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Court of Appeals No.52949-1-II

IN THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

MICHAEL S. POKORNY and JOETTA POKORNY, husband and wife
and the marital community composed thereof,
Plaintiffs/Appellants,

v.

SHOWELL OSBORN and NANCY OSBORN, husband and wife and the
marital community composed thereof; JOHN DOE and JANE DOE 1-5,
NATHANIEL D. JUDD and BETHANIE R. JUDD, husband and wife and
the marital community composed thereof, d/b/a JUDD TREE SERVICE, a
Washington contractor, JUDDTTS875N2 and WESCO INSURANCE
COMPANY under bond No. 46-WB033713.,
Defendants/Appellants.

APPEAL FROM THE SUPERIOR COURT OF GRAYS HARBOR
COUNTY, THE HONORABLE STEPHEN BROWN, PRESIDING

BRIEF OF APPELLANTS

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III. ASSIGNMENTS OF ERROR

1. The trial court lacked subject matter jurisdiction to hear Respondents' claim for adverse possession.
2. The trial court erred in granting Respondents' motion for partial summary judgment.
3. The trial court erred in denying Appellants' motion for summary judgment.
4. The trial court erred in denying Appellants' motion for reconsideration.
5. The trial court erred in awarding attorney fees and costs to Respondents.
6. The trial court erred in dismissing Appellants' remaining claims.
7. The trial court erred in quieting title to the subject property in Respondents.

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court lack subject matter jurisdiction to hear Respondents' claim of adverse possession, due to their failure to exhaust their administrative remedies under RCW Chapter 58.17?
2. Do triable issues of fact regarding adversity prohibit summary judgment on Respondents' claim for adverse possession?
3. Do triable issue of fact regarding notorious possession prohibit summary judgment on Respondents' claim for adverse possession?
4. Do triable issues of fact regarding continuous possession prohibit summary judgment on Respondents' claim for adverse possession?
5. Does Respondents' inability to establish continuous possession for 10 years entitle Appellants to summary judgment?
6. Did the trial court err in awarding attorney fees and costs to Respondents?
7. Do triable issue of material fact prohibit dismissal of Appellants' remaining claims?
8. Did the trial court err in quieting title to the subject property in Respondents?

V. STATEMENT OF THE CASE

A. Facts

1. Appellant, Michael and JoEtta Pokorny.

Michael and JoEtta Pokorny (hereinafter Pokornys) are the fee owners of Parcel No. 093101505500, commonly described as 856 Hake Ct SW Ocean Shores, WA 98569 and legally described as Division 16, Lot 55 Blk 15, Sec 14, T17, R12 volume 9 of plat of Ocean Shores, page 3, records of Grays Harbor County, Washington. CP 27. Pokornys acquired fee ownership of Lot 55 by virtue of a bargain and sale deed recorded on April 20, 2011, following a foreclosure sale on or about March 16, 2011 under Recorder's No. 201104200035. Pokornys have been the fee owner since April 20, 2011. CP 28. This property is used as a vacation house for the Pokornys. CP 1251.

2. Lot 55

Lot 55 is a parcel in Block 15 Division 16 of the plat of Ocean Shores, recorded on April 24, 1967. CP 1021-22. Lot 55 is located east of the common boundary with Lot 54. CP 161, 169. Lot 55 is an irregular-shaped lot approximately 7584 square feet in size located on a cul de sac. CP 329.

3. Prior owners of Lot 55.

Marjorie Whitworth purchased Lot 55 in July 1998. CP 744. Until February 2003, Lot 55 was undeveloped and unimproved land. Mrs. Whitworth sold Lot 55 to Judith Dawson in March 2003. CP 957; CP 744. In February 2003, Mrs. Whitworth's contractor, DB Construction, applied for a clearing permit and a building permit for Lot 55. CP 956.

DB Construction was owned by Bill Green. CP 956. Bill Green approached James Moors to help build a house on Lot 55. CP 956. Green and Moors formed an oral joint venture. CP 956. Moors provided money for the construction of the house and he cleared the lot and did the excavating. CP 956. Bill Green built the shell of the house, framing it, sheeting it and putting on the roof. CP 956. The house was intended to be finished by the purchaser. CP 956. The grading work and the "dried in" house construction was done in 2003. CP 958.

James Moors purchased Lot 55 in August 2004. CP 744. In August 2005, Moors and Bill Green/DB Construction applied for a permit to build a garage on Lot 55 requested by Woodbecks for the sale of Lot 55. CP 958. Moors cleared trees and dug the foundation for the garage. CP 958.

Anthony and Karen Woodbeck (Woodbecks) purchased Lot 55 of the Ocean Shores plat on September 17, 2005 as a rental. CP 933. Woodbecks rental listing recites a soon to be fenced yard. CP 204. When asked at her

perpetuation video deposition about having any personal recollection if there was a fence, Karen Woodbeck replied “*only this picture*”. CP 948. Several photos taken by Woodbeck in August 2005 show no fence in the back corner lot next to the stringed stake she claims is next to the “old fence” and runs down its length toward the street. Through the door window, lattice is visible where a fence should be seen since the garage had not yet been built. A panel of a fence is visible out the side window, but the boards are facing Lot 54 and the “old fence” never extended past the façade of the garage, though Woodbeck claims this is the middle of the fence. CP 1317, 1333, 1334; CP 1318; CP 1321, 1322; CP 953; CP 939. Woodbecks owned Lot 55 until their home went into foreclosure on August 11, 2010. CP 937.

4. Lot 54

Lot 54 is a trapezoid-shaped parcel approximately 7630 square feet in size located at 854 Hake Ct, SW Ocean Shores, WA in the cul de sac. CP 207. Lot 54 is located on the west side of the common boundary with Lot 55. CP 169. Lot 54 is improved with a single-family residence approximately 1112 square feet in size. CP 882. The house on Lot 54 was constructed in 1980. CP 1231; CP 209.

5. Lot 54 owners.

A. Showell and Nancy Osborn.

Showell and Nancy Osborn (hereinafter Osborns) are the current fee owners of Parcel No. 093101505400, commonly described as 854 Hake Court SW Ocean Shores, WA 98569 and legally described as Div 16, Lot 54, Blk 15, Sec 14, T17, R12 volume 9 of plat of Ocean Shores, page 3, records of Grays Harbor County, Washington. CP 4. Osborns acquired Lot 54 on or about August 3, 2007 and remained as fee owners since their date of purchase. CP 4; CP 837; CP 807. This property is used as a vacation house for the Osborns. CP 806.

6. Prior owners of Lot 54.

A. Richard Walter

Richard Walter purchased Lot 54 on September 28, 1990. CP 885. Walter, his wife and children used Lot 54 as their primary residence. CP 885. Walter sold Lot 54 to Millard on November 21, 2006. CP 885.

After purchasing Lot 54, Walter attempted to determine the location of the eastern boundary between Lots 54 and 55. CP 886. Walter located a galvanized pipe at the northeast corner of Lot 54 and knew it was a property monument. CP 886. There was another galvanized pipe at the northwest corner of Lot 54. CP 886. Walter did not find another marker at the southwest corner of Lot 54. CP 886.

Walter installed a few pieces of driftwood in the ground “as a barrier to keep out wild animals” between Lots 54 and 55. CP 886-887. Less than 20 pieces of driftwood (covered ~ 15 feet) placed over “several seasons” ran parallel to the east side of his house. CP 886-887; CP 894. Walter admits he didn’t like the look of the driftwood and blocked his view, so he removed it. Walter denied he built a fence. Walter states in his perpetuation video deposition that “I had no real reason to build a fence”. CP 899. Walter also mowed the grass between his house and the property line. CP 887. There was also a greenhouse in the northeast corner of Lot 54, in “very, very close proximity to the galvanized pipe”. CP 887.

In 1996, Walter constructed a concrete porch on his house. CP 887. Walter had the driver pour the excess concrete next to the eastern side of his house on Lot 54. CP 888. The concrete was flattened. Walter occasionally washed a car on the concrete pad, but “there was never a parking area” CP 887-888. A small portion of the concrete pad extended a short distance onto Lot 55. CP 858. Walter used the east side of his lot to drive vehicles into the backyard of Lot 54. CP 888. Walter stored materials for his landscaping business in his backyard but mostly on his lot (Lot 53) next door. CP 888. Walter also placed “boulders and rocks” in the soil “during the winter months when it rains” on the east side of his

house to provide traction for his vehicles. CP 888. The rocks “immediately disappear” into the sandy soil. CP 888. Walter purchased Lot 53 to the west of his Lot 54 and he used that lot primarily to park his vehicles and store his business supplies during most of the years he lived at Lot 54. CP 887-888; CP 904; CP1329. Walter stated in his video deposition that Lot 53 was his primary parking spot. CP 904. Walter saw the owner of Lot 55 construct a wood fence approximately 20 feet east of the galvanized pipe. CP 888.

Walter testified when he sold Lot 54 on November 21, 2006, there were no fences or existing driveway between his house on Lot 54 and the house on Lot 55. CP 1118. “When you moved in, the old fence wasn’t there for you to draw your line, was it?” and Walter replied “Correct”. CP 902. Walter was always confused as to the actual boundary lines of his lot. CP 895; CP 1118. He pointed out the northeast corner monument to the contractor as he prepared to build the fence after the house and garage on Lot 55 were completed, but he already was aware of the galvanized pipe location. CP 888. The fence was intentionally set back approximately 5 feet off the newly constructed garage/ADU and ran only the length of the structure. CP 888. Nobody states the “old fence” was brand new when it was put up on Lot 55 in late 2005.

Walter began pruning the vegetation on the eastern boundary of Lot 54 soon after he moved in. CP 889. Walter claimed he'd prune monthly vegetation on his side and he would use a chain saw to cut vegetation once a year. CP 889. When Walter was asked what Lot 55 looked like while he lived at Lot 54, Walter replied "vacant". Did you see any fences; "no" replied Walter. Were there any signs that said keep out; Walter again replied "no". CP 896. Did you tell the builder you would prune your side? "That's correct" replied Walter. CP 889. Walter was asked if he made any improvements to his Lot 54 while he lived there and he replied "just the greenhouse" which was located "very, very close" to the northeast corner monument. When asked if there were any other improvements, Walter replied "no". CP 887.

Walter moved out of his house on Lot 54 on April 21, 2006 and moved himself and his family to Colville, Washington. CP 893. Lot 54 sat vacant for 203 days. CP 918; CP 1183. Per Walter's MLS listing, the house included all appliances, but no refrigerator. CP 207. Walter sold Lot 54 on November 21, 2006 to Justin Millard. CP 620.

