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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

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

Plaintiffs/Appellants,

vs.

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/Respondents.

BRIEF OF RESPONDENTS
SHOWELL OSBORN AND NANCY OSBORN

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I. INTRODUCTION

This case involves disputed title to real property located in Ocean Shores, Washington. Plaintiffs Michael and JoEtta Pokorny, hereafter referred to collectively as “Pokorny” or the “Pokornys,” bought a residential lot in 2011. The Pokorny property shared a boundary line with a neighboring residential lot owned by defendants Showell and Nancy Osborn, hereafter collectively referred to as “Osborn” or the “Osborns.” The Osborns had purchased their lot several years earlier, in 2007. The properties were used as vacation homes by the parties, not as their primary residences. In 2015, the Osborns cut down part of a hedge growing along the perceived boundary line between the Pokorny and Osborn properties. After this cutting took place, the Pokornys learned the surveyed boundary line between the two properties did not run along the length of the hedge that had been cut, but was instead located several feet closer to the Osborns’ home.

The Pokornys brought an action for trespass, timber trespass, ejectment and to quiet title in a disputed strip of land that ran the entire length of the boundary between the Osborn and Pokorny lots. In their answer to the complaint, the Osborns asserted that title to the disputed area had passed to them and/or their predecessors in interest by adverse possession before the cutting took place.

The parties brought motions and cross-motions for summary judgment on the issue of adverse possession a total of three times in Grays Harbor Superior Court. After hearing extensive oral arguments on the third iteration of the summary judgment motions, the Honorable Stephen Brown granted the Osborns' motion for summary judgment and found title to the disputed area had passed to the owners of the Osborn property before the alleged trespass took place. After this finding, Judge Brown also granted subsequent motions 1) establishing a new legal description for the Osborns' property that included the disputed area, 2) dismissing the Pokornys' trespass and ejectment causes of action, and 3) awarding statutory attorneys' fees and costs to the Osborns as the prevailing party in an adverse possession lawsuit. This appeal followed. The orders on summary judgment should be affirmed because the trial court's findings were based on substantial evidence and those findings support its conclusions.

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court have jurisdiction to hear the parties' competing motions for summary judgment?
2. Were the trial court's findings of fact relating to the use and possession of the properties at issue supported by substantial evidence?

3. Did the trial court err when it ruled as a matter of law the Osborns or their predecessor in interest acquired title to the disputed area by adverse possession?

4. Did the trial court err when it ordered the legal description of the Osborns' property be amended to reflect new boundary lines that encompassed the disputed area?

5. Did the trial court err when it awarded the Osborns statutory attorneys' fees as the prevailing party in an adverse possession lawsuit?

6. Are the Osborns entitled to their attorneys' fees and costs on appeal?

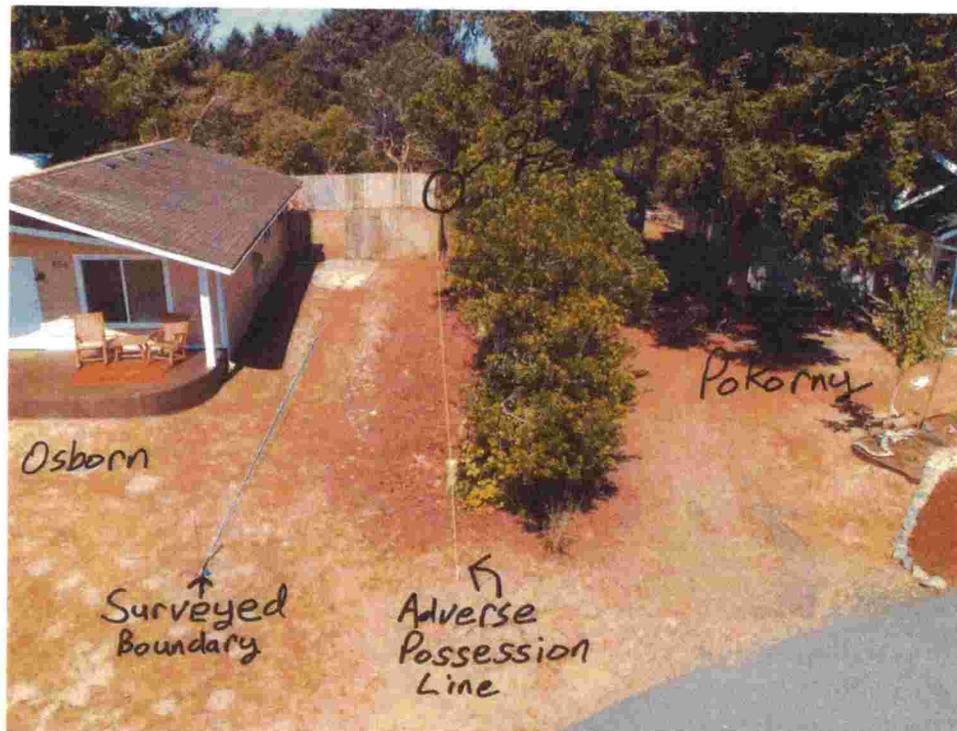
III. STATEMENT OF THE CASE

A. Factual Background

1. The Parties' Properties in Ocean Shores, Washington.

Appellants Mike and Joetta Pokorny own a residence located at 856 Hake Court SW, Ocean Shores, Washington, described as Lot 55 on area plat maps. CP 27. Respondents Showell and Nancy Osborn own a neighboring residence, located at 854 Hake Court SW, Ocean Shores, Washington, described as Lot 54 on area plat maps. CP 4. The properties share a common boundary that runs in a straight line between the back of

the properties and Hake Court SW. The disputed area at issue here runs along the entire length of the properties between the surveyed boundary line and the line perceived as the true boundary by all owners. The photograph below shows the two properties, the original surveyed line, and the line the trial court ultimately determined was the extent of the disputed area acquired by adverse possession. CP 481.



CP 481

2. History of Ownership.

a. Osborn Property.

The Osborns purchased their home on July 11, 2007 from Justin Millard. CP 52. Millard purchased it from Richard Walter on November 21, 2006. *Id.* Walter had owned the property since September, 1990 before selling it to Millard. CP 885.

b. Pokorny Property.

The Pokornys purchased their home on April 20, 2011. CP 52. Prior to that purchase, the house had been owned by Anthony and Karen Woodbeck, who bought it on September 19, 2005 from James Moors. CP 933. Moors acquired it as part of a development venture in 2003. CP 955-956.

The ownership history of the two lots during the time period relevant to this matter may be summarized as follows:

