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DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

**NO. 32908-9-III**

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JOHN W. LEBLEU and ROLA M. LEBLEU, husband and wife;

Respondents/Plaintiffs,  
v.

DAVID W. AALGAARD and LOUELLA A. AALGAARD, husband and  
wife,

Appellants/Defendants.

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**APPELLANTS/DEFENDANTS DAVID AND LOUELLA  
AALGAARD'S REPLY BRIEF**

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## I. INTRODUCTION

Plaintiffs, Appellees, John and Rola LeBleu, timely filed their Responsive Brief. Defendants, Appellants, David and Louella Aalgaard, requested, and were granted, a three week extension. This Reply Brief is now timely submitted.

LeBleus argue, somewhat extraneously, that “Aalgaards now argue for ownership of less ground than what their supposed agreement included.” At this juncture, the Aalgaards have been ejected from their home. It is possible, despite the continued refusal of the LeBleus to let the Aalgaard’s keep their home, to do so with a slightly smaller impact to the LeBleus than was originally adversely possessed from the Denos.

## II. ARGUMENT

### A. LEBLEUS DID NOT DEFEAT THE EXISTENCE OF AN ISSUE OF FACT REGARDING HOSTILITY.

For purposes of summary judgment appeals, an appellate court is required to review the materials submitted in the light most favorable to the party against whom the motion is made. *Preston v. Duncan*, 55 Wash. 2d 678, 683, 349 P.2d 605, 607-08 (1960), *citing*, CR 56; *Morris v. McNicol*, 83 Wash.2d 491, 494, 519 P.2d 7 (1974)(en banc). As the Washington Supreme Court has also stated; ‘..., Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its

toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if *they really have evidence which they will offer on a trial*, it is to carefully test this out, in advance of trial *by inquiring and determining whether such evidence exists.* \* \* \*’ *Preston*, 55 Wash.2d at 683, 349 P.2d at 608-609. (Italics ours.)

“Adverse possession is a mixed question of law and fact. Whether the essential facts exist is for the trier of fact, but whether the facts constitute adverse possession is for the court to determine as a matter of law.” *Herrin v. O’Hern*, 168 Wash.App. 305, 311, 275 P.3d 1231, 1234 (2012).

i. There Is A Clear Question Of Fact Regarding The Discussion Between Denos And Aalgaards.

At a minimum, in reviewing the parties’ arguments, it is clear that there is a question of fact, on the hostility element – which focuses on the discussion between Aaalgaards and Denos. Specifically, whether the Aalgaards’ and Denos’ agreement was “permissive,” or whether it was hostile. It is abundantly clear, that the Aalgaards, actual parties to the discussion, describe the conversation in one way. The LeBleus, who were not parties to the discussion, offer their speculative opinions as to an alternative meaning of the discussion. This in and of itself creates a

question of fact, sufficient to return this to the Superior Court. If there could be more than one interpretation to a fact that is for the jury decide.

ii. Even permissive Use Can Become Hostile

The parties do not appear to differ on the basic elements of adverse possession. To successfully establish a claim of adverse possession “the claimant must prove his possession was actual and uninterrupted, open and notorious, hostile and exclusive for more than 10 years.” *Draszt v. Naccarato*, 146 Wn. App. 536, 542, 192 P.3d 921 (Div. 3 2008) (citing *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989)).

However, the LeBleus appear to be focused on whether the use of the property was “permissive,” because “permission negates hostility.” LeBleus rely on *Chaplin*, 100 Wn.2d at 853. However, LeBleus take *Chaplin* out of context. (See *LeBleus’ Response*, p. 10) *Chaplin* specifically states hostility does not require ill-will, but rather it imparts that claimant is in possession as the owner in contradiction to holding in recognition of, or in subordination of the true owner. *Chaplin v. Sanders*, 100 Wn.2d 853, 857-858, 676 P.2d 431 (1984)(enbanc). In fact, the *Chaplin* Court noted that it was reviewing the preexisting adverse possession law because it had led to mixed results. See generally, *Chaplin*, 100 Wn.2d at 855-860. *Chaplin* then held;

Thus, when the original purpose of the adverse possession doctrine is considered, it becomes apparent that the claimant's motive in possessing the land is irrelevant and no inquiry should be made into his guilt or innocence....For these reasons we are convinced that the dual requirement that the claimant take possession in 'good faith' and not recognize another's superior interest does not serve the purpose of the adverse possession doctrine. The 'hostility/claim of right' element of adverse possession requires only that the claimant treat the land as his own against the world throughout the statutory period. 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.

*Chaplin*, 100 Wn.2d at 860-861, 676 P.2d at 435-36 (internal citations omitted)(emphasis added)

That is precisely the situation here. It was not permissive, thus the cases cited by LeBleus are unhelpful as they are permissive use cases. What the Aalgaards and the Denos "intended" is not relevant. The only

factor that is relevant is “the nature of the possession.” *Chaplin*, 100 Wash.2d at 861, 676 P.2d at 436. Here, the nature of the possession is very clear; the Aalgaards used the property as their own; there is no dispute that they possessed the land in a manner that a true land owner would have. They built a home (CP 207), cultivated the land with grass and flowers (CP 288), built additional structures (CP 308); and celebrated their lives in the normal manner people do at their homes. (CP 307, 308)

iii. Evidence Of A Mistake Was In The Record and Previously Raised.

