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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

MARK MARTIN and DEBRA MARTIN,
Plaintiffs/Respondents,
vs.
BENJAMIN ORVOLD and COREY ORVOLD,
Defendants/Appellants,

RESPONDENTS' BRIEF

February 3, 2020

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COME NOW the Respondents herein and submits for the Court's consideration this Response Brief:

I. INTRODUCTION

This was an adverse possession trial in a cul-de-sac in Puyallup. (Diagram – Appendix 1). As will be shown in the summaries of the testimony below, there were about 21 witnesses who testified that the Martins controlled the gravel parking spot (GPS) as an owner would for over a quarter century. Moreover, the appeal largely ignores that this is not a situation of simple parking. The Martins, in plain sight, created this spot by bench cutting a flat area into the hillside next to the road, graveled and used it as an owner would use for about 24 years before the Orvolds tried to disrupt such use. What should jump out to this court is that the great weight of the evidence was on the Martins' side and the trial judge did not abuse her discretion in ruling in the Martins' favor as to the GPS. Finally, given the incredibly aggressive conduct of the Orvolds (surveillance, placing jersey barriers, driving cars at defendants) and the pettiness of the Orvolds' position, the trial court did not abuse its discretion in the remedies it ordered.

II. RESPONSE TO ASSIGNMENT OF ERRORS

1. The trial court was supported by substantial evidence and relevant law that the use of the GPS satisfied the hostility element of adverse possession given, *inter alia*, no witness ever testified to giving the Martins permission and given the Martins used the area as an owner would.

2. The trial court was supported by substantial evidence and relevant law that the Martins' use, including creating the GPS, maintaining the GPS, parking in and using the GPS, was open and notorious as it adjacent to a private road that served the cul-de-sac at issue as testified by many witnesses.
3. The trial court properly exercised its discretion in awarding attorney fees and costs pursuant to RCW 7.28.083 \$51,431.59 out of the \$56,799.19 requested.
4. The trial court did not abuse its discretion in not awarding attorney fees to the Orvolds and when it refused to enter a protective order in favor of the Orvolds when the Orvolds were attempting to alter the status quo that had existed for over 26 years.
5. The trial court was well within its discretion in ordering the Orvolds to cease illegal surveillance the Martins including not audio recording them without their consent.
6. The trial court was well within its discretion in ordering the Orvolds to make the security lights motion activated given the Orvolds' overall history of abuse of those who disagreed with them and there had been prior issues with security lights and surveillance.
7. The trial court is supported by ample evidence on each of the purportedly improper findings of facts, some of which, no formal objection was placed on the record.

8. The trial judge conducted all proceedings fairly and unbiasedly, made decisions based on the evidence, admonished both sides as to their conduct, fashioned pragmatic orders and drew obvious conclusions in light of the evidence presented.

III. ISSUES PERTAINING TO APPELLANTS' ASSIGNMENTS OF ERROR

1. Substantial case law supports a finding of hostility when a person takes, controls, builds upon and uses as an owner would use a private right of way.
2. The inference of neighborly sufferance applies more specifically to prescriptive easements, not adverse possession, and does not apply to the present situation where the Martins took right of way property by excavating the side of a hill, creating and have used a parking spot for over 26 years.
3. A review of the evidence does not show permission was ever given as the prior owners of the Orvolds' property explicitly testified they granted no permission to the Martins but rather showed indifference and acquiescence to the Martins' use.
4. A review of the evidence will show far more than transitory or occasional parking when there is a history of substantial use by the Martin family for over 26 years prior to this lawsuit thus satisfying the open and notorious element.

5. Given that the Martins were the prevailing party and RCW 7.28.083 allows attorney fees in adverse possession cases, the trial court was not in error in granting the Martins attorneys fees.
6. The Orvolds were not granted a protection order and at the same hearing the trial court ordered the Orvolds to remove invasive barriers, therefore the trial court did not abuse its discretion in not granting the Orvolds' request for attorney's fees.
7. Given the Orvolds' history of surveillance on the Martins, illegal audio recording without consent, and that trial judges can enjoin harassing surveillance, the trial court did not abuse its discretion in ordering the Orvolds to disable their audio recording equipment.
8. Given the Orvolds' aggressive history towards the Martins and the Martins' witnesses, prior surveillance and what essentially was a spite structure, the trial judge was well within the law and her discretion in ordering the modification of spiteful, harassing, bright lights that aided improper surveillance.
9. Findings of Fact 5, 14, 22, and 29 are supported by substantial evidence and such findings 14 and 22 were not objected to by the Orvolds.
10. The trial judge was appropriate in her behavior, did not give legal advice when pondering out loud as to a matter of litigation strategy, and was appropriately measured given the inappropriateness and pettiness of the Orvolds' conduct and legal positions.

IV. REPLY STATEMENT OF THE CASE

This brief will not set forth the history of the properties and ownership in great detail. Rather, the focus will be on setting forth the factual basis in the record rebutting the Appellants' claim of insufficient evidence as to specific factual findings and legal conclusions.

a. Procedural History

The procedural history is unremarkable except that summary judgment was granted as to adverse possession as to all of the area east of the roadway that was in the Orvold property's description excepting the GPS. CP 630-634. This was conceded by prior counsel for the Orvolds, which the Orvolds tried to recant, but still did not dispute the operative facts. CP 379. RP 5-10-19 Transcript P. 26. Accordingly, additional costs were incurred in renoting and rearguing a settled and undisputed matter. CP 891-892.

Also notable was that there were dueling motions for protective orders and injunctions that surround the placing of three jersey barriers in the GPS by the Orvolds. CP 116-120 and 100-108. The trial court did not give the Orvolds a protective order, granted an injunction requiring the Orvolds remove the jersey barriers and then issued mutual restraints on photographing, surveilling and communicating with each other. CP 355-356.

The Orvolds tried for a last minute trial continuance to bring in their warranty deed grantor and the rest of the neighborhood which was denied. CP 412-430, 482-483. The matter proceeded to a bench trial with 27 witnesses and about 133 admitted exhibits (in whole or part).

b. Factual History

1. FACTS RELATED TO EXCLUSIVITY.

The area at issue had been part of the sloped front yard of the Martins who in spring/early summer 1992 landscaped the front yard, and dug out the GPS. RP 91-92. The GPS was necessary as the driveway up the very steep hill to the Martins' house was only wide enough for one vehicle. RP 93. The Martins would use the GPS so that the person leaving first in the morning would park in the GPS in the evening. RP 93. The GPS has remained relatively the same since it was created in 1992. RP 95. The GPS was only big enough to fit a car and not a semi-truck or a truck and horse trailer. RP 96. This stands in contradiction to Butch York's testimony of parking a semi there (RP 588).

The Martins planted and maintained the ivy on the hillside by standing below in the GPS. RP 97. They graveled the GPS as needed every year or two. RP 98. They used the GPS to put out their garbage cans. RP 100. Such cans were shown in Exhibit 53. Mark Martin's mother provided child care and parked in the GPS "very often" between 1992 to about 2008. RP 102-103. In addition to the testimony of Mark Martin, photography including Google Earth photography showed the Martins and their family's vehicle in the GPS. RP 107 – 119. Exhibits 19, 20, 24, 25, 26, 27, 33, 47, 58, 59, 60, 62, 63, 65, 66, 67. Notable is a complete lack of any photography with vehicles owned by anyone but the Martins until the Orvolds appeared on the scene.

Mark Martin parked in the GPS “almost daily” in the 1990’s. RP 120. He parked in the GPS in the 2000’s similarly but not quite as much. RP 121. He testified once his daughter turned 16 in 2008, she parked in the GPS for about four years. RP 139. No one but the Martins maintained the GPS. RP 145. No one ever tried to restrict the Martins’ use (up until the Orvolds). RP 146. The only use by third parties was “very occasional use” for overflow parking for a party to which the Martins did not object as allowing such parking “was the neighborly thing to do.” RP 146. Mr. Martin never saw Mr. Pulicicchio use the GPS. RP 146. When Ryan Radke tried to use the GPS spot – “a rare occasion” – Mr. Martin asked him to move the car. RP 147, 294. In fact, Radke called the police over Mr. Martin kicking him out of the GPS and the recorded call to the police department was admitted into evidence. RP 295, Exhibit 193. Mr. Martin testified that another neighbor (and Ryan Radke’s landlord) Bonnie Anderson never used the GPS. RP 148. Further, he testified that Butch York never used the GPS. RP 148-149.