B. Justin Millard

Justin Millard purchased Lot 54 on November 21, 2006. CP 912. Millard sold Lot 54 on July 11, 2007 to Osborns. CP 912. Millard purchased Lot 54 with the purpose of flipping it. CP 913. Millard recalls

moving into the house on Lot 54 to work on the property, but he does not recall when that was. CP 913. Millard does not recall how long he lived in the house on Lot 54. CP 912. The MLS listing for Millard's Lot 54 is dated May 4, 2007 and lists the property as vacant on that date and includes appliances with a refrigerator to be delivered on May 19, 2007. CP 920; CP 209. Millard purchased another lot on April 4, 2007. CP 918-919. Millard sold Lot 54 to Osborns on July 11, 2007. CP 912.

When he first purchased Lot 54, Millard saw an old cedar fence in rough shape near the east side of his property. CP 912. Millard thought the neighbor owned the fence. CP 924. Millard built a new fence, attaching it to the old fence. CP 915; CP 1450-1451. When asked why he attached the new fence to the old fence, Millard replied, “[*b*]ecause I'm lazy...”CP 924. The mossy cement slab was located on Lot 54 when Millard purchased it. CP 913; CP 719-720; CP 1236-1237. Millard “now and then” parked a vehicle on the east side of Lot 54. CP 915. Millard saw some rocks in the ground that were placed there by Walter. CP 928.

Millard constructed a gate in the fence around his backyard to allow vehicles to enter. CP 915. Millard was a contractor, so he kept construction debris in the backyard of Lot 54. CP 915. Millard states, “I believe” and “I guess” placed his construction debris straight back behind the gate but he doesn't remember where he put it. CP 916. “I don't

remember how I used that area” he stated multiple times with reference to the disputed area. CP 926. Millard estimates he drove vehicles through the gate a couple of times per week. CP 915. Millard states in his perpetuation video deposition that he drove through and placed construction debris behind the double gates while he lived there, but the double gates were not constructed until July 2007 (after he vacated Lot 54) as a condition of sale by Osborns. CP 915; CP 1450-1451.

Millard claims he built the new enclosed fence when the Osborns purchased Lot 54 per their instructions to include an 8-foot gate on the east side and a 4-foot gate on the west side. CP 916. When he built the new fence, Millard did not know where the southeast corner of Lot 54 was nor did he attempt to locate it. CP 917. Millard located the new fence with reference to survey stakes installed on Lot 53 in connection with construction of that new house. CP 918. The stakes from which Millard measured are located on the west side of Lot 54. CP 927. Millard did not get a survey prior to constructing the new fence. CP 918. Millard is not sure where the fence he constructed is located in relation to the galvanized pipe at the northeast corner of Lot 54. CP 927; CP 917. Millard admits to seeing the galvanized pipe in the northeast corner and knowing it was a corner monument. CP 917. Millard listed Lot 54 for sale by broker,

vacated the home and it sat vacant for 68 days until the sale to Osborn. CP 649.

7.The common boundary between Lots 54 and 55.

The common boundary between Lot 54 and Lot 55 appears on the Plat of Ocean Shores. CP 169. The boundary is marked at the northwest corner of Lot 55 with a ½ inch iron pipe. CP 886; CP180. The boundary line proceeds southeasterly 103.33 feet to the southwest corner, which is also marked with a ½ inch iron pipe. CP 169; CP 180. The distance between the common boundary and the southeast corner of the Osborns' house is 6.29 feet. CP 858.

When he owned Lot 54, Walter located the iron pipe at the northeast corner of Lot 54, but he did not locate the southeast corner. Did you see anything in the front yard where Hake Court SW is that you thought indicated where the boundary of the property was? “Nothing” replied Walter. CP 886. Millard also did not know where the southeast corner of Lot 54 was. CP 917.

When they initially looked at Lot 55 prior to the auction (early February 2011), Pokornys had no reason to doubt the property line extended from the new fence at that time. CP 972. After their purchase, on their first visit, Pokornys cleaned bags full of debris out of the privacy barrier (Osborns do not dispute this) CP 1180, and, attempted to locate the

southwest corner of Lot 55 by using a tape measure to gauge the distance across Osborns' property to the Pokornys' yard. CP 972. Pokornys also used a metal detector to search between the privacy barrier and the cul de sac. *Ibid.* Pokornys did not find their southwest corner of Lot 55 at that time. CP 973. By July 2011, after obtaining a plat map from the city of Ocean Shores that included lot measurements, Pokornys were able to determine the general location of Lot 55's southwest corner by measuring across the front of Lot 54. Because of the curvature of the cul-de-sac, Pokornys were unable to find the exact location of the front monument but have always known the general area of the southwest monument. CP1232. Pokornys have pictures that date this event in July 2011 because Osborns For Sale sign is seen. CP 568; CP 569; CP210. Pokornys have always known the entire privacy barrier was on their Lot 55. CP 568, 569; CP 589

In an e-mail exchange with Nancy Osborn, Karen Woodbeck acknowledged while Woodbecks had Lot 55, "*They never had a survey. The trees and fence were as they are now. We never questioned the property lines.*" CP 225. Woodbecks lived in California and never lived at Lot 55 but instead used it as a rental property while they owned it. CP 945; CP 204. In an email from Nancy Osborn to Karen Woodbeck on March 10, 2016 Nancy tells Karen that "*our attorney feels your statement about the trees being the boundary may help put this to rest before it gets totally*

out of hand. Thanks for your help in resolving this". CP 225. This was written to Karen after Nancy asked her if the trees were on her property, theirs or both. Woodbecks lived in California during their ownership of Lot 55 and visited their Lot 55 "less than 10 times" in the five years they owned it for a few days each visit while they did maintenance on all their Ocean Shores rentals. CP 936.

Moors, Walter, Steege, Kirkpatrick and the e-mail from Karen Woodbeck all affirmed they never discussed the boundary with their neighbor. CP 960; CP 889; CP 254-255; CP 252-253; CP 225. Pokornys also did not have any conversations with the prior owners before purchasing Lot 55. CP 967.

8. The old and new fences.

When Pokornys purchased their property in 2011, there were two fences between the rear portion of Pokornys' property and Osborn's property, the "*Old Fence*" and the "*New Fence*." CP 1310 (photo taken February 2011). When Osborns purchased their Lot 54 on July 11, 2007, a condition of sale was that the seller, Justin Millard, build a fence enclosing the back yard. CP 1450-1451.

Millard built the "New Fence" onto the "Old, dilapidated fence" and used the posts from that fence to nail up his fence boards. Millard added a few new posts to extend his new fence past the front and rear of the old

fence barrier. CP 915. By extending it further in the rear, Millard enclosed the northwest corner marker for Lot 55 inside Osborn's backyard, making it impossible for Pokornys to locate their corner marker. CP 164. The back rear fence that Millard built is also located approximately 15 inches into the city of Ocean Shores property/greenbelt. CP 738; CP 1413; CP 1547.

Osborns had the new fence in their back yard built by Millard as a barrier for backyard privacy and to keep their children's' dogs enclosed and to keep their grandchildren safe. CP 872; CP164; CP 532-533.

Both the "Old Fence" and the "New Fence" were located east of the common boundary between Lots 54 and 55. CP 856. The "Old Fence" did not extend to the rear of Lot 55 and did not extend past the front of the newly built garage on Lot 55. CP 939. The "Old Fence" did not enclose anything. CP 944; CP 526; CP 553-559.

It is not entirely clear when the "Old Fence" was constructed but Walter spoke with the builder when the builder put the fence up sometime after the construction of the garage/ADU on Lot 55 in October 2005. CP 888. The first actual photo of the old fence is July 27, 2006, as illustrated by the Grays Harbor County Assessor's photograph of Lot 55. CP 217. Walter vacated his property on April 21, 2006 and said there was no fence there at that time. CP 1118; CP 256; CP 252; CP 254.

9. The privacy barrier.

A prominent feature of the common boundary between Lots 54 and 55 is the area left in natural vegetation, or the so-called “privacy barrier.” CP 943. Commencing with development of Lot 55 in 2003, a strip of land on the west side of Lot 55 was retained in its natural state. CP 1257-1258; CP 1329. The privacy barrier was approximately 5-10 feet wide and ran from the northwest corner of Lot 55 to a point approximately 10 feet from the cul de sac. CP 582-585; CP 1457-1459. The thickness of the vegetation in the privacy barrier varies from place to place. CP 969. The front part of the privacy barrier was thick enough to make it difficult to go through and provided a nice visual barrier from Lot 54. CP 943.

10. The events of July and August 2015.

a. Pokornys and Osborns discuss trimming trees in the privacy barrier.

On July 6, 2015, Nancy Osborn was talking to Bonnell Tree Technicians owner, Dan Bonnell, on his cell phone when Mike Pokorny approached to see who was walking on his Lot 55. CP 1232. Bonnell handed his phone to Mike after telling Nancy that “your neighbor is here”. Nancy informed Mike they were thinking of cutting down/back the trees and removing the brush. CP 556; 976. Nancy Osborn then asked what Mike thought about that. Mike replied, “*No because we liked the privacy barrier*”. *Ibid.* Nancy Osborn inquired whether Pokornys would agree to

trimming the trees to the eight-foot mark. CP 976. Mike Pokorny agreed. *Ibid.* Nancy never told Mike that was her property and she could do what she wanted. CP 1232. Mike Pokorny and Nancy Osborn mutually agreed Dan Bonnell would trim the privacy barrier between Lots 54 and 55 in mid-August 2015. Nancy Osborn hired Bonnell Tree Technicians to do the work. CP 977. Bonnell gave Pokornys his business card and stated that the job would be scheduled for mid-August 2015 when Nancy Osborn could be present. CP 5; CP 977; CP 555-556.

b. Pokornys secured a survey of Lot 55.

Pokornys always had a general idea of where the southwest corner of their property was located after measuring to locate the monument soon after purchasing their vacation home in April 2011. Pokornys have always known that the entire privacy barrier was located on their property. But because of the curvature of the cul-de-sac, they could not calculate and locate the actual monument but had the general area of the marker. Osborns started talking about trimming back the overhanging branches of the privacy barrier by involving a tree service, Pokornys decided it was time to locate the actual location of the southwest corner and decided to have it officially surveyed. CP 1232. Pokornys secured a survey of Lot 55 from Don Hurd, PLS in July 2015. At the time of survey, Don Hurd, PLS marked the boundary between Pokornys' Lot 55 and Osborns' Lot 54. CP

182, 183. Once Pokornys had the actual surveyed results in hand, they were going to approach Osborns with the official findings since they believed the trimming wasn't going to be done until mid August 2015. CP 555. Pokornys always believed that Osborns knew or should have known where their own corner monuments were as any responsible homeowner should especially if they were having such extensive cutting and trimming done around their entire property. CP 1232. Osborns surveyor asked for Pokornys survey on September 1, 2015 and Pokornys emailed it to Osborns. CP 1419-1420. Pokornys had their survey filed with the state on August 14, 2015. In October 2015, after the timber trespass, Osborns caused their Lot 54 property surveyed "as used" by Berglund, Schmidt & Assoc., Inc. CP 858; CP 1291. Nancy Osborn stated in her deposition, they were "never concerned about the location of their boundary lines until our neighbors sued us". CP 1246, 1247. Osborns did not have their survey filed with the state.

