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Court of Appeals  
DIVISION II  
STATE OF WASHINGTON

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THOMAS G. BOWDISH and CHARLENE P. BOWDISH LIVING TRUST,

APPELLANTS,

v.

KAREN K. DECARUFEL, as Trustee of the R&J FAMILY TRUST; and

ROGER RICKER and JEANNETTE RICKER, husband and wife,

RESPONDENTS.

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**APPELLANTS THOMAS G. BOWDISH and CHARLENE P. BOWDISH  
LIVING TRUST'S OPENING BRIEF**

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## I. ASSIGNMENTS OF ERROR

A. The trial court erred by concluding that the Rickers had an easement over the Bowdishes, and that the Bowdishes did not have an easement over the Rickers.

1. The trial court incorrectly concluded that the Rickers had an access and utilities easement over the Bowdishes, by virtue of the Replat of Seamount Estates. EX 2, 3, 23. CP 35, 44, 35.
2. The trial court incorrectly concluded that the Bowdishes did not have a utilities easement over the Ricker property by virtue of the covenants of Seamount Estates. EX 7, 24. CP 35, 44, 45.
3. The trial court erred in granting a prescriptive easement for access across the Bowdish driveway. CP 35, 44, 45.
4. The trial court erred in granting, sua sponte, an implied access easement over the Bowdish property. CP 35, 44, 45.

B. The trial court erred in holding that the Rickers had established title to a portion of the Bowdish property.

1. By adverse possession. CP 35, 44, 45.
2. By estoppel. CP 35, 44, 45.

C. The trial court erred in granting attorney's fees to the Defendants under RCW 4.24.630. CP 35, 44, 45.

D. The trial court erred in not quieting title in the Bowdishes property. CP 35, 44, 45.

E. The trial court erred in not granting attorneys fees to the Bowdishes pursuant to RCW 4.24.630. CP 1, 35, 44, 45.

## **II. STATEMENT OF THE CASE**

This matter involves issues relating to adjoining parcels of real property in Division 4 of Seamount Estate near Brinnon in Jefferson County, Washington. EX 2. Plaintiffs Bowdish own Lots 9, 10, and 11 thereof, having bought Lots 9 and 10 in the 1976-1977 time period. EX 26, 27, 28, 29. They bought Lot 11 from the Pettit family in 1985, who, at that time, also owned Lot 12 next door. EX 31. RP 71. The R&J Family Trust acquired the adjoining Lot 12 in 2003. EX 34, 35. Thereafter, Lot 12 was transferred from that trust to the Rickers. CP 20, 21.

The Plaintiffs' property is now in a family trust. EX 32.

For convenience, the properties are referenced by the party's names, Bowdish and Ricker, without reference to the trusts except where that is germane to the discussion.

After purchasing, the Bowdishes built their home and have resided there for many years. Pettit has used a gravel driveway on Lot 11 which was an old logging road, which the Bowdishes paved. RP 70. Lot 12 had a small mobile home on it. EX 49, 16A, 16B. RP 66, 73-74. The paved Bowdish driveway was, and still is, somewhat adjacent to Lot 12, and the Bowdishes allowed the Pettit family to use it. RP 63, 64, 70, 71, 74. The Pettits resided out of the area and would be at Lot 12 once a week. RP 73. The entry from Lot 12 onto the Bowdish driveway was ten to twelve feet wide and was a simple gravel access. EX 46, 49. RP 72.

In 1995, the Pettits granted a recorded easement for ingress and egress, along the southwest portion of Lot 12, to the Bowdishes at no cost. EX 33. It was actually Pettit's idea. RP 63. This easement was twelve feet in width across another existing roadway on Lot 12 (not the above Bowdish driveway used by the Rickers) which started at the southwest corner of Lot 12 and ran back to the northwest area of Bowdishes' Lot 11, which, for years, has been maintained, gated and locked by the Bowdishes. EX 33. RP 72.

In addition to the foregoing, the plan of development created two easements along common property lines. EX 23, 24.

The covenants applicable to the properties within Seamount Estates provide for a ten foot easement for utility purposes, five feet on either side of the common lines. EX 24. The covenants also provide that no building or structure shall be built closer than five feet from any common line. EX 24.

The replat of Seamount Estates (hereafter simply referred to as the "plat") contains a similar easement, but is only five feet in total width. EX 23.

In 1977, the developer transferred its remaining interests to the Seamount Estates Community Club. EX 40. The two platted easements were included within that grant. EX 40. The covenant easement was not. EX 40.

During the course of this matter, prior to suit being filed, discussions were had about the Bowdishes' intended use of the ten foot covenant easement area between the Bowdishes' counsel and the Defendants' then counsel, Lincoln Miller. EX 5, 37, 38, 39. No assertion was ever made, during this period of over a year, that the lot owners were not the intended beneficiaries of the ten foot covenant easement. EX 5, 37, 38, 39.

In fact, through counsel, the Defendants were given notice that there was going to be work done in the easement. EX 37, 38, 39. There was no objection. EX 5, 37, 38, 39. During the course of this, dirt was being moved around, and the Bowdishes' adult children were moving some concrete pavers Mr. Ricker had placed within the easement area for a small retaining well. EX 14A, 14B, 14C. They did this so the pavers would not be damaged. Mr. Ricker came out and assaulted the Bowdishes' daughter. RP 273, 274, 285. At that point, they stopped to avoid further issues. RP 274, 286.

It was not until this lawsuit was filed that the Defendants claimed the Community Club was claiming it was the sole beneficiary of the covenant easement. CP 4. RP 229-261. Mr. Ricker was, at that time, illegally, a board member, since the Ricker property was in trust and he was not the trustee. EX 34, 94. To be a board member, one had to be an owner. EX 25.

Starting in 2007 and ending in 2010, the Defendants removed the mobile home from Lot 12 and built a new home on their property. RP 73-75. The building permit for the home was issued on September 11, 2007. EX 44. (This exhibit was inadvertently left out of the record, which is being supplemented). Later landscaping was done, including

placement of a patio and a concrete paver-type wall, and other improvements onto the Bowdish property. EX 48, 49, 50, 54, 55, 56, 91. RP 42, 47, 74-76, 82-85, 87-111, 175-176, 185. The Defendants' driveway was also expanded to twenty-five feet in width. EX 54, 135, 17L, 17G. RP 75. One of the walls extended around to the side yard of Lot 12 and was placed about four and one-half feet from the common line inside the covenant easement. EX 3, 91, 92.