**OSBORN
LOT 54
854 HAKE COURT**

Sept. 1990 – Walter buys Lot 54

Nov. 2006 – Walter sells Lot 54
to Millard

July 2007 – Osborns buy Lot 54
from Millard

**POKORNY
LOT 55
856 HAKE COURT**

Feb. 2003 – Moors buys Lot 55

Sept. 2005 – Moors sells to Woodbecks

April 2011 – Pokornys buy Lot 55

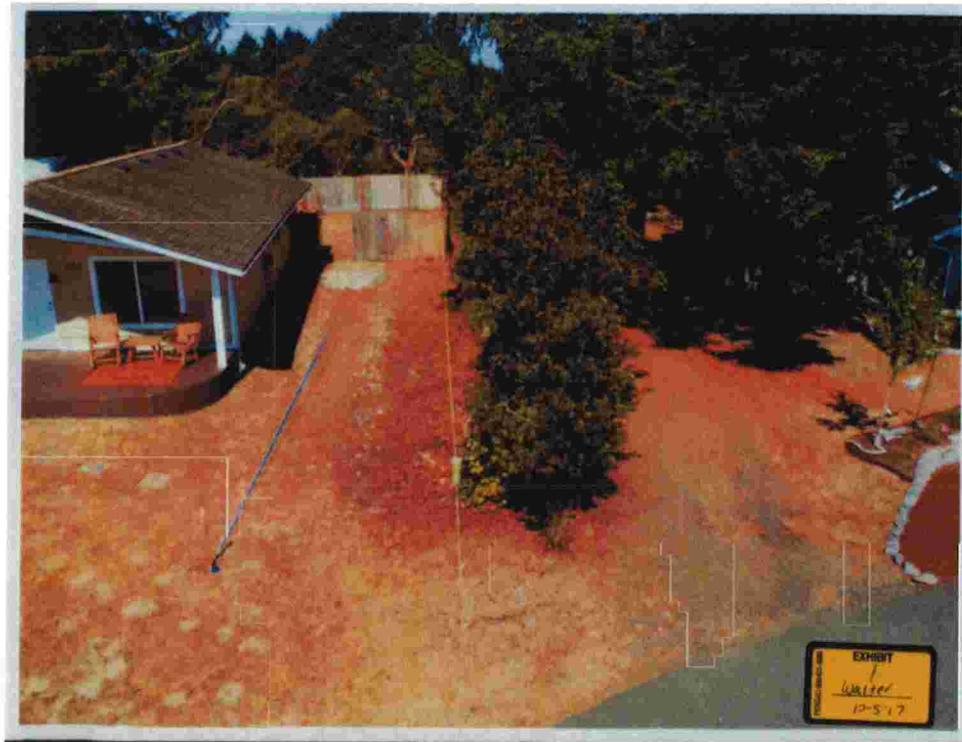
3. Use of Osborn Property -- Including Disputed Area

a. Walter's Use of Lot 54 from 1990 to 2006.

Richard Walter owned the house on Lot 54 (now owned by the Osborns) for approximately 16 years, from September 1990 to November 2006. CP 885. He used the home as a residence for himself, his wife, and four children continuously throughout these 16 years. *Id.* Shortly after purchasing his home Mr. Walter attempted to find the boundary line between Lot 54 and Lot 55 by looking around the borders of his property. CP 886. During this inspection, Mr. Walter found a galvanized pipe in the ground near the back corner of the lot which he assumed was the rear boundary marker. *Id.* He also found a green utility pedestal near the street which he assumed marked the front property boundary. *Id.* In order to visualize the line between these two markers, he stretched a string from the pipe to the pedestal. *Id.* He believed the string ran along the boundary line between Lot 54 and Lot 55. *Id.* This belief was based on the prior clearing and landscaping of his property up to that line and "on where the previous owners had established the line." *Id.*

Mr. Walter began building a fence made of driftwood that ran along the perceived boundary line. *Id.* During the entire time he lived on Lot 54, he considered the line where he had stretched the string and where he built his driftwood fence to be the eastern boundary of his property. CP

886-887. Exhibit 1 to Mr. Walter's deposition was the photograph below showing a yellow rope. CP 891-892. Mr. Walter testified the yellow rope shown in this photo ran along the same perceived boundary line he described during his earlier testimony. *Id.*



During the time he lived on Lot 54, Mr. Walter and his family continuously used the entire property up to the line where he was building his driftwood fence, which was the same line depicted by the yellow rope in Exhibit 1 to his deposition. *Id.* Mr. Walter mowed the grass between the house and the boundary line “at least once a week.” CP 887. He built a greenhouse in “very, very close proximity to the galvanized pipe” he

found in the back corner. *Id.* Mr. Walter also pruned the bushes along the edge of the boundary once a month and cut larger branches and trees along the boundary annually. CP 889. He followed this pruning regime continuously from “almost immediately after I moved in” until the time a cedar fence was built by Pokorny’s predecessor-in-interest around early 2003. *Id.*

Mr. Walter’s children had a swing and a play area in the backyard. CP 889. They also played in the front yard right up to the trees and shrubs growing on the eastern side of the property, in what became the disputed area. *Id.* The eastern edge of the area the children played in was along a line corresponding to the yellow rope show in Exhibit 1 to Mr. Walter’s deposition. *Id.*

In 1996 Mr. Walter built a concrete pad in the disputed area. CP 887-888. He used this pad to park vehicles when he was washing them, which he did regularly. *Id.* He also used the disputed area to drive vehicles into the backyard. *Id.* During the 16-year period he lived on Lot 55, Mr. Walter ran a landscaping business. *Id.* He stored materials and supplies from his landscaping business all along the driftwood fence and the bushes at the eastern edge of his property. *Id.* When asked how often he did this during his ownership of Lot 54 he answered, “Continuously.” *Id.* One reason Mr. Walter stored his materials in the

disputed area right up to the boundary line was because he thought the disputed area was his property and no one ever told him otherwise. *Id.* When asked how frequently he would use the disputed area to access the backyard, Mr. Walter answered, "Daily." CP 896.

In order to facilitate driving vehicles through the disputed area into the backyard, Mr. Walter laid down two strips of rocks in the ground where the wheels of his vehicles would travel. CP 888. Mr. Walter identified strips of rocks that can still be seen in the driveway to this day as the rocks he placed in the disputed area in the 90's. CP 905. He testified that these rocks were visible in the photograph made Exhibit 1 to his deposition. *Id.*

In 2003 Jim Moors, together with his business partner Bill Green, acquired Lot 55 with the intention to build a house on it. CP 956. Mr. Walter testified that during the time Moors was building the house on the Lot 55 Walter remembered having a conversation with a person he believed to be the owner of Lot 55.¹ CP 888. One of the topics of this conversation was the owner's intention to build a cedar slat fence along the boundary between Lot 54 and Lot 55. *Id.* Mr. Walter pointed out the galvanized pipe in the back corner of the lot he assumed was the property marker. *Id.* The man he was speaking with told Mr. Walter he was

¹ It is unclear if this was Mr. Moors or Mr. Green, who has since passed away.

already aware of the pipe and knew it was there. *Id.* Later, Mr. Walter saw the same person stretch a string to mark the line where the slat fence was being built. CP 891. The string line marked for the slat fence was in the same place where Mr. Walter marked the boundary line a decade earlier to build his driftwood fence. *Id.*

b. Millard's Use of Lot 54 from 2006 to 2007.

Justin Millard owned Lot 54 for approximately 8 months, from November 2006 to July 2007. CP 912. When Mr. Millard bought the property there was an "old cedar fence" running along the boundary between Lot 54 and Lot 55.² CP 914. Mr. Millard assumed from the first time he visited the property until the day he sold it that the property boundary between the two lots ran along the existing old fence and then out to the street in a straight line. CP 915.

Mr. Millard was shown the photograph made Ex. 1 to Richard Walter's deposition. CP 915. Mr. Millard testified that for the entire time he owned Lot 54 he thought the property boundary between Lot 54 and Lot 55 ran along the same line shown by the yellow rope in that photograph. *Id.* This is the same line the trial court determined was the eastern edge of the property acquired by adverse possession.

² During discovery and in the pleadings before the trial court the parties at times referred to the cedar slat fence as the "Old Fence."

During the time Mr. Millard owned Lot 54, he resided there with his wife Collette. The couple used Lot 54 as their primary and only residence. CP 913. At the time the Millards bought their home, the concrete pad originally poured by Mr. Walter and the gravel Mr. Walter placed in the driveway were still present. *Id.* The Millards used the concrete pad and the driveway in the disputed area to access the backyard, to park their own cars, and to park friend's cars when they had guests over on social occasions. CP 915-916. Mr. Millard testified that such use happened "all the time" and at least a few times a week. *Id.*

While he lived on Lot 54, Mr. Millard often stored construction materials in the disputed area. CP 915. He testified that, although he could not remember every detail 11 years after the fact, he was certain he stored construction materials throughout the disputed area, including up to and on the ground cover vegetation along the boundary line shown in photographs of the disputed area. CP 925-926.

