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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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DAN THOMSON and TIM THOMSON,

Appellants,

v.

R AND H FAMILY, LLC and BARRY THOMAS,

Respondents.

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**BRIEF OF RESPONDENTS**

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## **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

This boundary dispute arose after Appellants, Dan and Tim Thomson, purchased approximately 89 acres of forestland in Forks, Washington from Rayonier Forest Resources, L.P. in 2010. The Thomson property shares a southern boundary with properties that are owned by Respondents, R&H Family, LLC and Barry Thomas—properties that have been owned by the Thomas family since the 1960s. Through this action, the Thomsons asked the trial court to ignore the respective boundary lines between the properties that have been marked by decades-old fencing, and to eject the Thomas family from the property that they have exclusively used as part of their farming operations for decades. R&H Family, LLC and Barry Thomas filed a counter-claim for adverse possession based on their historic usage of the disputed property.

Following the trial, the trial court entered findings of facts and conclusions of law that R&H Family, LLC and Barry Thomas had demonstrated all elements of adverse possession to two disputed areas of property, defined below as the Disputed Triangle Area and Disputed Farm Area. The trial court also entered an award of attorneys' fees to R&H Family, LLC and Barry Thomas, pursuant to RCW 7.28.083.

The Thomsons file the instant appeal challenging the trial court's adverse possession rulings on the following grounds: (1) that the trial

court erred in concluding that the Thomas family's use of the Disputed Triangle Area was open and notorious, (2) that the trial court erred in concluding that the Thomas family's use of the Disputed Triangle Area and Disputed Farm Area was hostile, and (3) that the trial court erred in its application of RCW 7.28.085.

The undisputed evidence and trial testimony was that the Thomas family built a gravel road in the 1970s across a portion of Rayonier's property, forming a triangle, and that the Thomas family used that road for their farming operations. This road connected one portion of the Thomas farm with another portion, but it did not provide access to the Rayonier property. In 1981, an employee of Rayonier, surveyed this disputed property line and "blazed" the line, which required that he physically traverse the property line. In so doing, he would have crossed the road built by the Thomas family, and which led to the Thomas family farm. Following trial, the trial court correctly found that the 1981 survey work put Rayonier on notice of the Thomas family's claim to the disputed property, and thus was open and notorious, and that the claim accrued ten years thereafter. Based on the undisputed testimony of Barry Thomas, the trial court also found that the Thomas family's use was hostile, as no permission was requested or received. The trial court likewise correctly found that RCW 7.28.085 did not apply because R&H's adverse

possession claim vested prior to the effective date of the statute. For the reasons stated herein, R&H respectfully requests that the Court affirm the decision of the trial court in all respects.

## **II. COUNTER STATEMENT OF ISSUES**

1. Was the trial court's findings and conclusion that the Thomas family's use of the road within the Disputed Triangle Area was open and notorious supported by substantial evidence when Rayonier's employee performed a survey in 1981 and would have seen the Road that led to the R&H Property?

2. Was the trial court's findings and conclusion that the Thomas family's use of the Disputed Triangle Area was hostile supported by substantial evidence when the unrefuted testimony was that the Thomas family neither asked for nor received permission from Rayonier to use the Disputed Triangle Area?

3. Was the trial court's finding and conclusion that the Thomas family's use of the Disputed Farm Area was hostile supported by substantial evidence when the unrefuted testimony was that the Thomas family neither asked for nor received permission from Rayonier to use the area inside the Thomas' barbed-wire fence?

4. Was the trial court's conclusion that RCW 7.28.085 did not apply when the Thomas family's adverse use of the Disputed Triangle and

Disputed Farm Areas began to accrue in 1981, when Rayonier's employee would have found the road, and their claim would have vested in 1991, before the effective date of the statute?

### **III. COUNTER STATEMENT OF CASE**

R&H Family, LLC and Barry Thomas (collectively "R&H") own several contiguous parcels along the Sol Duc River in Forks, Washington. (RP 108) These parcels are collectively referred to herein as the "R&H Properties." The R&H Properties were purchased by Russell and Helen Thomas in the 1960s (RP 109, 111), and remained in their ownership until such time as one small parcel was conveyed to Barry Thomas in 1991 and the remaining parcels were conveyed to R&H Family, LLC in 1998 (Exhibits 19, 20).