Bowdish was also putting in landscaping in the same area. RP 83-85. Earlier, Bowdishes had installed a three fence panels about four feet inside the line. RP 279. At some time after the original Holman survey, Ricker damaged the fence and Bowdish then removed this fence. RP 78, 180, 184.

The gate that the Bowdishes had installed on the southwest easement on Lot 12 extended a few feet onto the adjoining lot to the southwest. EX 20I, 71, 80, 91, 92. RP 32, 44.

Mr. Ricker took it upon himself to have the gate cut off a few feet, (Compare EX 20I, 71, 80 with 68, 76, 86. RP 476, 480-482.) removed the Bowdish lock and installed his own lock. EX 85. RP 126, 132, 133. In addition, Mr. Ricker caused rocks and gravel to be placed on the easement, narrowing the useable width. EX 68, 72, 73, 74 and compare

with 82. RP 103-137 for this and the following. He also placed steel fence posts which narrowed the usable width. EX 70, 75, 77, 78, 81. He placed a shed made of a plastic tarp and tubing into the easement. EX 67, 69, 76, 89. RP 24. Mr. Ricker also conducted some earth movement activities. EX 60, 61, 62, 65. RP 24, 112-118. In doing so, he pushed dirt onto the Bowdish property and obliterated one of the Bowdish survey monuments along the common line. EX 60, 61, 62, 65. RP 31, 112-118. Mr. Ricker was aware of the survey and the monumentation and proceeded in total disregard thereof.

Demands were made of Defendants to remove all encroachments on the Bowdish property and easements, and to discontinue the offending actions. EX 37, 38, 39. Some encroachments were removed. RP 110. A good many remain.

After months of attempts between attorneys to resolve these matters, a final demand was made and was not complied with. EX 39. This lawsuit followed. CP 1.

Two months prior to trial, Defendants constructed a fence along the northwesterly common line, knowing full well the easement claim of the Bowdishes and knowing it was the intention of the Bowdishes to place utilities along the common line. EX 39, 41, 87, 89.

### III. EASEMENT BY GRANT

Three easements are referenced in documents crafted by the developer of Seamount Estates No. 4. They are referred to as follows:

1. A single line across Lots 5-11 designated access and utilities easements on the face of the plat. EX 2, 3, 23.
2. Easement "for utilities installation and maintenance", 2 ½ feet along the internal lot lines on the face of the plat. EX 2, 3, 23.
3. Ten foot easement, five feet on either side of lot lines for water, pipes, storm sewers, and utilities referenced in the covenants of Seamount Estates No. 4. EX 7, 24.

None of these documents reference who or what properties hold the beneficial interest (the dominant estate) to these easements. EX 2, 3, 7, 23, 24.

In 1977, the developer conveyed all easements in the plat, only, to the Seamount Estates Community Club, thereby conveying the first and second easements above. EX 40. The Seamount Estates Community Club was aware of this action but has never sought to be a party. RP 229-264.

The Defendants', at trial, asserted a right to the first easement and asserted the Plaintiffs are not benefitted by the second and third. CP 4.

Defendants never asserted a right to the first easement in their pleadings (CP4), or at any time until the trial. In their pleadings, they only asked for a prescriptive easement over the Bowdish driveway. CP 4.

The Plaintiffs assert they are benefitted by the third easement and that the Defendants are not benefitted by the first and second. CP 1, 7, 27, 28, 29.

There appears to be no dispute regarding the second easement.

Without explanation, and without comparing and contrasting the derivation and history of these easements, the trial court agreed with the Defendants. CP 35, 44, 45. The decision of the trial court is facially inconsistent and is also inconsistent with the intent of the grantor that can be determined from the record.

Defendants attempted to support their position by providing testimony from the Seamount Estates Community Club as to what the club thought. RP 229-264, and EX 8, 9. This testimony is self-serving and came from an entity which allowed Roger Ricker to illegally be a

board member. EX 94. This testimony was objected to numerous times and overruled by the trial court. RP 229-264. Regardless, the testimony is not relevant as the intention of a grantor must relate to the time period of the transaction, not to later, subjective, interpretations. Newport Yacht Basin Ass'n of Cond. Owners v. Supreme NOV, Inc., 108 Wash. App. 56, 64, 277 P. 2d 18 (2012), Hirt v. Eutus, 37 Wash. 2d 418, 428, 224 P. 2d 620 (1950). No testimony was presented by Defendants relating to the time of the transaction.

The intention of the developer that the first two easements benefit the community and not individual lot owners is shown by the deed of conveyance to the association. EX 24, 40. The fact that the third easement was not conveyed is evidence it was intended to benefit individual lot owners. EX 40. This would also be consistent with the general nature of covenants which are designed to benefit individual lot owners. Tindolf v. Schoendelf Bros. Inc., 157 Wash. 605, 289 P 50 (1930).

It is inconsistent for the Defendants, the community club and the trial court to have determined that the first and second easements, both in the plat, and conveyed to the community club, had different

beneficiaries, when the record shows no distinction between how the two were created, treated, and transferred.

The nature and extent of the first easement is also unclear at best. What we know is the plat states “access and utilities easement” with a single dotted line to another line showing its purported location. EX 2, 3. The line from the easement language to the dotted line does not point to the area between that line and Cirque Drive. EX 2, 3, 23. The dotted line also does not point to the area between the dotted line and property lines to the north. EX 2, 3, 23. It does not say it benefits the Defendant’s lot 12. EX 2, 3, 23. The line from the easement language touches directly on the single dotted line, not on either side of it. EX 2, 3, 23. It takes off from Lot 5 and then bends northwest suggesting that, if necessary, the association could put in a road coming off Cirque Drive going northwest. EX 2, 3, 23.

Mr. Bowdish also indicates that Jefferson County did not approve the plated easement (RP 87), but could not find a record of it.