Sarah Kartes, a neighbor and Seattle Police dispatcher testified it was the Martin family that used the GPS. RP 128-129. She did not see others use the GPS. RP 129. When asked what percentage of the time the GPS was used by the Martins, she answered 99.5%. She testified to never seeing John Pulicicchio, Ryan Radke, or Butch York using the GPS. RP 131-132.

Melisa Horton, a neighbor on the same street since 2001 and drives by the GPS every day, testified the Martins parked there primarily. RP

150-152. She corroborated the Martin family use and estimated their use of the GPS to be 90% of the time noting occasionally others would park there if there was a party. RP 152-153.

Tiffany Smith, a predecessor owner of the Orvold property from 2001 to 2011 –“about ten years on the nose”. RP 163. She corroborated that Mark Martin’s mother parked there identifying her as the Martins’ child’s grandmother: “Lindsey’s grandma”. RP 165. Mrs. Smith testified she did not use the GPS as she could park, in theory, nine cars in the garage, driveway and in front of the Orvold house. RP 165-166. She only saw the Martins maintain the GPS and she also never saw Bonnie Anderson, Butch York or Ryan Radke park in the GPS. RP 168-169.

Dixie Lee Cooper lived with Tiffany Smith from 2001 to 2004. RP 174-175. She disagreed with prior testimony of Ryan Radke to parking the GPS hundreds of time saying “that is not true” and that Mr. Radke was an alcoholic and a troublemaker. RP 208. She also never saw York or Anderson park in the GPS. RP 211-212. She identified Radke’s truck and said she never saw it parked in the GPS, noting it would not fit. RP 215.

Clayton Horton is also a neighbor on the street and drove past the Martins’ house every day. RP 217. He testified to the Martins creating the space – “just dug into the hillside and threw gravel down, nothing major.” RP 217-218. He estimated the Martin family uses to be “probably 99 percent” while acknowledging its use as overflow parking for parties. RP 218. He could not remember Radke parking in the space

except maybe one to four times in 20 years. RP 219. He testified they “raised a stink” about York trying to park in the cul-de-sac – not the GPS – and York stopped. RP 219. He never saw Bonnie Anderson use the spot. RP 220.

George Woodward lives in the cul-de-sac and has driven by the GPS thousands of times. RP 225-226. He identified the primary user of the GPS as the Martins. RP 226. He could not identify other users other than for overflow party parking. RP 226. He corroborated the seeing Mark Martin’s mother park there and the Martin kids as they grew up and as they came back. RP 227. He confirmed the Martins maintained the GPS. RP 228. He saw Radke park in the space “twice maybe” in 28 years. RP 229-230.

JoEllen Woodward, the wife of George, testified the Martins used the GPS 99.5% of the time saying “It’s their front yard.” RP 239. Interestingly, she was the postal carrier for that street for 14 years. RP 239. She too confirmed that Mr. Pulicicchio and the Smiths did not use the GPS. RP 240- 241. She testified (contrary to Mr. Radke’s testimony RP 538 and Declaration Exhibit 192) that “he comes and goes” for months and years – and she knew that as she delivered the mail. RP 242-243. She testified Ryan hadn’t parked in the GPS up until recently after the Orvolds moved in. RP 243-244. In being asked about others parking in the GPS, she pointed out the obvious “Nobody ever parks there unless there’s an oddity, there’s either a party or someone, you know, has guests. That’s all

there is to it. Why would someone across the street go park there if there's room in your own driveway?" RP 244.

Laurie Ayers, the daughter of Debbie Martin who was either living at the house or there visiting fairly often since 1992 testified to the family's exclusive use. RP 189-190. She similarly testified to the family's primary use of the GPS and acknowledged occasional third party use for overflow parking at parties. RP 192.

Andrea Woodward, the daughter of George and JoEllen, identified the user of the GPS as "Debbie and her family." RP 271. She did not recall any one but the Martins using the GPS with regularity. RP 271-272. She never saw Mr. Pulicicchio, Radke, Smiths, or Bonnie Anderson use the GPS. RP 272-273.

Charles Sundsmo was the first owner of the Orvold property and did a majority of the building of the house. RP 277-278. He never took any steps to exclude the Martins from the GPS. RP 279. He did not recall the Martins...much less them asking permission to do anything on the east side (the Martin side) of the street. RP 280.

Lindsey Martin, the daughter of Mark and Debbie Martin, similarly confirmed the GPS had been used by herself and her family. RP 284. She confirmed she parked her car in the GPS. RP 285. She also never saw Pulicicchio, Radke, York or Anderson park in the GPS. RP 287-288.

Ed Meier a corner neighbor on the east side of the road, testified to the GPS the Martins' installed. RP 346. He testified he only saw the Martins use the GPS. RP 347.

Jenny Tharp, Debbie Martin's daughter, confirmed she parked in the GPS. RP 351. She testified to Mark Martin's use and her grandmother Marge's use as she babysat Lindsey. RP 353. Ed Tharp, Jenny's husband, testified he helped create the GPS and that he had never seen anyone but the Martins use it. RP 357-359.

Shane Klingenstein, was a former neighbor of the Martins who still owns the neighboring house as a rental RP 365. Other than occasional parties with overflow parking he said the Martins use of the GPS was "near a hundred [percent]". RP 368.

2. FACTS RELATED TO LACK OF PERMISSION/ HOSTILITY.

Mark Martin did not seek any permission to create the parking spot and put down the gravel. RP 143. No one, through the date of trial, had ever given him permission. RP 143-144. The only discussion he had with John Pulicicchio (a predecessor owner of the Orvold lot) was in 1994 when Mr. Pulicicchio informed Mark Martin that the property lines extended to where Mr. Martin was working, being the landscaped area of the front yard. RP 143. Mr. Pulicicchio simply said he had bought umbrella insurance in case "anything weird happens". RP 143. This was when Mr. Martin learned of the unusual lot lines. RP 142-143. Contrary to the cited testimony of Mr. Pulicicchio in the Appellant's brief, Mrs.

Martin testified that Mr. Pulicicchio never offered to sell them the area east of the road. RP 419. Still, Mr. Martin had been using the space for parking and garbage cans prior to such revelation by Mr. Pulicicchio. RP 145. Mr. Martin testified how Mr. Pulicicchio was never asked for permission to use the GPS and he never gave permission. RP 313. Tiffany Smith testified the Martins never asked her permission. RP 167. Debbie Martin testified she never asked Mr. Pulicicchio permission to put in the GPS and that Mr. Pulicicchio never told them to leave and never gave permission. RP 375-376. Mr. Pulicicchio testified the Martins never asked him for permission to park in the GPS. PR 569. He made clear on cross as to permission: “they never asked. I never granted.” RP 576. Still, Mr. Pulicicchio’s memory was not clear as he thought the GPS was paved. RP 576. He also testified he saw other cars in the GPS but did not know what cars the Martins and their family had. RP 577-578. The reason for his lack knowledge became clear when he testified he was working long hours and was not home during the day. RP 584. Mr. York also testified that the various cars he saw in the GPS could have belonged to the Martins and their family. RP 599.

Attempts by the Orvolds’ witnesses to claim other people used the GPS fell flat when Bonnie Anderson confirmed she saw a white car parking there (which was identified by other witnesses as Mark Martin’s mother’s car). RP 531. Ms. Anderson also acknowledged that as she did not know what car the Martins and their daughter’s drove, and the cars she saw in the GPS could have been owned by the Martin family. RP 532-

533. Another witness, Ryan Radke who testified he lived at Ms. Anderson' continuously since 1991 was impeached with an antiharassment proceeding showing he was living in Graham for part of the time. RP 549-554, Exhibit 190-192. He then testified that Debbie Martin had called Radke and Corey Orvold "the worst two bitches in the neighborhood". RP 561. When the undersigned went to play Exhibit 186 which was a recording of the incident, Mr. Radke panicked saying "I didn't know this was on audio. Wait a minute they are recording me vocally?" wherein the undersigned informed Radke it was from the Appellants Orvolds' cameras and recording. RP 563-564. This court can listen to Exhibit 186 which does not say what Mr. Radke testified to.

3. FACTS RELATED TO OPEN AND NOTORIOUS.

Mr. Martin testified that his family had used the GPS for 27 ½ years and such use was pretty easy to see from the street. RP 145. Moreover, not only do the photographs admitted show that the space, and parking therein, is readily viewable from the street, it is also visible in Google Earth satellite photography. Exhibits 60-67.

