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Court of Appeals  
Division II  
State of Washington  
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**No. 51995-0**

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

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**DAN THOMSON and TIM THOMSON**

Appellants,

v.

R and H Family, LLC.

Respondent.

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**REPLY BRIEF OF APPELLANTS**

**DAN THOMSON and TIM THOMSON**

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Kenneth J. Wolfley, WSBA 49131  
Wolfley Law Office, P.S.  
Attorneys for Appellants  
DAN THOMSON and TIM THOMSON  
713 East First Street  
Port Angeles, WA 98362  
360-457-2794

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## II. ARGUMENT

### A. THE STANDARD OF REVIEW IS SUBSTANTIAL EVIDENCE ON FINDINGS AND *DE NOVO* ON THE CONCLUSION OF ADVERSE POSSESSION.

The Parties agree that the standard of review is *de novo*. BA 12; BR 9.

### B. THE TRIAL COURT ERRED IN PERMITTING ADVERSE POSSESSION OF THE DISPUTED TRIANGLE AREA AND DISPUTED FARM AREA.

The Thomson's argued that the trial court erred in concluding that the statute of limitations for adverse possession began to accrue as to the Disputed Triangle Area and Disputed Farm Area in 1981, where R&H's use was neither open and notorious nor hostile as a matter of law. BA 13. R&H seems to argue that a road in a forest somehow provides actual notice that an entire forest area is being adversely claimed. R&H is incorrect.

1. Rayonier had no actual notice of R&H's alleged adverse possession of the Disputed Triangle.

R&H contends that its use of the Disputed Triangle Area was "Open and Notorious" because the road itself is an improvement in the Disputed Triangle Area, sufficient to put Rayonier on "actual notice" that someone may be claiming adverse possession of the entire area south of the road because a Rayonier Employee surveyed the property in 1981. BR 15.

R&H does not suggest that the road itself is an improvement in the Disputed Triangle Area sufficient to put a true owner on constructive notice. R&H

believes that Rayonier had “actual notice” because Rayonier’s surveyor would have seen the road found on the PUD’s easement in 1981. Thus, any argument concerning constructive notice is somehow unnecessary. That is incorrect because a road in a forest gives no one notice that any particular additional portion of the forest is being claimed by anyone.

R&H provides no authority supporting its claim that a gravel road provides sufficient notice of an adverse possession claim of an area far larger than the road. There are no cases supporting that position. Where the alleged adverse use is only a road, even where the road was constructed by the claimant, Washington Court of Appeals Division II has only heard claims of prescriptive easements.<sup>1</sup> R&H concedes that it has no claim of prescriptive easement in the Disputed Triangle Area. BR 19.

R&H contends the Thomson’s failed to cite authority that the construction and use of a road is insufficient to provide actual notice of

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<sup>1</sup> (*Zonnebloem, LLC v. Blue Bay Holdings, LLC*, 401 P.3d 468, 473 (2017) When the alleged easement involves a road, who created the road and who used it are important factors in determining whether we can infer neighborly acquiescence. *Citing Cuillier v. Coffin*, 57 Wash.2d 624, 627, 358 P.2d 958 (1961). When the landowner constructs and uses the road and the claimant simply shares the road, there is an inference of permissive use. *Id.* Such an inference is particularly appropriate when the claimant's use does not interfere with the landowner's use. *Miller v. Jarman*, 2 Wash.App. 994, 998, 471 P.2d 704 (1970). But evidence that the claimant constructed the road for his or her exclusive use is more persuasive of adverse use. *Cuillier*, 57 Wash.2d at 627, 358 P.2d 958.)

adverse possession of an entire parcel. There are no cases to cite because adverse possession cases generally require adverse use *up to* a disputed boundary line. 17 WASH. PRAC., Real Estate actual possession—Principles, § 8.9 (2d ed.). In the context of adverse possession, a road situated along a PUD easement does not itself provide any notice to a true owner that their boundary line far distant from the road could permanently move if the true owner fails to end the road use or “reclaim” the rest of the real estate.