The court determined, without explanation, that the easement area was between the entire area between the line and Cirque Drive to the south. CP 35. There is no fact in the record to support that.

From the face of the plat, there is no indication of what property areas, if any, are burdened by the easement. EX 2, 3, 23.

Where an easement is unclear, the use to which the easement is put subsequent to its grant is evidence of the party's intent in establishing it. Hanson v. Lee, 3 Wash. App. 461, 476 P. 2d 550 (1970). The Defendants nor the Plaintiffs have never come across Lots 5-11 to access Lot 12. RP 87-88. The only use was for utility lines installed by the local PUD, which would be inconsistent with the easement being anything other than a community easement. RP 336, 337.

The Defendants asserted for the first time at trial that their use of the Plaintiffs' driveway is an exercise of that easement right. CP 4, 28. This argument fails for four reasons.

First, the deed to the association evidences the intent of the developer that the easement benefits the association not the Defendants. EX 40.

Second, the easement indicates that if it exists and is to be utilized, that should be done by starting at Lot 5 and coming across Lots 5 through 11, not directly from Cirque Drive, up Lot 11, to Lot 12. EX 2, 3, 23. Third, and most significantly, the driveway being utilized by Defendants was an old logging road that Pettit used, but then improved

and paved by Bowdishes. RP 70-73. It has always been the Plaintiffs' driveway since they bought Lot 11 and was built by them over an old logging road. RP 70. There was no evidence presented that the historical use of the Plaintiffs' driveway was with the intent to exercise any easement rights.

The testimony was undisputed that the use of the driveway was allowed as a neighborly courtesy between Bowdishes and the Defendants' predecessor, Pettit, with whom the Bowdishes maintained a family relationship, so much so that they granted the Bowdishes an unrelated easement over their southwesterly border without compensation. EX 33. RP 64, 268. Mr. Ricker admitted they had a good relationship with the Bowdishes until 2014. RP 482.

Fourth, the claim of the Defendant requires a belief that the developer created two utility easements, one five foot, and one ten foot, for its own benefit and subsequently the benefit of the community club. No one would logically do that.

Finis Brewer, a surveyor working for Rickers, provided a survey. EX 1. In testifying about the platted easement over Lots 5 through 11, his only testimony to support the idea this easement was south of the dotted line was his unsupported, bare bones, conclusion. RP 200.

His testimony (at RP 208-215) shows he was unfamiliar at the time of his testimony with the plat, he could not support his conclusions in any way, and he was unaware of the deed to the community club conveying the platted easements. EX 40. RP 214. He was unaware if the plat had been approved. RP 209.

The trial court made note of the fact that the Bowdish deed to Lot 11 referenced the plat easement. CP 35, at page 3. It might also be noted that all other deeds are silent. This is of no importance because easements benefit and burden properties regardless if they are mentioned in a deed. Heg v. Alldredge, 157 Wash. 22 154, 137 P. 3d 9 (2006).

However, in looking at the deed, while the language at the end of the "subject to" paragraph is not perfectly clear, it seems to suggest the platted access easement is to benefit the community club. EX 31. That may or may not be significant. The deed appears to have been created by the Jefferson Title Company. EX 31. The interpretation of a title company does not bind a court. However, the title company's interpretation is consistent with the Bowdishes perception that the platted easement over Lots 5 through 11 is for the benefit of the community club.

#### IV. PRESCRIPTIVE EASEMENT

The trial court held that the Defendants had established a prescriptive easement over the Bowdish property. CP 35, 44, 45. The Plaintiffs take issue with that.

This issue is controlled by Gamboia v. Clark, 183 Wash. 38, 348 P. 3d 1214 (2015). The facts in that case are indistinguishable from the present case. In that case a property owner constructed and used a driveway used to access their property. The adjoining landowner used it in a noninterfering way without objection for the prescriptive period. The court held no prescriptive easement was acquired.

That case held:

1. Prescriptive rights are not favored.
2. The burden of proof is on the claimant to prove use for ten years

that is:

- a. Open and notorious;
- b. Continuous and uninterrupted;
- c. Over a uniform route;
- d. Adverse to landowner; and
- e. With knowledge of the landowner.

The sole issue was whether the use was adverse, without the land owner's permission, express or implied.

The initial entry is presumed permissive in three scenarios:

1. The land is unenclosed land.
2. There is a reasonable inference the use was permitted by neighborly sufferance or acquiescence.
3. The landowner created or maintained the road and the neighbor used it in a noninterfering manner.

The presumption can be overcome if the use by the neighbor by some act that shows the neighbor used the way as a matter of right, thereby establishing adverse use. There must be a distinct and positive assertion of the right.

The case clearly states that the second criteria above is not dependent on the land being open and unoccupied and suggests the same as to the third criteria above.

Defendants presented no proof to overcome any of the above, particularly the second or third criteria. Interestingly, in Gamboa, the claimant would occasionally blade the road and graveled it once. There was no testimony the Rickers did any maintenance on the easement except for the work done in 2010. RP 75.

## V. IMPLIED EASEMENT

The Defendants never pled, nor briefed, a claim for an implied easement yet the court determined they had established one. CP 4, 28, 35, 44, 45. The Defendant did not even assert this matter half way through the trial. RP 342.

An implied easement is created when there is:

1. Prior common ownership and severance.
2. Prior to severance by the common owner the use of the roadway must have been so long continued and obvious as to show it was meant to be permanent.
3. The use must necessary to the beneficial enjoyment of the land.

It must be essential and not merely convenient.

Ashton v. Bwell, 149 Wash. 494, 271 P. 591 (1928), McMeekin v. Low Incoming Housing Institute, 111 Wash App. 188, 45 P. 3d 570 (2002).

Easements by implication are not favored and the burden of proof is on the claimant. Rogers v. Cation, 9 Wash. 2d 369, 115 P. 2d 702 (1941).

The only proof by the Defendant as to necessity was Mr. Rickers self-serving conclusion unsupported by any facts or expert opinion. In fact, the photos in evidence shows there was no necessity, that a

roadway solely over the Defendants' property would have been only slightly steeper than the Bowdish driveway. EX 17F, 17G, 46. The only easement testimony was by Mr. Holman, the surveyor who stated the grate was not steep and that the Rickers home was reading "accessible" directly from Cirque Drive. RP 54.

