

**FILED
Court of Appeals
Division II
State of Washington
6/28/2019 1:15 PM**

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

APPELLANTS' REPLY BRIEF

By:
Christopher M. Constantine, WSBA, No. 11650
Of Counsel, Inc., P. S.
Of Attorneys for Appellants
P. O. Box 7125
Tacoma, WA 98417-0125
(253) 752-7850

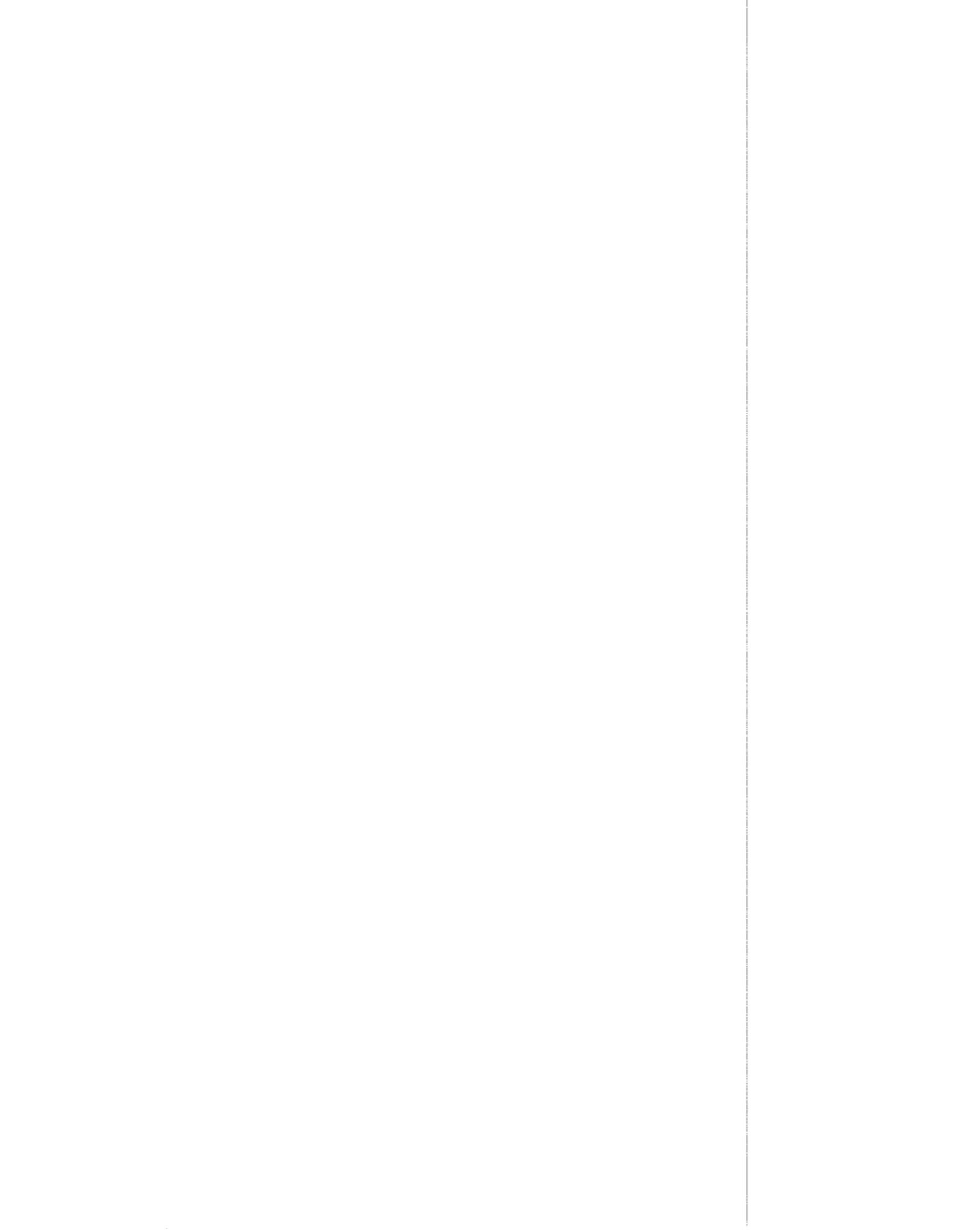
I. TABLE OF CONTENTS

I.	TABLE OF CONTENTS	i
II.	TABLE OF AUTHORITIES	ii
III.	RESPONSE TO STATEMENT OF THE CASE	1
IV.	ARGUMENT.....	6
	A. Standards of Review	6
	B. The trial court erred in granting Osborns’ motion for summary judgment.	7
	1. The trial court lacked subject matter jurisdiction to alter the boundaries of Pokornys’ Lot 55.	7
	2. Osborns cannot prove they adversely possessed the disputed property for 10 years.	11
	3. Triable issues of material fact persist on the adverse character of the use made of the disputed property by Osborns’ predecessors.	12
	5. Triable issues of fact persist on the issue of notorious possession.	19
	6. Osborns fail to present adequate argument whether their use of the disputed area was exclusive.	21
	7. The trial court erred in ruling the “Old Fence” to be a boundary fence.	22
	8. The trial court erred in extending the area encompassed by Osborns’ adverse possession all the way to Hake Court SW.	23
	9. The trial court erred in denying Pokornys’ motion for reconsideration.	24
	10. The trial court erred in denying Pokornys’ motion for summary judgment.	24
	11. The trial court erred in dismissing Pokornys remaining claims.	24
	12. The trial court erred in awarding attorney fees to the Osborns.	25