Pokornys were at their Lot 55 residence on July 31, 2015 before leaving the state on a trip. A partial survey by Don Hurd, PLS had located the front shared southwest monument. Mr. Hurd placed a survey metal rebar with an orange ribbon around next to and noting the unearthed pipe monument. CP 162; CP 1233; CP 1278; CP 556. Pokornys took pictures

of the unearthed front southwest corner survey marker and the corner pipe with the trees in the background. CP 162; CP 182, 183.

At the time, Pokornys were expecting that Bonnell Tree Technicians would be back mid-August which left them plenty of time to get the rest of their property boundary surveyed. CP 1232-1233; CP 162.

c. Osborns cut vegetation in the privacy barrier.

On August 1, 2015, Osborns used a different tree contractor after firing Bonnell in a voicemail on July 14, 2015 from her work phone and proceeded to have Pokornys' privacy barrier trees cut down and their brush and ground vegetation removed while Pokornys were in Utah. CP 6. Pokornys learned of the cutting trespass from a neighbor who informed Pokornys that they now had a good view of their neighbor's house. Late on August 1, 2015, Pokornys' neighbor texted them a photograph of the Pokornys' destroyed green belt privacy barrier. CP 5; CP 162; CP 1461.

Osborns' destruction of Pokornys' privacy barrier was simply devastating. Osborns removed more than half the privacy barrier down to the stumps/roots. CP 1233. Osborns never called to inform Pokornys they were changing the date of the cutting, changing tree service or that they were having the trees, salal, and other growth removed. CP 6; CP 556. Osborns ended up butchering the remaining trees and salal on what Osborns maintain to be Pokornys' side of the boundary line down the

middle of the privacy barrier. Osborns and their new tree contractor, Judd Tree Service, removed entire limbs down to the trunk. CP 105-108; CP 1233; CP 1461-1465. Osborns went looking for a southeast monument on August 1, 2015 and came across a metal “poker” sticking out of the ground that they determined to be the marker. Osborns maintained this was their southeast corner until later they changed it to be the green utility post in the privacy barrier. CP 1243; CP 1132, 1134-1138; CP 1280; CP 1651.

Pokornys have done no trimming or cutting of vegetation since the timber trespass, even on their own side of the privacy barrier. CP 1243. Pokornys continue to watch the remaining butchered trees lean farther and farther into their driveway, because the remaining trees have no counter-balance. due to Osborns cutting their limbs off at the trunk during their timber trespass. CP 576; CP 1243. Osborns continue to cut and remove regrowth, stumps and branches even after a status quo was agreed to on April 4, 2016. CP 1375-1381; CP 1243.

Pokornys’ tree expert inventoried the number and species of trees and bushes in the privacy barrier that were destroyed in the Osborns’ timber trespass. CP 244-248. Pokornys’ tree expert estimates the cost of replacing those trees and shrubs at \$27,586. CP 244-248.

d. Pokornys confront Osborns regarding their trespass.

On August 2, 2015, Pokornys cut their vacation short and flew home where they called Osborns and left a message informing them they had no authority to remove Pokornys' green belt privacy barrier. CP 6; CP 1488. Mike Pokorny also informed Osborns the boundary marker was fully visible on Osborns' side of the privacy barrier and none of the privacy barrier was located on Osborns' property. CP 6; CP 1488.

On August 3, 2015, Nancy Osborn called Pokornys apologetically stating that had she known that the trees belonged to Pokornys, Osborns would not have cut the trees down. Nancy Osborn admitted seeing the survey marker, but she believed it was some form of utility marker. CP 6; CP 162. Nancy Osborn has admitted to previously seeing their other monuments and knows what one looks like. Mike Pokorny informed Nancy Osborn the resurvey of the boundary line confirmed that the markers were correct. CP 6; CP 1488.

At the time Osborns directed the tree contractor, having only a verbal contract to do the removal work, Osborns knew and had reason to know that the property line had been surveyed and the privacy barrier was fully on Pokornys' property. CP 1488; CP 105-108. Osborns proceeded with the removal work without investigating the unearthed and flagged boundary

marker or informing Pokornys of Osborns' intention to have the removal work done in advance of the mid-August plan. CP 1488.

Pokornys contacted Bonnell Tree Technicians and learned for the first time Osborns had canceled Bonnell's verbal contract at the end of July 2015. CP 1489.

Pokornys returned from Utah on August 2, 2015, and on August 8, 2015, they viewed the destruction of their green belt privacy barrier and took pictures. They noted that all four corners of their property were marked with survey flags and metal rods. CP 1489; CP 21. Pokornys returned on August 17, 2015 and found while they were away from their residence during a period of time between August 10, 2015 and August 17, 2015, Osborns had removed the ground cover within their rear fence area, despite the existence of the survey post, marker stick and survey flag, in full view showing the area belonged to Pokornys. CP 1575; CP 1365-1367. Even months later, Osborns had their landscapers remove tree stumps and all re-growing salal and roots from behind their fence knowing there was a dispute and lawsuit filed. CP 1243; CP 1369-1370. Nancy Osborn admitted in her deposition that she had to brush away dirt and debris from the buried rocks to "see if that looked like a driveway" and "I was curious how far it went". CP 576.

Osborns also constructed their side yard rear fence upon Pokornys' property without permission or legal authority. CP 1489.

B. Procedural History

On February 25, 2016, Pokornys commenced this action by filing their complaint seeking recovery for ejectment, quiet title, timber trespass, injunction, and attorney fees. CP 845-851. Osborns filed an answer and counterclaim on April 28, 2016. CP 863-877.

On November 16, 2016, Pokornys moved for partial summary judgment, arguing Osborns could not meet their burden of clear, cogent and convincing proof on their claim for mutual acquiescence and recognition. CP 136-159. Pokornys also argued Osborns could not prevail on their claim for adverse possession. CP 155-157. The trial court denied Pokornys' motion and Osborns counterclaim. CP 436.

On March 9, 2017, Osborns filed a motion for partial summary judgment on their claim for adverse possession, arguing their use of the disputed portion of Lot 55 was open and notorious, continuous, exclusive, and hostile for more than 10 years. CP 516-517; CP 679-680. The trial court denied Osborns' motion. CP 700.

On May 14, 2018, in their second motion for partial summary judgment, Pokornys argued Walters' claimed use, if any, of any part of Lot 55 was permissive, as Lot 55 was open, undeveloped and unenclosed

until at least February/March 2003, when Moors began grading the lot. CP 722-724. Pokornys argued unobjected use of Lot 55 by any of Osborns' predecessors or by Osborns themselves was subject to the presumption of permissive use. CP 711; CP 722-723; CP 1189-1195. Pokornys argued Osborns' possession of any part of Lot 55 would be limited to the period of July 11, 2007 to February 25, 2016, and therefore to satisfy the requirement of 10 years of adverse use, Osborns would have to tack the use of Lot 55 by one or more of their predecessors, which they could not do. CP 717; CP 1061-1063. Pokornys argued Millard, who purchased Lot 54 on November 21, 2006, and who on May 4, 2007 vacated the home, listed it for sale by broker, and left Lot 54 unoccupied for 2.5 months until sold to Osborn, thereby broke the required 10 consecutive years of adverse possession. CP 717. Likewise, Walter left Lot 54 unoccupied for seven months, thereby destroying continuous use. CP 718. Pokornys also argued Walter's possession and use of Lot 55 at inception was permissive at its inception and remained so. CP 709; CP 1069-1070. Pokornys argued Osborn's rear fence which enclosed part of Lot 55 within the fence might not be permissive use, but that fence had not been in place for 10 years. CP 721. Pokornys also argued Osborn can't meet the ten-year statute to prevail on their claim for mutual recognition and acquiescence. CP 724-

728. Pokornys also argued they were entitled to affirmative relief by order of ejectment of Osborns' fence from Lot 55. CP 729.

On June 5, 2018, Osborns filed their third motion for summary judgment CP 804-839, after Pokornys filed on May 14, 2018 CP 704-798. Osborns argued they had satisfied the requirements for adverse possession of the disputed portion of Lot 55. CP 820-829.

The parties' motions for summary judgment were heard by the trial court on July 16, 2018. VRP I p. 1. The trial court issued its decision on September 19, 2018. CP 1170-1171. The trial court found that at least by September 2005, when Woodbeck purchased Lot 55, there was a boundary fence in the back yard, and the subsequently constructed rear yard fence followed the line established by the prior boundary fence. CP 1171. The trial court also found as shown by the concrete slab and large rocks in the ground that Walter and subsequent owners of Lot 54 used both the front and back portions of the disputed portion of Lot 55 as their own. CP 1171. The trial court found that use exclusive, actual and uninterrupted, open and notorious, hostile and under a claim of right, and was well established before September 2005. CP 1171. The trial court also found no evidence was presented showing Pokornys or their predecessors used or even tried to use the disputed portions of Lot 55. CP 1171. The trial court also

concluded, as a matter of law, Osborns were entitled to tack the use of the property by the predecessors in interest to Lot 54. CP 1171.

Pokornys filed a motion for reconsideration, arguing, inter alia, the trial court's award to Osborns of a portion of Lot 55 amounted to an alteration of the Plat of Ocean Shores, and the trial court lacked jurisdiction to do so, in light of RCW 58.17.215, *Halverson v. City of Bellevue*, 41 Wn. App. 457, 461, 704 P.2d 1232 (1998), and *Hanna v. Margitan*, 193 Wn. App. 596, 608, 373 P.3d 300 (2016). CP 1195-1196. On October 10, 2018, the trial court denied reconsideration. CP1471; CP 1230-1467.

On January 14, 2019, the trial court entered judgment in this case. CP1773-1774. On January 18, 2019, Pokornys filed notice of appeal from the judgment, order denying Pokornys' motion for summary judgment and granting Osborns' motion, and the order denying reconsideration. CP 1780-1781.

