</sup> 97 Wash. App. at 254.

entirely consistent with the nature of the property. They built a chicken coop that encroached into part of the property. They planted and transplanted rhododendrons on the disputed property, maintained an extension of their back yard, stored cars, maintained two compost piles, built a dog house and maintained a grey water kitchen drain. These are the types of uses that an owner would make of their back yard in a rural community. Thus, not only was the Appellants' use of the property obvious, but it was also the type of use that would be made of the property by the true owner.

At the hearing below, the Respondents argued that the Appellants' use of the property was merely a neighborly accommodation, citing Crites v. Koch.<sup>28</sup> In Crites, the Plaintiff claimed adverse possession to the northern part of Black Acre that he used to turn around his equipment. The evidence showed it was common for farmers to cross and park equipment on their neighbors' fields. Therefore, this use was recognized as adverse and not adverse.

The Appellants' use of the disputed property

differs from Crites in two respects. First, the Respondents have presented no evidence that allowing a neighboring owner to mow, maintain, store vehicles, create compost piles, clear and plant on adjacent property is common in the Rosburg area. Second, the neighborly courtesy in Crites was temporary in nature: the moving and parking of farm equipment. In this case, the Appellants engaged in permanent activities in maintaining the property. Based on these distinctions, the Respondents' argument that the Plaintiffs' use was a neighborly courtesy must fail.

#### VI. CONCLUSION.

The Appellants have established adverse possession to the disputed property as a matter of law. Their use was sufficiently obvious that it was noted on the survey completed by the Respondents' surveyor and was observed by the Respondents prior to their logging activities. Further, the Appellants' use was consistent with the nature and location of the property.

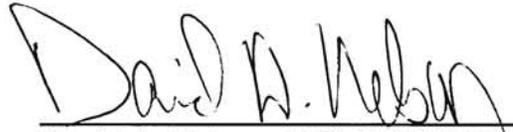
The Appellants request that the trial court's Order of Summary Judgment in favor of the Respondents be reversed and the Summary Judgment be entered in favor of

the Appellants.

DATED this 16<sup>th</sup> day of February,

2012.

NELSON LAW FIRM, PLLC

A handwritten signature in black ink that reads "David A. Nelson". The signature is written in a cursive style with a large initial "D".

David A. Nelson, WSBA #19145  
Attorney for Appellants

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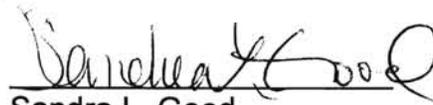
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 16th day of February 2012, she deposited in the United States Post Office in Longview, Washington, in a first-class sealed envelope postage prepaid a copy of APPELLANTS' OPENING BRIEF addressed to:

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