

FILED  
Court of Appeals  
Division II  
State of Washington  
12/18/2019 1:12 PM

IN THE COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

**No. 53831-8-II**

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Mark and Debra Martin,  
Respondents

v.

Benjamin and Corey Orvold,  
Appellants

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

---

BRIEF OF APPELLANTS

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## **Assignments of Error**

### **A. Assignment of Error**

1. The trial court erred in finding the Martins' use of the disputed area was hostile and non-permissive for the prescriptive period. CP 1011-1012.
3. The trial court erred in finding the Martins' use was open and notorious for the prescriptive period. CP 1011.
2. The trial court erred in finding that the Martins adversely possessed the disputed area. CP 1012.
3. The trial court erred in awarding attorney's fees to the Martins. CP 1014, 1021-1023, 1026.
4. The trial court erred in not awarding the Orvolds fees on their petition for an anti-harassment protection order. CP 1014, 1021-1023; RP, p. 715.
5. The trial court erred in requiring the Orvolds to disable audio recording devices on their security system absent written consent. CP 1014, 1026.
6. The trial court erred in requiring the Orvolds to make all security lights motion-activated. CP 883, 1004, 1026.
7. The trial court erred in entering the following findings of fact:  

Finding of Fact #5 (CP 1003). There was testimony from several long-time property owners in the neighborhood, including Sharon Streleski, who with her husband filed the 1978 short plat and created the 60'-wide private easement. The testimony was consistent that due to the odd configuration of the lots, property owners to the east

of the easement (same side as the Martins) treated the easternmost unpaved strip as extensions of their property; each owner typically used the unpaved easement for parking or landscaping in front of his or her lot. *See, e.g.*, Exs. 154 and 155. Property owners from the west side (same side as the Orvolds) of the easement typically did not come over to use or maintain the easternmost unpaved strip. If anyone other than the owner of an easement lot wanted to use a portion of the easternmost unpaved easement, permission was usually asked of the owner of the immediately abutting eastern lot, and it was usually only done on special occasions where overflow parking was needed.

Finding of Fact #14 (CP 1005). The Martins continued to use and maintain the GPS. Mark Martin testified that he usually parked in the GPS before his daughter was old enough to drive, as he was the first one to leave for work. *See, e.g.*, Exs. 16, 58, and 69. He also testified that every Friday he would put the Martins' garbage and recycling bins out in the GPS for pick-up. *See, e.g.*, Ex. 52.

Finding of Fact #21 (CP 1006). The Martins acknowledged that third parties would occasionally park in the GPS. However, these were infrequent, special occasions where overflow parking was needed, and the Martins usually either gave their permission or allowed the parking as a neighborly accommodation.

Finding of Fact #22 (CP 1007). There was no evidence presented that at any time between 1992-2015, the Martins ceased using or maintaining the GPS on a regular basis.

Finding of Fact #29 (CP 1008). From there [April 2018], relations between the parties continued to deteriorate. The parties began photographing and videotaping each other and any third parties who approached either house or used the GPS. The Orvolds installed a security system which recorded sound in addition to video, and began making illegal recordings of conversations that took place as far away as the Martins' driveway.

8. The assigned trial judge in this case is prejudiced against the Orvolds, as she has, amongst other concerns, provided legal advice to the Martins (RP (11/30/2018), p. 14-15), advocated for the Martins during questioning of Mr. Orvold at trial (RP, p. 646-647), issued a preliminary injunction under the guise of “controlling litigation” (CP 355-356), entered orders against the Orvolds which are overly broad designed to protect non-parties (CP 883, 1004, 1026; RP, p. 246, 249, 411-412), and incorrectly designated the Orvolds’ behavior as “illegal” (CP 880, 883, 1014, 1026).

**B. Issues Pertaining to Assignment of Error**

1. Was it error for the trial court to find hostile and non-permissive use by the claimants, where the use was allowed by the terms of an express easement? Assignment of Error 1.

2. Was it error for the trial court to find hostile and non-permissive use, where there was a reasonable inference of neighborly sufferance? Assignment of Error 2.

3. Was it error for the trial court to find hostile and non-permissive use, where there was permission from the owner? Assignment of Error 3.

4. Was it error for the trial court to find “open and notorious possession,” when the transient and occasional parking by the Martins was not an unmistakable claim to ownership? Assignment of Error 4.

5. Was it error for the trial court to award attorney's fees to the Martins for adverse possession and deny fees to the Orvolds?

Assignment of Error 5.

6. Was it error for the trial court to award fees to the Martins and deny fees to the Orvolds for their successful anti-harassment protection order requests? Assignment of Error 6.

7. Was it error for the trial court to require the Orvolds to disable the audio function of their security system, when conversations within its range are not "private," and speakers are on notice that conversations are being recorded? Assignment of Error 7.

8. Was it error for the trial court to require the Orvolds to change their security lights to motion-activated, when there was no evidence or testimony that the Orvolds' lighting impacted the Martins in any way? Assignment of Error 8.

9. Was it error for the trial court to enter Findings of Fact 5, 14, 21, 22, and 29, when they were not supported by the evidence? Assignment of Error 9.

10. Has the trial judge violated the appearance of fairness doctrine? Assignment of Error 10.

### **Introduction**

Benjamin and Corey Orvold ("the Orvolds") appeal the trial court's order awarding a portion of their property to Mark and Debra Martin ("the Martins") by adverse possession, awarding the Martins attorney's fees, refusing to award the Orvolds attorney's fees for their

successful anti-harassment protection order petition, requiring the Orvolds to disable audio recording on their security systems, and requiring the Orvolds to make all security lights motion activated. The Orvolds also request that the matter be remanded to a different trial court judge so that they may receive fair and impartial rulings.