VI. ARGUMENT

A. Standards of Review

An appellate court reviews *de novo* an order granting summary judgment. *Kim v. Lakeside Adult Family Home*, 185 Wn. 2d 532, 547, 374 P. 3d 171 (2016). The court considers all the evidence presented to the trial court and engages in the same inquiry as the trial court. *Ibid.* The

moving party has the burden of showing that there is no genuine issue as to any material fact. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn. 2d 59, 70, 170 P. 3d 10 (2007). The court will affirm a grant of summary judgment only if “*the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.*” CR 56 (c). The court must consider all facts in the light most favorable to the nonmoving party and can affirm a grant of summary judgment only if it determines, based on all the evidence, reasonable persons could reach but one conclusion. *Kim*, 185 Wn. 2d 547.

B. The trial court erred in granting Osborns’ motion for summary judgment.

Pokornys assign error to the trial court’s September 19, 2018 memorandum decision granting Osborns’ Motion for Summary Judgment (App. 1), the Decree Quieting Title (App. 5), the Order Denying Pokornys Motion for Summary Judgment (App. 1), and the Order Denying Reconsideration (App. 2). CP 1170-1171; 1172-1199;

The trial court’s reasoning is set forth in the following three paragraphs:

It is undisputed that at least by Sept. 2005, when Woodbeck purchased Lot 55, there

was a boundary fence in the back yard. The subsequently constructed rear yard enclosure fence followed the line established by the prior boundary fence.

It is undisputed and as shown by the concrete slab and large rocks that Walter and subsequent owners of Lot 54 regularly use both the front and back portions of the disputed portion of Lots 55 as their own. This use was exclusive, actual and uninterrupted, open and notorious, hostile and under a claim of right, and was established long before Sept. 2005. No evidence was presented showing that Pokorny or the predecessors in interests to Lot 55 ever used or even tried to use the disputed portion of Lot 55.

As a matter of law, Osborn is entitled to “tack” the use and possession of the property by predecessors in interest to Lot 54. *Howard v. Kunto*, 3 Wn. App. 393, 397, 477 P 2d 210, 213-15, *overruled [on other grounds] by Chaplin v. Sanders*, 100 Wn. 2d 853, 676 P. 2d 431 (1984).
CP 1171.

As more fully set forth herein, unresolved triable issues of material fact persist in this case and prevent summary judgment for the Osborns.

1. The trial court lacked subject matter jurisdiction to alter the boundaries of appellants’ Lot 55.

The trial court did not have subject matter jurisdiction to award property from Lot 55 to the Osborns under a theory of adverse possession. It would appear that any such award of property would constitute an alteration of the Ocean Shores plat of which Lots 54 and 55 are a part. If so, then the trial court had no jurisdiction to alter the Plat of

Ocean Shores. “*The law is clear that the Legislature has granted the authority to amend plats to the legislative bodies and not the courts.*” *Halverson v. City of Bellevue*, 41 Wn. App. 457, 461, 704 P.2d 1232 (1998). *See also, Hanna v. Margitan*, 193 Wn. App. 596, 608, 373 P.3d 300 (2016) where the court stated, “*We therefore hold that changes to something depicted on a short plat or changes that permit something expressly prohibited by the notes on the short plat are ineffective unless the plan is formally amended as to provide for in RCW 58.17.215.*”

In RCW 58.17.215, the Legislature conferred sole authority to alter a plat upon the legislative authority of the city, town, or county where the subdivision is located. Under that statute, the Osborns were required to submit an application to the City of Ocean Shores and Grays Harbor County to request such an alteration. Osborns have not made such an application to the best of Pokornys’ understanding.

Under RCW 58.17.180, review of the decision approving such an alteration is confined to chapter 36.70C RCW. See RCW 36.70C.030. Under that statute, the superior court acts in an appellate capacity and has only the jurisdiction conferred by law. *Durland v. San Juan County*, 182 Wn. 2d 55, 63, 340 P.3d 191 (2014).

Osborns’ failure to submit an application to Grays Harbor County and City of Ocean Shores to alter the plat to include an award of property

under adverse possession constitutes a failure to exhaust administrative remedies. RCW 36.70C.060 (2) (d); *Durland*, 185 Wn. 2d 66; *West v. Stahley*, 155 Wn. App. 691, 797, 229 P. 3d 943, *review denied*, 170 Wash.2d 1022, 245 P.3d 772 (2011). As they have failed to exhaust administrative remedies, Osborns lack standing to bring a LUPA action. *Durland*, 185 Wn. 2d 66.

Where statutes prescribe procedures for the resolution of a particular dispute, Washington courts require substantial compliance or satisfaction of the spirit of the procedural requirements before they will exercise general jurisdiction over the matter. *James v. County of Kitsap*, 154 Wn. 2d 574, 588, 115 P.3d 286 (2005). *See also, Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393, 232 P.3d 1163 (2010); *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475, *review denied*, 159 Wash.2d 1005, 153 P.3d 195 (2007).

As Osborn made no effort to comply with RCW Ch. 58.17.215's requirement to amend the plat to address the alteration of the plat caused by the adverse possession and mutual acquiescence claims, it follows the trial court cannot exercise general jurisdiction to hear respondents' claim for adverse possession. Alternatively, Osborns' adverse possession claim fails to state facts upon which relief can be granted and must be

dismissed. Accordingly, this court erred in granting summary judgment to Osborns.

2. Osborns cannot prove they adversely possessed the disputed property for 10 years.

Osborns rely on their fence line to establish a possession line for adverse possession of Pokornys' rear property enclosed by their fence. CP 1131; CP 1144; CP 1048. Osborns admit Pokornys surveyed the property line and filed a lawsuit before ten years had expired on the placement of the Osborns' fence. CP 1131; CP 1145; CP 1048. Nancy Osborn was asked, "*Are you still contending that you have adversely possessed the rear property?*" She replied, yes, because their possession will tack onto their predecessor's possession. CP 1131; CP 1145-1146; CP 1048. Nancy Osborn admitted they are relying on Richard Walter's claims of use and Justin Millard's claims of use to prove their claim for adverse possession. CP 1131; CP 1146; CP 1048. The trial court likewise relied upon the claimed use of the disputed property by Walter and Millard yet nobody has yet to show any actual use of the disputed property on Lot 55 other than Millard attaching a new fence to the old fence but that has been there less than 10 years. There is no other proof or evidence of actual use on any part of Lot 55 other than just claims of use. Everything mentioned as "use"

was done on Lot 54. There were 4 sheds, a greenhouse and a double car garage on Lot 54. CP 207.

3. Triable issues of material fact persist on the adverse character of the use made of the disputed property by Osborns' predecessors.

In order to tack use by a predecessor, the adverse claimant must first establish the adverse character of the predecessors' use. *Muench v. Oxley*, 90 Wn. 2d 637, 642-43, 584 P. 2d 939 (1978), *overruled on other grounds*, *Chaplin v. Sanders*, 100 Wash. 2d 853, 861 n. 2, 676 P.2d 431 (1984). The trial court relied heavily on the claimed use of the disputed property by Osborns' predecessors, Walter and Millard, in granting Osborns' motion for summary judgment. CP 1183-1184; CP 1171.

In so doing, the trial court failed to address applicable presumptions. Possession is presumed to be in subordination to the title of the true owner. *Muench*, 90 Wn. 2d 642. Thus, from the outset, claimed possession of the disputed property by Walter and Millard was presumed to be in subordination to Pokornys' title. That presumption continues "*until a distinct and positive assertion of a right hostile to the owner, and brought home to him, can transform a subordinate and friendly holding into one of an opposite nature, and exclusive and independent in its character.*" *Scheller v. Pierce County*, 55 Wash. 298, 301-02, 104 P. 277 (1909).

Adverse possession of open and vacant land is also presumed to be permissive. *State ex rel Shorett v. Blue Ridge Club, Inc.*, 22 Wn. 2d 487, 495, 156 P. 2d 667 (1945); *Sharp v. Kieszling*, 35 Wn. 2d 620, 623, 214 P. 2d 163 (1950)¹. Lot 55 was vacant until September 2005, when Woodbecks purchased it. CP 711; CP 754.

An inference of permissive use also arises in an adverse possession case when it is reasonable to assume “*that the use was permitted by sufferance and acquiescence.*” *Miller v. Anderson*, 91 Wn. App. 822, 828, 964 P. 2d 365 (1998). An inference of permissive use is applicable to any situation in which it is reasonable to infer that the use was permitted by neighborly sufferance and acquiescence. *Miller*, 91 Wn. App. 828; *Granston v. Callahan*, 52 Wn. App. 288, 294, 759 P. 2d 462 (1988).

Presumptions of permissive use can be overcome by evidence that resolves whether, considering the character of possession and the locale of the land, “*is the possession of such a nature as would normally be objectionable to owners of such land?*”. 17 Washington Practice: Real Estate: Property Law § 8.12. Walter’s alleged activities in the disputed area consisted of pruning vegetation on his side of the privacy barrier and installing rocks which quickly disappear into the sand. CP 888, 889. Such

¹ *Disapproved on other grounds, Cuillier v. Coffin*, 57 Wash.2d 624, 627, 358 P.2d 958 (1961).

nominal activities are insufficient to overcome the presumptions discussed above.

Walter and Millard also claim to have stored materials related to their businesses in the privacy barrier on Lot 55. CP 888; CP 915. Putting aside the absence of any corroborating evidence to support their testimony, such use, if it existed, is insufficient to overcome the presumption of permission. *Miller v. Anderson*, 91 Wn. App. 832-33.

As a result, the presumptions of permissive use operating in this case have not been rebutted. Summary judgment for the Osborns must therefore be reversed.

Osborns' actions also negated hostile possession. Osborns admit that the "Old Fence" belonged to Karen Woodbeck (Lot 55) when e-mailing her about the property. CP 1203. Osborns also acknowledged and recognized ownership of the front disputed property in Pokorny when they sought Pokorny's permission to top the Privacy Barrier to eight feet. CP 1175-1176. Osborns also asked permission by Pokornys for their painters to access across the disputed area into Osborns' back yard and if permission was not granted, Pokornys were threatened with court action for an order by a judge. CP1382-1388; CP 1390. By Osborns asking permission, they recognized superior title in Pokornys to the disputed property thereby destroying the element of adversity. *Peoples v. Port of*

Bellingham, 93 Wn.2d. 766, 775, 616 P.2d 1128 (1980); *Roesch v. Gerst*, 18 Wn.2d. 295, 306-07, 138 P.2d 846 (1943) (When a prescriptive claimant recognizes a superior title in the true owner during the statutory period, adversity is not established.) Osborns also made Pokornys several offers to purchase the disputed property, once again recognizing fee ownership in Pokornys and destroying any claim of adversity associated with the disputed property. CP. 1208-1211.

At a minimum, Osborns' actions in asking Pokornys for permission to cut the vegetation, access for their painters and their offers to purchase the disputed property are inconsistent with their claim of adverse possession, thereby raising an issue of their credibility that cannot be resolved on summary judgment. *Riley v. Andres*, 107 Wn. App. 391, 397-98, 27 P.3d 618 (2001).