Barry Thomas lived in what was referred to as the farm house from 1973 until he built a new house east of a stand of trees ten years later. (RP 109-110) The farm area was enclosed by barbed wire fencing when the Thomas family acquired the R&H Properties in the 1960s. (RP 114-115, 116) The historic fence line has been maintained and repaired in place during the Thomas family's farm ownership. (RP 117-118) The western edge of the clearing, which is a half-moon shape, extends over the boundary line of the R&H Properties ("Disputed Farm Area"). (RP 116, Exhibits 2, 4, 23, 25-27, 29, 32-33, 36)

Rayonier Forest Resources, L.P. ("Rayonier") owned the property adjacent and to the north and west of the R&H Properties at all relevant times during the Thomas family's ownership of the R&H Properties.

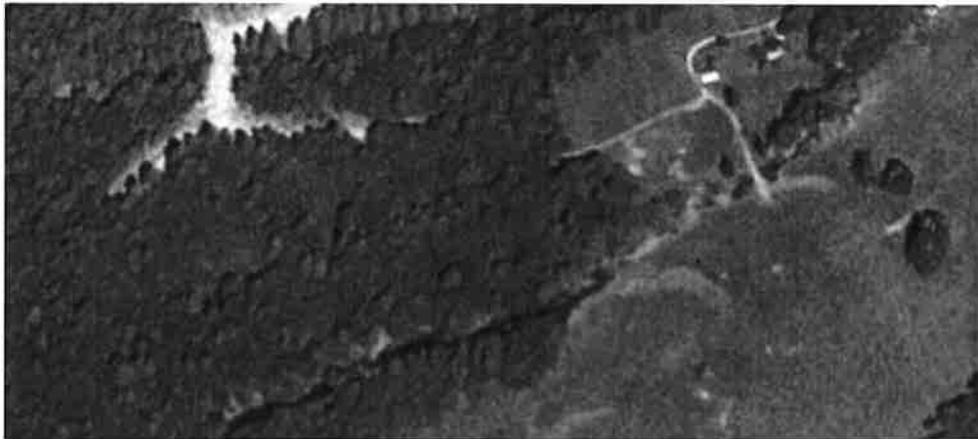
In the late 1970's, Russell Thomas hired workers to build a gravel road, 1,200 to 1,500 feet in length, across land located partially on Rayonier's property ("Road"). (RP 119, Exhibits 2, 23, 25, 30-31, 42-44) Russell Thomas never asked for permission to build the road. (RP 126) The Road was surfaced with gravel from the Thomas family's gravel pit. (RP 119) Since the construction of the Road, the Thomas family and R&H have regularly and consistently used the Road for their farming operations. (RP 123-125) The Road was resurfaced by the Thomas family sometime in the 1980s when alder trees were logged on the R&H Properties. (RP 126-127) The Road bisects the corner of the property owned by Rayonier ("Disputed Triangle Area"). (Exhibit 2) However, the Road does not provide access to the Rayonier property. (RP 137)

Aerial photographs support the existence of the Road in the disputed area since the 1970s:



(Exhibit 23) (7/16/1971)

The Road remained in place through the 1980s and 1990s, and is still present in the same location today. Aerial photographs depict the Road in the 1990s:



(Exhibit 30) (7/19/1994)



(Exhibit 31) (7/19/1994)

In 1981, Gerry Keck, an employee of Rayonier, surveyed Rayonier's property, including the Disputed Property. (Exhibit 17, 18) In addition to creating a survey, Gerry Keck also blazed the property line, which involved physically walking the property line and marking the property line through "blaze" marks on the trees. (Exhibit 17) In the course of blazing the property line in the disputed area, Mr. Keck would have had to cross the Road constructed by R&H and walk along the existing fence of the Disputed Farm Area. (RP 136) Barry Thomas testified that "you'd have to cross [the Road] four times. Twice going in and twice going out." (RP 136) The Road would have led Mr. Keck directly to the R&H farm. (RP 137)