### **Statement of the Case**

The Orvolds purchased the real property located at 11910 122<sup>nd</sup> Avenue Court East in Puyallup, Washington, in August 2015. CP 1007. The Martins purchased the property located at 11911 122<sup>nd</sup> Avenue Court East in Puyallup, Washington, in February 1992. CP 1004. The Martin property is located across the street from the Orvold property, with the Orvold home located on the western side of 122<sup>nd</sup> Avenue Court East (“122<sup>nd</sup> Ave Ct E”) and the Martin home on the eastern side of the street. CP 1003.

In July 1978, the first short plat was recorded related to the Martin and Orvold properties (“1978 Short Plat”). CP 1002; Ex. 9. The 1978 Short Plat created a 60-foot private “road and utilities easement” (“Easement”) which later encompassed 122<sup>nd</sup> Ave Ct E. Ex. 9. In 1985, a second short plat was recorded (“1985 Short Plat”) and this created the Martin property. CP 1002, Ex. 10. The 1985 Short Plat also shows the sixty-foot wide Easement. Ex. 10.

In 1990, the owners of the lots abutting the Easement executed a Road Maintenance Agreement (“RMA”), granting those owners a right of “common use” over and across the Easement, stating:

It is agreed that each of the Owners is entitled to unrestricted use of the Street, in common with the other owners for foot and vehicular ingress and egress by themselves and their invitees; and for all utilities now or in the future serving the property.

Ex. 158.

A third short plat was recorded later that year (“1990 Short Plat”), creating four additional parcels at the end of 122<sup>nd</sup> Ave Ct E. CP 1002; Ex. 11. The 1990 Short Plat identifies 122<sup>nd</sup> Ave Ct E and the “private road & utilities easement.” Ex. 11.

The Orvold property was created by a fourth short plat, recorded in 1991 (“1991 Short Plat”). Ex. 162. The 1991 Short Plat also shows 122<sup>nd</sup> Ave Ct E and the private road and utilities easement and references the 1985 Short Plat. *Id.*

The short plats show the lots on the west, including what is now the Orvold Property, being burdened on the east by this 60-foot wide road and utilities easement. CP 1002; Ex. 9, 10, 11, 162. At the southern end of the Easement, it ended in a 45’ wide cul-de-sac. *Id.*

The Orvold property has been owned by the following individuals/entities since 1992:

- Charles and Candace Sundsmo- until March 1992. Ex. 2;
- Jon Pulicicchio and Marcia Newton- March 1992- October 1999. Ex. 2 and 3.
- Julianna Tucker and Kevin Fleck- October 1999- September 2001. Ex. 3 and 4.

- Dixie Cooper, Todd Smith and Tiffany Smith- September 2001-January 2015. Ex. 4-7.
- JMFB-3, LLC- January 2015-August 2015. Ex. 7 and 8.
- Benjamin and Corey Orvold- August 2015-present. Ex. 8.

The street and the cul-de-sac lie within the Easement, but themselves are significantly narrower than the Easement depicted on any of the short plats. CP 1003. As a result, the street and cul-de-sac are lined with graveled or unpaved spaces between the paved street/cul-de-sac and the respective owners' homes. CP 1003. The area in dispute is a parking space that lies in front of the Martin home, across the Street from the Orvold home, but within the boundaries of the Orvold property. CP 1003; Exs. 124, 127, 128, and 160. This area is referred to by the trial court as the "GPS." CP 1002.

In 1993, the then-owner of the Orvold property, Jon Pulicicchio, informed the Martins that he owned some of the land on the east side of the street (including part of their front yard and the GPS), and further informed them that he would be obtaining an umbrella insurance policy to protect him from any liability related to that hillside area. RP, p. 570 and 574. The Martins did not claim ownership of, or any right to, the GPS during that conversation. *Id.* Mr. Pulicicchio later offered to give the Martins the portion of his property lying on the eastern side of the street, but the Martins refused his offer. RP, p. 581.

The unpaved areas along the street, including the GPS, were used by the neighborhood without incident until April 2018, at which

time the Martins and the Orvolds got into a dispute about the property. CP 1003 and 1008. The Martins filed the current lawsuit on June 22, 2018, seeking to quiet title to that portion of the Orvold property lying on the eastern side of the street based on adverse possession, seeking an injunction, and requesting an anti-harassment protection order. CP 1-11.

On November 11, 2018, the Orvolds filed a Petition for Order for Protection, seeking anti-harassment relief from the Martins. CP 116-120. A hearing was held on November 30, 2018, and the court entered a mutual order protecting both the Martins and the Orvolds. CP 355-366; RP (11/30/2018), p. 31-34. The court also required the Orvolds to remove concrete barriers they placed in the GPS, not as an injunction but “under the court’s authority to control litigation.” CP 355-366; RP (11/30/2018), p. 15.

On April 12, 2019, the court denied the Orvolds’ motion to amend their answer to allow them to bring in a third-party defendant for breaches in the statutory warranty deed. CP 482-483. Then, on May 10, 2019, the court granted the Martins’ motion for partial summary judgment as to the portion of the Orvold property that made up the Martins’ driveway and the landscaped area north thereof. CP 630-634. This excluded the GPS, which lies to the south of the driveway. *Id.*

Based on the court’s order on partial summary judgment, the only issues left for trial were: 1) adverse possession of the GPS; 2) the

anti-harassment petitions by both parties; and 3) the Martins' claim for injunctive relief to prevent the Orvolds from using the GPS. CP 1-11.