The starting point of the Bowdish driveway on Cirque Drive, and the area on Cirque Drive just west of there, adjoining the Ricker property, is virtually the same elevation. EX 12A.

Mere convenience is not enough. The issue is whether, can a party at reasonable cost create a substitute? Berlin v. Robbins, 180 Wash. 176, 38 P.2d 1047 (1934). A slightly increased cost is not enough. Davidson v. Columbia Lodge No. 8, K.P., 90 Wash. 461, 156 P. 383(1926).

In Roberts v. Smith, 41 Wash. App. 861, 707P. 2d 143 (1985), the cost to create an alternative access of \$3000-5000, was not enough necessity. It must be "extremely expensive" to create an alternative. Hubbard v. Grandquist, 191 Wash. 442, 450, 71 P. 2d 410 (1985).

Defendants also submitted no proof as to the second element, that the roadway existed at the time of severance.

## VI. ADVERSE POSSESSION

The Defendants claimed, and the court granted, adverse possession to an area of the Plaintiffs' property. CP 4, 35, 44, 45. There was no "occupation" (the use was not "actual"). What was done was not hostile or exclusive. There was no well-defined line. The pleadings and evidence were inadequate in failing to provide a legal description of the claimed area. CP 4.

### A. Elements

In order to establish a claim of adverse possession, the claimant traditionally had to prove occupation that is:

1. Exclusive;
2. Actual;
3. Uninterrupted (sometimes referred to as continuous);
4. Open and notorious; and
5. Hostile and made under a claim of right made in good faith (a clear reading of the following case would indicate the claim of right element no longer exists).

Chaplin v. Sanders, 100 Wn.2d 853,676 P.2d 431 (1984). The period throughout which all these elements must concurrently exist is ten (10) years. RCW 4.16.020.

The facts are viewed from an objective, as opposed to subjective, viewpoint. The case is viewed from what is done on the land, not what was thought or said. However, traditional presumptions still apply. Chaplin, supra.

### **B. Presumptions and Rules of Construction**

Three rules apply to an analysis of the present situation to form a framework for analysis:

1. Prescriptive rights are not favored in the law since they necessarily work a loss or forfeiture of the rights of others.
2. The burden of proof is upon the one to be benefited by the establishment of the claim.
3. When one enters upon the property of another there is a presumption it is done with the owner's permission and it is done in subordination to the latter's title.

State ex. rel. Shorett v. Blue Ridge Club, 22 Wn.2d 487, 156 P.2d 667 (1945).

With regard to the third of the above three rules, permission, which negates hostility, can come in two forms, express or implied. Implied permission occurs where the use by another does not interfere with the owner's use, State ex. rel Shorett, supra. at p.495, or where the

use is a neighborly courtesy. In the implied context, the above presumptions continue to apply. Crites v. Koch, 49 Wn.App. 171, 741 P.2d 1005 (1987). No interference was shown and there was undisputed proof of the neighborly relationship between the Bowdishes and Rickers predecessor, the Pettits. RP 63, 64, 72. It was a “family” relationship. RP 64, 74. Mr. Bowdish and Mr. Pettit worked together and would go hunting. RP 64. In fact, for a time, the relationship between the Bowdishes and Rickers was cordial. RP 67.

Permission is inferred when it is reasonable to infer that the use was permitted by sufferance or acquiescence, particularly when a friendly relationship exists. Cranston v. Callahan, 52 Wn.App. 288, 759 P.2d 462 (1988), Miller v. Anderson, 91 Wa.App. 822, 964 P.2d 365 (1998). The claimant, in order to overcome this presumption, must make a distinct and positive assertion of a right, hostile to the true owner. Roediger v. Cullen, 26 Wash.2d 690, 175 P.2d 669 (1946). Factors which can be considered would be whether the use was temporary, as opposed to permanent, or whether the use excluded the true owner. See Cranston, supra.

The Defendants made no permanent improvements on the Bowdish property other than the patio and related wall, which the

Rickers surveyor stated was 2.2 feet over the line. RP 199) but for the most part conducted sporadic acts of use (as opposed to acts of occupancy). Those manor stones did not run south to any extent. EX 51, 52, 53, 54. Evidence of entry or occupation is not sufficient to overcome this presumption. Hostile intent must be clearly evidenced by acts of permanent occupation and appropriation evincing a determination of permanent ownership. Peoples Savings Bank v. Bufford, 90 Wash. 204, 155 P. 1068 (1916).

“Permission can be express or implied; an inference of permissive use arises when it is reasonable to assume “That the use was permitted by sufferance and acquiescence.”

Miller v. Anderson, supra.

### **C. Actual Use**

The Bowdishes challenge that whatever use was made by the Rickers did not satisfy the element of actual occupancy as required. The starting point for such an analysis is that the use must be of a kind a true owner would make of the particular land under the circumstances of the case in light of the land's nature and location. Chaplin v. Sanders, supra. at p.863. While the area, as a whole, is rural in character, the use of the areas of the properties in question is reasonably intensive and more characteristic of urban property. EX 46, 47, 48, 49, 52, 54, etc.

In reviewing cases relating to the requirement of actual possession or occupancy, two thoughts should be kept in mind. Any time elements of adverse possession are discussed, there always appears to be an overlap between the elements. Language from many cases can be applicable to more than one element.

Secondly, when discussing actual occupation or possession, the focus is really not on the term "actual" but on the term "occupation" or "possession", whichever is used. An occupation or possession is a very distinguishing feature of adverse possession, which is very different than a use. Neighbors go on each other's properties all the time. Neighbors who are particularly friendly will do this regularly. While some of the above cited cases would, by implied permission, prevent adverse possession from occurring, the acts cited therein also are generally not of a substantial enough nature to be an "occupation" or a "possession". The cases immediately following do not explicitly make this point, but in substance, they do.