	13. If the Court reverses summary judgment, Pokornys request attorney fees and costs on appeal.	25
V.	CONCLUSION.....	25
VI.	CERTIFICATE OF MAILING	26

II. TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Accord v. Pettit</i> , 174 Wn. App. 95, 302 P.3d 1265 (2013).....	22
<i>Adams v. Dep't of Labor & Indus.</i> , 128 Wash.2d 224, 905 P.2d 1220 (1995)	24
<i>Anderson v. Hudak</i> , 80 Wn. App. 398, 907 P.2d 305 (1995).....	7
<i>Bohn v. Cody</i> , 119 Wn. 2d 357, 832 P.2d 71 (1992).....	11, 19
<i>Booten v. Peterson</i> , 34 Wn. 2d 563, 209 P. 2d 349 (1949).....	21
<i>Boyd v. Sunflower Properties, LLC</i> , 197 Wn. App. 137, 389 P.3d 626 (2016).....	14
<i>CalPortland Co. v. Level One Concrete, LLC</i> , 180 Wn. App. 379, 321 P.3d 1261 (2014).....	22
<i>Chaplin v. Sanders</i> , 100 Wn. 2d 853, 676 P. 2d 431 (1984).	passim
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn. 2d 801, 828 P. 2d 549 (1992).....	18, 19, 21, 24
<i>Cuillier v. Coffin</i> , 57 Wn. 2d 624, 358 P. 2d 958 (1961).....	20
<i>Dave Johnson Ins. Inc. v. Wright</i> , 167 Wn. App. 758, 275 P.3d 339 (2012)	25
<i>Durland v. Island County</i> , 182 Wn. 2d 55, 340 P. 3d (2014).....	7, 9, 10
<i>Gates v. Port of Kalama</i> , 152 Wn. App. 82, 215 P. 3d 983 (2009).....	6, 19
<i>Granston v. Callahan</i> , 52 Wn. App. 288, 759 P. 2d 462 (1988).....	14
<i>Guillen v. Pearson</i> , 195 Wn. App. 464, 381 P. 3d 149 (2016).....	24
<i>Halverson v. City of Bellevue</i> , 41 Wn. App. 457, 704 P.2d 1232 (1998).....	8
<i>Hanna v. Margitan</i> , 193 Wn. App. 596, 373 P.3d 300 (2016).....	9
<i>Hawk v. Walthew</i> , 184 Wash. 673, 52 P.2d 1258 (1935)	14