At trial, Mr. Martin testified that his mother parked in that spot to babysit their daughter, Lindsey, from 1992-2008, and that she parked there "all day" before Lindsey started school, at least 3 days per week. RP, p. 103. Mr. Martin further testified that he has parked in other areas within the easement, including in front of the Orvold home. RP, p. 303. Mr. Martin testified that he did not believe Jon Pulicicchio was objecting to their use of the GPS when he told them about the lot lines, and that nobody has ever objected to them parking in the GPS until now. RP, p. 313, 317-318.

Mrs. Martin similarly testified that Mr. Pulicicchio talked to them about 2 years into their ownership and informed them about the odd lot lines and that he was getting umbrella insurance to protect himself. RP, p. 376. She testified that they "thought that was nice of him to share it," that he never told them to get off his property, and she did not think he objected to what they were doing. RP, p. 376 419. Mrs. Martin believes that people have the right to park on the street for occasional use, just not permanently. RP, p. 422. She further testified that Mr. Martin's mother parked in the GPS "off and on until Lindsey was about 12," approximately four to five times per week. RP, p. 382-383. Mrs. Martin also testified that for the last 25 years she has only worked Monday-Thursday. RP, p. 411.

Jon Pulicichio, owner of the Orvold property from 1992-1999, testified that he knew his property extended to the other side of the street, and that he never asked permission of the Martins to do anything, as he knew he owned it. RP, p. 568. He testified that a lot of cars parked in the GPS and he did not care or object. RP, p. 569. Mr. Pulicichio also stated that he offered to give the Martins that portion of his property lying east of the street if they paid for the paperwork, but they refused. RP, p. 581.

Tiffany Smith, owner of the Orvold property for 15 years, testified that the Martins' use of the GPS was never an issue, and that it was not the Martins' fault that a street went through the property. RP, p. 167.

Dixie Cooper resided in the Orvold property from 2001-2004 and testified that she remembers the GPS "usually being open." RP, p. 206.

Charlene Knowlton has lived on the street since 1996 and testified that the cul-de-sac was "general parking" and used if somebody had a party. RP, p. 180.

Clayton Horton has lived on the street for 28 years and testified regarding the GPS, that "if anybody needed it, whoever was there first parked there," and further stated that anybody can park where they want. RP, p. 220, 224.

Joellen Woodward has resided on the street for 29 years and testified that visitors would “use the cul-de-sac,” as it would be “a normal thing to do.” RP, p. 241.

Andrea Woodward resided on the street until 1993 and testified that others use the GPS if something is happening, including her, stating “it’s a cul-de-sac.” RP, p. 272.

Charles Sundsmo developed the neighborhood and resided in the Orvold property until 1992. RP, p. 282. He was one of the creators of the easement and testified that it included the right to park. *Id.* He further testified that he did not object to anyone parking in the right of way. *Id.*

Sharon Streleski lived on the street for 35 years and her husband was one of the creators of the easement. RP, p. 337. She testified that she envisioned the easement included the right to park. RP, p. 341.

Bonita Anderson has resided on the street since 1991 and testified that she has asked the owners of the Orvold property for permission to park in the GPS. RP, p. 522. Consistent with Mr. Pulicchio’s testimony, she stated that the owners on the western side of the street worked with an attorney in 1995 to try to give the property on the east side of the street to those owners, but some did not want it. RP, p. 523.

Following the trial, the court issued a letter ruling, finding in favor of the Martin’s for adverse possession (with a prescriptive period of 1992-2002), awarding them attorney’s fees, and enjoining the Orvolds

from any use of the GPS absent express consent by the Martins. CP 1001-1020. The court further granted mutual restraints against the parties. *Id.* The court ultimately awarded the Martins the net amount of \$50,857.96 in attorney's fees, including fees they incurred in pursuing their anti-harassment protection order, while denying the Orvolds' request for attorney's fees for the same. CP 1014, 1021-1023; RP 715.

The Orvolds appeal. CP 1028-1056.

### **Argument**

**1. Adverse Possession is a mixed question of law and fact and the Martins bear the burden of proving each element.**

To establish adverse possession, the claimant must show that possession of the disputed area was: 1) exclusive; 2) actual and uninterrupted; 3) open and notorious; and 4) hostile and under a claim of right made in good faith. *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984). All elements must be present for at least 10 years. RCW 4.16.020. The claimant bears the burden of proving each element of adverse possession by a preponderance of the evidence. *Itt Rayonier v. Bell*, 112 Wn.2d 754, 758, 774 P.2d 6 (1989).

Adverse possession is a mixed question of law and fact. *Peeples v. Pt of Bellingham*, 93 Wn.2d 766, 771, 613 P.2d 1128 (1980), overruled in part on other grounds in *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984). Whether the essential facts exist is a question of fact. *Id.* Whether the facts, as found, constitute adverse possession, is for the court to determine as a matter of law. *Id.* In addition, failure of the trial

court to make an express finding on a material fact requires that the fact be deemed to have been found against the party having the burden of proof. *Crites v. Koch*, 49 Wn. App. 171, 176, 741 P.2d 1005 (1987).

**2. The trial court erred in finding the Martins' use of the GPS was "hostile," when the use of the GPS was consistent with and authorized by the Easement.**

The Martins did not establish all elements of adverse possession, as their use of the GPS was allowed by the ingress and egress easement and was therefore permissive.