Near the time Mr. Millard sold Lot 54 to defendants, he built a fence around the rear portion of the property.³ CP 915. When Mr. Millard built the new fence, he used the fence rails of the existing fence where it ran along the perceived property line. *Id.* Mr. Millard nailed the boards of the new fence onto the west side of the existing rails, facing Lot 54. *Id.*

³ At times the parties have referred to the fence enclosing the back yard as the "New Fence."

He did not change the location of the existing posts or rails of the old fence. *Id.* The new fence is still present on the boundary between Lot 54 and Lot 55 today and forms part of the line the trial court used to delineate the eastern edge of the disputed area the Osborns acquired title to by adverse possession.

c. Osborns' Use of Lot 54 from 2007 to Present.

When the Osborns purchased lot 54 in 2007, the cedar slat fence built in 2003 was still in place. CP 340, 1143. Ms. Nancy Osborn always believed the old fence lay along the boundary line between Lot 54 and Lot 55. CP 340, 1141-1142. Plaintiffs never expressed any contrary belief to Ms. Osborn until after the tree cutting took place in August, 2015. CP 340.

After purchasing Lot 54, the Osborns routinely mowed the grass in the disputed area and regularly pruned and cut the salal hedge located there. CP 340. They also regularly used the disputed area to park their vehicles and to access the back yard. *Id.* At no time prior to the hedge cutting in 2015 did plaintiffs - or any other person - object to the Osborns' use of the property or claim the disputed area was part of Lot 55. *Id.* Before the events leading to this lawsuit, the Pokornys never told the Osborns the property line was anywhere other than along the line of the old fence and then straight out to the street. *Id.* The Osborns have never

seen the Pokornys come into the disputed area to maintain the salal, do other yardwork, or for any other purpose. *Id.*

4. Use of Pokorny Property

a. Moors' Use of Lot 55 from 2003 to 2005.

Mr. Moors and Mr. Green jointly built what is now the Pokorny house as part of their business venture in early 2003. CP 995-996. Through Mr. Green's company, DB Construction, a building permit for the Pokorny house was applied for on February 7, 2003. *Id.* During the months that followed, the concrete foundations of the house were poured, the house was framed, exterior siding was installed, the roof was put on, and the house was painted. CP 958.

The first time Mr. Moors saw Lot 55 in 2003, there was an existing fence running along the boundary between Lot 54 and Lot 55. CP 958-959. The fence was "old" and "rickety" and Mr. Moors assumed it had been there for some time. *Id.* The rickety old fence ran from the back corner of the boundary between Lot 54 and Lot 55 out towards the street. *Id.* It ended about halfway along this line. *Id.* Mr. Moors was shown a picture of the fence described as the "Old Fence" in various pleadings by the parties in this matter. CP 959. He identified the "Old Fence" as the rickety old fence he saw in 2003. *Id.*

When Mr. Moors was developing Lot 55 in early 2003, he believed the property boundary between Lot 54 and Lot 55 ran along the rickety old fence. CP 959. Mr. Moors was shown the photograph made Ex. 1 to Richard Walter's deposition. *Id.* Like every other witness in this case, Mr. Moors testified he believed the property boundary line was depicted by the yellow rope in the photograph. *Id.* In particular, Mr. Moors testified to his belief that the line shown by the yellow rope in the photo was the boundary line because; 1) it lined up with the rickety old fence, 2) it lined up with the green utility pedestal shown in the photo, and 3) "this looks like it's obvious. CP 959-960. During the whole time he owned Lot 55, Mr. Moors never entered the disputed area for any reason. CP 691.

b. Woodbeck's Use of Lot 55 from 2005 to 2010.

With her husband Anthony Woodbeck, Ms. Karen Woodbeck purchased Lot 55, now owned by Pokorny, in September, 2005. CP 933. Ms. Woodbeck first physically inspected the property in July 2005. CP 933-934. On the day she first saw the property, there was an old cedar slat fence in place on the boundary between Lot 54 and Lot 55. *Id.* A few weeks later, Ms. Woodbeck visited the property again. *Id.* On the day of that visit, Ms. Woodbeck took several photographs of the house and the property in general. *Id.* One of these photographs, marked as Ex. 1 to

Ms. Woodbecks deposition, shows a portion of the cedar slat fence. The digital properties associated with this photograph show that it was taken on August 20, 2005. CP 934. Ms. Woodbeck testified that the slat fence was in poor condition when she first saw it. CP 949-950. She described it as “extremely old” and “scabbed together” over time to replace or patch old parts of the fence. CP 934.

For the entire time Ms. Woodbeck owned Lot 55, she assumed the boundary line between Lot 54 and Lot 55 ran along the slat fence and then in a straight line out to the street. CP 935. She was shown the same photograph presented to Mr. Walter and Mr. Millard during their depositions. Ms. Woodbeck testified that she always believed the western boundary line of her property was in the same location depicted by the yellow rope in the photograph. CP 935.

When the Woodbecks were negotiating to buy the property, they arranged for a garage to be built on the lot. CP 935-936. As part of the garage construction, the Woodbecks instructed their contractor to work with the City of Ocean Shores to locate the property boundary between Lot 55 and Lot 54. *Id.* In particular, the Woodbecks wanted to be sure that the garage was set back five feet from the property line in order to comply with local building codes. CP 936. At the time the garage construction was being considered, Ms. Woodbeck understood the

property line ran along the existing wooden fence and then in a straight line from the end of the fence out to Hake Court S.W. *Id.* The garage was built five feet east of this line to comply with Ms. Woodbeck's understanding of the set-back requirement. *Id.* This is the same line the trial court determined was the eastern boundary of the disputed area the Osborns acquired by adverse possession.

c. Pokornys' Use of Lot 55 from 2011 to Present.

The Pokornys bought Lot 55 in April, 2011. At his deposition, Mr. Pokorny testified that he first physically saw the property a few weeks prior to a foreclosure auction when he inspected it alone. CP 967. On that day, he walked all around the lot, including the area between the garage and the fence on the border between Lot 54 and Lot 55. *Id.* He also saw the strip of salal, bushes, and trees running from where the fence ended out towards the street. *Id.*

Pokorny's unequivocal testimony is that when he first viewed Lot 55, he believed the property boundary line ran along the fence and then in a straight line from the end of the existing old fence out to Hake Court. S.W.:

Q: I'm going to go back in time to your first visit to the property before the auction, when you were out there alone. **When you visually looked at the property, where did you think the property line**

was between the house you were considering buying and the house that's the Osborns'?

A: Physically the -- **someplace in the tree barrier.**

Q: What did you think with respect to the fence that stretches from the back towards your garage? **That day when you went and looked at it, did you think the fence was on the property line?**

A: Then I had no question to doubt anything. **Yes.**

Q: And you already testified you thought the property line was somewhere in the bushes. Did you think the property line probably extended up from the fence? And again, I'm asking you that day when you were looking at it. You saw the fence, you thought that was part of the property line; right? **Did you think the property line probably extended in alignment from the fence out to Hake Court Southwest?**

A: **Yes.**

CP 972.

Pokorny's belief that the boundary line ran along the Old Fence and from there in a straight line out to the street is exactly what every other person involved with the ownership of these lots also thought.