4. FACTS AS TO RIGHT OF WAY AND HISTORIC USAGE.

Melissa Horton testified that the people on the east side took care of the strip of land next to the road on the east and the people on the west side never did. RP 156. Clayton Horton testified he never saw people from the west side making any regular use of the property on the east. RP 230. Shane Klingenstein also testified he never saw anyone from the west

side make use of the property on the east side. RP 368. Tiffany Smith testified similarly. RP 168. Mr. Klingenstein also testified that he would ask permission of neighbors to have overflow parking if there was going to be a party. RP 371.

Charlene Knowlton lived on the same street since 1996 testified she and her husband maintained and parked on the strip as they lived on the east side of the road and never saw anyone from the west side caring for the strip on the east side. 179-180. Ron Knowlton testified similar to his wife on such point. RP 185.

Sharon Streleski was one of the original owners who platted the land. RP 337-338. She testified that despite where the lot lines were, the people on the east side of the road (same side with the Martins) “pretty much treated that as their property. They maintained it and use the parking on the east side, yes” up and down the street. RP 338. She also testified that others had created little gravel parking spaces as well. RP 338.

Ed Meier testified that other than parties, people just parked in front of their own places. RP 349.

5. FACTS AS TO CONDUCT OF APPELLANTS JUSTIFYING INJUNCTION.

Corey Orvold confronted Laurie Ayers for parking in the GPS, threatened to have her towed and called her “an effin ‘B’”. RP 194-5. This almost led to a fight. RP 195. Corey Orvold admitted calling Ms. Ayers a “bitch”. RP 472-473. Mrs. Woodward testified how Corey

Orvold has screamed at her. RP 248. She labeled Corey Orvold “bat shit crazy” saying Corey Orvold “acts very strange.” RP 248. She testified how the Orvolds shines a bright, “great big floodlight” into her living room. RP 249. She confirmed how the Martins created the GPS “They dug that out for Marge [Mark Martin’s mother] years ago.” RP 250. Mrs. Woodward noted how the Orvolds have the road under audio and video surveillance. RP 259.

After 26 ½ years of use, Corey Orvold sent Debbie Martin a text prohibiting parking in the cul-de-sac and that they would be towed. RP 394, Exhibit 15. Debbie Martin testified as to how Corey Orvold would move her car and her husband’s truck back and forth into the GPS and watch the vehicles, then move them back. RP 398. Debbie Martin also testified to how the Orvolds, who already had two vehicles, bought another car to park over in the GPS and how when Corey Orvold moved the new car out, a Mini Cooper, she would move her BMW to the GPS. RP 398-399. Corey Orvold would sit in her garage and just stare at the car and the GPS. RP 400. The Orvolds, admittedly, called the police on the Martins for putting down a little bit of gravel in the GPS. RP 293, 480. Right after the police left telling people that both sides needed some “TLC” and to stay on each other’s side, Corey and Radke moved their cards to the GPS, came out and “high fived” each other and the two laughed about the situation only to move the cars about 20 minutes thereafter. RP 330, 402-404, Exhibits 183, 184, 185, 186 187. Corey Orvold lied to the Court when asked if she asked Radke to park in the

disputed area, by testifying “no”. RP 517. Radke said on two occasions during trial, once to counsel (RP 559) and to the Judge (RP 564) that Corey Orvold asked him to park there. Benjamin Orvold confirmed this. RP 628. The Orvolds started taking pictures of everyone, the Martins’ children, grandchildren and anyone who pulled up. RP 402. Even after the trial court ordered the parties not to photograph each other, Ben Orvold was taking pictures of the Martins’ guest including a person who merely pulled up to buy an old Corvair wherein Ben Orvold took a picture of the man’s license plate. RP 298-301. Exh.107. The Orvolds would move and shuffle cars over into the GPS for no discernable reason. RP 303. The Orvolds, during the litigation, paid thousands of dollars (as estimated by Mr. Martin) to have three massive concrete jersey barriers placed around the GPS. RP 304. Jenny Tharp testified to how upset the jersey barriers made Debbie Martin worrying about what would happen next. RP 354. Debbie Martin testified that when she saw the jersey barriers she was shocked and mortified “someone could do this in front of my house.” PR 404-405. Debbie Martin explained how she was scared given the lengths the Orvolds were going to over the GPS in buying an extra two cars and putting in the barriers. RP 405. She testified how she felt “criminally attacked” by the Orvolds and how it was effecting her sleep, her health and how she had to go to the doctor for anxiety and high blood pressure. RP 406-407. She testified how it made her uncomfortable in her own house. RP 407. She also expressed fear as Corey and Ben

Orvold drove their vehicles at her on two separate instances. RP 407. Exhibits 68 and 196.

V. ARGUMENT

a. Standard of review.

The Appellate Brief is light on the standard of review. This was a bench trial with 21 witnesses for the Martins and 6 witnesses for the Orvolds. The Orvolds witnesses included a witness who was rarely around in daylight hours (Mr. Pulicicchio), a convicted child molesting, truck driver who was on the road much of time (Mr. York) (RP 597) and a neighbor who lied about being a continuous resident and whom another neighboring witness labeled a drunk and a liar. (Mr. Radke). Incidentally, Anderson, Radke and York all lived at Anderson's home. RP 518, 538, 587. This is not mentioned gratuitously, but illustratively, so as to drive home the point that it is the trial court that weighs the evidence and judges credibility. "An appellate court reviews a trial court's findings of fact for substantial evidence in support of the findings. *In re Marriage of Schweitzer*, 132 Wash.2d 318, 329, 937 P.2d 1062 (1997). Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the declared premise. *Bering v. SHARE*, 106 Wash.2d 212, 220, 721 P.2d 918 (1986). A reviewing court may not disturb findings of fact supported by substantial evidence even if there is conflicting evidence. *In re Marriage of Lutz*, 74 Wash.App. 356, 370, 873 P.2d 566 (1994). Unchallenged findings of fact are verities on appeal. *Robel v. Roundup Corp.*, 148 Wash.2d 35, 42, 59 P.3d 611 (2002)." Merriman v. Cokeley,

168 Wn.2d 627, 631, 230 P.3d 162, 164 (2010). Appellate tribunals “are not entitled to weigh either the evidence or the credibility of witnesses even though we may disagree with the trial court in either regard. The trial court has the witnesses before it and is able to observe them and their demeanor upon the witness stand. It is more capable of resolving questions touching upon both weight and credibility than we are. *In re Palmer*, 81 Wash.2d 604, 606, 503 P.2d 464 (1972).” *In re Seggo*, 82 Wn.2d 736, 739–40, 513 P.2d 831, 833 (1973).

The trial court standard on adverse possession is that of a preponderance. *Teel v. Stading*, 155 Wn. App. 390, 394, 228 P.3d 1293, 1295 (2010). In looking at adverse possession, that is a mixed issue of fact and law but the court looks to see if the facts are sustained in the record and then considers if the facts, as found, constitutes adverse possession. *Peeples v. Port of Bellingham*, 93 Wn.2d 766, 771, 613 P.2d 1128, 1132 (1980), overruled by *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984).¹

b. Adverse Possession was established.

The Appellate Brief at p.12-13 discusses how there has to be findings on the elements of adverse possession. Finding 11, 13 and 23 covers lack of permission. Finding 20, 22 establishes continuous use.

¹ Virtually every adverse possession case prior to *Chapman v. Sanders* is technically overruled but that relates to the rejection of examining subjective intent to adversely possess in favor of considering the objective use of the property. Still, the remainder of such cases are generally good law.

Finding 20 sets out exclusivity. Findings 8-10 establish how the GPS was established out of the hillside next to the road establishing facts of it being open and notorious. Conclusions of law 4, 5, 6 and 7 go through each of the four elements of adverse possession and set forth the applicable facts which gave rise to the conclusion such elements had been met to a preponderance of the evidence.

c. Hostility was established.

As set forth in the recitation of facts as to hostility/lack of permission, there was ample testimony that the use was non-permissive. Mark and Debbie Martin, Charles Sundsmo, Jon Pulicicchio and Tiffany Smith all testified to a lack of permission. To try to get around this overwhelming testimony, the Appellants tried to take recorded easements and have them construed as allowing parking when they clearly do not reference parking. Exhibits 157, 158 and 161. Mr. Martin was asked about the road maintenance agreement (Exhibit 158) and testified it said nothing about parking in the document rather it was for “vehicular ingress and egress.” RP 330. Similarly in reviewing the short plat (Exhibit 157) Mr. Martin recited how the short plat had a “private road and utilities easement” but nothing about parking. RP 330-331. In another plat related to the road (Exhibit 161) Mr. Martin testified to how it also did not mention parking. RP 331. The court can read such exhibits as well...parking is not mentioned. Accordingly, it is counter to the recorded documents to argue that the plat right of way or the road maintenance agreement allows parking. The trial court was well within its discretion to

not imply permission from recorded documents that did not grant such permission.