Permissive use negates the element of hostility. *Crites v. Koch*, 49 Wn. App. at 177. In the case of an express easement, hostility is established only when the claimant creates "an obstruction that clearly interferes with the proper enjoyment of the easement." *Littlefair v. Schulze*, 169 Wn. App. 659, 666, 278 P.3d 218 (2012). Furthermore, the scope of an express easement is established by the intent of the parties in creating it, and the use of the easement is evidence of that intent. *York v. Cooper*, 50 Wn.2d 283, 285, 373 P.2d 493 (1962).

In *York v. Cooper*, a mutual easement was established along the boundary of two adjoining properties for the "primary purpose of ingress and egress." *York v. Cooper*, 50 Wn.2d at 283. The Yorks and their tenants parked along the easement and the Coopers protested, claiming it was beyond the scope of the easement. *Id.* In considering the Coopers' argument regarding the scope of the easement, the Washington Supreme Court held that the intent of a donor in granting an easement must be established by the evidence, and the use to which

an easement is put is evidence of the intent of the parties in establishing it. *Id.* at 285. The Supreme Court upheld the trial court's finding that the ingress and egress easement included the right to park, as the respective owners had been parking in the easement from 1929 through 1960. *Id.*

In the instant case, one creator of the Easement, Charles Sundsmo, testified that the Easement includes the right to park along the street. RP p. 278, 282. Sharon Streleski has lived in the neighborhood for 38 years and her husband was part of the original platting of the neighborhood. RP, p. 338. She testified that she envisioned the Easement would include the right to park. RP, p. 341.

Furthermore, numerous witnesses testified that they, and others, have parked in the unpaved areas along 122<sup>nd</sup> Ave Ct E, and within the 60' Easement, since 1992. Tiffany Smith, owner of the Orvold Property and resident in the same from 2001 through 2011, testified that the Martins never asked permission to use the parking space, that it was never an issue, and it was not the Martins' fault "the county came through and put a street down through our property." RP, p. 167. Charlene Knowlton has lived on the street since 1996, and she testified that the cul-de-sac is "general parking." RP, p. 180. Clayton Horton has resided on the street for 28 years and testified regarding the GPS, "if anybody needed it, whoever was there first parked there." RP, p. 220. Joellen Woodward has lived on the street for 29 years and testified that people visiting "would use the cul-de-sac. It would be a normal thing to

do.” RP, p. 241. Andrea Woodward testified that she has parked in the GPS, stating “[i]t’s a cul-de-sac.” RP, p. 272. Mark Martin testified that he has parked in the Easement area in front of the Orvold Property and their guests have parked there as well. RP, p. 303.

Parking in the unpaved areas along the street and cul-de-sac results in no obstruction of the Easement and the creators of the Easement intended it would include the right to park. Consistent with that intention, the unpaved areas lining the street and cul-de-sac have been used for parking by the neighborhood and their guests since at least 1992. As a result, parking along the road and within the 60’ Easement area is a permitted use, and the Martins cannot establish the element of hostility. The Martins’ claim for adverse possession fails, and the trial court’s order awarding them the GPS should be vacated.

**3. Even if the use was not permitted by the Easement, the trial court erred in not applying a presumption of permissive use based on neighborly acquiescence.**

The Martins’ use of the GPS was not “hostile,” as it was allowed by neighborly sufferance and acquiescence.

Use is presumed permissive in any situation in which it is reasonable to infer that the use was “allowed by neighborly sufferance and acquiescence.” *Gamboa v. Clark*, 183 Wn.2d 38, 50-51, 348 P.3d 1214 (2015). “What constitutes a reasonable inference of neighborly sufferance or acquiescence is a fairly low bar.” *Id.* at 51. The fact that no permission was granted or received does not preclude applying the

presumption of permissive use. *Tiller v. Lackey*, 6 Wn. App.2d 470, 489, 431 P.3d 524 (2018). Furthermore, use that is permissive at its inception does not ripen into a prescriptive right unless the claimant has made a distinct and positive assertion of a right hostile to the owner. *Crites v. Koch*, 49 Wn. App. at 177.

Once a presumption of permissive use is established, it can be defeated by the claimant establishing that he or she interfered with the owner's use of the land in some manner. *Id.* at 52. The claimant must make a "distinct and positive assertion of a right hostile to the owner, and brought home to him," to transform a presumptively permissive use into a hostile one. *Roediger v. Cullen*, 26 Wn. 690, 714, 175 P.2d 669 (1946).

In *Crites*, the parties agreed it was common for farmers to cross and to park equipment on their neighbors' fields and this was not perceived as a trespass. *Crites v. Koch*, 49 Wn. App. at 177. Such use was therefore presumed permissive as neighborly acquiescence. *Id.* Similarly, in *Gamboa*, the court found an inference of neighborly sufferance and applied the presumption of permissive use where the Gamboas and the Clarks used a road to access their properties with mutual awareness and without incident from 1992 until 2008. *Gamboa v. Clark*, 183 Wn.2d at 51.

Here, as noted above, numerous witnesses testified that the owners along 122<sup>nd</sup> Ave Ct E have parked, and allowed others to park, along the Street and within the Easement on a first come, first served

basis since 1992. RP, pp. 167, 180, 220, 241, 272, 278, 283, 303, 338, and 341. Further, Jon Pulicicchio owned the Orvold Property for seven and a half years of the prescriptive period adopted by the trial court (1992-2002), and specifically testified that he did not object to *anybody* parking in the GPS, as he “pretty much” considered it a neighborly accommodation. RP, p. 571.

As in *Crites* and *Gamboa*, it is reasonable to apply an inference of neighborly sufferance and acquiescence in using the GPS for parking, as all of the owners of the Orvold property testified to the same. In fact, the trial court found that the Martins allowed others to park in that same area as an act of neighborly acquiescence when no express permission was given. CP 1006, 1010. How would this be neighborly acquiescence for the Martins to allow parking, but not the true owner?