Many cases have held occupations to be insufficient, as not being substantial enough. The following cases are illustrative:

1. People's Sav. Bank v. Bufford, 90 Wash. 204, 155 P. 1068 (1916), held cutting of brush, some fencing, growing of turnips, and some clearing & grading were insufficient.
2. Smith v. Chambers, 112 Wash. 600, 192 P. 891 (1920), held piling of wood, mowing of hay and grass, and raising vegetables was not a sufficient occupation.
3. Loomis v.- Stromburg, 166 Wash. 567, 7 P.2d 973 (1932), held clearing and cultivating was not sufficient occupation.
4. Harkins v. Del Pozzi, 50 Wn.2d 237, 310 P.2d 532 (1957), held building of a boat house and walkway (torn down after two years), combined with picnicking and placement of a sign for ten years was insufficient.
5. Slater v. Murphy. 55 Wn.2d 892,351 P.2d 515 (1960), when two parties claimed adverse possession against a third, held locating or perhaps causing to be located three signs and a mailbox, in one instance, was insufficient, and disking to keep down weeds and pulling fruit trees was insufficient in the other.
6. Adamec v. McCray. 63 Wn.2d 217, 351 P.2d 515 (1963), held that the placing of moveable houseboats on water over tidelands did not give adverse possession to tidelands.

A review of these cases, contrasted with cases upholding adverse possession, will make apparent a single most distinguishing feature, and that is the construction or placement of significant, permanent improvements. No case holds this is specifically required, nor does any case say that permanent improvements will, necessarily, permit adverse possession. Rather a comparison of the cases will reveal this is a very critical element. In particular, see Bowden-Gazzam Co. v. Kent, 22 Wn.2d 41, 154 P.2d 292 (1944).

Another very illustrative case is Hunt v. Matthews, 8 Wn.App. 233, 505 P.2d 819 (1973). In that case the Plaintiff maintained an "irregular and undetermined extension of the lawn" beyond the true boundary. A garden was also maintained in this area. The Plaintiff also maintained a compost pile. There was also an old dilapidated fence. The court found this use to be insufficient to establish adverse possession. It particularly noted with approval a finding of the trial court that the area claimed by the claimant was not in conformity with the area sought. In looking at the facts and the holding, the court appeared to be very concerned about the idea of a few random uses being alleged to establish adverse possession. The court stated at p. 237,

"When a claimant does everything a person could do with particular property, it is evidence of the open hostility of the

claim. If he does less, the trier of the fact is justified in concluding that an owner would not be expected to take alarm from such random activity."

The court went on to say, at p. 238,

"The property must be used beyond the use it would receive because it was handy and convenient, and, instead, must be utilized and exploited as by an owner answerable to no one."

This is consistent with the often-cited rule that one claiming adverse possession must exercise such domain over property that marks the conduct of owners in general. Fadden v. Purvis, 77 Wn.2d 23, 459 P.2d 385 (1969).

#### **D. Exclusive Occupation**

While the evidence showed uses by the Rickers, the evidence also showed a lack of exclusive occupation by them. RP 75-76, 77, 82-85, 110, 111. In fact, the Defendants trial brief twice references a "shared flower bed." CP 28. The Bowdishes' son, his wife, and Mrs. Bowdish would all garden in the area just east of the line. RP 271. They placed rocks in that area. RP 268.

The ultimate test is whether or not the adverse possessor is exercising such dominion over the land that his or her intensive use excludes the true owner in sharp contrast to the incidental use of the

other. Lilly v. Lynch, 88 Wn.App. 306, 945 P.2d 13 727 (1997), Crites v. Koch, supra.

Examples are:

1. Scott v. Slater, 42 Wn.2d 366, 255 P.2d 377 (1953). Both parties used a strip of land. Title holder cultivated, sprayed, and harvested pears. The court held there was no ouster and therefore no exclusive occupation.
2. Thompson v. Schlittenhart, 47 Wn.App. 209, 734 P.2d 48 (1987). Title holder had mowed to a location where a barbed wire fence had once existed. The court held this defeated the claim of adverse possession.
3. Peeples v. Port of Bellingham, 93 Wn.2d 766, 613 P.2d 1128 (1980). The title holder's access was unrestricted by a fence or other barrier. The area remained accessible at all time and, therefore no exclusivity.
4. Smith v. Chambers, supra. Use of a portion of an area claimed as a garden was sufficient to defeat adverse possession.

See also, Bowden-Gazzam Co. v. Kent, supra. ITT Rayonier Inc. v. Bell, 112 Wn.2d 754, 774 P.2d 6 (1989).

The trial court's determination that Rickers established adverse possession of a strip of land is inconsistent with the court's determination regarding attorney's fees. The only trespass that could have been the subject of attorney's fees is the removal of manor stones from the northeast Ricker line and the Bowdish activity along the southwest line. The issue relating to the northeast line did not relate to adverse possession. That issue only existed along the southeast Ricker line. The only trespass alleged and identified by the court, other than possibly the spray paint, was the removal by the Bowdishes of some of the Rickers' landscaping on the area claimed by adverse possession.

The trial court granted attorneys fees under RCW 4.24.630 for fees to establish the adverse possession claim because it was related to establishing the trespass claim. This means the trial court determined the Bowdishes conducted activity within the area claimed by adverse possession. In order to do this, the trial court had to determine that the occupation by the Rickers was not exclusive.

#### **E. Ten Years**

The time period of the Rickers activity over the line was after 2010. RP 73-75, 179. Ricker did not get a building permit until 2008. RP 73-74. It would defy logic to suggest that the Rickers put in their

landscaping before tearing down their mobile home and building a new house. This lawsuit was initiated on September 7, 2016. CP1.

The Pettits did not occupy over the now disputed line. RP 177, 179, 275, 290.

A review of the entirety of the Ricker testimony shows they never disputed the time frame asserted by Plaintiffs as to the permit, construction of their new home, and the placement of the manor stones. They never testified the work over the line occurred prior to 2010. In fact, counsel for Defendants stated it was not until 2014. RP 179.

None of the improvements existed for ten years prior to the lawsuit.

**F. Lack of Well-Defined Line**

The lack of a well-defined line, while not strictly an element of adverse possession, has been held to be a determining factor when examining other elements.