“Hostility does not require enmity or ill-will; rather, it ‘requires only that the claimant treat the land as his own as against the world throughout the statutory period.’ *Chaplin v. Sanders*, 100 Wash.2d 853, 857, 860-61, 676 P.2d 431 (1984). The nature of possession is determined objectively by the manner in which the claimant treated the land; the claimant's subjective belief regarding the claimant's true interest in the land and intent to dispossess or not dispossess another is irrelevant to determine whether hostility has been established. *Chaplin*, 100 Wash.2d at 861, 676 P.2d 431.” *Anderson v. Hudak*, 80 Wash. App. 398, 402, 907 P.2d 305, 308 (1995). In the present case we have a minimum of 26 years of objective use before any dispute. “The hostility element ‘requires only that the claimant treat the land as his own as against the world throughout the statutory period.’ *Chaplin*, 100 Wash.2d at 860–61, 676 P.2d 431. The only relevant consideration is the claimant's treatment of the land, not his subjective belief about his true interest in the land. *Riley v. Andres*, 107 Wash.App. 391, 397, 27 P.3d 618 (2001).” *Maier v. Giske*, 154 Wn. App. 6, 19, 223 P.3d 1265, 1272 (2010).

The idea that someone cannot adversely possess a private road or common area has been repeatedly rejected by the courts. A party can encroach on a platted road right of way and gain title by adverse possession. “Mrs. Harris' activity also constituted a claim by adverse

possession to the portion of the platted road right of way on which the improvements encroached. Since her claim continued for the statutory period, it ripened to title.” Barnhart v. Gold Run, Inc., 68 Wn. App. 417, 423, 843 P.2d 545, 548–49 (1993). The notion of “you had the right to be there so it is not hostile” is simply incorrect. Homeowner association cases have allowed adverse possession when the use made of common areas exceeded the authorization. This court had no problem finding adverse possession by a property owner of common area when they had landscaped, maintained and installed sprinklers for over 23 years. Nickell v. Southview Homeowners Ass'n, 167 Wn. App. 42, 52, 271 P.3d 973, 979 (2012). In such case, this court set forth the basic, established law:

A claimant can satisfy the open and notorious element by showing either (1) that the title owner had actual notice of the adverse use throughout the statutory period or (2) that the claimant used the land such that any reasonable person would have thought he owned it.” Riley v. Andres, 107 Wash.App. 391, 396, 27 P.3d 618 (2001). Hostility requires “that the claimant treat the land as his own as against the world throughout the statutory period.” Chaplin v. Sanders, 100 Wash.2d 853, 860–61, 676 P.2d 431 (1984). “[I]f the use of another's land is open, notorious and adverse, the law presumes knowledge or notice in so far as the owner is concerned.” Hovila v. Bartek, 48 Wash.2d 238, 241–42, 292 P.2d 877 (1956).

Nickell 167 Wn. App.at 50. The current case is quite comparable as there is sufficient testimony and evidence in the record of the Martins taking such property, creating the GPS and maintaining it for 26 years. Testimony confirms the Martins treated the space as an owner would -

going so far as kicking an intruder (Radke) out of the GPS and thereafter, Radke called the police. Exhibit 193.

Division 1 similarly found adverse possession where an association lot owner put in a patio and a fence in HOA common area. Timberlane Homeowners Ass'n, Inc. v. Brame, 79 Wn. App. 303, 901 P.2d 1074 (1995). Such case discussed the “ultimate test” of adverse possession as follows: “The ‘ultimate test’ is whether the party claiming adverse possession exercised dominion over the land ‘in a manner consistent with actions a true owner would ‘take.’” (citation omitted) Timberlane Homeowners Ass'n, Inc. v. Brame, 79 Wn. App. at 309–10.

Appellants’ reliance on Littlefair v. Schulze, 169 Wn. App. 659, 278 P.3d 218 (2012), as amended on denial of reconsideration (Sept. 25, 2012) is misplaced and supports the Martins’ position. In that case there was a 40’ easement of which only about 12-14 feet were used and a party built a fence in the unused part. This court stated that the “trial court erred by failing to address the possibility that Schulze's fence could support an adverse possession claim for a major part of the easement.” Littlefair v. Schulze, 169 Wn. App. 659, 668, 278 P.3d 218, 223 (2012), as amended on denial of reconsideration (Sept. 25, 2012). Still, in such case, the court ordered removal of the fence on a nuisance per se theory as it violated a local ordinance not relevant here.

The point is, the trial court did not err in finding adverse possession when the Martins built a parking space in a private right of way which did not provide for parking. The attempt by the Appellants to use the testimony of Mrs. Streleski as being binding regarding parking being allowed because she signed the plat is misleading as she testified she wasn't that involved in the platting and that her husband did the work on the plat and she was not aware what the legal document said about the roadway. (RP 342). The testimony from Chuck Sundsmo as to parking being allowed is also misleading as he testified over the phone (without the benefit of reviewing the Plat documents) 26 years after selling the house, does not scream error by the trial court. In fact, in light of the clear easement language, it would be proper to reject such parol evidence outright. Moe v. Cagle, 62 Wn.2d 935, 939, 385 P.2d 56, 59 (1963). Faced with clear written language and dubious, potentially contrary, oral testimony, the trial court did not commit error in not implying that the easement allowed parking.

Similarly, the Appellants' reliance on York v. Cooper, 60 Wn.2d 283, 373 P.2d 493 (1962) is hardly persuasive. In such case the court ordered a removal of a fence in a narrow easement when it had been used for parking for 31 years but the Court limited the parking to a 12 hour period. Still, the case does not give the exact language of the easement

and the decision to allow parking based on 31 years of use seems to support the Martins' position that they should have continued use of their parking after 27 years. It is a "prior use" case and the fencing was not a prior use...the parking was. This is very similar to what this trial court found in enjoining the jersey barriers – effectively a fence – and honored the historic use which was the Martins parking in the GPS. York is further distinguishable as owners on both sides of the easement had parked in the easement so it was not an adverse possession case as there was no exclusivity.

If this court considers the "ultimate test" - there is no doubt the trial court did not err in finding adverse possession as witness after witness testified the Martins used the GPS as an owner would.

d. The notion of "neighborly acquiescence" is misplaced in this case.

The great weight of evidence (pretty much unrefuted) is that the Martins never sought or received permission. They simply acted in creating the gravel space and used it for two years before Mr. Pulicichio ever mentioned a boundary line issue. "Where the entry has been adverse and hostile, its character as such could not be interrupted or destroyed by the property owner's unsought consent." *Cf. Huff v. Northern Pac. Ry. Co.*, 38 Wash.2d 103, 113, 228 P.2d 121 (1951) (citing *Naporra v. Weckwerth*, 178 Minn. 203, 226 N.W. 569, 65 A.L.R. 124 (1929)) (prescriptive

easement case). To interrupt adverse possession there must be actual cessation of the possession; a mere protest will not interrupt possession that is hostile at its inception. *See Huff*, 38 Wash.2d at 113, 228 P.2d 121.” Lingvall v. Bartmess, 97 Wn. App. 245, 256, 982 P.2d 690, 696-97 (1999). The testimony from the Martins is that they always treated the property down to the street as being their own and sought no permission to create the GPS and use such space at issue. The use started hostilely and has continued for about 28 years, to date.

In looking at the argument of Appellants, it has to be noted that Gamboa v. Clark, 183 Wn.2d 38, 348 P.3d 1214 (2015) is not an adverse possession case but is a prescriptive easement case. In fact, in Kunkel v. Fisher, 106 Wn. App. 599, 603, 23 P.3d 1128, 1130 (2001) wherein neighborly sufferance was discussed in a prescriptive easement case, the court took pains to discuss the manner in which adverse possession is different from prescriptive easements and how prescriptive easements (unlike adverse possession) are disfavored. Id. at 602-603. Tiller v. Lackey, 431 P.3d 524 (Wash. Ct. App. 2018), review denied, 193 Wn.2d 1016, 441 P.3d 1197 (2019) cited by Appellant is also a prescriptive easement case. Such presumptions of permissive use which rebuts the disfavored doctrine of prescriptive easements have not been applied to adverse possession and no persuasive argument to such expansion is

cogently made. Roediger v. Cullen, 26 Wn.2d 690, 175 P.2d 669 (1946) cited by Appellant is also a prescriptive case related to use of a footpath. The Appellants' cases simply do not apply to this situation. Moreover, the Martins' overall use in the Orvold lot was more than just this GPS. There was a driveway and established landscaping...and the GPS. It was their front yard and was treated like that to the exclusion of others for 26 years. This is not some sort of shared pathway case. The trial court did not err in relying on precedent as to adverse possession of private right of ways instead of improperly applying prescriptive easement law. The notion of "neighborly accommodation" as it has been applied in adverse possession cases has been to support adverse possession and rebut attacks on exclusivity:

Adverse possession claimants need not prove, however, that their possession was absolutely exclusive: "An 'occasional, transitory use by the true owner usually will not prevent adverse possession if the uses the adverse possessor permits are such as a true owner would permit a third person to do as a neighborly accommodation.'" *Lilly v. Lynch*, 88 Wn.App. 306, 313, 945 P.2d 727 (1997) (quoting 17 William B. Stoebuck, *Washington Practice Real Estate: Property Law* § 8.19, at 516 (1995)) (internal quotation marks omitted). Thus, "the possession must be of a type that would be expected of an owner under the circumstances." *Crites*, 49 Wn.App. at 174.