In the early 1980s, the Thomas family built a three-wire barbed fence starting from the northwest corner of the farm east along the north

boundary line of the Disputed Triangle Area. (RP 127-29) This fence line intersected the Road, and then followed the northern edge of the Road connecting to another section of the historic fence to the east, which is the Disputed Farm Area. R&H maintained and repaired the fence as needed. (RP 128, 153)

Rayonier logged its property north of the Disputed Triangle Area in 1994. (RP 137) Rayonier cut the timber and stopped at the fence line along the boundary of the Disputed Triangle Area. (RP 137-138, 140) Following removal of the timber, Rayonier inspected the boundary line near the Disputed Triangle Area and Disputed Farm Area. (RP 58-59, Exhibit 15) During such inspection, the Road, the fence along the northern border of the Disputed Triangle Area, and the fence on the western border of the Disputed Farm Area would have been seen by employees of Rayonier. (RP 59)

In approximately 1996, the Thomas family granted permission for WDFW and later the Pacific Coast Salmon Coalition ("Salmon Coalition") to study a salmon pond located partially within the Disputed Triangle Area. (RP 130-32, 175-176) The site was named "Thomas Springs." (RP 132, Exhibit 52) WDFW and the Salmon Coalition accessed the "Thomas Springs" pond through the Road along the northern boundary of the Disputed Triangle Area. (RP 132, 178, Exhibits 51, 52) The Road was

resurfaced by WDFW, in connection with their work in the 1990s. (RP 133, 157)

The Thomsons entered a purchase and sale agreement with Rayonier on or about January 21, 2010. The Thomsons closed the purchase transaction on February 17, 2010. The Thomsons later filed this lawsuit on July 1, 2016, seeking quiet title and ejectment. (CP 577-580) R&H counterclaimed for adverse possession. (CP 570-76) Trial was conducted on January 22 and 23, 2018, and the Court orally ruled in favor of R&H. (RP 1, 219-223) Subsequently, the trial court entered its final Findings of Fact and Conclusions of Law on April 18, 2018. (CP 20-29) The trial court also entered an award of attorneys' fees and costs, pursuant to RCW 7.28.083, on April 6, 2018. (CP 33-37) This appeal follows.

#### **IV. ARGUMENT**

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

Whether adverse possession has been established by the facts as found is a question of law, which the Court reviews de novo. *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 210, 936 P.2d 1163 (1997). The Court must uphold the trial court's findings if they are supported by substantial evidence. *Id.* Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise. *Id.* This rule is “based upon the theory that there is a conflict in the testimony

and that the trial court, having the witnesses before it, is in better position to arrive at the truth than is the appellate court.” *Id.*

**B. Adverse Possession of Disputed Triangle Area was “Open and Notorious”**

To establish a claim of adverse possession, there must be a showing that possession is “(1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile.” *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989); *Bryant v. Palmer Coking Co.*, 86 Wn. App. 204, 936 P.2d 1163 (1997). Such possession must continue for a period of 10 years. RCW 4.16.020. It is well established that the use must be such as an owner of the type of property in question would make. *Bryant*, 86 Wn. App. at 209-210 (citing *Timberland Homeowner’s Ass’n v. Brame*, 79 Wn. App. 303, 309-10, 901 P.2d 1074 (1995); *Selby v. Knudson*, 77 Wn. App. 189, 196, 890 P.2d 514 (1995)). What constitutes adverse possession of a particular tract of land depends on the nature, character and locality of land, and uses to which land of that type is ordinarily put. *Id.* (citing *Anderson v. Hudak*, 80 Wn. App. 398, 403, 907 P.2d 305 (1995); *Frolund v. Frankland*, 71 Wn.2d 812, 817, 431 P.2d 188 (1967)).