4. Triable issues of fact persist on the issue of continuous possession.

The trial court failed to address evidence offered by Pokornys of Walter's abandonment of Lot 54, 203 days before it was sold to Millard. CP 1186-1187; CP 207. The trial court also failed to address Millard's departure from Lot 54 for 68 days prior to its sale to the Osborns. CP 1186-1187; CP 209.

To interrupt adverse possession there must be actual cessation of the possession. *Lingvall v. Bartmess*, 97 Wn. App. 245, 256, 982 P. 2d 690 (1990). Here, Walter's permanent departure from Lot 54 on April 21, 2006, with no plan to return, and Millard's departure for 68 days in 2007 qualify as interruptions in continuous possession thereby defeating Osborns' claim of adverse possession by tacking Walter's and Millard's possession. CP 1183-1187.

The rule in Washington allowing an adverse claimant to tack the possession of his predecessor is subject to the caveat there be no breaks in continuous possession. *Howard v. Kunto*, 3 Wn. App. 393, 398, 477 P. 2d 210 (1970)² (“*This rule (which permits tacking) is one of substance and not of absolute mathematical continuity, provided there is no break so as to sever two possessions.* (Emphasis added).” See also, 17 Washington Practice, Real Estate, § 8.17 (“*If there is a general test of “uninterrupted,” it is that there must be no “significant” break in the claimant’s continuity of possession. A significant break will cause what is called abandonment of adverse possession.*”).

Here, the breaks in continuous possession by the departures of Walter and Millard from Lot 54 are fatal to Osborns' claim of adverse possession of the disputed property. At a minimum, the jury should decide whether

²²² Overruled, on other grounds, in *Chaplin v. Sanders*, 100 Wn. 2d 853, 676 P. 2d 431 (1984).

Walter's vacating his Lot 54 home for 203 days prior to its sale to Millard and Millard's departure from Lot 54 for 68 days prior to its sale to the Osborns constitute "*significant breaks*" in the continuity of possession of the disputed area by Osborns' predecessors. *See Johnson v. Brown*, 33 Wash. 588, 74 P. 677 (1903).

The trial court misplaced reliance upon *Howard v. Kunto*. CP 1183-1185. In *Howard*, the court held occupancy of a beach house during the summer months for more than 10 years satisfied the requirement of continuous possession by the defendant and his predecessors. 3 Wn. App. 214. The court in *Howard* was not called upon to address, nor did it address, whether the defendant or his predecessors abandoned the property. *Howard* therefore does not control the issue whether Walter and Millard abandoned their use of the disputed area when they vacated Lot 54; Walter's primary residence, and not a beach house, for 16 years.

5. Triable issues of fact persist on the issue of notorious possession.

The character of acts satisfying the element of notorious possession is discussed in *Hunt v. Matthews*, 8 Wn. App. 233, 236, 505 P. 2d 819 (1973): "...*The acts constituting the warning which establishes notice must be made with sufficient obtrusiveness to be unmistakable to an adversary, not carried out with such silent civility that no one will pay attention....*"

An adverse claimant's burden to establish notorious possession is higher when the property in question is vacant land. "...*Greater use of a vacant lot would be required to be notorious to an absentee owner than to one occupying the land who would observe an offensive encroachment daily...*" *Hunt*, 8 Wn. App. 237.

In *Hunt*, the court relied on *People's Savings Bank v. Bufford*, 90 Wash. 204, 208, 155 P. 1068, 1069 (1916):

It is . . . important . . . to consider the character and intended uses of the property . . . the mere fencing and sowing of some turnip seed were insufficient to initiate a title to a town lot. It is not like land that may be pastured or put to commercial crops or from which wood may be cut. Such acts are not inconsistent with an intent to trespass for few owners would object to the use of his unimproved town lot by those who might plant a garden, erect a chicken run, or pile wood upon it. Town lots are laid out for the purpose of erecting dwellings and convenient outbuildings, and the title to them should not be disturbed until there is clear proof that the occupant intends to devote the property to the uses for which it was intended.

8 Wn. App. 237-38.

The trial court misplaced reliance upon the "Old Fence." CP 1170-1171; CP 1174-1175; CP 803. That fence was not installed by Osborns or any of their predecessors. CP 888; CP 1175. The fence did not straddle

the property line between Lots 54 and 55. Instead, it was constructed several feet east of that boundary. CP 1174; CP 180. The fence ran from the front façade of the garage on Lot 55 to the back side of the connected accessory dwelling unit and shielded Lot 55 from the mess on Walter's Lot 54 rear property. CP 940; CP1174. The fence did not extend the full length of Lot 55. The fence did not keep anyone or dogs from crossing the property line between Lots 54 and 55. CP 944; CP 1584. Pokornys' surveyor, Donald Hurd, recorded the length of the fence at 40 feet. CP 587. In contrast, the western boundary of Lot 55 is 103.33 feet. CP 587.

The "Old Fence" in this case bears much in common with the old fence in *Hunt v. Matthews*, 8 Wn. App. 238 ("*...The fence did not define the boundary of the area claimed by the plaintiff; it did not exclude the defendants from the property; and it did not indicate an affirmative exertion of dominion by the claimant over the property...*").

In *Hunt*, the court also recognized a fence existing as a convenience rather than as an assertion of ownership does not establish notice of a claim. 8 Wn. App. 238. As the "Old Fence" did not exclude anyone from crossing the Lot 54/55 boundary, it is reasonable to infer it was not intended as a boundary, but rather as an aesthetic convenience to shield the owners of Lot 55 from activities occurring on Lot 54. On summary

judgment, Pokornys were entitled to this reasonable inference. *Morris v. McNichol*, 89 Wn. 2d 491, 494, 519 P. 2d 7 (1974).

The “Old Fence” in this case also resembles the fence in *Muench v. Oxley*, 90 Wn. 2d 637, 642, 584 P. 2d 939 (1978):

[T]he testimony makes clear that, at the time he took possession of the property, the fence itself was in a dilapidated condition and the ground on either side was heavily covered by trees and underbrush. Thus, Oxley cannot be said to have been in such possession as would put a person of ordinary prudence on notice of a hostile claim.

The trial court also erred by considering the concrete slab and rocks installed by Walter as notorious. CP 1178-1179. Pokornys’ predecessor, Moors, testified he did not observe the concrete slab. CP 1178-1179. Moreover, Walter installed the concrete slab in the Fall of 1996, but he left Lot 54 in April 2006. CP 1178.

The concrete slab, only a sliver of which is located on Lot 55, is akin to the croquet court rejected by the court in *Booten v. Peterson*, 34 Wn. 2d 563, 575, 209 P. 2d 349 (1949) (“*We are of the opinion that the Petersons’ encroachment on the plaintiffs’ land, in order to increase the area of their croquet court, was not much of a ‘flag,’ and we find no evidence whatever which indicates that they did so with hostile intent.*”).

The rocks placed in the sand by Walter are no less insignificant than the concrete slab. Walter testified the rocks immediately disappear into the sand. CP 1178-1179. The rocks are insufficient to satisfy the notorious element of adverse possession. In *Lloyd v. Montecucco*, 83 Wn. App. 846, 856, 924 P. 2d 927 (1996), placement of concrete blocks moveable by tidal action and placed only eight feet from the bulkhead, intermittent moorage, and seeding of oysters and claims were not sufficiently visible to be open and notorious.

Osborns also claim to have (their landscaper) mowed grass in the disputed area and pruned their side of the privacy barrier. CP 813; CP 657. Neither activity amounts to open and notorious possession. *Wood v. Nelson*, 57 Wn. 2d 539, 540, 358 P. 2d 312 (1961); *Hunt v. Matthews*, 8 Wn. App. 235, 238-39.

Osborns also offered the testimony of Walter, who claimed to have stored his landscaping materials in the disputed area. CP 810; CP 888. Osborns offered no evidence that Walter's landscaping materials could be seen through the dense vegetation of the privacy barrier by one standing on the Lot 55 side.

Cases such as *Chaplin v. Sanders*, 100 Wn. 2d 853, 676 P. 2d 431 (1984) do not support Osborns' claim in this case. The level of activity in the disputed area in *Chaplin* included the trailer park tenants' use of the

area for parking, storage, garbage removal and picnicking. 100 Wn. 2d 856. In addition, grass was mowed up to the drainage ditch and flowers were planted in the area by trailer personnel and tenants. In the spring of 1978, the Sanders installed underground wiring and surface power poles in the area between the roadway and the drainage ditch. *Id.* The activities in *Chaplin* were more intense than the claimed actions of Osborns and their predecessors. In addition, the installation of underground wiring and the erection of surface power poles in *Chaplin* has no parallel in this case. Thus, the facts that supported adverse possession in *Chaplin* are significantly different from the facts of this case.

In *Hunt v. Matthews*, in affirming dismissal of the plaintiff's claim for adverse possession, the court concluded the plaintiff's use of a portion of an adjacent vacant urban lot as a lawn and garden spot was insufficient to establish adverse possession of the claimed property. 8 Wn. App. 238-39. A similar conclusion is warranted here.

6. The trial court erred in ruling the "Old Fence" to be a boundary fence.

The trial court erred in concluding it was undisputed that at least by September 2005, when Woodbeck purchased Lot 55, there was a boundary fence in the back yard. CP 1175-1178. In late 2005, a 40-foot long "Old

Fence” intentionally located 5 feet east of the Lot 54/55 boundary line was erected by the builder of Lot 55. CP1174; CP 1584; CP 888.

The trial court’s conclusion there was a boundary fence in September 2005 stands in marked contrast to comments made by the trial court on July 16, 2018 at a joint hearing for motion for summary judgments:

So, it’s not a boundary fence. There is not enough to show it’s a boundary fence. It’s not--it wasn’t--it’s—there’s a fence there, but it’s not put there for a boundary fence. It doesn’t run from one corner to the other corner, and it really didn’t do anything except put up a barrier, for whatever purpose, and we don’t know.

RP 071618 p. 35 l. 17-23.

The trial court gave no explanation for its characterization of the “Old Fence” as a boundary fence in its letter ruling of September 18, 2018. CP 1170-1171. Nor did the trial court give any reason for its departure from the comments it made on July 16, 2018.

In order for it to be a boundary fence, it was incumbent upon Osborns to establish an agreement with Pokornys that it was indeed such a boundary fence. *Thomas v. Harlan*, 27 Wn. 2d 512, 519, 178 P. 2d 965 (1947) (“*In the absence of an agreement to the effect that a fence between the properties shall be taken as a true boundary line, mere acquiescence*

in its existence is not sufficient to establish a claim of title to a disputed strip of ground.”).