Mr. Pokorny also testified that on July 6, 2015, he had a cell phone conversation with defendant Nancy Osborn. CP 976. Mr. Pokorny told Ms. Osborn during this conversation he liked the privacy created by the trees and bushes in the disputed area and didn't want them cut all the way

to the ground. *Id.* During that conversation, Pokorny did not claim that he owned the trees or bushes in the disputed area. CP 977. In fact, during the entire time from when he bought Lot 55 until after the cutting in 2015 the Pokornys never communicated to the Osborns a belief that the boundary line between the properties was anywhere other than along the fence and in a straight line from there out to the street. CP 995. Likewise, the Pokornys never claimed ownership of the disputed area until after the cutting giving rise to this lawsuit. *Id.*

IV. ARGUMENT

A. Standards of Review

This Court reviews a trial court's findings of fact for substantial evidence. *Merriman v. Cokeley*, 168 Wn. 2d 627, 631, 230 P.3d 162 (2010). Substantial evidence is that which would persuade a fair-minded, rational person of the declared premise. *Id.* Unchallenged findings are verities on appeal. *Id.* An appellate court may affirm the trial court's order on any basis supported by the evidence. *Ladenburg v. Campbell*, 56 Wn. App. 701, 703, 784 P.2d 1306 (1990).

A reviewing court is not to disturb findings of fact that are supported by substantial evidence, even if there is conflicting evidence. *Merriman v. Cokeley*, 168 Wn. 2d 627, 631, 230 P.3d 162 (2010). Put

another way, an appellate court will not reverse a trial court's findings of fact if substantial evidence supports those findings. *Rogers Potato Serv., LLC v. Countrywide Potato, LLC*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004).

Pursuant to RAP 10.3(g) a separate assignment of error for each finding of fact a party contends was improperly made must be identified with reference to the finding by number. RAP 10.3(g). A party seeking review must demonstrate why specific findings of the trial court are not supported by the evidence and cite the record in support of such arguments. *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998). Adherence to this rule is not "merely a technical nicety." *Id.* The court will not "comb the record with a view toward constructing arguments for counsel" regarding challenged findings and alleged lack of evidentiary support for the same. *Id.*

Appellate courts reviewing summary judgment in adverse possession cases consider the matter de novo and make the same inquiry as the trial court. *Lloyd v. Montecucco*, 83 Wn. App. 846, 852, 924 P.2d 927 (1996). A trial court's findings on the elements of adverse possession are mixed questions of law and fact. *Harris v. Urell*, 133 Wn. App. 130 (2006). Whether essential facts exist is decided by the trial court, but whether the facts constitute adverse possession is for the appellate court to

determine as a matter of law. *Lloyd*, 84 Wn. App. at 852, citing *Peeples v. Port of Bellingham*, 93 Wn.2d 766, 771, 613 P.2d 1128 (1980), *overruled on other grounds*, *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984), see, also, *Lingvall v. Bartmess*, 97 Wn. App. 245, 253, 982 P.2d 690 (1999) (“adverse possession is for the court to determine as a matter of law”); *Miller v. Anderson*, 91 Wn. App. 822, 828, 964 P.2d 365 (1998) (whether use is adverse or permissive is a question of fact, whether facts constitute adverse possession is a question of law.)

B. The Trial Court Had Original Subject Matter Jurisdiction Over the Parties’ Claims.

1. Superior Courts Have “Universal Original Jurisdiction” In Cases Involving Title to Real Property.

Whether a court has subject matter jurisdiction is a question of law reviewed de novo. *MHM & F, LLC v. Pryor*, 168 Wn. App. 451, 459, 277 P.3d 62 (2012). The trial court’s subject matter jurisdiction in this matter derives from Article 4, § 6 of the state constitution:

The superior court shall have original jurisdiction in all cases ... at law which involve the title or possession of real property.... The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court.

WASH. CONST. Art. IV, § 6.

The parties’ claims and causes of action before the trial court involve title to and possession of real property. For this reason the

superior court had original jurisdiction over this action at all times under Art. IV, § 6.

In *MHM & F, LLC v. Pryor*, 168 Wn. App. at 459-460, the court highlighted the primacy of a trial court's subject matter jurisdiction over any alleged conflicting statutory requirements:

In recent cases where our appellate courts have considered the constitutional grant of subject matter jurisdiction to the superior courts, they have accorded it the centrality that it deserves. Our Supreme Court has held that article IV, section 6 is dispositive and has overruled precedents that erroneously classify the superior court's jurisdiction as statutory.

Id.

In *MHM & F, LLC v. Pryor*, an evicted tenant contended the superior court's judgments were void because the court had no subject matter jurisdiction. The basis of this contention was that plaintiff's failure to comply with statutory requirements governing the form of the summons deprived the superior court of subject matter jurisdiction. Soundly rejecting this line of reasoning the appellate court held that whether the superior court ruled correctly or not on the merits, it never lacked subject matter jurisdiction:

The court's subject matter jurisdiction in cases involving the title or possession of real property is expressly granted by the state constitution and has not been "vested exclusively in some other court." WASH. CONST. art. IV, sec. 6. We narrowly construe exceptions to the

constitution's jurisdictional grant. Thus, it is incorrect to say that the court acquires subject matter jurisdiction from an action taken by a party or that it loses subject matter jurisdiction as the result of a party's failure to act.

If the type of controversy is within the superior court's subject matter jurisdiction, as it is here, then all other defects or errors go to something other than subject matter jurisdiction.

Id., (internal citations omitted, underlining added).

Applying the holding of *MHM & F, LLC v. Pryor* to the facts of this case leads to the inescapable conclusion that the trial court had jurisdiction at all times in this matter. Pokorny contends that RCW 48.17.215 divests superior courts' jurisdiction to determine title to real property through adverse possession. As discussed below, there was no evidence before the trial court that RCW 48.17.215 applied to the facts of this case. Even if it did, statutory provisions cannot alter the original subject matter jurisdiction granted to superior courts by the state constitution.

In *Ralph v. State Dept. of Natural Resources*, 182 Wn. 2d 242, 343 P.3d 342 (2014) the Washington State Supreme Court also addressed the potential effects of statutory provisions on the subject matter jurisdiction granted to superior courts by the state constitution. In that case, the plaintiffs alleged RCW 4.12.010 required filing the complaint in a certain county, thereby depriving a superior court of another county of

jurisdiction over a tort action for damage to real property. After citing the jurisdictional grant contained in Article IV, § 6 of the state constitution, the *Ralph* court held:

We have interpreted this language as giving to the superior courts “universal original jurisdiction, leaving the legislature to carve out from that jurisdiction the jurisdiction of ... any other inferior courts that may be created.” *Moore v. Perrott*, 2 Wash. 1, 4, 25 P. 906 (1891); see *Posey*, 174 Wash.2d at 136, 272 P.3d 840. In *Young*, we explained that article IV, section 6 prevents the legislature from limiting subject matter jurisdiction “as among superior courts.” 149 Wash.2d at 134, 65 P.3d 1192. This is so because under article IV, section 6, “all superior courts ... have the same authority to adjudicate the same ‘types of controversies.’ ” *Dougherty v. Dep’t of Labor & Indus.*, 150 Wash.2d 310, 317, 76 P.3d 1183 (2003). In *Dougherty*, “[w]e reject[ed] the theory that subject matter jurisdiction of the superior court varies from county to county” since “[t]he ‘type of case’ is the same whether it is heard in Thurston County or some other county.” *Id.*

Ralph, 182 Wn. 2d, at 252.

Based on the “universal original jurisdiction” granted to superior courts in case involving title to real property, the *Ralph* court held the “interpretation of any statute that restricts superior court jurisdiction must be read consistent with article IV, section 6 wherever possible.” *Id.* It also held application of a statute did not abrogate the superior court’s jurisdiction:

Our holding also aligns with common sense. “Elevating procedural requirements to the level of jurisdictional

imperative has little practical value and encourages trivial procedural errors to interfere with the court's ability to do substantive justice' ” by “allow[ing] a party to raise it at any time, even after judgment,” resulting in potential “ ‘abuse and ... a huge waste of judicial resources.’ ” *Dougherty*, 150 Wash.2d at 319, 76 P.3d 1183 (quoting *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wash.2d 769, 790–91, 947 P.2d 732 (1997) (Durham, C.J., concurring)).