Severson v. Clinefelter, 190 Wn. App. 1012 (2015)(Cited per GR 14.1). Even if one were to look at Gamboa, the presumptions therein would not apply as it deals with "footpaths" as in Roediger v. Cullen, 26 Wn.2d 690,

175 P.2d 669 (1946) upon which Gamboa relies. “Additionally, we have held that when ‘the use of [a] pathway [*arises*] *out* of mutual neighborly acquiescence,’ the use is deemed ‘permissive in its inception.’ *Roediger*, 26 Wash.2d at 713–14, 175 P.2d 669 (emphasis added).” Gamboa at 45. The notion of “unenclosed” lands related to adverse possession was explained by this court:

It held that, to prevail on a prescriptive easement claim over wild, unoccupied, prairie lands where land is “vacant, open, unenclosed, unimproved,” the claimant must first rebut a presumption of permissive use. *N.W. Cities Gas*, 13 Wash.2d at 85–86, 123 P.2d 771 (alteration in original). Southview's argument ignores that (1) the Hearing Examiner described the site as located within a medium-intensity residential environment, not vacant land; and (2) although the law disfavors prescriptive easements, no such disfavor applies to adverse possession of actual land. *N.W. Cities Gas*, 13 Wash.2d at 83, 123 P.2d 771; *Kunkel v. Fisher*, 106 Wash.App. 599, 603 n. 12, 23 P.3d 1128, *review denied*, 145 Wash.2d 1010, 37 P.3d 290 (2001). Southview further argues that a presumption of permissive use protects landowners from claims arising by “casual trespassers.” Br. of Resp't at 32. But Southview ignores that the Nickells openly, continuously, and exclusively treated the disputed strip as their own property; they were not casual trespassers.

Nickell v. Southview Homeowners Ass'n, at 51–52. The properties at issue are medium-density residential environment...not vacant lands. Our situation is not one where there would be an implication of neighborly sufferance such as joint use of a path, we have excavation and creation of a parking space. Division 2 rejected the notion of the open unenclosed land presumption when “the record shows that the disputed land was improved: Harris built a gravel driveway on it and cleared several areas.

Thus, contrary to the Urells' contention, Harris's use was not presumptively permissive.” Harris v. Urell, 133 Wn. App. 130, 140, 135 P.3d 530, 534 (2006). The other presumption (for prescriptive easements) applies when “the owner of the property created or maintained a road and his or her neighbor used the road in a noninterfering manner. Cuillier, 57 Wash.2d at 627, 358 P.2d 958.” Gamboa at 44. Besides, even if a presumption applied, it was amply rebutted “when the facts and circumstances are such as to show that the user was adverse and hostile to the rights of the owner...” Gamboa at 44–45. Excavating and constructing a parking spot and then using it for 26 years is not the same as using a footpath.

More relevant are adverse possession cases about parking. In 2015 Division 1 had no problems affirming adverse possession when “...it is undisputed that the Howes neither paid rent to, executed a new lease with, nor sought permission from BNSF, to use the parking lot. It is also undisputed that after the Howes took possession of the Kelley property, they continued to use the parking lot for business purposes. (footnote omitted). City of Redmond v. Howe, 185 Wn. App. 1041 (2015)(Cited per GR 14.1). The case has some similarity to the (disputed) allegation that the title owner (in our case Mr. Pulicicchio) tried to sell the east of the road. “In this case it is beyond dispute that at least since 1993 when the Howes repelled BNSF's effort to exclude them from the property, the Howes have been in continuous and exclusive possession of the property. And although, the Howes responded to BNSF's offer to sell the property,

there is no evidence that they expressly admitted ownership in BNSF. Indeed, during and following the unsuccessful negotiations, BNSF concedes that the Howes continued their exclusive use and possession of the property.” Howe *6.

Division 2 had no problem affirming the finding of adverse possession when:

Plaintiff Severson had for more than ten years prior to litigation herein, from 1977 to 2011, by occupying, **maintaining by mowing as a lawn** up to the fence, storing and **parking vehicles, grading and maintaining a driveway** that only Plaintiffs used, and otherwise exercised open and notorious, actual and uninterrupted, exclusive to the rights of the true owner, and without recognition of superior title by another or by permission, adverse possession of that portion of vacated Swan Street between the centerline adjacent to his property and the old fence, which portion is indisputably within the fee to which title has been held by the Defendants Clinefelter and their predecessors since 1977.

(bold added) Severson v. Clinefelter, 190 Wn. App. 1012 (2015)(cited per GR 14.1). Recall, in the present case the situation was not just based on the GPS but also the landscaping and having a driveway. The Appellate Brief tries to take a myopic view of what was done by focusing only on the GPS. However, the GPS was part and parcel of larger adverse possession claim including the landscaped hillside and the driveway that connected the uphill Martin house to the street. The court should ponder the Appellants’ tortured logic in appealing only about 10% of the area in a much larger adverse possession claim.

e. The claim of permission is simply incorrect as witness after witness testified to no permission being asked or given.

Appellants implicitly concede that no permission was given and no permission was asked. This was set forth extensively in the facts, above. However, Appellants try to imply permission by lack of protest and quoting witness who did not object. This is the sort of subjective intent that the seminal case of Chaplin v. Sanders, 100 Wn.2d 853, 861, 676 P.2d 431 (1984) sought to do away with when it moved from subjective intent to objective use: “The nature of his possession will be determined solely on the basis of the manner in which he treats the property. His subjective belief regarding his true interest in the land and his intent to dispossess or not dispossess another is irrelevant to this determination.” Granted, such case looked at the possessor’s intent as opposed to the titled owner’s intent. Still, Chaplin at 860 made it a two way street: “A true owner’s subjective thought process, however, does not constitute a grant of permission.” The Appellants cite to LeBleu v. Aalgaard, 193 Wn. App. 66, 371 P.3d 76 (2016) to infer permission when unobjected use occurs – but that case actually reversed and remanded the trial court finding of permission based on a verbal agreement after the use had begun. The citation to Teel v. Stading, 155 Wn. App. 390, 394, 228 P.3d 1293 (2010) does not help Appellants as in that case the permission found by the trial court was “[a]fter moving onto the property, [Mary] Teel ran into Mr. Ralph J. Stading on the Stading property north of the Teels [sic] and asked permission to ride and graze horses on the Stading property. Mr. Stading gave his permission but stated that he was not giving up one square inch of his property.” That is a long way from the situation in the present case.

This case is more similar to Harris v. Urell, 133 Wn. App. 130, 140, 135 P.3d 530, 534 (2006) that found adverse possession of making and using driveways for the statutory period when no explicit permission was given and no implication was proper.

Simply put, no one needs to be a mind reader. The Martins were not required to read Sundsmo, Pulicicchio or Smith's mind to discern some lack of objective objection to equate to implied permission. Similarly, this court need not delve into intent but can look at the objective use for 26 years where no permission was requested and none was given.

f. Given the use was visible from space – and the road – it was open and notorious.