No evidence was presented by the Martins of a distinct and positive assertion of a right hostile to any of the owners of the Orvold property. Instead, the trial court repeatedly stated that the Martins never “asked for or received permission.” CP 105, 1007, 1010-1012 (Finding of Facts 11, 13, 23, and Conclusions of Law 5, 6, and 7). However, this does not preclude application of the presumption of permissive use, and further supports that their use was an act of neighborly acquiescence. *Tiller v. Lackey*, 6 Wn. App. at 489. As a result, the trial court erred in not applying a presumption of permissive use, and in finding the element of hostility was met.

**4. Even if there is no presumption of permissive use, the trial court erred in finding hostility, as the prior owners of the Orvold lot gave the Martins actual permission.**

Express or implied permission from the true owner negates hostility as a matter of law. *Teel v. Stading*, 155 Wn. App. 390, 396, 228 P.3d 1293 (2010). Permissive use of the sort that will negate hostility and prevent adverse possession is use based on a personal, revocable license from the true title owner. *LeBleu v. Aalgaard*, 193 Wn. App. 66, 72-73, 371 P.3d 7 (2016). When there is no explicit agreement but only unobjected-to use, it is reasonable to infer a personal revocable license. *Id.* The most useful test of hostility is whether the use “is of such a nature as would normally be objectionable to owners” of the land. *Id.* at 72.

Here, Charles Sundsmo, owner of the Orvold Property from 1991-1992, testified that he never took any steps to exclude the Martins from his property lying on the east side of the street nor did he tell them they could not park there. RP, p. 279-280. He further testified that he “didn’t have any objection to anyone parking on the right-of-way.” RP, p. 282.

Jon Pulicicchio, owner of the Orvold property from 1992 until 1999, testified that he knew the GPS was part of his property. RP, p. 569. He further testified that he did not object to the Martins parking in the GPS, as he “had no problem” with it.” RP, p. 569, 581. Mr. Martin himself testified that he did not believe Mr. Pulicicchio was objecting to their use of the property after he brought his ownership to

their attention. RP, p. 313. Mrs. Martin testified similarly, that she did not believe Mr. Pulicicchio objected to their use and presumed it was ok with him. RP, p. 419.

Tiffany Smith, owner of the Orvold Property from 2001 until January 2015, testified that the Martins used the parking space regularly, that she had no need for it, and that she never objected to their use. RP, pp. 164-167. Here, the use of the land was not “of such a nature as would normally be objectionable to owners” of the land, as the owners from 1991-2015 all specifically testified that they had no objection to the use, as it did not interfere with the enjoyment of their property or the Easement. *LeBleu v. Aalgaard*, 193 Wn. App. at 72. As a result, it is reasonable to infer the un-objected to use of the land was permission. *Id.*

Permissive use cannot ripen into prescriptive use unless there is a distinct change in use which provides notice to the owner of a claim of right. *Teel v. Stading*, 155 Wn. App. at 395. The court determines when permissive use terminates based on the viewpoint of the party who granted the permission. *Id.* There was no evidence presented that the Martins’ use of the GPS changed at any point in time, or that the owner of the Orvold Property would have been put on notice that they were claiming the property as their own. In fact, Mrs. Martin testified that they did not change the way they used the property after they found out about the lot lines. RP, p. 424. As a result, the Martins’ use of

the GPS was always with the implied permission of the owner, and the finding of adverse possession must be overturned.

**5. The trial court erred in finding the Martins' use of the GPS was "open and notorious" possession.**

To establish "open and notorious" possession, the claimant must demonstrate that the owner knew, or should have known, that the occupancy of the land "constituted an ownership claim." *Anderson v. Hudak*, 80 Wn. App. 398, 405, 907 P.2d 305 (1995). The acts "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." *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 212, 936 P.2d 1163 (1997), citing *Hunt v. Matthews*, 8 Wn. App. 233, 236-237, 505 P.2d 819 (1973), overruled on other grounds by *Chaplin*, 100 Wn.2d 853, 676 P.2d 431. For example, planting trees without maintaining or cultivating them is not open and notorious use. *Riley v. Andrews*, 107 Wn. App 391, 397, 27 P.3d 618 (2001).

Here, when asked if he understood the Martins claimed ownership of his property lying east of the street, Jon Pulicicchio denied the same, and testified that he told them in no uncertain terms he owned the property. RP, p. 581. He further testified that he offered to give them that portion of his property lying east of the street if they paid for the paperwork, but they refused his offer. RP, p. 581. How would an owner be put on notice that they claimed the land as their own, if they refused ownership and continued to treat the land in the same manner?

Furthermore, the testimony established that, during the prescriptive period, the vast majority of their use of the GPS consisted of Mr. Martin's mother parking there 3-5 times per week to babysit their daughter. RP, p. 82-83, 103. Once she started school, the grandmother provided only after school care. *Id.* Parking for a couple of hours per day while the Martins and the owner (Mr. Pulicicchio for the vast majority of the prescriptive period) were at work, would not be an unmistakable claim to ownership. In fact, Mr. Pulicicchio testified that he was at work during the day, that he was not aware of the Martins creating a parking space and does not recall seeing the grandmother parking in the GPS several times per week. RP, p. 577-578, 584. George Woodward testified that, if a stranger drove down the street, nothing would tell them the GPS belonged to the Martins. RP, p. 236.

And finally, the Martins' "maintenance" of the GPS was limited to laying gravel a few times over the past 27 years. RP, p. 92-93, 98. The Martins' use was not "open and notorious possession" sufficient to put an owner on notice of a claim to ownership.