Id., at 257.

The holding and analysis of *Ralph* apply with equal force to the facts of this case. Plaintiffs' contention that the trial court's subject matter jurisdiction is conditioned on compliance with a legislative requirement flies in the face of the language of Article IV, § 6 of the state constitution. It also constitutes precisely the type of limitation on superior court jurisdiction flatly rejected by the Washington State Supreme Court in *Ralph*, *supra*. Moreover, carrying plaintiff's contention to its logical conclusion would be tantamount to “elevating procedural requirements to the level of jurisdictional imperative,” and would interfere with superior courts' ability to do justice, both of which are prohibited by the holding of *Ralph*.

Pokorny cites no published decision in Washington supporting the propositions that 1) application of RCW 58.17.215 deprives a superior court of jurisdiction to adjudicate title to real property by adverse possession or, 2) that compliance with the statute is required to exhaust

administrative remedies. To the contrary, despite the plethora of appellate and supreme court decisions addressing adverse possession, Osborn is not aware of a single case that even discusses such contentions, let alone establishes them as controlling authority.

The cases relied on by Pokorny do not change this analysis. *Halverson v. City of Bellevue*, 41 Wn. App. 457, 704 P.2d 1232 (1989) stands for the opposite of Pokorny's argument. There, the plaintiff landowner asserted a claim of ownership by adverse possession to a parcel of property. The parcel was located within the boundaries of a much larger plot described in a plat application made to the City of Bellevue by a developer. While the City was processing the plat application, the plaintiff put the City on notice of her ownership claims. The plat was approved and building permits were issued to the developer. In a separate action, after the plat had been approved, the landowner prevailed on her adverse possession claim. The trial court found because title to the disputed land vested in the plaintiff before the plat application, she was an owner whose signature consenting to the plat application was required under RCW 58.17.215. Because no such consent was given, the plat was declared invalid. The City argued in the alternative that the plat application could be modified after the fact to exclude the parcel adversely possessed. The appellate court disagreed.

The holdings of *Halverson* are that a plat application not properly consented to by an owner is invalid and that such an invalid plat cannot be cured by judicial alteration. *Id.*, at 461. That holding has no application here, where the facts of this case are distinguishable and the proper construction of the statute is the opposite of what Pokorny suggests. Notably, in *Halverson* the court held title obtained by adverse possession trumped the plat, the opposite of the Pokornys' premise here.

Similarly, in *Hanna v. Margitan*, 193 Wn. App. 596, 373 P.3d 300 (2016) changes to a subdivision made without applying for a formal amendment of the plat were affirmed as valid and enforceable. In that case, a number of separate easements were granted by the owner of a parcel before and after a short plat application was approved. The plat application erroneously did not contain descriptions of the easements granted before the application process began. Relying on RCW 58.17.215 a subsequent owner contended any easement not appearing on the plat application, whether granted before or after the plat was approved, was invalid and ineffective. Citing the same statutory provisions relied on here by Pokorny, the plaintiff in *Hanna* contended RCW 58.17.215 established a property owner cannot alter a subdivision through the grant of an easement without formally amending the plat. The court rejected this contention, finding that so long as the explanatory notes on the short plat

application did not prohibit the easements (and they did not) there was “no need to require that the short plat is formally amended.” *Id.*, at 608. Accordingly, the appellate court found the trial court did not err when it confirmed the easements were valid. *Id.*

The holding in *Hanna* is that a grant of a private easement does not require formal amendment of the plat under RCW 58.17.215. Applying this holding to the facts of this case, it is apparent that Osborn’s acquisition of title by adverse possession, granted under the trial court’s “universal” subject matter jurisdiction, also does not require a formal amendment.

2. RCW 58.17.215 Is Inapplicable In This Case.

The statute relied on by Pokornys, RCW 58.17.215, is not applicable to the facts before the trial court. The court therefore did not err when it granted summary judgment to the Osborns.

In relevant part, RCW 58.17.215 states:

When any person is interested in the alteration of any subdivision or the altering of any portion thereof, **except as provided in RCW 58.17.040(6)**, that person shall submit an application to request the alteration to the legislative authority....

Id., (emphasis added).

The referenced section, RCW 58.17.040, states:

Chapter Inapplicable, when

.....

The provisions of this chapter **shall not apply to:**

(6) A division **made for the purpose of alteration by adjusting boundary lines, between platted lots or both, which does not create any additional lot, tract, parcel, site, or division** nor create any lot, tract, parcel, site, or division which contains insufficient area and dimension to meet minimum requirements for width and area for a building site;

Id., (emphasis added).

A plain reading of RCW 58.17.215 reveals it does not apply to this case. The trial court's order adjusted the boundary line between two platted lots, it did not create an additional lot or parcel. There was no evidence before the trial court and there is no evidence on the record regarding minimum building site requirements. The only evidence on the record is that the house and garage built on Pokornys' lot utilizing the perceived boundary line were approved by the City of Ocean Shores and permitted without comment or exception. Based on the facts before this Court and on the record the exception stated in RCW 58.17.040(6) applies here and RCW 58.17.215 is inapplicable in this matter.

C. The Trial Court Did Not Err When It Found Title to the Disputed Area Vested in Osborn by Adverse Possession.

Pokorny assigns error to the trial court's order on summary judgment quieting title in the Osborns on the basis of adverse possession. However, substantial evidence supports the trial court's findings of fact with respect to each required element of adverse possession and the trial court properly based its conclusions of law on those findings.

Pokorny fails to identify a lack of substantial evidence relating to any required element of adverse possession. Contrary to the requirements of RAP 10.3(g) Pokorny also fails to cite the record to support any such identification. Moreover, Pokorny does not cite any controlling authority that contradicts the trial court's determinations of any question of law.

1. Elements of Adverse Possession.

In order to acquire title to real property by adverse possession, the possession must be 1) exclusive, 2) actual and uninterrupted, 3) open and notorious, and 4) hostile for a period of ten years. *ITT Rayonier Inc. v. Bell*, 112 Wn.2d 754, 757 P.2d 6 (1989), *Gorman v. City of Woodinville*, 174 Wn.2d 68, 71, 282 P.3d 1082 (2012), *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984). Once real property has been held by adverse possession for ten years, the possession automatically ripens into original title. *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 855, 376 P.2d 528

(1962) (citing *Mugaas v. Smith*, 33 Wn.2d 429, 432, 206 P.2d 332 (1949)), *Gorman, supra*, at 72.

Title acquired by adverse possession transfers with property when it is sold. *Gorman v. City of Woodinville*, 175 Wn.2d 68, 74, 283 P.3d 1082 (2012). Subsequent purchasers can “tack” onto the acts of predecessors in interest if necessary to satisfy the ten year period. *Howard v. Kunto*, 3 Wn. App. 393, 400, 477 P.2d 210 (1970), overruled in part on other grounds by *Chaplin*, 100 Wn.2d 853.

2. Periods of Adverse Possession.

Based on the substantial evidence before the trial court, the Osborns or their predecessors in interest satisfied the requirements to acquire title by adverse possession in any one, or all, of the following periods.

1990 to 2006 Richard Walter claimed, used, and maintained the disputed area during his 16 years of ownership of the Osborn property.

2003 to 2018 During the 15 years after the Pokorny’s home was built in 2003, Richard Walter, Justin and Collette Millard, and the Osborns each claimed, used, and maintained the disputed area as owners.

2006 to 2016 In the 10 years preceding Pokorny’s suit in this matter, Richard Walter, Justin and Collette Millard, and the Osborns each claimed, used, and maintained the disputed area as owners.