“Open and notorious use is such use that would lead a reasonable person to assume that the claimant was the owner.” *Bryant*, 86 Wn. App.

at 211-12 (citing *Anderson*, 80 Wn. App. at 405.) “A claimant can satisfy the open and notorious element by showing either (1) that the title owner had actual notice of the adverse use throughout the statutory period or (2) that the claimant used the land such that any reasonable person would have thought he owned it.” *Riley v. Andres*, 107 Wn. App. 396-97, 27 P.3d 618 (2001) (citing *Anderson*, 80 Wn. App. at 404-05).

Here, the trial court made the following specific findings of fact germane to R&H’s open and notorious use of the Disputed Triangle Area:

A. In the late 1970's, Russell Thomas hired workers to build a gravel road along land located partially on Rayonier’s property (“Road”).

B. The Road was surfaced with gravel from the Thomas family’s gravel pit.

C. Since the construction of the Road, the Thomas family and R&H have regularly used the Road for their farming operations. The Road was resurfaced sometime in the 1980s when alder trees were logged on the R&H Properties. The Road was also resurfaced by WDFW, in connection with their work in the 1990s.

D. The Road bisects the corner of the property owned by Rayonier (“Disputed Triangle Area”). However, the Road does not provide access to the Rayonier property. This is the third piece of property that was in dispute in this case.

E. The Disputed Extension Road, Disputed Farm Area and the Disputed Triangle Area are collectively referred to as the “Disputed Property.”

F. In 1981, Gerry Keck, an employee of Rayonier, surveyed Rayonier's property, including the Disputed Property. In addition to creating a survey, Gerry Keck also blazed the property line, which involved physically walking the property line and marking the property line through "blaze" marks on the trees. In the course of blazing the property line in the disputed area, Mr. Keck would have had to cross the Road constructed by R&H and walk along the existing fence along the Disputed Farm Area.

(CP 20-21)

Based on these findings, the trial court entered the following conclusion of law:

9. R&H established that its possession of the Disputed Triangle Area was open and notorious. In the 1970s, the Thomas family built the Road on the northern boundary of the Disputed Triangle Area. The Road was resurfaced in the 1980s when alder trees were logged on the R&H Properties, and later by WDFW when they did work on the "Thomas Springs" site. The Thomas family and R&H used the Road to access the lower portion of the R&H Properties, and Barry Thomas regularly drives on the Road as part of his farming operations. An employee of Rayonier, Gerry Keck, would have crossed the Road in 1981 when he surveyed the Rayonier property and blazed the property line. The road had been surfaced with gravel. It led directly to the R&H Properties. It did not provide access to Rayonier's property. Thus, Mr. Keck and Rayonier were put on inquiry notice of a possible claim of use in 1981. Such inquiry notice started the ten year time period for adverse possession. . . .

(CP 26)

The Thomsons argue that the trial court erred in concluding that R&H's possession was "open and notorious." The Thomsons attack the trial court's ruling in two principal respects. First, the Thomsons appear to attempt to characterize the Thomas family's building of the Road as merely placing gravel on an existing, historical PUD easement or road. This argument is a clear attempt to minimize the Thomas family's use of the disputed areas. Second, the Thomsons argue that even if the Thomas family built the road, the mere act of building a road is not sufficient to put the true owner on notice of a claim. Both arguments are erroneous.

The Thomsons first argue that "only a gravel road over the existing historical PUD easement" and "no improvements, nor even storage of personal property" existed for Rayonier's surveyor to see in 1981.<sup>1</sup> Thus, the Thomsons argue, as a matter of law, Rayonier cannot be charged with actual or constructive notice, such that a claim for adverse possession began to accrue.

These contentions are not supported by the record. There is no evidence that the Road was built on an "existing historical PUD easement." Starting from their Introduction, the Thomsons argue that the Thomas family merely "placed" gravel along a "PUD pole-line easement," and their brief is built on the false narrative that the "Road" was either a

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<sup>1</sup> Thomsons' Brief at 13-14

PUD easement or a prior PUD easement road, and that the Thomas family merely placed gravel on it. This narrative starts to unravel the moment you peel back the layers and try to find evidence that supports it. There is none. The alleged “PUD easement” was never admitted into evidence at trial. (CP 78; Proposed Exhibits 67, 68). There was no testimony whatsoever that the “PUD easement” is where the Thomas family built their road, or that otherwise identifies where this alleged easement is located. There is likewise no evidence or testimony concerning a PUD “pole line” along the road. (RP 144, 146, 159-160)<sup>2</sup> For this reason, the trial court did not enter any findings of fact or conclusions of law that even mention a PUD easement or pole line. (CP 20-29) Simply put, there is nothing in the trial court record to support that the road the Thomas family built was on an existing PUD easement. This false narrative must be rejected.