Based on all of the above, the trial court erred in finding that the Martins had met their burden of establishing all of the elements of adverse possession, and that decision should be reversed. Relatedly, the injunction restraining the Orvolds from using the GPS should be vacated. CP 1013, 1025.

6. **Attorney's fees should be awarded to the Orvolds as the prevailing party on the adverse possession claim and not the Martins.**

The trial court awarded the Martins \$50,857.96 in attorney's fees and costs pursuant to RCW 7.28.083 and RCW 10.14.090. CP 1021-23. Despite entering a mutual anti-harassment protection order, the trial court refused to award the Orvolds attorneys' fees or offset fees for the same. RP 715; CP 1021-23.

RCW 7.28.083(3) provides that the court "may award all or a portion of costs and reasonable attorneys' fees" to the prevailing party in an adverse possession action, if the court determines such an award is "equitable and just." RCW 7.28.083(3). RCW 10.14.090 provides that a court "may require" the respondent in an anti-harassment protection order matter to pay costs and reasonable attorney's fees. RCW 10.14.090.

If the Orvolds are successful on appeal, they should be awarded their attorneys' fees and costs pursuant to RCW 7.28.083(3) as the prevailing party in the adverse possession case. If it was "equitable and just" to award fees to the Martins, the same should be true of the Orvolds if they prevail. The case should be remanded for an award of attorneys' fees to the Orvolds related to the adverse possession claim.

**7. Even if the Orvolds are not successful in overturning the finding of adverse possession, the trial court erred in awarding the Martins fees for their anti-harassment protection order and denying fees to the Orvold.**

Even if the Orvolds are not successful on appeal on the adverse possession claim, the Orvolds should be awarded the attorneys' fees

they incurred in pursuing their anti-harassment protection order, which was granted at the temporary hearing and at trial. RCW 10.14.090; CP 355-356, 1013-14, 1025-26. There was no legal basis for the trial court to award attorney's fees to the Martins related to their anti-harassment petition but not to the Orvolds, when the Orvolds were successful in obtaining an anti-harassment protection order. The matter should be remanded for an award of attorney's fees.

**8. The trial court erred in requiring the Orvolds to disable the audio function of their security system, when conversations within its range are not "private," and speakers are on notice that conversations are being recorded.**

The trial court found that the Orvolds installed a security system after their difficulties with the Martins started in April 2018, that they began making "illegal recordings of conversations that took place as far away as the Martins' driveway," and required the Orvolds to disable the audio function of their security system. CP 1008, 1014, 1026.

First, there was no evidence to support the court's finding that the Orvolds installed a security system in response to their difficulties with the Martins in April 2018. CP 1008 (Finding of Fact #29). Mr. Orvold specifically testified that he installed the security system in 2016 after hearing of theft occurring at the Martin home. RP, p. 617. There was no evidence to the contrary.

Next, the court erred in finding that the Orvolds engaged in "illegal" recording, and in requiring them to disable the audio function

of their security system, as the Orvolds had consent of the speakers and there is no expectation of privacy.

No individual may record a “private conversation” without the consent of the persons engaged in the conversation. RCW 9.73.030(1)(b). “Consent” is considered obtained “whenever one party has announced to all other parties... in any reasonably effective manner” that the conversation will be recorded. RCW 9.73.030(3). There is no requirement that consent be obtained in writing, as required by the trial court. CP 1014, 1026.

In determining whether a communication is private, a court looks at whether the parties manifest a subjective intent to have a private conversation, and whether that intent is objectively reasonable. *State v. Babcock*, 168 Wn. App. 598, 605, 279 P.3d 890 (2012). In analyzing those factors, a court must consider: 1) the duration and subject matter of the communication; 2) the location of the communication and the potential presence of third parties; and 3) the role and relationship of the non-consenting party to the consenting party. *Id.* A conversation is not private when it takes place in front of third parties or when it takes place on a public thoroughfare and can be overheard by others. *State v. Clark*, 129 Wn.2d 211, 228, 96 P.2d 384 (1996). Furthermore, while one may expect privacy in his or her own home, statements exposed to the plain view of outsiders are not protected because the declarant has shown no intention to keep to himself. *Id.* at 229-230. In the instant case, communications occurring

on the Orvold property or in the street are not “private communications,” as there can be no reasonable expectation of privacy in those locations.

Furthermore, the evidence at trial established the Orvolds have placed a sign on their property notifying others that audio recording was in use, and that the Martins have read the sign. RP 304, 488-89. This sign is announcing, in a reasonably effective manner, that a conversation will be recorded, and therefore any speaker has deemed to consent. RCW 9.73.030(3). By way of example, a party is deemed to consent to her communication being recorded if she voluntarily leaves a message on an answering machine, as an “answering machine’s only function is to record messages.” *In re Marriage of Farr*, 87 Wn. App. 177, 184, 940 P.2d 679 (1997). In *Farr*, the court held that the defendant had no reasonable expectation of privacy because he left voicemail messages “knowing that his messages were being recorded.” *Id.* In this case, the sign on the Orvold Property is a reasonably effective communication that conversations are being recorded, and any speaker has therefore consented to the recording.

Based on the above, the trial court erred in requiring the Orvolds to disable the audio recording function on their security system, as conversations within its range are not conducted with any reasonable expectation of privacy. Furthermore, speakers have consented to the recording. This order should be vacated, along with Finding of Fact #29.

**9. The trial court erred in requiring the Orvolds to change their security lights to motion activated only.**

The mutual anti-harassment protection order granted by the court (although ultimately entered as a restraining order instead by agreement), is overly broad and restrains the Orvolds from conduct directed at third parties and even the public in general.