All elements required for the Osborns to acquire title to the disputed area by adverse possession were satisfied in each and all of the periods listed above. The trial court found that Richard Walter used the disputed area as his own throughout his ownership. CP 1171. It also found that his use was exclusive, actual and uninterrupted, open and notorious, hostile under a claim of right and was “well established long before Sept. 2005.” *Id.* The same findings were made with respect to the use of the Osborn property by the Millards and the Osborns, “It is undisputed...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.” *Id.* (underlining added).

3. Substantial Evidence Supports the Trial Court’s Factual Findings.

a. Evidence of Richard Walter’s Exclusive Use of the Disputed Area of Lot 55.

The following facts regarding Richard Walter’s use of the Osborn and Pokorny properties were undisputed by Pokorny before the trial court:

- Shortly after he bought his property in 1990 Mr. Walter demarcated a line that he thought was the eastern boundary line of his property. This was substantially the same line shown by the rope in a photograph made Ex. 1 to his deposition. His belief that this was the boundary line was based both on the physical characteristics of the land and “on where the previous owners had established the line.” He began building a fence made of driftwood along this line in 1990. CP 885.

- Walter mowed the grass between the house and this boundary line “at least once a week.” *Id.*
- Walter pruned the shrubs along the boundary line monthly and pruned back the trees annually. *Id.*
- Walter poured the concrete pad he used to wash vehicles on and placed rocks in the wheel travel areas of the driveway; both of which can still be seen today. CP 905.
- Walter “continuously” used the disputed area to store materials for his landscaping business. CP 888.
- One reason he stored materials right up to the perceived boundary line was because he thought this was his property. *Id.*
- Walter used the disputed area as a driveway to access his backyard “daily.” CP 896.
- Mr. Walter’s children used the entire yard up to the perceived boundary line as play area throughout his ownership. CP 889.
- When a cedar fence was built between the two properties by the owner of the Pokorny property, Walter discussed the location of the perceived boundary line with the neighbor building a fence along that line. The fence was built in the same place and along the same line Walter marked a decade earlier to build his driftwood fence. CP 891.

Mr. Walter’s uncontradicted deposition testimony is substantial evidence of his use and possession of the disputed area. With a single exception, Pokorny did not dispute these facts before the trial court and does not cite the record for any contention the facts are not supported by substantial evidence here. Unchallenged findings are verities on appeal.

Pokorny's sole argument regarding Walter's testimony is an alleged conflict regarding when the cedar fence was built by the owners of the Pokorny property. Before this litigation commenced Walter signed a declaration authored and prepared by Pokorny which states no fences were present when Walter sold to Millard in 2006. CP 890-891. At his deposition, Walter testified about his conversations with the builder of the fence, where it was to be situated, and how it was built, all of which took place in 2003 or 2005 at the latest, before he sold to Millard. Regarding the potential conflict between the declaration Pokorny prepared and Walter's deposition testimony Mr. Walter explained he was confused by the wording of the declaration and did not think it meant what Pokorny now contends. *Id.* He believed the declaration referred to fencing that completely enclosed his yard; such an enclosure was not present when he sold his home to Mr. Millard. *Id.* Even if the declaration and Walter's deposition testimony conflicted, which they do not, this Court's role is not to disturb the trial court's findings of fact. This is true even when there is conflicting evidence. Because substantial evidence supported Walter's testimony about when the cedar fence was built, there is no basis to reverse the trial court's findings on that issue.

b. Evidence of Justin Millard's Exclusive Use of the Disputed Area of Lot 55.

It is undisputed that for the entire time Justin Millard owned Lot 54 he thought the property boundary between Lot 54 and Lot 55 ran along the same line shown by the yellow rope in the photograph that was Ex. 1 to Mr. Walter's deposition. When Millard bought his home the concrete pad originally poured by Mr. Walter and the gravel Mr. Walter placed in the driveway were still present. CP 913. The Millards used the concrete pad and the driveway in the disputed area to access the backyard, to park their own cars, and to park friend's cars when they had guests over on social occasions. CP 915-916. Such use happened "all the time" and at least a few times a week. *Id.*

While he lived on Lot 54, Mr. Millard often stored construction materials in the disputed area including up to and along the perceived boundary line. CP 915-916.

Near the time Mr. Millard sold Lot 54 to defendants, he built a fence around the entire rear portion of the property. *Id.* Where the old fence between the Osborn and Pokorny properties was already in place Mr. Millard nailed the slats of the fence he built onto the existing fence rails. *Id.* He did not change the location of the existing posts or rails of the old fence. *Id.*

Substantial evidence, in the form of Millard's uncontradicted deposition testimony, supports the trial court's finding that Millard regularly used the disputed area as an owner would. Pokorny did not dispute Mr. Millard's testimony before the trial court and does not assign error to the trial court's findings here by citing the record to show a lack of substantial evidence.

c. Evidence of the Osborns' Exclusive Use of the Disputed Area of Lot 55.

The trial court found the Osborns regularly used the disputed portion of the Pokorny property as their own. This finding is supported by substantial evidence that is undisputed by Pokorny. The Osborns have always believed the existing fence lay along the boundary line between Lot 54 and Lot 55. CP 340. Pokornys never expressed any contrary belief to the Osborns until after the tree cutting in August, 2015. *Id.* After purchasing their home the Osborns routinely maintained their yard up to the perceived boundary line in the disputed area. This use included mowing the grass in the disputed area and regularly pruning and cutting the salal hedge located there. *Id.* The Osborns also regularly used the disputed area as a place to park their vehicles and to access the back yard. *Id.* At no time prior to hedge cutting in 2015 did plaintiffs - or any other person - object to the Osborns' use of the property or claim the disputed

area was part of the Pokorny property. *Id.* The Osborns have never seen the Pokornys come into the disputed area to maintain the salal hedge, do other yardwork, or for any other purpose. *Id.*

4. Substantial Evidence Supports All Required Elements of Adverse Possession.

In order to acquire title to real property through adverse possession, the acquiring party must show that they have possessed or used the property in a manner that is: 1) open and notorious, 2) actual and uninterrupted, 3) exclusive, and 4) hostile for ten years. *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984). The trial court did not err when it concluded the Osborn's use of the disputed area satisfied each of the required elements of adverse possession and that title vested in the Osborns well before the cutting took place in 2015.

a. The Osborns' Use of the Disputed Area Was Open and Notorious.

In determining what acts are sufficiently open and notorious to establish adverse possession, both actual and constructive knowledge on the part of the title holder can be considered. *Hovila v. Bartek*, 48 Wn.2d 238, 242, 292 P.2d 877 (1956), *Chaplin v. Sanders*, 100 Wn.2d at 862. The use and occupancy must be of the character that a true owner would assert in view of the nature and location of the property in question. *Chaplin*, 100 Wn.2d at 863. The undisputed factual findings of the trial

court, taken as verities on appeal, are that every owner of the Osborn property used the disputed area as a true owner would. Each of them always believed the boundary of the Osborn property ran along the line established by Richard Walter at least as early as 1990. Each of them used the disputed area regularly, and in many instances daily, to drive into the back yard of the Osborn property or to park vehicles next to the Osborn house. Walter and Millard stored construction materials and other supplies in the disputed area up to the perceived boundary line without seeking permission from anyone and without ever being told the disputed area did not belong to them. The trial court did not err when it found Osborns' use was open and notorious.

b. The Osborns' Use of the Disputed Area Was Continuous and Uninterrupted.

The Osborns and their predecessors in interest have used the disputed area as true owners continuously since 1990. Pokorny admits there is no dispute Richard Walter's use from 1990 to 2005 was continuous and uninterrupted. The trial court's ruling may be affirmed on this basis alone.