Additionally, the inference the Thomsons urge the Court to make from the existence of the alleged PUD easement is that Mr. Keck would have “known” the Road was simply an easement, and not something the Thomas family built, and therefore the Road’s existence cannot constitute

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<sup>2</sup> Barry Thomas specifically testified that he had never seen a pole line along the road, but that there was a single pole near the road, but outside the disputed area. The pole line he had seen was on farm property, not within the Disputed Triangle Area. (RP 159-160)

notice of an adverse possession claim. This is pure speculation. There is absolutely no evidence in the record to support such an inference. Mr. Keck provided a declaration to the Thomsons, which was admitted into evidence as Exhibits 17 and 18. He offered no testimony at all concerning an alleged PUD easement. The Thomsons also failed to call Mr. Keck as a witness at trial. Thus, the “inference” that Mr. Keck should have somehow known the road was simply the PUD easement is pure supposition. As no facts support such an inference, it must be rejected.

Additionally, the Road itself is an improvement in the Disputed Property, sufficient to put a true owner on notice that another may be claiming a right in that property. The evidence and testimony established that the Road was built by the Thomas family and was made of gravel. The Road provided access from one portion of the Thomas family farm to another, but it provided no access to the Rayonier property. Thus, when Rayonier’s employee conducted a survey in 1981, he would have crossed the Road (up to four times) while blazing the line. He would have seen that the Road led directly to the Thomas family farm. He also would have recognized that the Road did not service the Rayonier property. This undisputed testimony is more than sufficient to support the trial court’s determination that the Road, an improvement, was sufficient to trigger notice of a claim of ownership in 1981.

Secondly, the Thomsons take issue with the trial court's conclusion that a single improvement (*i.e.*, the Road) was sufficient to impart notice. They rely on the *Bryant v. Palmer Coking Coal*, 86 Wn. App. 204, 213, 936 P.2d 1163 (1997) decision, in which the Court found that the "construction and use of a road" on undeveloped land was sufficient to support adverse possession. In *Bryant*, the adverse possessor not only built a road, but also made some clearings and parked used vehicles in the clearings on the undeveloped land.<sup>3</sup> *Id.* at 214. The Thomsons argue that because there was more evidence of use in *Bryant* than constructing a road, then the mere act of building a road by itself is not sufficient.

Even accepting that the quantum of evidence of use is greater in *Bryant*, as the Thomsons allege, the Thomsons fail to cite any authority that the construction and use of the Road itself is not sufficient to impart notice. The purpose behind the requirement of "open and notorious use"

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<sup>3</sup> The *Bryant* decision notes that the trial court found evidence that Bryant "cut a road, cleared openings, built a structure, cut wood, parked 50 to 100 vehicles, kept a horse and guard dog, and built a 7,000-gallon diesel fuel tank." The Thomsons rely on this description as the "use" the court considered. However, as the decision later notes, "The trial court did not distinguish between activities that took place in the immediate vicinity of the airstrip, which is the eastern portion of the parcel, and those that occurred in the forested, undeveloped area to the west." In relation to the latter area, the *Bryant* court seemed to accept Palmer's contention that Bryant merely "cleared some dirt roads, some larger clearings[,] and parked used vehicles in the clearings" in the undeveloped area. *Id.*

is to give the true owner an opportunity to object to the possessor's use. Thus, the true owner must actually know of the use, or the use must be such that any reasonable person would assume the possessor was the true owner. Here, Rayonier actually knew of the Thomas family's use of the area because its surveyor walked along the Road that was built by the Thomas family that bisected the Disputed Triangle Area. With such notice, Rayonier had the opportunity to object to the Thomas family's use. Thus, the purpose of the open and notorious requirement has been fulfilled, even though the only improvement was the Road itself.