Osborns made no attempt to establish such an agreement. Instead, Osborns offered Nancy Osborns’ belief in 2007 that the “Old Fence” lay along the Lot 54/55 boundary line. CP 455.

In addition, in order for a boundary fence to constitute evidence of hostile possession of land up to the fence, the fence must be effective in excluding the abutting owner. *Wood v. Nelson*, 57 Wn. 2d 541. Here, however, the 40-foot long “Old Fence” was unable to keep the owner of Lot 55 from bypassing it at either end. Thus, the “Old Fence” failed as a boundary fence.

More fundamentally, there exists profound confusion among the witnesses as to what fence existed, or when or where it existed. Richard Walter testified in his declaration, “[o]n the date I sold the property on 11/21/06, there were no fences or existing driveway between my house and the neighbor’s house on Lot 55.” CP 1117-1118. Yet in his deposition, Mr. Walter testified he spoke to the owner of Lot 55 when he was building the old fence after the house was built on that lot. CP 888. The Woodbecks purchased Lot 55 and its house and garage on September 19, 2005. CP 744. Thus, Mr. Walter’s conversation with the builder of the house on Lot 55 about the old fence had to have occurred in late 2005, a

year before Walter sold Lot 54. This conflict in Walter's testimony on an issue as fundamental as the old fence creates an issue of credibility that cannot be resolved on summary judgment. *Powell v. Viking Ins. Co.*, 44 Wn. App. 495, 503, 722 P. 2d 1433 (1986).

7. The trial court erred in extending the area encompassed by Osborns' adverse possession all the way to Hake Court SW.

Pokornys assign error to the Decree Quieting Title (App. 5) and the legal description appearing therein. Including the changes made to their survey after trial court's ruling of September 19, 2018. CP 1783-1785; CP 1544; CP 1547. Pokornys also assign error to the trial court's letter ruling of September 18, 2018, wherein the trial court stated "'[i]t is undisputed and as shown by the concrete slab and large rock in the ground that Walter and subsequent owners of Lot 54 regularly used both front and back portions of the disputed portion of Lot 55 as their own. CP 1171-1172. CP 1178-1179.

Courts may create a penumbra of ground around areas actually possessed when reasonably necessary to carry out the objective of settling boundary disputes. *Lloyd v. Montecucco*, 83 Wn. App. 846, 853-54, 924 P. 2d 927 (1996). Here, however, no reasonable explanation can be given for extending the area adversely possessed into the portion of the privacy barrier that extends from the Osborns' backyard fence out toward Hake

Court SW. That part of the privacy barrier is not reasonably necessary to allow vehicles to transit from the street to Osborns' back yard.

8. The trial court erred in denying Pokornys' motion for reconsideration.

Pokornys assign error to the trial court's order denying their motion for reconsideration. CP 1471; App. 3. The trial court's denial of Pokornys' motion for reconsideration is reviewed for abuse of discretion. *Landstar Inway Inc. v. Samrow*, 181 Wn. App. 109, 120, 325 P. 3d 327 (2014). A trial court's decision based upon an erroneous view of the law is an abuse of discretion. *Washington State Insurance Exchange Association v. Fisons Corp.*, 122 Wn. 2d 299, 339, 858 P.2d 1054 (1993).

In their motion for reconsideration, Pokornys addressed the presumption of permission that governs this case. CP 1780, 1190-94. In an adverse possession case, a use is not adverse if it is permissive. *Miller v. Anderson*, 91 Wn. App. 822, 828, 964 P.2d 365 (1998); Permission can be express or implied. *Miller*, 91 Wn. App. at 828. A permissive use may be implied in "any situation where it is reasonable to infer that the use was permitted by neighborly sufferance or acquiescence." *Lingvall c. Bartmess*, 97 Wn. App. 245, 982 P.2d 690 (1999) ((quoting *Roediger v. Cullen*, 26 Wash.2d 690, 707, 175 P.2d 669 (1946); *Miller*, 91 Wash. App. 828-29.

In its September 18, 2018 order on summary judgment, the trial court never once mentioned the presumption of permission operating in this case. CP 1170-71. By failing to consider the presumption of permission in this case, the trial court's order on summary judgment and its denial of Pokorny's motion for reconsideration rest on an erroneous view of the law and therefore constitute an abuse of discretion. *Fisons*, 122 Wn. 2d 339.

9. The trial court erred in denying Pokornys' motion for summary judgment.

Pokornys assign error to the trial court's denial of their motion for summary judgment. CP. 1170-1171; CP 1172-1199 (App. 1). An important argument raised by Pokornys in their motion involved the departure of Osborns' predecessor in title, Richard Walter, who left Lot 54 on April 21, 2006 and moved himself and his family to Colville, Washington, never to return. CP 1183-1189. As a result, Lot 54 was vacant for 203 days. CP 1183-1187; CP 207. Millard listed Lot 54 for sale by broker, vacated the home and it sat vacant for 68 days until the sale to Osborn. (Millard Listing) CP 1186-1187; CP 209. The trial court never addressed the effect of those interruptions in possession by Osborns' predecessors. CP 1170-1171; CP 1183-1189. The departures by Walter and Millard interrupted continuity of possession by Osborns'

predecessors, thereby preventing Osborns from satisfying that requirement of adverse possession. *See, Johnson v. Brown*, 33 Wash. 590.

Where Pokornys present the absence of an essential element to Osborns' claim for adverse possession, the burden shifts to Osborns to make a showing sufficient to establish the existence of that element, and on which the Osborns will have the burden of proof at trial. *Granville Condominium Owners v. Kuhner*, 170 Wn. App. 543, 551, 312 P.3d 702 (2013) (*Quoting Young v. Key Pharm., Inc.*, 112 Wash.2d 216, 225, 770 P.2d 182 (1989) (*footnote omitted*) (*quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986))). “[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.” *Celotex*, 477 U.S. at 323, 106 S. Ct. 2548.

The departures by Walter and Millard from Lot 54 caused a cessation of use of the disputed area by them. Their departures therefore constitute interruption of adverse use. *Huff v. Northern Pacific Railway*, 38 Wn. 2d 103, 113-14, 228 P. 121 (1951) (*quoting* Restatement of Property § 459, comment c.).

In light of the interruptions in continuous possession of Lot 54 by their predecessors, Osborns cannot establish 10 years of continuous possession of the disputed area. Instead, with each interruption, Osborns must begin

adverse possession anew. 17 Washington Practice, Real Estate, §8.17.

Since both interruptions occurred within 10 years of the filing of this action, Osborns cannot establish 10 years of adverse use, with or without tacking.

10. The trial court erred in dismissing Pokornys remaining claims.

Pokornys assign error to the Order Granting Defendants Showell and Nancy Osborns' Motion for Summary Judgment of Dismissal. CP 1793-1794; App. 3. As the trial court erred in granting Osborns' motion for partial summary judgment and in denying Pokornys' motion for partial summary judgment, it follows the trial court had no basis to dismiss Pokornys' remaining claims. Pokornys incorporate their arguments and authorities on paragraphs 1-9.

11. The trial court erred in awarding attorney fees to the Osborns.

Pokornys assign error to Findings 3, 4, 5, 6, 7, 8, 9, Conclusions 1, 5, 9 and the Order Granting Defendants' Motion for Attorney Fees and Costs. CP 1787-1792; CP 1767-1772; App. 4.

RCW 7.28.083 (3) provides as follows: *"The prevailing party in an action asserting title to real property by adverse possession may request the court to award costs and reasonable attorneys' fees. The court may award all or a portion of costs and reasonable attorneys' fees to the*

prevailing party if, after considering all the facts, the court determines such an award is equitable and just.”

A prevailing party is one who receives an affirmative judgment in their favor. *Dave Johnson Ins. Inc. v. Wright*, 167 Wn. App. 758, 782-83, 275 P. 3d 339 (2012). As indicated by the foregoing arguments and authorities, Osborns are not entitled to summary judgment. As Osborns are not prevailing parties in this case. Pokornys therefore request the Court to reverse the award of attorney fees and costs to Osborns.

12. If the Court reverses summary judgment, Pokornys request attorney fees and costs on appeal.

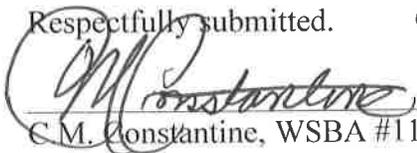
In the event the Court reverses summary judgment, Pokornys will be the prevailing party for purposes of attorney fees and costs on appeal under RCW 7.28.083 (3). *Dave Johnson Ins. Inc. v. Wright*, 167 Wn. App. 782-83 . Per RAP 18.1, Pokornys therefore request attorney fees and costs.

VII CONCLUSION

Pokornys ask the Court to reverse the trial court’s grant of summary judgment and the award of attorney fees and costs to Osborns, award Pokornys attorney fees on appeal, grant Pokornys’ motion, or remand the case for trial.

Respectfully submitted.

OF COUNSEL, Inc., P.S.



C.M. Constantine, WSBA #11650, Of Attorneys for Appellants

III APPENDICES

1. September 18, 2018 Order Denying Appellant's Motion for Summary Judgment and Granting Respondent's Motion for Partial Summary Judgment.
2. Order Denying Reconsideration
3. Order Granting Summary Judgment of Dismissal
4. Findings of Fact, Conclusions of Law and Order for Attorney Fees and Costs.
5. Decree Quieting Title

Appendix 1

September 18, 2018 Order Denying Appellant's Motion for Summary Judgment and Granting Respondent's Motion for Partial Summary Judgment.

THE SUPERIOR COURT OF WASHINGTON
GRAYS HARBOR COUNTY

STEPHEN E. BROWN, JUDGE
DAVID L. EDWARDS, JUDGE
RAY W. KAHLEH, JUDGE
(360) 219-5311 FAX
AMINTA SPENCER, ADMINISTRATIVE
(360) 219-5311 FAX

100 W. BROADWAY
ROOM 335
MONTESANO, WASHINGTON 98543

September 18, 2018

Mr. James A. Gauthier
Gauthier Law Offices, P.S.
10908 171st Ave. E.
Lake Tapps, WA 98391-5179

Mr. Paul S. Smith
Forsberg & Urnlauf, P.S.
901 Fifth Avenue, Suite 1400
Seattle, WA 98164-1039

Re: MICHAEL S. POKORNY & JOETTA POKORNY v. SHOWELL OSBORN &
NANCY OSBORN; Grays Harbor County Cause No. 16-2-00135-8

Dear Mr. Gauthier and Mr. Smith:

Cross Motions for Summary Judgment were presented before me on July 16, 2018, and I took the motions under advisement. The parties advised the court shortly thereafter that they stipulated to a stay of proceedings of 30 days. On August 16, 2018, the parties presented an agreed order lifting the stay.