<i>Herrin v. O'Hern</i> , 168 Wn. App. 305, 275 P. 3d 1231 (2012).....	13
<i>Howard v. Kunto</i> , 3 Wn. App. 393, 477 P. 2d (1970).....	16, 17
<i>Hunt v. Matthews</i> , 8 Wn. App. 233, 505 P. 2d 819 (1973).....	12, 16, 20, 21
<i>In re Estate of Jepsen</i> , 184 Wn. 2d 376, 358 P. 3d 403 (2015).....	8
<i>In re Marriage of Buecking</i> , 179 Wn.2d 438, 316 P.3d 999 (2013).....	8
<i>James v. Kitsap County</i> , 154 Wn.2d 574, 115 P.3d 286 (2005).....	8
<i>LeBleu v. Aalgard</i> , 193 Wn. App. 66. 371 P. 3d 76 (2016).....	13
<i>Lloyd v. Montecucco</i> , 83 Wn. App. 846, 924 P. 2d 927 (1996).....	23
<i>MHM & F, LLC v. Pryor</i> , 168 Wn. App. 451, 277 P. 3d 62 (2012).....	7
<i>Miller v. Anderson</i> , 91 Wn. App. 822, 964 P. 2d 365 (1998).....	13, 16
<i>Muench v. Oxley</i> , 90 Wn. 2d 637, 584 P.2d 939 (1978).....	14, 16, 22
<i>Nickell v. Southview Homeowners Association</i> , 167 Wn. App. 42, 271 P. 3d 973 (2012).....	12, 13
<i>Ofuasia c. Smurr</i> , 198 Wn. App. 133, 392 P. 3d 1148 (2017).....	18, 22
<i>Peoples v. Port of Bellingham</i> , 93 Wn.2d. 766, 616 P.2d (1980).....	15
<i>People's Savings Bank v. Bufford</i> , 90 Wash. 204, 155 P. 1068 (1916).....	12, 16
<i>Ralph v. State Department of Natural Resources</i> , 182 Wn. 2d 242, 343 P. 3d 342 (2014).....	7
<i>Reymore v. Tharp</i> , 16 Wn. App. 150, 553 P. 2d 456 (1976).....	17, 18
<i>Riley v. Andres</i> , 107 Wn. App. 391, 27 P.3d 618 (2001).....	15
<i>Roesch v. Gerst</i> , 18 Wn.2d. 295, 138 P.2d 846 (1943).....	15
<i>Roy v. Cunningham</i> , 46 Wn. App. 409, 731 P.2d 526 (1986).....	22



that may or may not be caught by the City of Ocean Shores. The superior court should not be a party to the creation of a risk of such an illegal use.

Osborns' argument there is no authority to require an adverse claimant to exhaust administrative remedies fails to address *Durland v. San Juan County*, 182 Wn. 2d 55, 66, 340 P.3d 191 (2014) and *West v. Stahley*, 155 Wn. App. 691, 697, 229 P. 3d 943, *review denied*, 170 Wash.2d 1022, 245 P.3d 772 (2011). Under RCW 58.17.215, Osborns' adverse possession claim constitutes an attempted alteration of the Plat of Ocean Shores, requiring them to submit an application to request the alteration to the legislative authority of the City of Ocean Shores. Under RCW 58.17.180, the City's approval or denial of that application is reviewable under RCW Chapter 36.70C. Under *Durland*, Osborns' failure to seek approval from the City of Ocean Shores prior to commencing this action deprives them of standing to pursue a remedy in court. 182 Wn. 2d 66.

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.

Osborns argue RCW 58.17.215 is inapplicable in this case because of the exception recognized in that statute for RCW 58.17.040 (6). BR 27-28. Osborns provide no authority that RCW 58.17.040 (6) authorizes a Washington court to do anything. Nor do Osborns identify any language in RCW 58.17.040 (6) that supports their argument. Without such authority, Osborns' argument should not be considered. RAP 10.3 (a) (6); *Bohn v. Cody*, 119 Wn. 2d 357, 368, 832 P.2d 71 (1992).

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.

Osborns steadfastly adhere to *Chaplin v. Sanders*, 100 Wn. 2d 853, 676 P. 2d 431 (1984). BR 41-45. In so doing, Osborns continue to overlook significant factual differences between *Chaplin* and this case. The installation of utilities and blacktop in the disputed area in *Chaplin* have no parallel here until Millard constructed the wooden fence around the back yard of Lot 54 in 2007. CP 915. The construction of such structures in the disputed area in *Chaplin* was far more probative of hostile possession than is the actions of Osborns’ predecessors in this case.

The testimony of Walter and Millard they stored construction materials in the disputed territory is no more probative of hostile possession than the storing of wood in the disputed area which was rejected by the court in *Hunt v. Matthews*, 8 Wn. App. 233, 236, 505 P. 2d

819 (1973) and *People's Savings Bank v. Bufford*, 90 Wash. 204, 208, 155 P. 1068, 1069 (1916).

Osborns misplace reliance upon *Nickell v. Southview Homeowners Association*, 167 Wn. App. 42, 271 P. 3d 973 (2012). BR 45. In *Nickell* the court rejected application of the vacant lands doctrine in part due to a hearing examiner's finding the disputed area was located within a medium intensity residential environment. 167 Wn. App. 51-52. No such finding was ever made in this case. In addition, aerial photographs taken of Lots 54 and 55 in July 28, 2003 and May 26, 1999 reveal no evidence of a medium intensity environment in this case. CP 1256-1260, 1329. Nor do those photographs reveal any construction materials stored in the disputed area. Nor does this case contain any evidence Osborns or their predecessors installed arborvitae hedges or underground sprinklers such as those installed by the adverse claimants in *Nickell*. Thus, *Nickell* is factually distinguishable from this case.