Moreover, *Bryant* is distinguishable in one significant respect: there was no evidence that the true owner visited the property and observed the adverse possessor's use. Thus, the court considered, in the absence of actual notice, whether the possessor's use was sufficient to lead a reasonable person to believe that the possessor owned it. In other words, the court considered whether the use was sufficient to impart constructive notice. Here, no such analysis is required. The true owner, Rayonier, visited the property through its employee, Mr. Keck, in 1981 and would have seen that the Thomas family built the Road across the Disputed Triangle Area. Such improvements put Rayonier on actual notice of the Thomas family's use of the disputed areas, which started the accrual of the Thomas family's adverse possession claim.

Similarly, the Thomsons rely on *Murray v. Bosquet*, 154 Wash. 42, 48, 280 P. 935 (1929) to argue that the use of the Road was not substantial enough possession to provide even constructive notice. The *Murray* case is easily distinguishable on the same basis. There, the true owner was an absentee owner of “wild,” “mountainous,” and “very sparsely settled” land. Such facts are arguably similar to the facts here. However, a critical difference is that, unlike the facts here, the true owner in *Murray* did not inspect the property and actually see the possessor’s use. Thus, in the absence of evidence that the true owner observed the adverse use, the Court was asked to decide what use was sufficient to impart constructive notice. Here, the Court need not decide that issue because Rayonier had actual notice of R&H’s use, since it inspected the property in 1981 and would have seen the Road.

In sum, the trial court correctly concluded that Rayonier was put on notice of R&H’s claim, such that the use was open and notorious, when it saw the Road that R&H had constructed across the Disputed Triangle Area. The Road itself was legally sufficient to impart notice. Therefore, the trial court’s conclusion should be affirmed.

**C. R&H's Possession of the Disputed Farm Area and Disputed Triangle Area was Hostile; Presumption of Permissive Use Does Not Apply in Adverse Possession Cases.**

The only evidence in the record concerning the hostile use of R&H was through the testimony of Barry Thomas. He testified that the Thomas family never asked for, nor received, permission to use the Disputed Triangle or Disputed Farm Areas. Such testimony is sufficient to support the trial court's findings and conclusions that their use was hostile.

To overcome this undisputed evidence, the Thomsons attempt to import the presumption applied in prescriptive easement cases to this adverse possession case. Yet, R&H asserted a claim for adverse possession; there is no prescriptive easement claim. While the elements of an adverse possession claim are the same as those of a prescriptive easement claim,<sup>4</sup> the claims are treated differently by the courts. The differing treatment is based upon the divergent public policies served by each doctrine. The public policy behind adverse possession is:

that title to land should not long be in doubt, that society will benefit from someone's making use of land the owner leaves idle, and that third persons who come to regard the occupant as owner may be protected.

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<sup>4</sup> *Workman v. Klinkenberg*, 430 P.3d 716, 6 2018 WL 6303705.

*ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6, 8 (1989). In other words, “[a]dverse possession promotes the maximum use of the land, encourages the rejection of stale claims to land, and, most importantly, quiets title in land.” *Kunkel v. Fisher*, 106 Wn. App. 599, 603, 23 P.3d 1128, 1130 (2001).

In contrast, the public policy behind prescriptive easements is:

The law should, and does encourage acts of neighborly courtesy; a landowner who quietly acquiesces in the use of a path, or road, across his uncultivated land, resulting in no injury to him, but in great convenience to his neighbor, ought not to be held to have thereby lost his rights. It is only when the use of the path or road is clearly adverse to the owner of the land, and not an enjoyment of neighborly courtesy, that the landowner is called upon ‘to go to law’ to protect his rights.