This is a quiet title action to establish the boundary between adjoining properties. Plaintiffs Michael S. & Joetta Pokorny (Pokorny) are the owners of Lot 55 and Defendants Showell & Nancy Osborn (Osborn) are the owners of Lot 54, said lots being adjacent parcels in Division 16, Block 15, Plat of Ocean Shores.

A survey procured by Pokorny in 2015 shows the boundary line between the lots as established by the original survey for the plat. The location of the "surveyed" line is not disputed by Osborn. Osborn instead asserts the actual boundary line between the lots was established contrary to the surveyed line by adverse possession and/or mutual recognition and acquiescence.

Along with the arguments of counsel and the case records and files, I have considered the following:

1. Declaration of Plaintiffs' Counsel, James A. Gauthier, in Support of Motion for Partial Summary Judgment (*May 14, 2018*)
2. Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment (*May 14, 2018*)
3. Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment and Cross-Motion for Partial Summary Judgment (*June 7, 2018*)

4. Declaration of Paul Smith in Support of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment (*June 7, 2018*)
5. Plaintiffs' Response Memorandum to Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment (*June 21, 2018*)
6. Defendants Showell and Marcia Osborn's Motion for Partial Summary Judgment re: Adverse Possession (*June 5, 2018*)
7. Declaration of Paul Smith in Support of Defendants' Motion for Partial Summary Judgment re: Adverse Possession (*June 7, 2018*)
8. Declaration of Plaintiffs' Counsel in Opposition to Defendants' Motion for Partial Summary Judgment (*June 21, 2018*)
9. Supplemental Declaration of Plaintiffs' Counsel, James A. Gauthier in Support of Motion for Partial Summary Judgment (*June 21, 2018*)
10. Defendants Showell and Nancy Osborn's Reply in Support of Motion for Partial Summary Judgment Re: Adverse Possession

It is undisputed that at least by Sept. 2005, when Woodbeck purchased Lot 55, there was a boundary fence in the back yard. The subsequently constructed rear yard enclosure fence followed the line established by the prior boundary fence.

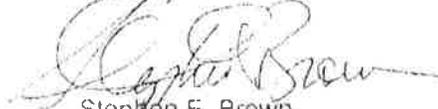
It is undisputed and as shown by the concrete slab and large rocks in the ground that Walter and subsequent owners of Lot 54 regularly used both the front and back portions of the disputed portion of Lot 55 as their own. This use was exclusive, actual and uninterrupted, open and notorious, and hostile and under a claim of right, and was well established long before Sept. 2005. No evidence was presented showing that Pokorny or the predecessors in interest to Lot 55 ever used or even tried to use the disputed portion of Lot 55.

As a matter of law, Osborn is entitled to "tack" the use and possession of the property by predecessors in interest to Lot 54. *Howard v. Kunto*, 3 Wn. App. 393, 397, 477 P.2d 210, 213-15 (1970), *overruled [on other grounds] by Chaplin v. Sanders*, 100 Wn. 2d 853, 676 P.2d 431 (1984).

Osborn's motion for partial summary judgment based on adverse possession is granted. Pokorny's motion for summary judgment is denied.

Dated this 18th day of September, 2018.

Sincerely,



Stephen E. Brown
Superior Court Judge

SEB/bmm

Appendix 2

Order Denying Reconsideration

THE SUPERIOR COURT OF WASHINGTON
GRAYS HARBOR COUNTY

STEPHEN E. BROWN, JUDGE
DAVID L. EDWARDS, JUDGE
RAY W. KAHLER, JUDGE
(360) 249-5311 Ext 4
AMINTA SPENCER, ADMINISTRATOR
(360) 249-5311 Ext 3

102 W BROADWAY
ROOM 303
MONTESSANO, WASHINGTON 98563

18 OCT 18 10 41

October 9, 2018

Mr. James A. Gauthier
Gauthier Law Offices, P.S.
10908 171st Ave. E.
Lake Tapps, WA 98391-5179

Mr. Paul S. Smith
Forsberg & Umlauf, P.S.
901 Fifth Avenue, Suite 1400
Seattle, WA 98164-1039

16-2-00135-8
LTR 127
Letter
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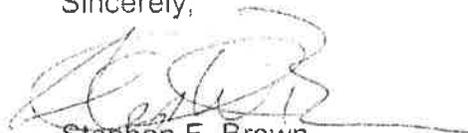
Re: Plaintiff's Motion for Reconsideration
POKORNY v. OSBORN
Grays Harbor County Cause No. 16-2-00135-8

Dear Mr. Gauthier and Mr. Smith:

Pursuant to LC/R 59, I deny the reconsideration motion.

Dated this 9th day of October, 2018.

Sincerely,


Stephen E. Brown
Superior Court Judge

SEB/bmm
Cc: File

Appendix 3

Order Granting Summary Judgment of Dismissal

16--2--00135-8
ORISJ 148
Order Granting Summary Judgment
4662787



Civil Motions Judge
Hearing Date: January 7, 2019
Hearing Time: 1:30 P.M.

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR GRAYS HARBOR COUNTY

MICHAEL S. POKORNY and JOETTA
POKORNY, husband and wife and the marital
community composed thereof,

Plaintiffs,

vs.

SHOWELL OSBORN and NANCY OSBORN,
husband and wife and the marital community
composed thereof; NATHANIEL D. JUDD and
BETHANIE R. JUDD, husband and wife and
the marital community composed thereof, d/b/a
JUDD TREE SERVICE, a Washington
contractor, JUDDTT3875N2 and WESCO
INSURANCE COMPANY under bond No. 46-
WB033713,

Defendants.

No. 16-2-00135-8

~~PROPOSED~~

ORDER GRANTING DEFENDANTS
SHOWELL AND NANCY OSBORN'S
MOTION FOR SUMMARY JUDGMENT
OF DISMISSAL

CLERK'S ACTION REQUIRED

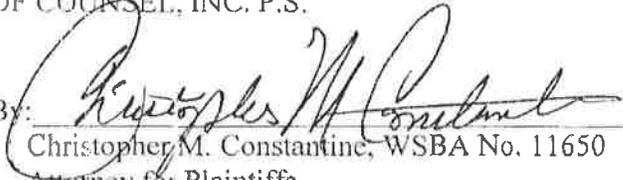
THIS MATTER came before the Court on Defendants Showell and Nancy Osborn's
Motion for Summary Judgment of Dismissal. The Court has considered the pleadings herein,
including:

1. Defendants Showell and Nancy Osborn's Motion for Summary Judgment of
Dismissal;

ORDER GRANTING DEFENDANTS SHOWELL AND NANCY OSBORN'S
MOTION FOR SUMMARY JUDGMENT OF DISMISSAL - PAGE 1

FORSBERG & UMLAUF, P.S.
ATTORNEYS AT LAW
901 FIFTH AVENUE • SUITE 1400
SEATTLE, WASHINGTON 98164-1039
(206) 689-8500 • (206) 689-8501 FAX

1 OF COUNSEL, INC. P.S.

2
3 By: 

Christopher M. Constantine, WSBA No. 11650

Attorney for Plaintiffs

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ORDER GRANTING DEFENDANTS SHOWELL AND NANCY OSBORN'S
MOTION FOR SUMMARY JUDGMENT OF DISMISSAL - PAGE 3

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FORSBERG & UMLAUF, P.S.
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SEATTLE, WASHINGTON 98164-1039
(206) 689-8500 • (206) 689-8501 FAX

Appendix 4

Findings of Fact, Conclusions of Law and Order for Attorney Fees and Costs

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Civil Motions Judge
Hearing Date: January 7, 2019
Hearing Time: 1:30 p.m.

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR GRAYS HARBOR COUNTY

MICHAEL S. POKORNY and JOETTA POKORNY, husband and wife and the marital community composed thereof,

Plaintiffs,

vs.

SHOWELL OSBORN and NANCY OSBORN, husband and wife and the marital community composed thereof; NATHANIEL D. JUDD and BETHANIE R. JUDD, husband and wife and the marital community composed thereof, d/b/a JUDD TREE SERVICE, a Washington contractor, JUDDTT3875N2 and WESCO INSURANCE COMPANY under bond No. 46-WB033713,

Defendants.

No. 16-2-00135-8

[PROPOSED]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING DEFENDANTS' MOTION FOR PREVAILING PARTY ATTORNEYS' FEES AND COSTS

CLERK'S ACTION REQUIRED

THIS MATTER came before the Court on Defendants' Motion for Prevailing Party Attorneys' Fees and Costs. The Court has considered the pleadings herein, including:

1. Defendants' Motion for Prevailing Party Attorneys' Fees and Costs;
2. Declaration of Paul S. Smith in Support of Defendants Showell and Nancy Osborn's Motion for Prevailing Party Attorneys' Fees and Costs, with exhibits;

ORDER GRANTING DEFENDANTS' MOTION FOR PREVAILING PARTY ATTORNEYS' FEES AND COSTS - PAGE 1

FORSBERG & UMLAUF, P.S.
ATTORNEYS AT LAW
901 FIFTH AVENUE • SUITE 1400
SEATTLE, WASHINGTON 98164-1039
(206) 689-8500 • (206) 689-8501 FAX

- 1 5. Defendants' counsel Mr. Lingg charged an hourly rate of \$185.00 for his work in this
2 case.
- 3 6. Defendants' counsel Mr. Smith charged an hourly rate of \$170.00 for his work in this
4 case.
- 5 7. Defendants' paralegal Ms. Gilligan charged an hourly rate of \$85.00 for her work in
6 this case.
- 7 8. From September 19, 2016 to November 29, 2018 defendants' attorneys and paralegal
8 employed by Forsberg & Umlauf, P.S. spent at least 942 hours working on this case.
- 9 9. Defendants' counsel were sufficiently experienced and competent to provide
10 representation to defendants in this matter.