In the alternative, Osborns are entitled to "tack" their personal use and possession of the property to the use of their predecessors in interest to satisfy the requirement that adverse use occur continuously for 10 years.

Roy v. Cunningham, 46 Wn. App. 409, 413, 731 P.2d 526 (1986).

Pokorny's contentions regarding two periods when the Osborn property was vacant while it was being sold do not change this result.

Pokorny admits that to interrupt adverse possession there must be a cessation of that possession. Substantial evidence in this case supports the trial court's conclusion there was no cessation of possession.

Howard v. Kunto, 3 Wn. App. 393, 477 P.2d 201 (1970) *overruled on other grounds by Chaplin v. Sanders*, 100 Wn. 2d 853, 676 P.2d 431 (1984), is instructive on this issue. In *Howard*, the party seeking ejectment contended, as does Pokorny here, that because the house at issue was not occupied continuously during the 10-year statutory period, adverse possession could not be had. This Court disagreed, holding:

We hold that occupancy of tract B during the summer months for more than the 10-year period by defendant and his predecessors, together with the continued existence of the improvements on the land and beach area, constituted 'uninterrupted' possession within this rule. To hold otherwise is to completely ignore the nature and condition of the property. We find such rule fully consonant with the legal writers on the subject. . . . 'Continuity of possession may be established although the land is used regularly for only a certain period each year. 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. It is not necessary that the occupant should be actually upon the premises continually.

Id. at 397-98, See also, *Reymore v. Tharp*, 16 Wn. App. 150, 553 P.2d 456 (1976) (intermittent use of vacation home sufficient to establish adverse possession because occupancy during the summer only did not destroy continuity of possession).

A similar result was reached in *Ofuasia v. Smurr*, 198 Wn. App. 133 (2017). In that case, the party challenging a finding of adverse possession argued that because a home was held out for rental and was not occupied by the owner for the entire 10-year statutory period there was no continuous possession. Citing *Lingvall v. Bartmess*, 97 Wn. App. 245, 256 (1999), this Court held, “to interrupt adverse possession, there must be actual cessation of the possession. *Id.*, at 144 (underlining added).

Expanding on its analysis, the court further held:

Smurr argues that the Ofuasia's absence from their home when they rented it disrupted adverse possession of the disputed property. The evidence, however, showed that the Ofuasia's continuously maintained the area along the original line of the chain link fence. Smurr provided no evidence that the disputed property to the west was unattended or no longer held out as the Ofuasia's property. No evidence demonstrated actual cessation of the Ofuasia's possession.

.....
The line of arborvitae trees enclosed the Ofuasia's property and they held the property out as their own. We conclude that because no genuine issue of material fact existed, the trial court did not err in granting the Ofuasia's motion for partial summary judgment regarding the adverse possession claim.

Id., 198 Wn. App. at 145–46.

Mr. Walter moved his family out of the house on Lot 54 when the property was put up for sale. Thus, there was a short period of time when the house was unoccupied. Similarly, Mr. Millard could not recall exactly when he moved into the house on Lot 54 after purchasing it or whether he moved out a short time before it was sold to the Osborns. These short periods when the house was unoccupied do not constitute interruptions of possession. It is customary, if not universally true that when residential homes are put up for sale, there may be periods when the sellers move out to facilitate the sale. Such use is consistent with the nature and character of a residence, and even more so for a vacation property.

The facts and holdings of *Howard*, *Reymore*, and *Ofuasia* each illustrate that it is not necessary for the owner to physically be on the premises continually. Here, just as in *Howard*, the physical improvements and evidence of possession, such as the concrete pad, the gravel in the driveway, the old fence, the landscaping of the bushes along the boundary line, and the mowing of the lawn up to the boundary line all remained during the short periods when the home was unoccupied. Applying the holding of *Howard* to the facts here establishes the trial court did not err when it found no interruption of possession occurred.

c. The Osborns' Use of the Disputed Area Was Exclusive.

The only evidence before this Court on the record is that the Osborns' use of the disputed area was exclusive. Mr. Walter, Mr. Millard, and the Osborns all testified that no one challenged their use of the disputed area, they never saw Pokorny or any other persons in the disputed area, and they never saw evidence that anyone other than themselves used the disputed area. Pokorny does not assign error to the trial court's finding on this issue and therefore admits the trial court did not err when it found Osborn's use of the disputed area was exclusive.

d. The Osborns' Use of the Disputed Area Was Hostile for 10 Years.

For the purposes of determining when adverse possession has occurred hostility does not require ill-will or enmity, but rather means use or possession as an owner. *Chaplin v. Sanders*, 100 Wn.2d at 860-61. "Hostility" in the context of adverse possession is "a term of art which means the claimant possesses property in a manner not subordinate to the title of the true owner." *El Cerrito, Inc. v. Ryndak*, 60 Wash.2d 847, 854, 376 P.2d 528 (1962). Substantial evidence supports the trial court's finding that the use made by the Osborns and their predecessors in interest was hostile. They mowed the grass and cut the shrubs in the disputed area up to the perceived boundary line. They stored construction materials

and built fencing in the disputed area. They used the disputed area as a driveway, parked vehicles in it, and built the concrete parking pad and graveled wheel travel areas that remain to this day. They also regularly used the disputed area for recreational, social, and family purposes. Each and all of these uses were performed as if they owned the disputed area and each and all of them were undertaken as true owners, not subordinate to the rights of any other.

The facts and holding of *Chaplin, supra*, are instructive here. In *Chaplin*, a dispute arose over a strip of land bordering two properties. The western parcel was developed and had a trailer park located on it. The other property, to the east, was vacant and undeveloped. There was no obvious boundary between the two parcels other than a drainage ditch. The owners of the western property installed a blacktop driveway on their side of the ditch. They mowed and maintained the grass between the driveway and the ditch and installed utilities in this area. The successors-in-interest to the neighboring vacant property had a survey conducted and learned the recorded boundary line was much further west than the perceived boundary, with the mowed grass, utilities and driveway all in the disputed area.

Affirming title to the disputed area had passed by adverse possession, the *Chaplin* court held:

In determining what acts are sufficiently open and notorious to manifest to others a claim to land, the character of the land must be considered. The necessary use and occupancy need only be of the character that a true owner would assert in view of its nature and location. In the present case the trial court found that...the western parcel was cleared up to the drainage ditch while the eastern parcel remained vacant and overgrown. The residents of the trailer park mowed the grass in Parcel B and put the parcel to various uses: guest parking, garbage disposal, gardening and picknicking. Some residents used portions of Parcel B as their backyard. The trial court concluded that the contrast between the fully developed parcel west of the drainage ditch and the overgrown, undeveloped parcel east of the drainage ditch was insufficient to put the owners of the eastern parcel on notice of the Sanders' claim. We disagree.

Chaplin, 100 Wn.2d at 863 (internal citations omitted, underlining added).

The facts of *Chaplin* are nearly identical with this case and its holding supports a finding that title to the disputed area vested in Mr. Walter sometime around the year 2000, ten years after he built the driftwood fence and began using the disputed area in 1990. When Mr. Walter purchased Lot 54 it was developed while Lot 55 was vacant and overgrown. There was no clear boundary between the properties other than the existing line between what had been maintained by the prior owners of Lot 54 and the unmaintained shrubs on Lot 55. Similar facts existed in *Chaplin*, where the perceived boundary was marked by mowed grass between the drainage ditch and the vacant land and unmaintained shrubs to the east. Like the residents of the trailer park in *Chaplin*,

Mr. Walter used the disputed area as his yard, as a driveway and for parking, for storage of his building materials, and for a play area for his children.