The incongruity of the Appellants' positions should not be lost on the court. On one hand they argue that Sundsmo and Pulicicchio knew of the odd lot lines and that the Martins were on the property and in the next breath, say the use was not open and notorious. Satellite photography showed the Martins' vehicles in the parking space. Exhibits 60-67. Witness after witness testified to seeing cars parked in the GPS. How this is not "open and notorious" is a bit of stretch. The space was dug out of the hillside. The gravelling was routine, as needed. The Martin family cars were parked there daily for decades. The Martins landscaped from the GPS and put their garbage cans in the GPS. It has been Washington law for over a century that open and notorious is satisfied by actual knowledge of the holder of the legal title. "If there is direct proof that the owner of the legal title knew of the adverse possession, it is not necessary

to go further; but the presumption is that, if the adverse possession is open and notorious, the owner of the title will know it.” McAuliff v. Parker, 10 Wash. 141, 143, 38 P. 744, 745 (1894) as cited in § 8.11. Open and notorious possession, 17 Wash. Prac. Real Estate § 8.11 (2d ed.) (“An adverse claimant's possession is certainly notorious if the owner has actual knowledge it is going on.”). “Open and notorious use is such use that would lead a reasonable person to assume that the claimant was the owner.” Bryant v. Palmer Coking Coal Co., 86 Wn. App. 204, 211–12, 936 P.2d 1163, 1169 (1997). The trial court did not err in finding that open and notorious use had been satisfied given the depth of testimony and exhibits showing the creation, maintenance and use as a front yard, driveway and parking spot for decades. Given the factual record that the Martins’ use was open and notorious, the trial court was on firm ground in such legal conclusion.

g. Attorney fees should be awarded to the Martins.

The appeal does not challenge the legal fees below but simply claims if Appellants’ appeal is successful, the Orvolds’ should get fees. That would be a matter of discretion for the trial court as RCW 7.28.083(3) says the court “may” award the fees. “The prevailing party in an action asserting title to real property by adverse possession may request the court to award costs and reasonable attorneys' fees. The court may award all or a portion of costs and reasonable attorneys' fees to the prevailing party if, after considering all the facts, the court determines such an award is equitable and just.” So a reversal would not create a

mandatory fee award. Still, this is all quite hypothetical as this court should affirm, not reverse.

Such request by the Orvolds is a good springboard for the Martins to request attorney fees on appeal. RCW 7.28.083(3) cited above has been applied to appeals. “The Klinkenbergs request attorney fees on appeal under RAP 18.1 and RCW 7.28.083(3). Attorney fees may be awarded at the appellate level only when authorized by a contract, a statute, or a recognized ground of equity. Labriola v. Pollard Grp., Inc., 152 Wash.2d 828, 839, 100 P.3d 791 (2004). As described above, RCW 7.28.083(3) provides such a basis. Because the Klinkenbergs are the prevailing party on appeal, we grant the Klinkenbergs their reasonable appellate attorney fees, subject to their compliance with RAP 18.1.” Workman v. Klinkenberg, 430 P.3d 716, 725 (Wash. Ct. App. 2018). In Lingering Pine Investments, LLC v. Khendry, 78962-7-I, 2019 WL 5951443, at *5 (Wash. Ct. App. Nov. 12, 2019)(cited per GR 14.1) fees on appeal were awarded: “We grant LPI its reasonable attorney fees on appeal concerning only the adverse possession issue, subject to compliance with RAP 18.1.”

Also, part of this appeal focuses on the injunction. Now, the injunctive relief arises from the adverse possession dispute. The jersey barriers were dumped in the GPS – not somewhere else. The rotating cars by the Orvolds occupied the GPS. The police were called over gravel in the GPS. The issues were inextricably combined.

The Orvolds keep talking about a protection order. The Martins magnanimously agreed not to require a protection order but urged a simple injunction as they did not want a protection order possibly interfering with Corey Orvold's claimed security clearance. RP 497 and 704; CP 989-991. So we are not technically dealing with a protection order under RCW 10.14.

Still, the court never formally granted anyone a protection order despite the oral ruling after trial. RP 883. There was the hearing over the jersey barriers where the trial court entered an interim order requiring the Orvolds to remove the Jersey barriers, to use the parking space on a shared basis, prohibited photographing of each other, communications to go through lawyers and the Orvolds adjusting their security cameras to not film the Martins' driveway. CP 355-356. Given that the majority of the order was prohibitions on the Orvolds, it is hard to see this as anything but the Martins being the substantially prevailing party. The Appellants' Brief at page 22-23 discusses the Orvolds "pursuing their anti-harassment order, which was granted at the temporary hearing and at trial." This is simply a misstatement of the record. The Order actually entered says "Plaintiff's [Martins'] Motion for Preliminary Injunction is granted in part...." CP 356. No anti-harassment order was entered. Id.

Recall, in the Complaint, a protective order was requested by Plaintiffs. CP 1-11. After trial the court entered an injunction against the Orvolds and ordered fees under both RCW 7.28.083 and 10.14.090. While there was some mutual restrictions as to filming and surveilling

people, the Orvolds were enjoined from use of the GPS. While some of the restraints are mutual, it was the Orvolds who were shining lights and audio recording others so the practical effect of the order was to stop the actual conduct of the Orvolds – not the Martins. How the Orvolds chalk this up as a victory that would justify fees to themselves is hard to reckon. The trial court refused to reduce such fees award based on such argument saying clearly: “I think that the Martins were the prevailing party as for as injunctive relief is concerned.” RP 715

From a legal perspective, there are three bases to award the fees. RCW 7.28.083, RCW 10.14.090 and the notion that all of proceedings were inextricably intertwined with the adverse possession issue. Case law looks to the “substantially prevailing party”. Transpac Dev., Inc. v. Oh, 132 Wn. App. 212, 217, 130 P.3d 892, 894 (2006). Also when the claims all derive from the same issue (in this case the adverse possession/property dispute injunctive relief) so that the claims are inextricably intertwined, the court does not have to try to segregate fees.

Pursuant to RCW 60.04.130 the prevailing party is entitled to attorney fees from trial and on appeal in a lien foreclosure action. The decision as to whether to award attorney fees is discretionary with the court. *Manke*, 27 Wash.App. at 96, 615 P.2d 1332. Fees incurred in proving extras over a contract price may be allowed. *Manke*, 27 Wash.App. at 97, 615 P.2d 1332. The trial court did not abuse its discretion in awarding fees attributable to proving the extras.

Furthermore, the defense of the counterclaims was inextricably intertwined with CKP's establishment of its lien rights. Thus, CKP was properly allowed fees incurred in the defense of counterclaims.

(footnote omitted) CKP, Inc. v. GRS Const. Co., 63 Wn. App. 601, 621, 821 P.2d 63, 74–75 (1991). “This court reviews the award of attorney fees pursuant to statutes...for abuse of discretion. *Humphrey Indus., Ltd. v. Clay Street Assocs.*, 170 Wash.2d 495, 506, 242 P.3d 846 (2010)(addressing analogous attorney fee statute applicable to limited liability companies). Thus, ‘[w]e reverse a trial court’s decision under this standard only if it “is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons.” ’ *Id.* (quoting *Noble v. Safe Harbor Family Pres. Trust*, 167 Wash.2d 11, 17, 216 P.3d 1007 (2009)).” SentinelC3, Inc. v. Hunt, 181 Wn.2d 127, 144, 331 P.3d 40, 48 (2014). In making such a motion, and determination thereof, case law is clear: “The determination of a fee award should not become an unduly burdensome proceeding for the court or the parties. *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 79 Wash.App. 841, 848, 917 P.2d 1086 (1995). Documentation ‘need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work (*i.e.*, senior partner, associate, etc.)’ *Bowers*, 100 Wash.2d at 597, 675 P.2d 193.” 224 Westlake, LLC v. Engstrom Properties, LLC, 169 Wash. App. 700, 740, 281 P.3d 693, 714 (2012).

This court should note that the trial court did not blindly sign off on all requested fees. The Martins requested \$56,799.19. CP 888. The trial court awarded \$51,431.59. CP 1021-1023. The findings noted that the Burns Law, PLLC billings had “no charged” and issued credits to

avoid secretarial type time. Id. The trial court noted how the Martins did little discovery and how the Orvolds increased the cost of litigation with failed motions and a disavowed settlement. Id. The trial court reviewed the bills closely and even deducted copy charges and travel time. RP 714, 716. The trial judge noted the undersigned's rates were "surprisingly low compared to rates that I've seen around town." RP 714. The record adequately supports the notion that the Martins were the prevailing party (CP 1022) and there is no basis to say the trial court abused its discretion in considering and awarding fees.

h. The trial court did not abuse its discretion or authority in ordering the Orvolds to stop audio recording.

Given we are at the appellate stage, we should start with this court's standard of review of a trial court issuing injunctive relief:

Some fundamental principles applicable to a request for an injunction must be considered. (1) The proceeding is equitable and addressed to the sound discretion of the trial court. (2) The trial court is vested with a broad discretionary power to shape and fashion injunctive relief to fit the *particular facts, circumstances, and equities of the case before it*. Appellate courts give great weight to the trial court's exercise of that discretion. (3) One of the essential criteria for injunctive relief is actual and substantial injury sustained by the person seeking the injunction. *Washington Fed'n of State Employees v. State*, 99 Wash.2d 878, 665 P.2d 1337 (1983); *Port of Seattle v. International Longshoremen's Union*, 52 Wash.2d 317, 324 P.2d 1099 (1958).