The case most on point is *Bryant v. Palmer Coking Coal*, 86 Wn. App. 204, 213, 36 P.2d 1163 (1997). R&H’s analysis of *Bryant* is erroneous. In *Bryant*, the trial court relied on the adverse use of the whole disputed property, not the road alone. The analysis about the road was relevant only to whether a road is a “well-defined boundary” to the disputed property adversely acquired. *Id.* at 212. The trial court found that,

Bryant's claim to Parcel 2A was supported by 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 there. The trial court did not distinguish between activities that took place in the immediate vicinity of the airstrip, which is in the eastern portion of the parcel, and those that occurred in the forested, undeveloped area to the west.

*Id.* at 213-14.

The *Bryant* court noted that all of the cases cited to show Bryant’s use as insufficient to establish adverse possession, involved “lesser uses”

than those found in *Bryant*. R&H concedes that its use was “lesser” than the *Bryant* use. BR 16.

R&H argues that the Thomson’s want the Court to infer that the Rayonier surveyor “knew” he was on a PUD easement and not on the Thomas family’s road, and that the road cannot constitute notice of adverse possession. That’s not the argument. Rather, regardless of what the Surveyor knew or saw, Rayonier knew of the PUD easement in the Disputed Triangle Area. RP 60. The surveyor’s knowledge of a gravel road is imputed to Rayonier, but does not equate to knowledge that the Thomas family graveled that road (as opposed to the PUD, which owns the easement). In any event, a road provides no notice that an entire adjacent parcel is being claimed. Notwithstanding R&H’s efforts to minimize the PUD easement, the record establishes that the road is on the PUD easement.<sup>2</sup>

In sum, R&H concedes that the Thomas family neither asked for, nor received, permission to use the Disputed Triangle or the Disputed Farm Area. A road is insufficient to claim an entire area south of the road. The

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<sup>2</sup> When asked if Rayonier had any maps showing the PUD easement runs in the triangle area, Rayonier testified it did not have maps showing where the easement was located, but had a PUD easement document indicating it showed the triangle area as the location. (RP 60) Barry Thomas testified The PUD pole line and, later, underground cable, were along the resurfaced road. (RP 145 & 16) He correctly assumed an easement to install and maintain powerlines, whether overhead or buried. (RP144)

Disputed Triangle Area contains no improvements, nor even storage for personal property. (RP 156-58) The Disputed Triangle Area has been described as a swamp, an estuary, a wetland, and a place for duck boxes. (RP 9-10, 146-47, 159, 177) This court should reverse the trial court's conclusion that R&H's claim to the Disputed Triangle was open and notorious.

**2. Presumptions of permissive use apply equally to both prescriptive easement and adverse possession cases.**

R&H concedes it has no claim to a prescriptive easement in the Disputed Triangle or the road. BR 19. R&H instead argues that presumptions surrounding permissive use apply only to prescription easements, not to adverse possession, because public policy differs between the two doctrines. BR 19. R&H is incorrect.

In Washington, a presumption of permissive use arises in both prescriptive easement and adverse possession cases, where the facts surrounding the use support a conclusion that the presumption should apply. In *Miller v. Anderson*, the court determined that the claimant received implied permission to use a disputed area from the initial occupancy and, therefore, was required to prove that the permission terminated. *Miller*, 91 Wash.App 822, 964 P.2d 365 (1998). The court reaffirmed that permission terminates when: (1) the claimant asserted a hostile right; or (2) the servient

estate changed hands through death or alienation. *Id.* at 864. R&H concedes no permission was requested or received, from Rayonier.

Our Supreme Court articulated three types of cases in which an adverse use is presumed permissive in *Gamboia v. Clark*: (1) cases involving unenclosed land; (2) cases involving enclosed or developed land, but it is reasonable to infer that the use was permitted by neighborly accommodation; and (3) cases where the true owner created or maintained a road and his or her neighbor used the road in a noninterfering manner. 183 Wn.2d at 44. Moreover, where the property in question is “vacant, open, unenclosed, and unimproved,” use by an individual other than the landowner is presumed to be permissive. *Sharp v. Kieszling*, 35 Wn.2d 620, 623, 214 P.2d 163 (1950); *Granite Beach Holdings, LLC v. Dep't of Natural Res.*, 103 Wn. App. 186, 200, 11 P.3d 847 (2000).