Osborns boldly announce that while there is a presumption that easements are permissive, "no such presumption applies to adverse possession." BR 45. Osborns are wrong. The presumption of permissive use applies in adverse possession cases, as discussed in *Chaplin v Sanders*, 100 Wash.2d 853, 861-62, 676 P.2d 431 (1984): "[P]ermission to occupy the land, given by the true title owner to the claimant or his

predecessors in interest, will still operate to negate the element of hostility.” See also, Miller v. Anderson, 91 Wn. App. 822, 828, 964 P. 2d 365 (1998); Teel v. Stading, 155 Wn. App. 390, 394, 228 P. 3d 1293 (2010); Herrin v. O’Hern, 168 Wn. App. 305, 307, 275 P. 3d 1231 (2012); LeBleu v. Aalgard, 193 Wn. App. 66, 72, 371 P. 3d 76 (2016).

Washington decisions have long recognized the presumption of permission operates in adverse possession cases. *Hawk v. Walthew*, 184 Wash. 673, 52 P.2d 1258 (1935); *Muench v. Oxley* 90 Wn. 2d 637, 641, 584 P.2d 939 (1978). Osborns fail to mention or discuss *Muench* or *Hawk*.

Osborns’ attempt to distinguish the elements for prescriptive easements from the elements for adverse possession fails, as Washington courts consider the elements of those two doctrines to be the same. *Workman v. Klinkenberg*, 6 Wn. App. 2d 296, 301, 430 P. 3d 716 (2018); *Boyd v. Sunflower Properties, LLC*, 197 Wn. App. 137, 143, 389 P.3d 626 (2016). Thus, Pokornys’ reliance upon prescriptive easement cases such as *Scheller v. Pierce County*, 55 Wash. 298, 104 P. 277 (1909), *State ex rel Shorett v. Blue Ridge Club*, 22 Wn. 2d 487m156 P. 2d 667 (1945), *Granston v. Callahan*, 52 Wn. App. 288, 759 P. 2d 462 (1988) is appropriate.

Osborns also fail to address Pokornys argument that Osborns' actions 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.

Osborns also fail to address Pokornys' argument that by asking permission, Osborns 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). 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.

Osborns argue Pokornys admit there is no dispute Walter's use from 1990 to 2005 was continuous and uninterrupted. BR 37. To the contrary, as set forth in paragraph B 3 above, Pokornys maintain Walter's use of the disputed area from 1990 until at least 2003 was permissive, either under the vacant lands doctrine or under permission arising from neighborly accommodation.

Walter's alleged activities in the disputed area during his ownership of Lot 54 consisted of pruning vegetation on his side of the privacy barrier and installing rocks and boulders which quickly disappear into the sand. CP 888, 889. Such nominal activities are insufficient to overcome the presumptions of permission operating in this case. *Hunt v. Matthews*, 8 Wn. App.236; *People's Savings Bank v. Bufford*, 90 Wash. 208.

Walter and Millard also claim to have stored materials related to their businesses in the privacy barrier on Lot 55. CP 888; CP 915. Such use, if it existed, is insufficient to overcome the presumption of permission. *Miller v. Anderson*, 91 Wn. App. 832-33. Quite simply, Walter and Millard's claimed storage of materials in the disputed area, if it occurred,

is not such possession as would put a person of ordinary prudence on notice of a hostile claim. *Muench*, 90 Wn. 2d 642.

Osborns' continued reliance upon *Howard v. Kunto*, 3 Wn. App. 393, 477 P. 2d 201 (1970) overlooks basic differences between *Howard* and this case in the possession of the disputed property. BR 38. In *Howard*, the adverse claimant's summer occupancy of the property recurred for more than 10 years. Here, in contrast, Walter abandoned Lot 54, 203 days before it was sold, and did not return. CP 1186-1187; CP 207. Unlike *Howard*, there was no recurring summer possession in this case. The same holds true for Millard's departure from Lot 54 for 68 days prior to its sale to the Osborns. CP 1186-1187; CP 209.