As stated in Scott v. Slater, supra. at p.369,

"The lack of proof of a well-defined boundary discussed in our consideration of the Plaintiffs claim of acquiescence is also a fatal defect in their claim by adverse possession."

Lloyd v. Montecucco, 83 Wn.App. 846,924 P.2d 927 (1996), is very instructive. In that case there were two areas claimed. In the first there was a fence and a bulkhead. There were plantings, and tree harvesting. There was a garden. The testimony in this area was undisputed as to the occupancy and its exclusive nature. While the occupations did not form a perfect line, the occupations were significant and permanent, and permitted the projecting of a line between occupations. However, as to another area, the tidelands, the court looked "at the occupations both for purposes of adverse possession and mutual recognition-acquiescence. The evidence showed placement of concrete blocks, intermittent moorage, and seeding of oysters and clams. This was insufficient under either theory.

Earlier in this brief it was indicated that the elements of adverse possession would overlap greatly. The above case is a perfect example. The discussion is very akin to the discussion regarding actual occupation. In the two factual scenarios, the first involved substantial, permanent improvements. The second involves insubstantial temporary improvements or were uses as opposed to occupations.

**G. The Pleadings and Evidence as to a Line Location Were Inadequate**

The pleadings of the Defendants were not adequate. CP 4. They asserted no claim to any specific area. CP 4. While they had a survey done, the area claimed was not mapped nor a legal description provided. CP 4, 28.

It has been long pointed out by Washington courts that “pleadings should be liberally construed, it is true, yet they must be couched in language sufficiently definite to appraise opposing counsel and the court of uses that are to be litigated.” Wright v. Joyce, 142 Wash 486, 488 (1927).

RCW 7.28.120, which address quiet title pleadings, states:

“The Plaintiff in such action shall set forth in his or her complaint the nature of his or her state, claim, or title to the property, and the Defendant may set up a legal or equitable defense to Plaintiff’s claims; and the superior title, whether legal or equitable, shall prevail. The property shall be described with such certainty as to enable the possession thereof to be delivered if a recovery be had.” (Emphasis added).

Defendants’ Counterclaim does not meet this standard. CP 4.

Complaints in condemnation, eminent domain and partition proceedings must contain legal descriptions of the subject property. 27 Am. Jur. 2d § 421, 59A Am. Jur. 2d Partition § 87. The purpose is to

“apprise the owner” and “enable the judge to make necessary findings and pass title by the judgment” among other purposes. *Id.* Quiet title actions are no different.

The Supreme Court of Missouri has considered a case directly on point and ruled that the petition and judgment must describe the land involved. “ ‘If the real estate in controversy could not be identified from the description given in the petition, no cause of action was stated.’ “ Ollison v. Village of Climax Springs, 916, S.W.2d 198(1996), citing to an earlier Missouri Supreme Court case, Hartvedt v. Harst, 173 S.W.2d 65, 68 (Mo. 1943)

The Ollison court pointed out that the state statute on actions to quiet title did not specifically state that the petition must describe the land involved, however, by using the terms “such property” and “such real estate” and “such real property,” a requirement to describe it was inferred. *Id.* At 201.

Similarly, Washington’s quiet title statute, RCW 7.28.010 includes the terms: “the real property involved in such action” (7.28.010); “such real property” (7.28.010); and “the lands at issue” (7.28.085).

Because of the lack of any description of the claimed area (CP 4), Plaintiffs had no way to determine whether certain defenses or counterclaims might be available, for instance, the counterclaim provided for in RCW 7.28.160 (Defendants' counterclaim for permanent improvements and taxes paid). This statute presumes that the Plaintiff can identify the subject real property with sufficient detail in order to determine whether any of the land is land "upon which permanent improvements have been made." *Id.*

Defendants' counterclaim, nor any other evidence at trial, does not contain a legal description, nor does it contain information that put Plaintiffs on notice as to what real property is the subject of the claim.

CP 4

Through the close of evidence, the Defendants identified no specific area being claimed but rather simply referenced a general undefined area. The legal description created was determined sua sponte by the trial court. CP 4, 35, 44, 45. A review of the findings and decree show the trial court created description is incomplete as it does not connect the northerly point to the Ricker easterly corner. CP 35, 44, 45.

The court will note that the testimony at trial regarding the occupation along the Ricker southeast line is not particularly focused with regard to any specific line. This was caused by the fact that in the pleadings, briefing, and trial testimony, the Rickers never identified a specific line they were claiming to. Throughout the trial, the claim was a moving target making it difficult to relate the testimony to any specific line.

What is particularly telling is Exhibit 52 as well as 51, 53, and 54. The Rickers home is on the left. The Bowdish driveway is shown on the right. The Holman survey stake is identified by a white post in the lower middle of the photo. The south end of the fence referenced in the court's legal description of the adversely claimed area can be seen behind some bare bushes about ten feet right of the corner of the house. The surveyed line is four feet to the left of that fence and runs down to the white post. The trial court gave the Rickers title to the area left of a line running from the fence to the white post.

There is no distinction between that area and the area to the right which shows improvements by the Rickers, but where the Bowdishes testified they conducted activities as well.

This discussion relates to the adverse passion claim but also relates to the trespass claim of the Bowdishes below. It is clear that photograph (EX 52) shows a trespass by Rickers, at a minimum, to the right of the fence. It also shows their activity was totally unrelated to any consistent line.

#### **H. Summary Regarding Adverse Possession Claim**

A reading of the above cited cases will indicate that adverse possession cases are very factually dependent. Finding a case that closely proximates the case at hand is often times very difficult. The two cases most factually close to the present case are Smith v. Chambers, supra., and Hunt v. Matthews, supra.

In the Smith case, the title holder had gardened a strip. The adverse claimant had piled wood, mowed hay or grass, and raised vegetables thereon. The activity of the claimant therein is very close to those claimed by the Rickers. Under facts more favorable to the Ricker position herein, the Smith court held there was no adverse possession.

In the Hunt case, the claimant used the area for a lawn and garden. She also maintained a compost pile. The use was described by the court as "irregular and undefined" (see P.234). The court stated, at p. 237, in holding that adverse possession was not established, that:

"Respondents did nothing that was not consistent with permissive use or the act of a trespasser ... (quoting People's Savings Bank v. Bufford, 90 Wash. 204,208, 155 P. 1068 (1916)."