Brown v. Voss, 105 Wn.2d 366, 372–73, 715 P.2d 514, 517–18 (1986).

The trial court had at least three reasons to label the audio recording "illegal". From a criminal point of view, such conduct is prohibited by

RCW 9.73.030 and violation of said statute is a gross misdemeanor. RCW 9.73.080. RCW 9.73.030 reads in pertinent part “Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any...(b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.” The Orvolds (without a legal basis) try to imply consent from a little sign in their yard. RP 304.

The second basis for such “illegal” labeling comes from RCW 10.14 – the harassment statute. As can be seen in the record, the Orvolds’ camera, which had the audio recording devices, were directed at the Martins. “‘Unlawful harassment’ means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose....” RCW 10.14.020(2).

The third basis is derived also from RCW 10.14 wherein the remedies set forth in statute allows the trial court to fashion appropriate remedies that match the facts. “The court, in granting an ex parte temporary antiharassment protection order or a civil antiharassment protection order, **shall have broad discretion to grant such relief as the court deems proper**, including an order: ...(b) Restraining the respondent from making any attempts to **keep the petitioner under surveillance....**”

(bold added) RCW 10.14.080(6). The notion of aiming your cameras with audio recording at the neighbors could rationally be called attempt to engage in surveillance. The trial court did not abuse its discretion in fashioning its remedy.

i. The trial court did not abuse its discretion in requiring the Orvolds to change to motion activate security lights.

The Appellate Brief seems to want to argue that the court abused its discretion in fashioning a remedy to stop annoying and harassing light shining. They seem to say “Hey, since we are only doing this to intimidate and punish a witness adverse to us, its ok.” There are, predictably, several problems with this approach. First the court has broad discretion, as briefed above. Supra. Second, the whole camera, light and audio recording was a problem towards the Martins as well as the Woodwards. Mrs. Martin testified to the list of problems they had with the Orvolds including them “turning on this bright light that we’ve never had before. It should be a motion light and I would request that it be turned off and made a motion light again.” RP 411. Third, the Woodwards were witnesses in this trial and for being placed on an adverse witness list, they were subject to retaliation. This is close to a felony violation of RCW 9A.72.110 trying to influence the testimony or scare them to not show up and testify. Fourth, under the inherent powers of the court, it can protect witnesses. “Under the inherent powers of the courts, the judiciary has authority to administer justice and to ensure the safety of court personnel, litigants and the public.” State v. Wadsworth, 139 Wn.2d

724, 741, 991 P.2d 80, 90 (2000). Fifth, the trial court was faced with an escalating problem where a minor parking dispute was escalating to dumping thousand pounds of concrete in the GPS, recording everyone nearby, directing lights and camera...no law was found to say the court could not take a pragmatic approach to deal not only with the current issues, but problems that were emerging with others involved. Sixth, bright lights facilitate surveillance which the trial court rightly was attempting to stop. Appellants miss a basic purpose of an injunction which is to prevent further harm as opposed to waiting around for the harm to occur and then suing for damages. It is to “prevent future mischief.” State ex rel. Dep't of Pub. Works of Washington v. Skagit River Nav. & Trading Co., 181 Wash. 642, 646, 45 P.2d 27, 29 (1935)(quoting 32 C. J., p. 45, § 24). The Orvolds were the problem. The court pragmatically and properly exercised its discretion in trying to prohibit further mischief.

j. The record amply supports the trial court findings as to use of the east side of the street.

Frankly, how property owners unrelated to the Martins' property conducted themselves is sort of irrelevant to the legal decision as to the respective rights of the Martins vis-a-vis the Orvolds. Still, the fact that the entire street acted fairly uniformly in use of the property east of the roadway surface yet still part of the western legal lots, does offer circumstantial support for the Martins' position. As set forth in the facts section, over and over witnesses testified to the west side owners never

taking action as to the strip of land to the east of the road. Also, there was testimony that such strip being used by anyone but the adjacent homeowner was rare and pretty much involved overflow parking for parties.

What the Appellants are doing is cherry picking testimony of the use of such space for parties out of context. The Appellants cite to Clayton Horton's testimony but ignore how he testified the Martins created the GPS (RP 217-218) and how the Martins used the GPS "Probably 99 percent" of the time it was in use and the other use was "when we had an overflow for parties or whatnot." RP 218. The notion of citing to Bonita Anderson parking in the GPS simply illustrates the point that there was testimony on both sides, the trial court weighed the evidence and ruled in favor of the Martins. Many, many of the Respondents witnesses, as discussed above, said Ms. Anderson never walked the short distance to the mailbox, but would drive to the mailbox. RP 148, 154, 273, and 388. When faced with conflicting testimony, the trial court did not abuse its discretion in finding the Martins' witnesses more credible.

The other thing the Appellants do not take into consideration is the near 27 years that had passed. Even if people parked in the GPS for a few hours a couple of times a year for overflow parking, it would be so transitory in nature given the near 10,000 days that would pass in 27 years and the near 240,000 hours that elapsed. "A claimant's possession need not be *absolutely* exclusive in order to satisfy the exclusivity condition of

adverse possession. *Crites v. Koch*, 49 Wash.App. 171, 174, 741 P.2d 1005 (1987). An ‘occasional, transitory use by the true owner usually will not prevent adverse possession if the uses the adverse possessor permits are such as a true owner would permit a third person to do as a “neighborly accommodation.” ’ 17 William B. Stoebuck, *Washington Practice Real Estate: Property Law* § 8.19 at 516 (1995). “Cases where the courts have found a lack of exclusivity involve use by the title owner that indicate ownership.” *Bryant v. Palmer Coking Coal Co.*, 86 Wash.App. 204, 936 P.2d 1163, 1172 (1997).” *Lilly v. Lynch*, 88 Wn. App. 306, 313, 945 P.2d 727, 732 (1997).

As for complaining that the trial court erred in saying that the Martins usually gave consent for others to use the space from time to time, there is nothing wrong with such finding. Recall, Mr. Martin would testify he would let people use the space in such situations as it “[j]ust seemed like the neighborly thing to do.” RP 146. However, he also kicked Radke out the parking space. RP 147. That testimony alone supports the judge’s discretion and basis for making such a finding.

k. The record supports the trial court’s finding that the Martins used the spot continuous at all times relevant.

Again, the Appellants cherry pick testimony as to Mr. Martin’s use. A more broad view of his testimony shows substantial and continuous used. Mr. Martin parked there daily in 1990’s. RP 120. The use declined a bit in the 2000’s but he used it pretty much the same. RP 121. Mark Martin’s mother Marge, used the GPS almost every day when

babysitting Lindsey Martin for the first 10 years of Tiffany Smith' occupancy. RP 152. When Lindsey Martin got her license, she parked down in the GPS "daily from the time I got my license until I moved out. " RP 285. As set forth in the fact section, witness after witness testified to 90-100% usage by the Martins and their family. The point is, there is plenty of evidence to support the trial court's findings 14 and 22.

1. The trial court has not displayed bias or that she was in any way prejudiced against the Orvolds.

An adverse ruling is hardly grounds to say that the trial judge was prejudiced. The basis for such claim is flimsy at best. First, Judge Spier never gave legal advice by pondering out loud why there was no claim for a prescriptive easement claim. She did not give the undersigned legal advice on how to plead (or not plead) a claim. Frankly, from the Martins' perspective, such comment was an attempt to telegraph where the trial might be going...hence forcing the Martins into settling for a non-exclusive prescriptive easement that they did not want, given the Orvolds' conduct. What is notable is that the Martins never acted on such "legal advice" but rather stayed the course and pursued the adverse possession claim through trial. Besides, the comment did relate to an issue before the court...exclusivity. If pondering out loud is grounds to remove a judge for prejudice, then this court better get ready for more appeals as many, many judges like to put in their "two cents." Notable, no authority for such

comments warranting disqualification is provided nor could the undersigned find any.