Based on nearly identical facts the court in *Chaplin* found such use open and notorious, “This conclusion is all the more compelling when the disparate condition of McMurray’s undeveloped, overgrown property and the cleared, mowed and maintained strip of land separating the [properties] is considered.” *Id.* Here, it is clear that the condition of the two properties, including the apparent boundary line delineated by the rickety old fence and the cleared edge of Lot 54 from the end of the fence to the street comprised notice to the owners of Lot 55 of open and notorious use. The “disparate conditions” between Lot 55’s vacant overgrown nature and the cleared, mowed and maintained character of the disputed area, coupled with the Walter’s use of the land by which any reasonable person would assume he was the owner, constituted notice of possession to the title holder of the vacant property. *Chaplin*, 100 Wn.2d at 862.

Additionally, the owners of Lot 55 had actual notice of the use being made of the disputed area by the owners of Lot 54 from early 2003 to present. The undisputed evidence in this case is that when Mr. Moors developed Lot 55 in the spring of 2003 he was on actual notice of Walter’s

possession of the disputed area. By 2003 Mr. Walter had poured the concrete pad, placed the gravel strips in the driveway, and was using the disputed area as a driveway and for storage. These features and use were observed by Mr. Moors, who saw Walter's vehicles in the back yard from time to time and saw debris and materials stored along the perceived boundary line. CP 960. Mr. Walter was regularly mowing the grass up to the eastern edge of the disputed area and was pruning back the shrubs along the perceived property line monthly. He used the disputed area to store construction materials and for other uses "daily." Moors' observation of Walter's use and possession means he had actual knowledge of the ongoing adverse possession from at least 2003.

Pokorny's reliance on presumptions that are unique to prescriptive easement does not change the result. Case law in Washington makes it clear that the analysis conducted to determine acquisition of title by adverse possession is fundamentally different from prescriptive easement cases. *Nickell v. Southview Homeowner's Ass'n*, 167 Wn. App. 42, 271 P.3d 973 (2012). Prescriptive easements are disfavored, adverse possession is not. *Id.* at 52. There is a presumption that easements are permissive, no such presumption applies to adverse possession. *Id.* Despite these fundamental differences, Pokorny repeatedly cites to prescriptive easement cases that are inapplicable and do not constitute

controlling or persuasive authority. Examples of such citations include *Scheller v. Pierce County*, 55 Wash. 298, 104 P. 277 (1909)(prescriptive easement for a highway sought after owner gave express permission by written contract); *State ex rel Shorett v. Blue Ridge Club*, 22 Wn.2d 487, 156 P.2d 667 (1945)(action by State to acquire public right of way easement across private land when use was originally permitted by property owners); *Granston v. Callahan*, 52 Wn. App. 288, 759 P.2d 462 (1988)(after prior owners executed express permissive use agreement, dispute over prescriptive easement across driveway). One case relied on by Pokorny, *Miller v. Anderson*, 914 Wn. App. 822, 964 P.2d 365 (1998) did address adverse possession rather than easement by prescription. However, it can be distinguished on its facts because in that case there was a written contract recognizing the proper boundary line, but permitting use of the disputed area. No such agreement existed here.

Similarly, the Pokornys' contentions regarding the fence built by their predecessor in interest have no effect. Whether or not the cedar fence is characterized as a line or boundary fence and whether or not there was a fence at all are not dispositive. It is not necessary for the purposes of adverse possession that a property owner erect a fence. In *El Cerrito, Inc. v. Ryndak*, 60 Wash. 2d 847, 376 P.2d 528, 532 (1962), the court held:

Appellants also argue that, because the fence did not extend the entire length of the property but only one third thereof, it could not be a line fence. We are not holding that this was a line fence; we do hold, however, that the facts as found by the trial court, taken together, show adverse possession of the entire strip for the required period of time. It is not necessary in such a situation that the adverse possession of an owner of residential property claiming an adjoining tract be limited to the actual ground area of structures or improvements which have been built by him beyond his true line. Nor is erection or the existence of a fence a condition precedent to a claim of adverse possession. *Skoog v. Seymour*, 29 Wn.2d 355, 187 P.2d 304 (1947).

Id., at 853–54.

e. The Trial Court Did Not Err When It Determined the Location of the Boundary Line.

When determining the proper boundary for the property obtained through adverse possession, trial courts have authority to “create a penumbra of ground around areas actually possessed to carry out the objective of settling boundary disputes.” *Lloyd v. Montecucco*, 83 Wn. App 846, 853, 924 P.2d 927 (1996). In making such determinations trial courts are allowed to reasonably and logically “project a line between objects when the extent of the adverse possessor’s claim is open and notorious as the character of the land and its use requires and permits.” *Id.*

The trial court did not err when it established the extent of the disputed area to which Osborn acquired title by adverse possession. The

court ordered the new boundary line to be drawn along the Old Fence and then from the end of the Old Fence in a straight line out to the street. This is where every person who has owned either the Pokorny property or the Osborn property historically believed the true boundary to be. It is also the logical boundary given the character and nature of the adverse use made of the disputed area by Osborn.

D. The Trial Court Correctly Denied Pokornys' Motion for Reconsideration.

Because the trial court's order on summary judgment was supported by substantial evidence and the court's findings were supported by that evidence, there was no basis for reconsideration and the trial court did not err when it denied Pokorny's motion for reconsideration.

E. The Trial Court Did Not Err In Awarding Attorneys' Fees.

Pursuant to RCW 7.28.083(3) the trial court had discretion to award attorneys' fees and costs to the prevailing party in this matter. The trial court's order awarding Osborn fees and costs recited the statutory and factual bases for its award. CP 1787-1792. Because the Osborns prevailed on their action to quiet title, they were entitled to their fees and costs and the trial court did not err when it made its award.

F. The Trial Court Did Not Err In Its Subsequent Orders.

The trial court's order quieting title in the Osborns to the disputed area mooted all of Pokorny's remaining claims for timber trespass, trespass and ejectment. The trial court did not err when it granted summary judgment dismissing these claims. The trial court also did not err when it ordered a new legal description of the Osborn property which included the disputed area. CP 1776-1779.

G. Osborns Are Entitled to An Award of Fees and Costs.

Should this Court affirm the trial court's decision, Osborn is entitled to a fee award as the prevailing party under RCW 7.28.083(3). Pursuant to RAP 18.1(b) Osborn requests an award of its fees and costs incurred in this appeal.

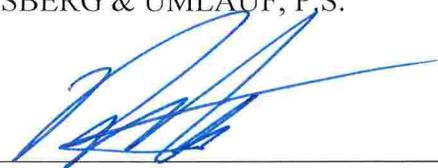
V. CONCLUSION

The Osborns respectfully request this Court 1) affirm the trial court's orders granting the Osborns' summary judgment motion on the issue of adverse possession, quieting title in the Osborns, and creating a new legal description of the Osborn property which includes the disputed area; 2) affirm the trial court's denial of Pokorny's motion for summary

judgment on adverse possession; 3) affirm the trial court's order dismissing Pokornys' remaining claims for trespass, timber trespass and ejectment; 4) affirm the trial court's order awarding attorneys' fees and costs to the Osborns; and 5) award the Osborns their fees and costs as the prevailing party in this appeal.

DATED this 10th day of June, 2019.

FORSBERG & UMLAUF, P.S.

By: 

A. Grant Lingg, WSBA #24227
Paul S. Smith, WSBA #28099
Attorneys for Respondents
Showell and Nancy Osborn

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing ***BRIEF OF RESPONDENTS SHOWELL OSBORN AND NANCY OSBORN*** on the following individuals in the manner indicated:

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SIGNED this 10th day of June, 2019, at Seattle, Washington.


Marissa C. Califano

FORSBERG & UMLAUF, P.S.

June 10, 2019 - 10:53 AM

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