Whether a case involves adverse possession or prescriptive easements, the same body of law is used to determine whether an adverse use is presumed permissive or not. The presumptions of permissive use are not to be confused with the overall disfavor of prescriptive easements in the law, and lack of disfavor of adverse possession. If the facts of the case show an adverse use that falls within one of the three criteria for a presumption of permissive use, then the presumption applies from the start.

It is then incumbent on the adverse claimant to prove that permission terminated because (1) the claimant asserted a hostile right; or (2) the servient estate changed hands through death or alienation. *Gamboa v. Clark*, 183 Wn.2d 38, 53, 348 P.3d 1214 (2015); *Miller, supra* at 91 Wash.App. 864.

*a) The Disputed Farm Area.*

Here, R&H's barbed-wire fence in the Disputed Farm Area left the property line and followed the tree line that crossed over into Rayonier's property. (RP 25, 116) This section of fence existed prior to the Thomas family's acquisition of the properties in the 1960s. (RP 111) In 1981, this fence existed when Rayonier surveyed the boundary line. (RP 116) The fence did not enclose the cattle area. (RP 116) The fence stopped short of the Disputed Triangle and returned to open land. (RP 116)

Despite the barbed-wire fence's existence in the Disputed Farm Area in 1981, the cattle fence is still presumed permissive because there is a reasonable inference of neighborly accommodation. *Gamboa v. Clark*, 183 Wn.2d 38, 51-52, 348 P.3d 1214 (2015). Rayonier is a timber company that, in 1981, owned approximately half-a-million acres on the Olympic Peninsula and Western Washington. (RP 50) The disputed farm area is reflected in Rayonier's records as a "wildlife conservation area"; therefore, "no cutting" was permitted. (RP 55-56; Ex 15) Rayonier has a policy that if

an encroachment does not adversely affect its timber, it will permit the encroachment to continue. (RP 60) This policy appears to be both neighborly and in line with Washington State case law involving forestlands.

This reasonable inference shows that if Rayonier saw the Disputed Farm Area cattle fence outlining the Disputed Farm Area, it acquiesced to the fence because it did not affect the timber harvest or land usable for Rayonier's purposes. The burden was then on R&H to put forth evidence that it made a positive assertion of possession adverse and hostile to the rights of the true owner. *Id.* R&H failed to do so.

Therefore, R&H failed to overcome the presumption of permissive use in the disputed farm area and could not have acquired title by adverse possession. This Court should reverse.

***b) The Disputed Triangle Area.***

In 1981, Rayonier's property was vacant, open, unenclosed, and unimproved. (RP 23, 52-53, 116, Ex 21) Therefore, R&H's use of the road on the PUD easement is presumed permissive. R&H presented no evidence that it asserted an adverse use or that Rayonier recognized by some act or admission that R&H had a such a claim. R&H failed to overcome the presumption of permissive use.

At all times, the Thomsons' property has been commercial timber forestland. In 1981, after Rayonier surveyed its property and set concrete monuments at the corners, 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. (RP 115-16) This cattle fence enclosed a wildlife conservation area, where no one may harvest timber. (RP 55-56) The only improvements on Rayonier's property were logging roads and the pole-line PUD easement in the Disputed Triangle. (RP Ex 27, 40) Rayonier could not use the timber in the Disputed Triangle, so R&H's cattle fence and operations did not interfere with Rayonier's use.

In sum, R&H's fence in the Disputed Farm Area and road use are presumed permissive because there is a reasonable inference of a neighborly sufferance or acquiescence. R&H made no assertion that their use was adverse or that Rayonier indicated by some act or admission that R&H's use was adverse. R&H thus failed to overcome the presumption of permissive use and could not have acquired title by adverse possession. This Court should reverse on this independently sufficient basis.