The trial court restrained the parties from shining flood lights into each other's windows, required that they be pointed only at the party's own property, and further required them to make all security lighting "motion-sensitive" only. CP 883, 1004, 1026. Anti-harassment protection orders may not interfere with a person's use or enjoyment of his or her real property and cannot be extended to protect non-parties. RCW 10.14.080 (9) (property rights); *Trummel v. Mitchell*, 156 Wn.2d 653, 131 P.3d 305 (2006) (non-parties); *Price v. Price*, 174 Wn. App. 894, 301 P.3d 486 (2013) (property rights).

Here, there was no testimony or evidence presented by the Martins that they were impacted or bothered by the Orvolds' security lighting. In fact, it was only Joellen Woodward who testified that the Orvolds' light was bright in her home. RP, p. 246, 249. Mrs. Martin also testified that the Orvolds' light was upsetting the Woodwards, but never said any lights were bothering the Martins. RP, p. 411-412. The trial court already protected the Martins from having lights shone into their home by restraining the parties from doing that very act, and the requirement that the Orvolds convert all security lighting to motion-

sensitive goes beyond what is required to protect the Martins. In fact, the order would require the Orvolds to switch security lighting even on the back of their home, which would clearly not interfere with the Martins in any way. As a result, the requirement that the Orvolds convert all security lighting to motion-sensitive should be vacated.

**10. The trial court erred in finding that owners from the west side of the street did not use the land on the east side of the street, and that if anyone used that land they asked permission from the adjoining property owner.**

At Findings of Fact #5 and #21, the trial court found that the owners from the east side of the street (the Martin side) used the unpaved area as extensions of their property, that owners on the west side (the Orvold side) typically did not come over to use the land on the east, and that permission was usually asked of the abutting eastern lot if someone wanted to park in that area. CP 1003. Relatedly, the trial court found that, whenever someone other than the Martins parked in the GPS, the Martins either gave permission or allowed the parking as a neighborly accommodation. CP 1006. However, there was no evidence to support these findings.

Michele Kartes testified that she has parked in the GPS and did not ask permission to do so. RP, p. 135. Clayton Horton testified with respect to the GPS that, if anyone needed it, whoever was there first parked there. RP, p. 220. He further testified that anyone can park anywhere they want. RP, p. 224.

George Woodward testified that he has used the GPS for overflow parking. RP, p. 226. Joellen Woodward testified that others would park there anytime there was a party, and that it was “a normal thing to do” to park in the cul-de-sac. RP, p. 241. Andrea Woodward similarly testified that she has used the GPS, as “it’s a cul-de-sac.” RP, p. 272. None of the Woodwards testified to asking permission from the Martins.

Bonita Anderson testified that she has parked in the GPS and asked permission from the owner of the Orvold property. RP, p. 520. Jon Pulicicchio and Reginald York both testified that they occasionally parked in the GPS and did not ask for permission. RP, p. 568, 588.

Mr. Martin testified that he has parked in front of the Orvold property, across the street, and has seen others do it as well. RP, p. 303. Sharon Stresleski and Debbie Martin also testified that people occasionally park on the other side of the street. RP, p. 339, 387.

There was no evidence to support the trial court’s findings that the owners from the west side asked permission from the owners on the east side to park along the street, nor that the Martins “usually gave their permission” to park in the GPS. Furthermore, the Martins never testified to allowing parking in the GPS as a neighborly accommodation. As a result, Findings of Fact 5 and 21 should be vacated.

11. **The trial court erred in finding that Mark Martin parked in the GPS until his daughter was old enough to drive, and that there was no evidence the Martins ceased using or maintaining the GPS on a regular basis.**

At Findings of Fact #14 and 22, the trial court found that Mark Martin “usually parked in the GPS before his daughter was old enough to drive,” and that there was no evidence the Martins ceased using or maintaining the GPS on a regular basis from 1992-2015. CP 1005, 1007. However, the evidence presented at trial does not support these findings.

With regard to his use of the GPS during the 1990s, Mr. Martin testified that he did not park there “every minute or something because sometimes I’d park it at the bottom of the driveway too. But, yeah, I mean, I used it when I needed to use it.” RP, p. 121. He further testified that the Martins added an addition to their home in 1996, creating additional parking where he could park at the top of their driveway. RP, p. 93-94. Mr. Martin also testified that he parked in the GPS less in the 2000s, just “as needed.” RP, p. 121. With regard to maintaining the GPS on a regular basis, Mr. Martin testified that they had no set schedule, but probably have had to add some gravel every year or two “to fill in a hole here and there.” RP, p. 98. No further specifics were provided on regular maintenance of the GPS.

Based on the above, there was insufficient evidence to support Findings of Fact 14 and 22, and the same should be vacated.

**12. The trial court is prejudiced against the Orvolds and the case should be remanded to a different judge.**

If the Orvolds are successful on appeal, the matter should be remanded to a different trial court judge for resolution of outstanding

issues, so that the Orvolds may obtain fair and impartial rulings. The conduct of the trial court throughout the litigation, as well as the orders entered, evidence a bias against the Orvolds and in favor of the Martins.

That judges must be fair and unbiased is “fundamental to our system of justice.” *GMAC v. Everett Chevrolet, Inc.*, 179 Wn. App. 126, 153, 317 P.3d 1074 (2014). Further, because “the appearance of bias or prejudice” can be as damaging as actual bias, the law requires that a judge also “appear to be impartial,” and to avoid even “a mere suspicion of... an appearance of bias or prejudice.” *Id.* at 153-154. In examining whether a proceeding appears fair, the court is to consider how it would appear to a “reasonably prudent and disinterested person.” *Id.* at 154.