11 II. CONCLUSIONS OF LAW

- 13 1. Defendants Showell and Nancy Osborn are the prevailing parties in this matter with
14 respect to their claim asserting title to real property by adverse possession.
- 15 2. R.C.W. 7.28.083(3) gives this Court discretion to award attorneys' fees and costs to
16 the party that prevails with respect to a claim asserting title to real property by
17 adverse possession if after consideration of the facts such an award is equitable and
18 just.
- 19 3. Fee decisions are entrusted to the discretion of the trial court. *Boeing Co. v.*
20 *Sierracin Corp.* 108 Wn.2d 38, 65 (1987).
- 21 4. Using the lodestar method, a court must first determine that counsel expended a
22 reasonable number of hours in securing a successful result. *Mahler v. Szucs*, 135
23

1 Wn.2d 398, 434 (1998). The amount of recovery is relevant but not conclusive. *Id.*
2 Large fee awards in cases involving small amounts at stake are not disfavored. *Id.*
3 Documentation of claimed attorneys' fees and costs need not be exhaustive or in
4 minute detail but must inform the Court the number of hours worked, the type of
5 work performed and the category of the person who performed the work, such as
6 senior partner, associate, ect. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581,
7 597 (1983). Hours reasonably expended must be spent on claims having a common
8 core of facts and related legal theories. *Martinez v. City of Tacoma*, 81 Wn. App.
9 228 (1996). The determination of a fee award should not become an undue
10 burdensome proceeding for the Court or the parties. *Absher Constr. Co. v. Kent Sch.*
11 *Dist. No. 415*, 79 Wn. App. 841 (1995). The Court is not required to segregate time
12 involving multiple claims or defenses when such claims or defenses all relate to the
13 same fact pattern. *Etheridge v. Hwang*, 105 Wn.App. 447 (2001). The trial judge
14 who has watched the case unfold is in the best position to determine which hours
15 should be included in a lodestar calculation. *Chuong Van Pham v. City of Seattle*, 159
16 Wn. 2d 527, 540 (2007).

17 5. The hourly rates charged by Mr. Smith, Mr. Lingg and Ms. Gilligan in this matter
18 were reasonable.

19 ~~6. Mr. Smith reasonably spent _____ hours securing a successful result for
20 defendants.~~

21 ~~7. Mr. Lingg reasonably spent _____ hours securing a successful result for
22 defendants.~~

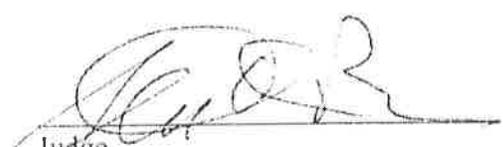
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~~8. Ms. Gilligan reasonably spent _____ hours securing a successful result for defendants.~~

9. Defendants counsel employed by Forsberg & Umlauf incurred 4345 in costs securing a successful result for defendants.

NOW THEREFORE, IT IS HEREBY ORDERED that Defendants' Motion for Prevailing Party Attorneys' Fees and Costs is **GRANTED**. It is further ordered that Plaintiffs shall pay Defendants \$ 101,843⁰⁰ in fees and \$ 4345.05 for costs. The check shall be made payable to "Forsberg & Umlauf, P.S." with the notation "Award of Attorney's Fees and Costs - 458.0439." Plaintiffs shall deliver the check within 30 court days of the date of this Order.

DONE IN OPEN COURT this 14th day of January, 2019.


Judge

1 *Presented By:*

2 FORSBERG & UMLAUF, P.S.

3
4 By: 

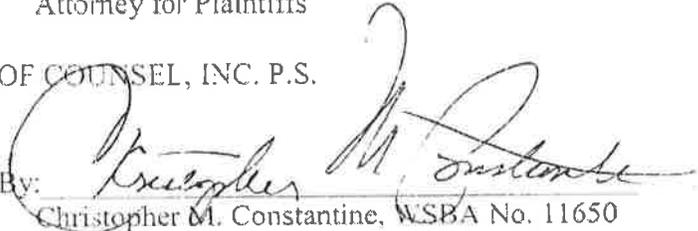
5 A. Grant L. ngg, WSBA No. 24227
6 Paul S. Smith, WSBA No. 28099
7 Attorneys for Defendants Showell
8 and Nancy Osborn

9 *Approved as to Form:*

10 GAUTHIER LAW OFFICES, P.S.

11 By: _____
12 James Gauthier, WSBA No. 15767
13 Attorney for Plaintiffs

14 OF COUNSEL, INC. P.S.

15 By: 
16 Christopher M. Constantine, WSBA No. 11650
17 Attorney for Plaintiffs

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Appendix 5
Decree Quieting Title

FILED

JAN 14 2019

COURT

16-2-00135-8
JDC-NT 149
Judgment and Decree Quietening Title
46E2802



Civil Motions Judge
Hearing Date: January 14, 2019
Hearing Time: 1:30 p.m.

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR GRAYS HARBOR COUNTY

MICHAEL S. POKORNY and JOETTA
POKORNY, husband and wife and the marital
community composed thereof,

Plaintiffs,

vs.

SHOWELL OSBORN and NANCY OSBORN,
husband and wife and the marital community
composed thereof; NATHANIEL D. JUDD and
BETHANIE R. JUDD, husband and wife and
the marital community composed thereof, d/b/a
JUDD TREE SERVICE, a Washington
contractor, JUDDTT3875N2 and WESCO
INSURANCE COMPANY under bond No. 46-
WB033713,

Defendants.

No. 16-2-00135-8

DECREE QUIETING TITLE

CLERK'S ACTION REQUIRED

This matter came before the Court on the parties' cross-motions for summary judgment on July 16, 2018. Among other things, defendants Showell and Nancy Osborn's motion for summary judgment sought an order quieting title to the "disputed area" running along the boundary line between the Osborn and Pokorny properties located in Ocean Shores,

1 Washington. The Pokornys' motion for summary judgment sought to quiet title to the
2 "disputed area" in the Pokornys as well as an order of ejectment relating to certain
3 improvements located in the "disputed area."

4 On September 18, 2018, the Court granted Defendants Showell and Nancy Osborn's
5 motion for summary judgment and denied Plaintiff's Michael and JoEtta Pokorny's motion for
6 summary judgment.

7 Now, therefore it is hereby ORDERED that title to the "disputed area" is quieted in
8 defendants SHOWELL OSBORN and NANCY OSBORN free and clear of any claim of the
9 plaintiffs MICHAEL POKORNY and JOETTA POKORNY. It is FURTHER ORDERED that
10 the legal description of the Osborn property commonly known as 854 Hake Court SW, Ocean
11 Shores, Washington be amended to the following:

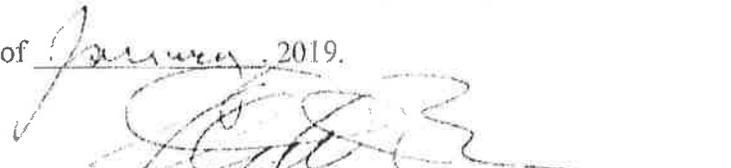
12 LOT 54, BLOCK 15, OCEAN SHORES DIVISION NO. 16, AS PER PLAT
13 RECORDED IN VOLUME 9 OF PLATS, PAGE 3, RECORDS OF GRAYS
14 HARBOR COUNTY; SITUATE IN THE COUNTY OF GRAYS HARBOR,
15 STATE OF WASHINGTON, PARCEL NO.: 093101505400, OS DIV 16 LOT
16 54 BLK 15, TOGETHER WITH THAT PORTION OF LOT 55, BLOCK 15,
DIVISION 16, PLAT OF OCEAN SHORES AS RECORDED IN VOLUME 9
OF PLATS, PAGE 3, RECORDS OF GRAYS HARBOR COUNTY, STATE OF
WASHINGTON, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

17 BEGINNING AT THE NORTHWEST CORNER OF SAID LOT 55;
18 THENCE NORTH 65° 39' 15" EAST ALONG THE NORTH LINE OF SAID
19 LOT 55 A DISTANCE OF 5.46 FEET;
20 THENCE SOUTH 20° 26' 42" EAST A DISTANCE OF 94.84 FEET TO A
21 POINT ON THE NORTHERLY RIGHT-OF-WAY OF HAKE COURT, ALSO
22 BEING A POINT ON A CURVE BEING CONCAVE TO THE SOUTH
23 WHOSE RADIUS POINT BEARS SOUTH 49° 10' 18" EAST A DISTANCE
OF 50.00 FEET;
THENCE SOUTHWESTERLY 14.47 FEET ALONG SAID CURVE
THROUGH A CENTRAL ANGLE OF 16° 35' 02" TO THE SOUTHWEST
CORNER OF SAID LOT 55;
THENCE NORTH 17° 04' 41" WEST ALONG THE WESTERLY LINE OF
SAID LOT 55 A DISTANCE OF 103.33 FEET TO THE TRUE POINT OF
BEGINNING.

1 SITUATE IN THE COUNTY OF GRAYS HARBOR, STATE OF
2 WASHINGTON.

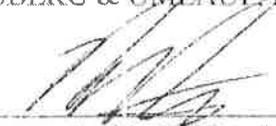
3 It is FURTHER ORDERED that the lis pendens on the Osborns' real property
4 commonly known as 854 Hake Court SW, Ocean Shores, Washington be quashed.

5 ENTERED this 14th day of January, 2019.

6 
7 JUDGE / COMMISSIONER

8 *Presented by:*

9 FORSBERG & UMLAUF, P.S.

10 By: 

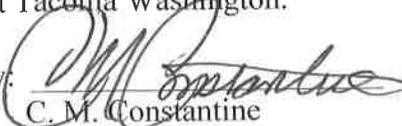
11 Paul S. Smith, WSBA #28099
12 Attorneys for Defendants
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IX. CERTIFICATE OF MAILING

The undersigned does hereby declare that on May 10 2019, the undersigned delivered a copy of BRIEF OF APPELLANTS filed in the above-entitled case and served on the following individual(s) via the manner indicated below.

Paul S. Smith WSBA 28099 Forsberg & Umlauf, P. S. Attorneys at Law 901 Fifth Avenue Suite 1400 Seattle, WA 98164-1039 <u>psmith@foum.law</u>	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Overnight Courier <input type="checkbox"/> Electronically via email <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Via Washington State Appellate Courts' Portal
Grant S. Lingg WSBA 24227 Forsberg & Umlauf, P. S. Attorneys at Law 901 Fifth Avenue Suite 1400 Seattle, WA 98164-1039 <u>glingg@foum.law</u>	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Overnight Courier <input type="checkbox"/> Electronically via email <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Via Washington State Appellate Courts' Portal
Clerk Washington State Court of Appeals, Division II 930 Broadway, Suite 300 Tacoma, WA 98402-4454	<input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via E-mail <input checked="" type="checkbox"/> Via Washington State Appellate Courts' Portal

DATED this 10th day of May 2019 at Tacoma Washington.

By: 
 C. M. Constantine

OF COUNSEL INC PS

May 10, 2019 - 11:58 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52949-1
Appellate Court Case Title: Mlichael S Pokorny, etal, Appellants v NFN Judd Tree Service, et al, Respondents
Superior Court Case Number: 16-2-00135-8

The following documents have been uploaded:

- 529491_Briefs_20190510115427D2333230_0803.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Appellants Brief.pdf

A copy of the uploaded files will be sent to:

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- swalker@foum.law

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