It is undisputed that the occupation, if any, was not for ten years.

#### **VII. ESTOPPEL AS TO THE BOUNDARY CLAIM OF RICKER**

The Rickers' claim the boundary has changed by way of estoppel claiming that Mr. Bowdish represented a fence as being the line in 2003. CP 4, 28. Mr. Bowdish disputed that testimony. RP 80, 81. While the trial court choose to believe Mr. Ricker, that testimony is not dispositive. CP 35.

As to a claim of estoppel, the Defendants must show by clear, cogent and convincing evidence:

1. An admission, act or statement, by an adjoining landowner, inconsistent with a later claim;
2. Action by an adjoiner in reasonable reliance on the admission, act or statement; and
3. Injury to the adjoiner if the owner is allowed to repudiate the original position.

Burkey v. Baker, 6 Wash. App. 243, 492 P.2d 63 (1961).

The burden of proof is on the claimant by clear and convincing evidence. Thomas v. Harlan, 27 Wash. 2d 512, 178 P.2d 965 (1947)

When the parties have the same means of ascertaining the truth, there can be no estoppel. Leonard v. Washington Employers, Inc., 77 Wash. 2d 271, 462 P.2d 538 (1969).

In the Leonard case, 77 Wn2d at 280 (bottom), the Supreme Court quoted the following language:

In order to create an estoppel it is necessary to prove that:

“The party claiming to have been influenced by the conduct or the declarations of another to his injury was himself not only destitute of knowledge of the state of facts, but was also destitute of any convenient and available means of acquiring such knowledge; and that where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.” 11AM. & ENG. ENCY. LAW (2DED) p.434.

At the point of the discussion alleged by Mr. Ricker, the lines had not been surveyed, and each party had the ability to determine where the lines were. Survey work was done for the Bowdishes in 2014 and 2015 (EX 3, 91) and in 2016 by the Rickers (EX1). (See also, EX 39, second page) In addition, the acts of Mr. Ricker went beyond the area of the fence Mr. Bowdish had constructed, or what Mr. Ricker claimed Mr. Bowdish told him. EX 3, 91. His doing so evidenced he was not relying on anything he asserted Mr. Bowdish said or did but was simply

acting unilaterally without any regard to any line. See discussion above relating to Exhibit 52. Finally, the evidence showed that the Defendants acted, on many occasions, in disregard to the Bowdishes' rights, consistent with the foregoing by, among other things, partially blocking the easement on the other side of the Ricker property and by cutting off the end of the gate installed by Mr. Bowdish.

No findings were made that the Rickers did not have convenient and available means to ascertain the truth. CP 35, 44. In fact, their later survey acknowledges they did. EX 1.

#### **VIII. QUIETING TO TITLE IN THE BOWDISH TRUST**

The Bowdish Trust requested that title to their property be quieted in the trust clear of any claim of the Rickers. CP 1. This claim is dependent upon a resolution of the above issues. If this court determines that the Rickers do not have an easement, by any means, over the Bowdish property, and also if the claim of title to a portion of the Bowdish property likewise fails, then title should be quieted in the Bowdish Trust.

#### **IX. AWARD OF ATTORNEY'S FEES TO RICKERS**

The Defendants, in their counterclaim, requested attorney's fees pursuant to RCW 4.24.630(1) for trespass. CP 4. For several reasons,

Plaintiffs asserted Defendants were not entitled to attorney's fees. CP 27, 42.

RCW 4.24.630(1) provides:

(1) Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures person property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages cause by the removal, waste, or injury. For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorney's fees and other litigation-related coats.

Defendants did not address this issue in their trial brief. CP 28.

Subsequent to the trial, further proceedings were had whereby the Defendants requested all of their attorney's fees, for all issues, both prior to the lawsuit being filed and after, and both during their ownership and the rior ownership of the R&J Family Trust (CP 41), which was a separate and distinct legal entity, and which did not exist at the time of trial (CP 20, 27.), and to which the property was put to protect it from the Rickers' creditors. CP 26. The trial court, in essence

and without saying so, determined that the R&J Family Trust claim to attorney's fees was assigned to the Rickers It was not.

While the Defendants presented anecdotal evidence of the de minimus damages to their property, the trial court found they submitted no proof of monetary damages. CP 35, page 12.

In the trial court's Memorandum Opinion, the court addressed seven issues. CP 35. The opinion specifically allowed attorney's fees to Defendants for one issue, that being the third numbered issue in the opinion related to RCW 4.24.630 and the trespass the court identified at the end of page 11 of the opinion. (At the hearing on attorney's fees the court also granted attorney's fees under RCW 4.24.630 for the adverse possession issue and the easement issue, what it identified as issues as 2 and 3. See discussion below). CP 35. Therefore, the Defendants were not entitled to their full fees requested, if any.

The burden of proving the amount of fees is upon the fee applicant. The applicant must comply with the lodestar formula as to time expended, difficulty of questions presented, skills required, customary charges by other attorneys, the amount involved and the benefit to the client. Scott Fetzer Co. v. Weeks, 172 Wash. 2d 141, 859 P.2d 1210 (1993).

Time spent on related causes of action which do not allow fees or unsuccessful claims are not to be considered. Herrera v. Singh, 103 F. Supp. 2d 1244 (2000), Bowers v. Transamerica Title Ins. Co., 100 Wash. 2d 581.675 P. 2d 193 (1983).

The amount of attorney's fees must, to some extent, be based on the amount of recovery. Maryland Cas. Co. v. City of Tacoma, 199 Wash.72 90 P. 2d 226 (1939), rehearings 94 P. 2d 217, 94 P. 2d 749. Elmore v. Graystone of Centralia, Inc., 65 Wash. 2d 948, 399 P. 2d 4 (1965).

There must be an adequate record for review and specific findings of fact are required. Bentzen v. Demmons, 68 Wash. App. 399, 842 P.2d 1015 (1993), Crest Inc. v. Costco Wholesale Corp., 128 Wash. App. 760 (2005).