The departures by Walter and Millard invoke the exception noted in *Howard v. Kunto*, 3 Wn. App. 393, 398, 477 P. 2d 210 (1970)¹ (“*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.*”

¹ Overruled, on other grounds, in *Chaplin v. Sanders*, 100 Wn. 2d 853, 676 P. 2d 431 (1984).

A significant break will cause what is called abandonment of adverse possession.”).

Osborns also misplace reliance upon *Reymore v. Tharp*, 16 Wn. App. 150, 553 P.2d 456 (1976). BR 39. In *Reymore*, the court rejected Reymores’ argument that Tharps’ summer occupancy of the disputed area did not satisfy the requirement of continuous possession. “*Occupancy during the summer only does not destroy the continuity of possession.* (Citing *Howard v. Kunto*.” 16 Wn. App. 153. This case is not a summer occupancy case. Instead, Walter and his family occupied Lot 54 year-round until he departed forever in April 2006. CP 207. *Reymore* is therefore not controlling here.

Osborns also misplace reliance upon *Ofuasia c. Smurr*, 198 Wn. App. 133, 392 P. 3d 1148 (2017). BR 39. In that case the court rejected the argument Ofuasias’ absence from their home when they rented it disrupted adverse possession of the disputed property, as the evidence showed that Ofuasias continuously maintained the area along the original line of the chain link fence. 198 Wn. App. 145. No similar facts are present here. Nor does the line of arborvitae bushes installed by Ofuasias have any parallel here.

Osborns argue the periods after Walter and Millard’s departure from Lot 54 were short and did not interrupt their possession of the disputed

area. BR 40. Osborns fail to support their argument with either citation to the record or authority. Osborns' argument should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P. 2d 549 (1992). Walter's departure from Lot 54 occurred more than 6 months prior to the sale of Lot 54 to Millard. There was nothing short about the time Lot 54 was unoccupied after Walter's departure.

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

Osborns argue the trial court's undisputed findings are verities that every owner of the Osborns' property used the disputed area as a true owner would. BR. 36-37. The trial court's findings entered in connection with its order granting Osborns' motion for summary judgment are surplusage and need not be considered. *Gates v. Port of Kalama*, 152 Wn. App. 86 n. 6.

Osborns fail to support their argument concerning notorious use with a single citation to the record. Osborns' argument should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

Osborns argue each of the owners of Lot 54 believed the Osborn property ran along the line allegedly established by Richard Walter as

early as 1990. BR 37. The subjective beliefs of adverse claimants are irrelevant. *Chaplin v. Sanders*, 100 Wn. 2d 861.

Osborns argue each owner of Lot 54 drove vehicles into the back yard of Lot 54 to park them there. BR 37. Osborns make no attempt to explain how driving vehicles into the back yard of Lot 54 justifies the award to Osborns of a substantial chunk of Lot 55. Such inadequately reasoned argument not adequately should not be considered. RAP 10.3 (a) (6); *Bohn v. Cody*, 119 Wn. 2d 368.

Osborns argue Walter and Millard stored construction materials in the disputed area without seeking permission. Osborns offer no evidence that those materials were ever seen by anyone. Therefore, there is no way to determine whether the storing of those materials met the requirement of notorious possession 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....*”

Further, 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. Osborns have not met this burden.

Osborns argue Walter and Millard did not seek permission from anyone to store the construction materials. CR 37. Washington courts do not regard the absence of permission as determinative. *Cuillier v. Coffin*, 57 Wn. 2d 624, 626, 358 P. 2d 958 (1961) (“*The fact that no permission was expressly asked, and that no permission was expressly given, does not preclude a use from being permissive...*”).

6. Osborns fail to present adequate argument whether their use of the disputed area was exclusive.

Osborns fail to support with either authority or citation to the record their argument that their use of the disputed area was exclusive. BR 31-33; BR 41. Osborns’ argument should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

To the extent the trial court’s findings need be addressed, Pokornys have addressed them throughout their opening brief. As to the trial court’s finding Walter mowed the grass between the house and the boundary line at least once a week, Pokornys responded at page 41 of their opening brief that neither mowing the grass nor pruning the wild vegetation amounts to open and notorious possession, citing *Wood v. Nelson*, 57 Wn.2d 539, 540, 358 P. 2d 312 (1961) and *Hunt v. Matthews*, 8 Wn. App. 233, 236, 505 P.