*Gamboa v. Clark*, 183 Wn.2d 38, 48, 348 P.3d 1214, 1219 (2015). In keeping with these policy considerations, Washington courts hold that “prescriptive rights are not favored in the law,” whereas adverse possession is not disfavored. *Roediger v. Cullen*, 26 Wn.2d 690, 706, 175 P.2d 669, 678 (1946) (prescriptive easement); *Gamboa v. Clark*, 183 Wn.2d 38, 43, 348 P.3d 1214, 1217 (2015) (prescriptive easement); *Kunkel v. Fisher*, 106 Wn. App. 599, 603, 23 P.3d 1128, 1131 (2001) (adverse possession).

As the elements of the claims are the same, the only way for the courts to effectuate the differing public policies and favor adverse possession claims while disfavoring prescriptive easement claims is through the application of presumptions to shift the burden of proof. “The differences in the historical origins and rationales behind prescriptive easement and adverse possession have resulted in a single but important difference in how they are applied.” *Kunkel v. Fisher*, 106 Wn. App. 599, 603, 23 P.3d 1128, 1131 (2001). That single difference is that, “in a claim for a prescriptive easement there is a presumption that the servient property was used with the permission of, and in subordination to, the title of the true owner.” *Kunkel v. Fisher*, 106 Wn. App. 599, 603, 23 P.3d 1128, 1131 (2001). “This rule springs from the modern tendency to restrict the right of prescriptive use to prevent mere neighborly acts from resulting in deprivation of property.” *Granite Beach Holdings, LLC v. State ex rel. Dep't of Nat. Res.*, 103 Wn. App. 186, 200, 11 P.3d 847, 855 (2000). In contrast, there is a presumption of possession in the holder of legal title. *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6, 8 (1989); *Herrin v. O'Hern*, 168 Wn. App. 305, 310, 275 P.3d 1231, 1234 (2012) (“courts will not permit the ‘theft’ of property by adverse possession unless the owner had notice and an opportunity to assert his or her right. Therefore, there is no presumption

in favor of the adverse holder because possession is presumed to be subordinate to the true owner's title.”).

While there are numerous cases analyzing the presumption, they are all in the context of prescriptive easements, and the Thomsons cite no case, and R&H is aware of none, in which this presumption is applied in adverse possession cases. *Teel v. Stading*, 155 Wn. App. 390, 395–96, 228 P.3d 1293, 1296 (2010) (adverse possession claim, no presumption applied);<sup>5</sup> *Workman v. Klinkenberg*, 77105-1-I, 2018 WL 6303705, at \*4 (Wash. Ct. App. Dec. 3, 2018) (holding that prescriptive easement claimants failed to present evidence to rebut the presumption of permissive use as required by *Gamboa*);<sup>6</sup> *Gamboa v. Clark*, 183 Wn.2d 38, 43, 348 P.3d 1214, 1217 (2015) (holding that an initial presumption of permissive use is applied to enclosed or developed land cases in which there is a reasonable inference of neighborly sufferance or acquiescence);<sup>7</sup> *Nw. Cities Gas Co. v. W. Fuel Co.*, 13 Wn.2d 75, 123 P.2d 771 (1942) (described by the *Gamboa* Court as the “seminal case on prescriptive easements”); *Sharp v. Kieszling*, 35 Wn.2d 620, 622, 214 P.2d 163, 164 (1950) (prescriptive easement case);<sup>8</sup> *Granite Beach Holdings, LLC v.*

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<sup>5</sup> Thomsons’ Brief at 17.

<sup>6</sup> Thomsons’ Brief at 17.

<sup>7</sup> Thomsons’ Brief at 17-18.

<sup>8</sup> Thomsons’ Brief at 18.

*State ex rel. Dep't of Nat. Res.*, 103 Wn. App. 186, 200, 11 P.3d 847, 855 (2000) (prescriptive easement claim).<sup>9</sup>

In sum, there is no authority for applying presumptions of permissive use in the prescriptive easement context to these adverse possession claims. Without these presumptions, the only evidence in the record is the undisputed testimony of Barry Thomas that the Thomas family never asked for, nor received, permission to use the Disputed Triangle or Disputed Farm Areas. Such testimony is sufficient to support the trial court's findings and conclusions that their use was hostile.