**C. THE TRIAL COURT ERRED IN CONCLUDING THAT RCW 7.28.085 DOES NOT APPLY.**

The Thomsons argued that the trial court also erred in concluding that RCW 7.28.085 does not apply, since Rayonier could not have had

actual or constructive notice of R&H's adverse possession claim before June 11, 1988. BA 22. The statute applies to adverse possession claims that have not transferred title prior to June 11, 1998. This is that claim.

R&H argues that its claim began to ripen in 1981, when Rayonier surveyed its property and, therefore, title vest ended in 1991, before the enactment on June 11, 1998. But title could not have passed to R&H prior to June 11, 1998, for the simple reason that R&H's possession could not have been deemed open and notorious until 1993, when Rayonier returned to the property for logging. As discussed in the opening brief and *supra*, Rayonier did not have actual or constructive notice of the fence on the easement prior to June 11, 1988, which was the last day the ten-year statute of limitations could accrue to avoid application of the statute, even if all of the other elements of adverse possessions had been established.

R&H was thus obligated to present clear and convincing evidence either that the fence and the graveled PUD easement road was a "substantial improvement" or that it acted in reliance upon a location stake or boundary markers set by a registered land surveyor. It presented no such evidence. The statute therefore applies.

**D. THE THOMSON'S ARE ENTITLED TO ATTORNEY FEES.**

Under RCW 7.28.083 and RAP 18.1, the Thomson's asked this Court to reverse the award of attorney fees and costs ordered by the trial court, to remand for a fee award to the Thomson's, and to award them fees on appeal. BA 24. Fees may be awarded as part of the costs of litigation when there is a contract, statute, or recognized ground in equity for awarding such fees. equity. *Buck Mountain Owner's Ass'n v. Prestwich*, 174 Wn. App. 702, 703, 308 P.3d 644 (2013). Here, the Thomson's are entitled to attorney's fees as the prevailing parties under RCW 7.28.083, having successfully defended a claim of adverse possession.

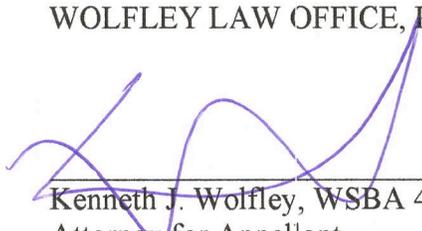
**E. CONCLUSION**

The Court should reverse, award appellate fees to the Thomson's, and remand for a fee and cost award in the trial court.

DATED this 2 day of April, 2019.

Respectfully submitted,

WOLFLEY LAW OFFICE, P.S.



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Kenneth J. Wolfley, WSBA 49131  
Attorney for Appellant

**WOLFLEY LAW OFFICE, P.S.**

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COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

TIM THOMSON, an unmarried man,  
and DAN THOMSON, an unmarried man,  
  
Plaintiffs,

vs.

R AND H FAMILY, LLC. A Washington  
State Limited Liability Company,  
  
Defendant.

BARRY THOMAS,  
  
Third-Party Plaintiff,

vs.

TIM THOMSON, an unmarried man,  
and DAN THOMSON, an unmarried man,  
  
Third-Party Defendants.

**NO. 51995-0-II**

**DECLARATION OF  
MAILING**

KM GERDTS declares under penalty of perjury of the laws of the State of Washington, that on this day she sent Reply Brief of Appellants Dan Thomson and Tim Thomson to Clerk of the Court for filing, with copies to Defendant's attorney, via portal, email and 1<sup>st</sup> Class Mail to:

Derek Byrne **Portal**  
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Division Two – 950 Broadway, Ste 300  
Tacoma WA 98402-4454

Adam R. Asher  
[aasher@sociuslaw.com](mailto:aasher@sociuslaw.com)  
Socius Law Group  
601 Union St, Ste 4956  
Seattle WA 98101

DECLARATION OF MAILING

DATED at Port Angeles, Washington, this 3 day April, 2019.



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Legal Secretary to Kenneth J. Wolfley,  
Attorney for Plaintiff-Third-Party Defendants

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**Filing on Behalf of:** Kenneth Jensen Wolfley - Email: Kenneth@wolfleylawoffice.com (Alternate Email: )

Address:  
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PORT ANGELES, WA, 98362  
Phone: (360) 457-2794

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