2d 819 (1973). As to the trial court's finding regarding the concrete pad, Pokornys argued at page 41 of their opening brief the concrete pad was not notorious, citing *Booten v. Peterson*, 34 Wn. 2d 563, 575, 209 P. 2d 349 (1949). As to the trial court's finding regarding Walter storing materials for his landscape business in the disputed area, Pokornys argued at pages 41 and 42 of their opening brief such activity was not notorious, citing *Hunt v. Mathews*. As to the trial court's finding on the old fence, Pokornys argued at pages 42 to 45 of their opening brief the old fence was not a boundary fence, and that Walter demonstrated profound confusion in his testimony as to what fence existed, or when or where it existed.

In light of the foregoing, Pokornys have adequately addressed the trial court's findings in this case. *CalPortland Co. v. Level One Concrete LLC*, 180 Wn. App. 379, 382, 321 P.3d 1261 (2014).

7. The trial court erred in ruling the “Old Fence” to be a boundary fence.

Osborns attempt to minimize the trial court's discussion of a fence in its September 18, 2018 Order Granting Osborns' motion for summary judgment. BR 46-47. Osborns' comments are at odds with Washington decisions that consider a boundary fence to be strong evidence of hostility. *See, e.g., Ofuasia v. Smurr*, 198 Wn. App. 133, 144, 392 P.3d 1148 (2017); *Roy v. Cunningham*, 46 Wn. App. 409, 413, 731 P.2d 526 (1986);

Accord v. Pettitt, 174 Wn. App. 95, 109, 302 P.3d 1265 (2013); *Chaplin v. Sanders*, 100 Wn. 2d 861; *Wood v. Nelson*, 57 Wn. 2d 540. It is clear the trial court considered the fence to be evidence of Osborns' hostile possession.

Osborns' attempt to side-step the fence is understandable, as they have no evidence, let alone clear and convincing evidence, required to establish an agreement the old fence was a boundary fence. *See Thomas v. Harlan*, 27 Wn. 2d 512, 519, 178 P. 2d 965 (1947); *Muench v. Oxley*, 90 Wn. 2d 641-42. Nor can Osborns establish that the fence was capable of keeping others out. *See Wood v. Nelson*, 57 Wn. 2d 540.

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

The trial court attempted to justify extension of the adverse possession area into the privacy barrier between Lots 54 and 55 based upon the concrete slab, concluding Walter and subsequent owners of Lot 54 in accessed the front and back portions of Lot 55. 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.

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

Osborns' response to Pokornys' claim the trial court erred in denying reconsideration fails to contain a single citation to the record or a single citation to authority. BR 48. Osborns' response should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

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

Osborns fail to respond to Pokornys claim the trial court erred in denying their motion for summary judgment. The Court may therefore make its decision based upon the argument and record before it. *Adams v. Dep't of Labor & Indus.*, 128 Wash.2d 224, 229, 905 P.2d 1220 (1995); *Guillen v. Pearson*, 195 Wn. App. 464, 480, 381 P. 3d 149 (2016).

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

Osborns' response to Pokornys' claim the trial court erred in dismissing Pokornys' remaining claims fails to contain a single citation to the record or a single citation to authority. BR 48. Osborns' response

should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

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

As indicated by the foregoing arguments and authorities, Osborns are not entitled to summary judgment. As Osborns are not prevailing parties under RCW 7.28.083 (3), Pokornys request the Court to reverse the award of attorney fees and costs to Osborns.

13. 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.

V 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.

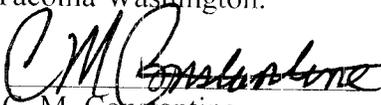

OF COUNSEL, Inc., P.S.
C.M. Constantine, WSBA #11650
Of Attorneys for Appellants

VI. CERTIFICATE OF MAILING

The undersigned does hereby declare that on June 28, 2019, the undersigned delivered a copy of APPELLANTS' REPLY BRIEF 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 psmith@foum.law	<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 glingg@foum.law	<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 28th day of June 2019 at Tacoma Washington.

By: 
 C. M. Constantine

OF COUNSEL INC PS

June 28, 2019 - 1:15 PM

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_20190628131406D2429430_3259.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Appellants Reply Brief.PDF

A copy of the uploaded files will be sent to:

- PSmith@FoUm.law
- glingg@foum.law
- jbranaman@foum.law
- jim@gauthierlawoffices.com
- swalker@foum.law

Comments:

Sender Name: Christopher Constantine - Email: ofcounsl1@mindspring.com
Address:
PO BOX 7125
TACOMA, WA, 98417-0125
Phone: 253-752-7850

Note: The Filing Id is 20190628131406D2429430