Second, the removal of the jersey barrier fit well into established injunction law. The judge wanted to maintain the status quo. RP 11/30/18 pg. 14. The whole issue on the prescriptive easement versus adverse possession dealt with the element of exclusivity which, not being needed for an easement, would have made the judge's decision even easier as there would have been no doubt that the Orvolds were invading a known right. Still, the Martins sufficiently established a right to a preliminary injunction. Preliminary injunctions are authorized under CR 65 and RCW 7.40. Case law sets forth the legal standard:

A preliminary injunction serves the same general purpose as a temporary restraining order to preserve the status quo until the trial court can conduct a full hearing on the merits. *Nw. Gas Ass'n*, 141 Wash.App. at 115–16, 168 P.3d 443. The “status quo ante” means the “‘last actual, peaceable, noncontested condition which preceded the pending controversy.’” *Gen. Tel. Co. of the Nw. Inc. v. Wash. Utils. & Transp. Comm'n*, 104 Wash.2d 460, 466, 706 P.2d 625 (1985) (citing *State ex. rel. Pay Less Drug Stores v. Sutton*, 2 Wash.2d 523, 529, 98 P.2d 680 (1940)). At a preliminary injunction hearing, the plaintiff need not prove, and the trial court does not reach or resolve, the merits of the issues underlying the three requirements for permanent injunctive relief. *Tyler Pipe Indus. v. Dep't of Revenue*, 96 Wash.2d 785, 793, 638 P.2d 1213 (1982). Instead, the trial court considers only the *likelihood* that the plaintiff will ultimately prevail at a trial on the merits by showing (1) that he has a clear legal or equitable right, (2) that he reasonably fears will be invaded by the [act to be enjoined], and (3) the [act to be enjoined] will result in substantial harm. *Tyler Pipe*, 96 Wash.2d at 792–93, 638 P.2d 1213.

Ameriquest Mortg. Co. v. State Atty. Gen., 148 Wash. App. 145, 157, 199 P.3d 468, 472–73 (2009), aff'd on other grounds sub nom. Ameriquest Mortg. Co. v. Washington State Office of Atty. Gen., 170 Wash. 2d 418, 241 P.3d 1245 (2010). Even if the trial court had not yet bought off on exclusivity, it agreed with the analysis that the jersey barriers were a spite structure under RCW 7.40.030 that allows injunctions under RCW 7.40.020 and 7.40.040. Far from being prejudiced, the trial court simply applied the law when litigants make such a provocative and unlawful action such as the Orvolds did by placing the barricades.

Judges are allowed to ask questions at trial – that is not argued by Appellants. Apparently, however, Appellants urge that only easy questions should be asked (“what is your favorite color?”). The trial judge was faced with requests for protective orders and injunctions and apparently wanted to probe the alleged offenders’ subjective thought process which, to the undersigned, seemed only to be seeking an innocent explanation for inexplicable, objective conduct. Frankly, such questioning could be seen as trying to create a record to not issue injunctive relief when neither counsel had developed such a possibly benign record. It was hardly advocacy for the Martins but rather was seeking exculpatory testimony from the Orvolds.

As for Mr. York being a registered sex offender, it is not disputed the undersigned gave prior notice of intent to solicit such testimony as well as providing a copy of the criminal docket. RP 593-597. This is allowed under ER 609(b). The fact that Mr. York was a registered sex offender did bear on the case as Mr. Martin testified to the effect that, being parents of young children, they took a special interest where Mr. York was. RP 296-297. That bolstered their credibility and foundation for testifying that they knew Mr. York was not using the GPS. Still, the judge only allowed the testimony of the prior conviction for the limited purpose as to where Mr. York lived. RP 597. The trial court made no reference to Mr. York's conviction in her ruling or that it, as opposed to the many other witnesses, guided her opinion.

As far as admitting the order of protection against Ryan Radke, the recitation of how the court testimony went is not as Appellants represent. Mr. Radke testified he lived continuously at Bonnie Anderson's house. RP 549, Exhibit 192. The protection order documents, including documents Mr. Radke had signed contradicted such testimony. Exhibit 189, 190 and 191. However, the trial court only admitted it for the purpose of where Mr. Radke lived and instructed the undersigned not to get into the details of the allegations. RP 551-552. This court can read the colloquy and the questioning and see that Mr. Radke was downplaying

the time he spent away and how he was evasive. The Judge's ruling allowed for proper impeachment while not getting into tangential and irrelevant prior proceeding allegations. The finding of Mr. Radke as being not credible was well supported by other factors such as other witnesses calling him a drunk and a liar. He lied as to what was said during the incident when the police were called and panicked on the stand when a recording was played. He then could not identify where on the recording the words he had alleged Mrs. Martin had said were ever spoken. Mr. Radke was on film "high fiving" Corey Orvold after he parked his car in the GPS right after the police left. Exhibit 180. He was clearly biased, involved and loose with the facts. Calling him not credible was charitable by the judge.

The issue as to the lights and audio sensors has been previously briefed. The requirement to seek the Martins' permission to use the GPS was proper. The Orvolds misunderstand adverse possession. Adverse possession transfers title as a matter of law after the elements are satisfied. "Title acquired by an adverse possessor, although not recorded, is valid and enforceable. Once an adverse possessor has fulfilled the conditions of the doctrine, title to the property vests in his favor." (footnote omitted) Gorman v. City of Woodinville, 160 Wn. App. 759, 763, 249 P.3d 1040, 1042 (2011), affd., 175 Wn.2d 68, 283 P.3d 1082 (2012). The point is that

adverse possession would have vested title in about 2002, more than a decade from the Orvolds' purchase of their lot. As such, without permission, the Orvolds were trespassers. The judge was correct to enjoin their use of the GPS without permission.

Referencing the landscaping and driveway is not improper. The GPS was one part of a larger picture. Still, no case law is cited to say that referencing a summary judgment by the same judge in the same action is inappropriate. Indeed, case law is clear that any such summary judgment order was interlocutory in nature until the final judgment. Grill v. Meydenbauer Bay Yacht Club, 57 Wn.2d 800, 804, 359 P.2d 1040, 1043 (1961). How is a judge referencing her prior ruling prejudicial in any way? Are judges supposed to forget their prior rulings prior to issuing findings? That would be an astounding position to take.

The reason much of the case went against the Orvolds is they had a weak legal position that was further eroded by petty, senseless conduct that only enflamed the situation. The trial court acted properly and with restraint. It admitted evidence for limited purposes, it tried to act pragmatically to a neighborhood dispute, got the legal issues correct and awarded only a portion of the attorney fees and costs requested. Much like a basketball team blaming the referees for losing a game, perhaps the fault lies with the players and coaching. At no point did Orvold seek

recusal or make a record of bias. Every adverse decision could be nitpicked for a judge supposedly being biased because, well, they ruled against a party. It is the role of the judge to get to the truth and render judgment. Nothing beyond that happened in this case.

VI. CONCLUSION

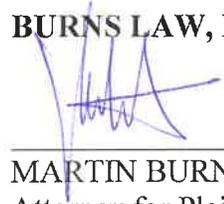
This was about as clear cut as an adverse possession trial could be. 21 witness were called by the Plaintiff that testified consistently of the Martins' overwhelming use of the GPS. Of the six witnesses called by the defense, two (the Orvolds) had no personal knowledge of the history of the GPS prior to their ownership in 2015, one was rarely there in daylight hours, one was a child molesting, long haul trucker who did not know who's cars belonged to who, one was a neighbor who would not park in the GPS, but rather would drive to the mailbox and back to her parking spot in her driveway and one was called a liar and a drunk who did not bother to try to refute such allegations.

The Martins created and used this GPS from 1992 until 2015 with no problems. Then the Orvolds moved in and despite having far more parking spots than they needed, decided to pick a fight they could not, and should not, win. The undersigned wrote a letter to the Orvolds prior to filing suit (CP 947-949) spelling out much of the facts and legalities as set forth in this brief. It told them to simply "knock it off". They should have heeded such admonition. This needs to come to a final resolution and the

Orvolds need to pay the cost of this folly. Please dismiss the appeal and grant the Martins' their attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED this 3rd day of February, 2020.

BURNS LAW, PLLC



MARTIN BURNS, WSBA No. 23412
Attorney for Plaintiffs/Respondents

CERTIFICATE OF SERVICE

I certify that on the 3rd day of February, 2020, I caused a true and correct copy of ***Respondents' Brief*** to be served on the following to:

Attorney for Appellant:

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| <input checked="" type="checkbox"/> | E-Service via Court of Appeals |
| <input type="checkbox"/> | Facsimile |

DATED this 3rd day of February, 2020, at Tacoma, Washington.

BURNS LAW, PLLC

By: Shelley Foster
Shelley Foster, Paralegal

APPENDICES

1.	Diagram of Property
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APPENDIX 1 – CP 4



BURNS LAW, PLLC

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Transmittal Information

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