Here, the trial court’s conduct throughout hearings and the trial, as well as the orders entered after trial, violate the appearance of fairness doctrine. Those acts/rulings include:

- Providing legal advice to the Martins, by suggesting that they raise a claim for a prescriptive easement. At the hearing on preliminary injunction/anti-harassment protection order, the trial court stated:

I was looking at the complaint. I was curious to see if the plaintiffs had alleged prescriptive easement because the laws says that, in that situation, possession doesn’t have to be exclusive. And I thought, you know, that might be a great fit if it had been alleged because there’s evidence that multiple people use this are for parking and getting their mail and whatever, but it doesn’t look like that’s in the complaint.

RP (11/30/2018), p. 14-15. This statement was not related to any issue before the court.

- Denying the Martins' request for preliminary injunction to remove the jersey barriers as their request did not meet the legal requirements, but still requiring the Orvolds to do so "under the Court's authority to control litigation and to make sure that things proceed in an orderly fashion." CP 355-356. Further, no bond was required as would have been required if an injunction was granted. *Id.*
- Advocating for the Martins during questioning of Mr. Orvold, asking why he took pictures and then asking: "Do you see that taking pictures as inconsistent with people being able to park wherever they want?" RP, p. 646-647. And further asking "if you want things to go back to the way they were, why did you put in jersey barriers?" RP, p. 647.
- Allowing extensive reference to Reginald York being a "registered sex offender" when the conviction was 19 years ago and not relevant to the instant case. RP, p. 597.
- Admitting a Petition for Order for Protection against Ryan Radke, over the Orvolds' objection, under the guise of proving his address. Ex. 189; RP, p. 552. However, he admitted he resided at the alleged address. RP, p. 552. The court stated "I think I can sort things out. I understand what's relevant and

what's not." *Id.* The court then found him "not credible." CP 878.

- Admitting an exhibit over the Orvolds' objection, stating that "impeachment doesn't have to be disclosed in discovery." RP, p. 552.
- Requiring the Orvolds to disable all audio-recording of their security system unless they have "written consent," and stating that their prior conduct in using such devices was "illegal," despite having a sign and despite the conversations being easily overheard by third parties and passersby. CP 880, 883, 1014, 1026.
- Requiring the Orvolds to change their security lighting to motion-activated based solely on the interests of a non-party. CP 883, 1004, 1026; RP, p. 246, 249, 411-412.
- Admonishing the Orvolds in the written ruling for using the GPS without "first obtaining the Martins' permission," when the Orvolds were the legal owners of the property and had no reason to ask permission. CP 1013.
- Ruling that the Martins' landscaping and driveway "interfered" with the easement, when those areas were not at issue at trial, had been settled on summary judgment, and should not have been the basis for any opinion expressed by the court. RP 698.

- Denying the Orvolds' request for attorney's fees for their anti-harassment protection order but awarding the same to the Martins. RP, p. 715.

Based on all of the above, the trial court in this matter has violated the appearance of fairness doctrine. This matter should be remanded to a different trial court judge so that the Orvolds may obtain a fair and impartial ruling on the outstanding issues.

**13. The Orvolds are entitled to an award of fees and costs on appeal.**

The Orvolds respectfully requests an award of fees and costs on appeal. RAP 18.1 provides for an award of costs and fees on appeal if otherwise permitted by applicable law. RAP 18.1(a). This court has authority to award fees on appeal where a statute or contract allows an award of attorney's fees at trial. *Bloor v. Fritz*, 143 Wn. App. 718, 753, 180 P.3d 805 (2008).

In the present case, if the Orvolds are successful on appeal, they should be awarded trial court fees pursuant to RCW 7.28.083(3) based on the adverse possession claim, and should have been awarded fees and costs pursuant to RCW 10.14.090. Because fees are allowed by statute for the underlying claims, fees as costs are authorized on appeal and should be awarded to the Orvolds. RCW 7.28.083(3); RCW 10.14.090; RAP 18.1(a); *Bloor v. Fritz*, 143 Wn. App. at 753. The Orvolds request permission to file an affidavit of fees and costs pursuant to RAP 18.1(d) following the decision on this appeal.

## V. Conclusion

Mr. and Mrs. Orvold respectfully request that the order granting the Martins title to the GPS be reversed and that they be awarded attorneys' fees in this matter as the prevailing party, including fees on appeal. The Orvolds further request an order vacating the restraints requiring them to disable audio recording on the security system and requiring them to make all security lighting motion-activated. Finally, they request that the case be remanded to a different trial court judge for further proceedings.

Respectfully submitted this 18<sup>th</sup> day of December, 2019.

BLADO KIGER BOLAN, P.S.

  
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Orvold  
Appellants

### **Certificate of Service**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 18<sup>th</sup> day of December, 2019, she electronically filed the attached Brief of Appellant and Certificate of Service for filing with the Court of Appeals, Division II, and true and correct copies of the same were electronically delivered to each of the following parties and their counsel of record:

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Dated this 18<sup>th</sup> day of December, 2019, at Tacoma, Washington.

BLADO KIGER BOLAN, P.S.

\_\_\_\_\_  
/s/  
Heather Alderson  
Paralegal

**BLADO KIGER BOLAN PS**

**December 18, 2019 - 1:12 PM**

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**Appellate Court Case Number:** 53831-8  
**Appellate Court Case Title:** Mark & Debra Martin, Respondents v. Benjamin & Corey Orvold, Appellants  
**Superior Court Case Number:** 18-2-09248-1

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