**D. RCW 7.28.085 Does Not Apply**

The trial court correctly concluded that RCW 7.28.085 does not apply. By its clear terms, this section only applies to adverse possession claims that have not ripened before its effective date, June 11, 1998. RCW 7.28.085(4) provides: "This section shall not apply to any adverse claimant who, before June 11, 1998, acquired title to the lands in question by adverse possession under the law then in effect." However, the trial court determined that the 10-year adverse possession period began to run in 1981 when Rayonier surveyed the property. The trial court found that such use was continuous and interrupted. Therefore, R&H's claim vested in 1991, 10 years later, well before the effective date of RCW 7.28.085.

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<sup>9</sup> Thomsons' Brief at 18.

**E. The Trial Court Properly Awarded Attorneys' Fees**

The Thomsons ask that the Court “reverse the award of attorneys’ fees and costs” and remand for a fee award to the Thomsons as the prevailing parties under RCW 7.28.083. For the reasons stated above, the Court should affirm the trial court’s rulings, and thus affirm the award of fees to R&H.

Notably, the Thomsons assert no error by the trial court in awarding fees and costs under the statute, apart from disputing that R&H was not the “prevailing” party. For instance, the Thomsons do not challenge the amount of fees or costs awarded or the trial court’s conclusion that an award of fees and costs was “equitable and just.” As the Thomsons did not challenge these rulings, they are verities on appeal. Thus, the only issue raised on appeal is whether R&H is the prevailing party.

**F. Request for Fees and Costs**

Pursuant to RCW 7.28.083 and RAP 18.1, R&H requests an award of fees and costs incurred in defending this appeal. The trial court entered specific findings and conclusion that an award of fees to R&H was “just and equitable” pursuant to RCW 7.28.083. As noted above, the Thomsons do not challenge those findings and that conclusion; they merely allege that R&H was not the “prevailing party.” Thus, should the Court affirm

the trial court's decision, R&H will have prevailed on this appeal, and should be entitled to fees on appeal consistent with the trial court's prior order. (CP 33-37)

## V. CONCLUSION

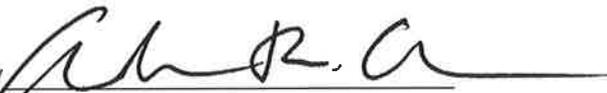
The trial court correctly concluded that R&H's possession of the Disputed Triangle Area was open and notorious. The trial court's findings were supported by substantial evidence demonstrating that Rayonier's employee personally inspected the property and would have walked across and seen the Road in 1981. And, the trial court's conclusions were correct as a matter of law, as Rayonier had actual notice that R&H was using the Disputed Triangle Area. Furthermore, the undisputed testimony at trial was that R&H's use of the Disputed Triangle Area and Disputed Farm Area was hostile, without permission. As a matter of law, the presumptions applicable to prescriptive easement cases do not apply in adverse possession cases. Thus, the trial court correctly found that no permission was granted, and concluded that R&H satisfied the hostility element. Moreover, as the trial court found that Rayonier had actual notice of R&H's use of the property in 1981, such notice started the 10-year limitation period for an adverse possession claim. Thus, the trial court correctly ruled that R&H's claim vested before the effective date of RCW 7.28.085. Therefore, the Court should affirm the trial court's

findings of fact and conclusion of law, affirm the trial court's award of attorneys' fees and costs, and award R&H its fees and costs on appeal.

Respectfully submitted this 6th day of February, 2019.

SOCIUS LAW GROUP, PLLC

By



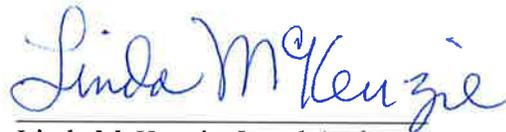
Adam R. Asher, WSBA #35517  
Attorneys for R and H Family, LLC and  
Barry Thomas, Respondents

**VI. CERTIFICATE OF SERVICE**

I certify that on the 6th day of February, 2019, I caused a true and correct copy of this Brief of Respondents to be served on the following in the manner indicated below:

***Counsel for Appellants:***  
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Legal Messenger  
Hand Delivery



Linda McKenzie, Legal Assistant

**SOCIUS LAW GROUP, PLLC**

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