The request of the Defendant did not comply with the forgoing. CP 41.

When fees might be allowed, "If the Defendants fail or refuse to segregate, the trial court shall deny fees", Loeffelhols v. Citizens for Leaders with Ethics and Accountability Now, 119 Wash. App. 665, 692, 82 P. 3d 1199 (2004). Defendants did not segregate their fees. CP 41.

Three other issues also present themselves.

The trial court anticipated the first issue when it recognized that Rickers did not submit evidence of monetary damages for the acts complained of. CP 35. This raises the question of whether attorney's fees can be awarded at all under such circumstances. This question is answered by Colwell v. Etzell, 119 Wash. App. 432, at 442, 81 P. 3d 895(2003), wherein it is stated that RCW 4.24.630 requires "some dollar amount of damages".

The issue has been addressed in other contexts. In a contract setting, it has been held that were there is a breach of a duty without proof of damages, the action should be dismissed, and no fees would be warranted. DC Farms, LLC. Vs Conagra Foods Lamb Western, Inc., 179 Wash. App. 205, 317, P. 3d 543 (2014).

Where an action is brought for damages and there is no recovery, or the damages are de minimus, an award of attorney's fees is not appropriate. Ermine v. City of Spokane, 143 Wash. 2d 636, 23 P. 3d 492 (2001), Cox v. City of Lynnwood, 72 Wash. App. 1, 863 P. 2d 578 (1993).

Second, in order for a violation of RCW 4.24.630 to occur, an aggrieved party must show that the alleged offending party acted:

1. Intentionally, and

2. Unreasonably, and
3. While knowing, or having reason to know, that he or she lacked authority to so act.

Clipse v Michels Pipeline Construction Inc. 154 Wash.

App. 537, 225 P.3d 492 (2010).

A person acts intentionally if he or she intends to cause the injury or destruction of the property. Parker v. Taylor, 196 Wash. 22, 81 P.2d 806 (1938)

There was no proof of this presented at trial. Defendants were on notice that the Bowdishes intended to install utilities along the common line and never objected until the work was being done. EX 37, 38, 39. Consequently, at the time the Bowdishes acted, they had no reason to believe they did not have the right to do so. There is nothing in the record that shows that the Bowdishes were advised they did not have a right to the easement or that there was a claim of adverse possession. EX 37, 38, 39.

As to the marking of the lines, this was temporary, or at least believed to be temporary, by the Bowdishes. RP 109. There was no intent to cause harm.

The trial court also determined that the damage to the Rickers' house sign was intentional. There was no proof of that. The Bowdishes testified it was accidental and there were no other witnesses to the event. RP 108. Therefore, this cause of action should fail. EX 37, 38, 39.

The third point is that the request for fees covers a three-year, two-month period of time from the inception of the disputes when the property was owned by the R&J Family Trust and its trustee. CP41. That trust no longer exists. From August 7, 2017 to the present, the property was owned by the Rickers. EX 20, 21. The damages found have not been segregated as to ownership, nor have the fees. CP 41. Therefore, there can be no attorney's fees awarded for any time prior to August 7, 2017. See Motion to Dismiss Complaint and to Join Parties, and exhibits thereto, filed November 21, 2017. EX 20, 21.

The court, once again, sua sponte, made an allocation of attorney's fees. CP 35. In doing so, the court commented that it included fees related to establishing the adverse possession and easement claims as being related to the trespass claim. CP 35.

First, Defendants never asserted any basis for this. CP 41. Because of this and because the trial court did the allocation sua sponte, the Bowdishes had no opportunity to address this.

Second, the trespass alleged, the temporary spray paint and removal of wall stones, occurred within the bounds of the Ricker Lot 12, not on the area claimed by adverse possession.

It appears the statute is to be strictly construed. Colwell v. Ezzell, supra. In that case, the claimant sought to bootstrap a claim under RCW 4.24.630 to an interference with easement claim. The trial court, on its own accord and without a specific request by Defendants, bootstrapped the claim under RCW 4.24.630 to the adverse possession and easement claims. It should be clear that the Defendants never made a claim for its attorney's fees pursuant to RCW 7.28.083. CP 4.

**X. REQUEST FOR ATTORNEY'S FEES AND EXPENSES BY THE  
BOWDISH TRUST**

The Bowdish Trust requests attorney's fees pursuant to RCW 4.24.630., and for treble damages thereof. It is clear they trespassed on the Bowdish property. See discussion regarding adverse possession above, particularly at the end of Section E. See also Exhibits 51-54/ RP 99, 185.

The Bowdishes provided testimony as to the damages being \$2,100.00. EX 90. RP 163-171. Damages for treble that amount should

be assessed, and the matter remanded for determination of attorney's fees and expenses.

#### **XI. ATTORNEY'S FEES ON APPEAL**

Dependent upon a resolution of the forgoing issues. Bowdishes request attorney's fees on appeals pursuant to RCW 4.24.630.

RAP 18.1 (i) provides that this court may remand to the trial court to determine attorney's fees on appeal. Given the discussion in Section X, above, that would seem appropriate.

#### **XII. CONCLUSION**

It should be noted that while exceptions are no longer necessary, Bowdishes advised the trial court of significant exceptions it had to the court ruling. CP 43. RR 569-597. CR 46. Gamboa v. Clark supra.

The Bowdishes request that this court determine that the Rickers have failed to establish any easement over the Bowdish property, that no boundary claim by adverse possession or estoppel was established, and that the Rickers were not entitled to attorney's fees under RCW 4.24.630.

The Bowdishes further request that this court determine that they are the beneficiaries of the covenant utilities easement. It should

be noted that if the Bowdishes are beneficiaries of the covenant easement, so are the Rickers. However, Rickers never made this claim.

The Bowdishes further request this court determine they are entitled to have their property quieted in them free and clear of any claim of the Rickers, that they be awarded damages of \$2,100.00, to be trebled, and for their attorney's fees and expenses both at trial and on appeal pursuant to RCW 4.24.630 for the trespass of the Rickers.

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**Appellate Court Case Title:** Bowdish Living Trust, Appellant v. Karen K. Decarufel et al.  
**Superior Court Case Number:** 16-2-00145-8

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