The LeBleus argue that the Aalgaards raise, for the first time, a mistake. (*LeBleu Response*) This issue was before the trial court. It is clear from a review of Mr. Aalgaard and Mr. Deno’s depositions that they mistakenly located a boundary line. (CP 309) They then proceeded forward with actions based on that mistake. (Supra)

Although old, the law in Washington regarding mistake remains good law; and it was not overruled by *Chaplin*. Rather, *Chaplin* lends support to these cases with its holding that “...what is relevant is the objective character of [the] possession.” *Chaplin*, 100 Wash.2d at 861, 676 P.2d at 436. To that extent, this situation is distinguishable from *Chaplin*. The *Chaplin* Court makes clear that where permission is at issue, a person who has permission to occupy the land, given by the true title owner,

would negate the element of hostility. However, it is again clear here that the Denos did not willingly give permission to the Aalgaards to build a home on their property. They walked the land and based upon those landmarks and legal descriptions (CP 61, 307, 341) arrived at what they both assumed was the proper property line. LeBleus argue that the Declarations do not say they used both deeds only Aalgaards. (Response Brief, p. 16) This makes a mistake all the more apparent why Denos didn't have their deed, why no one surveyed, etc. are all questions of fact for a jury. However, these issues of fact do not affect the existence of a mistake. If the Denos had intended to give them the property, or permission to use it, why then did Mr. Deno not say that? He was under oath to tell the truth. Thus, there was no permission given, because Denos did not know that they were "giving away," or "allowing" the Aalgaards to use their land. (CP 307, 341, 342, 343) At a minimum, it is a question of fact as to whether the Denos were giving permission, or whether they truly believed that that the Aalgaards owned the land.

LeBleus also argue that *Gamboa v. Clark*, applies to this case. However, *Gamboa* is a case that specifically addresses prescriptive easements. *Gamboa v. Clark*, 183 Wash.2d 38, 348 P.3d 1214( 2015)(en banc) The issue in *Gamboa* was whether the use of a road was a prescriptive easement; "is there an initial presumption that a claimant's

use of land is permissive in prescriptive easement cases?” *Gamboa*, 183 Wash.2d at 43, 348 P.3d. 1217. In *Gamboa*, the issue was the use of a path, or road, across uncultivated land. *Gamboa*, 183 Wash.2d at 41-42. The Court specifically noted, “regarding the ‘adverse use’ element in prescriptive easement cases, our precedent supports applying an initial presumption of permissive use to enclosed or developed land cases in which there is a reasonable inference of neighborly sufferance or acquiescence.” *Gamboa*, 183 Wn.2d at 52, 348 P.3d at 1221. Here the dispute in this case was never an easement, nor is it an enclosed or developed piece of property. Thus, *Gamboa* is not applicable.

As already argued in the Opening Brief, the interpretation of the 1993 conversation is a disputed material fact. The Aalgaards categorically deny that the 1993 conversation with Mr. Deno was a conversation regarding permissive use. The intent was to preserve each parties property lines and rights. (CP 341) Not to “allow” Aalgaards to build on the “best” land or for any other potential reason. Only the Aalgaards and Mr. Deno were present at this conversation. (CP 341; 307) No permission was ever sought to build; because the Aalgaards and the Denos assumed that it was the Aalgaard’s property. Nowhere in Washington does a case require that the person seeking adverse possession have the knowledge that they do

not own the property. Indeed, this is precisely why the *Chaplin* Court clarified that subjective belief does not matter.

Plaintiff's argument that the Aalgaards should have looked at the survey map back in 1993 is nothing more than a red herring. In fact, the same statement can be made about the Lebleus: perhaps if they had had the survey of the property done prior to purchase, none of this would be an issue. Regardless, neither of these facts alters or amends the pertinent facts of this case.

### III. CONCLUSION

The construction and occupation of the Aalgaards' family home and multiple improvements for 20 years clearly meet all the elements of adverse possession. The Aalgaards and Mr. Deno, the only witnesses to the 1993 conversation, testified that the conversation was solely to locate the common boundary line as described in their deeds. It was not intended to give permissive use, a conveyance of land, or any other type of boundary adjustment. Any other assertion regarding the 1993 conversation is a misinterpretation or misstatement of the testimony of the Aalgaards and Mr. Deno. This misinterpretation is unreasonable because it is not supported by the testimony of the only witnesses.

At minimum, the different interpretations of the 1993 conversation are a dispute of material fact. As the non-moving party in *LeBleus*'

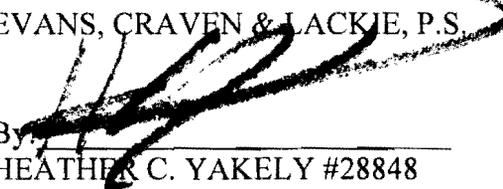
summary judgment motion, Aalgaards are entitled to have all evidence and any reasonable inferences construed in their favor. Instead the trial court ruled on an issue of fact and Summary Judgment was improper.

Aalgaards respectfully request this Court reverse the trial courts order of summary judgment in favor of LeBleus by granting their own summary judgment motion or vacating the trial court's Order and remanding the case back to the trial court for trial.

Aalgaards respectfully request this Court remand the case to the trial court for trial on the disputed questions of fact.

DATED THIS **23** day of July, 2015.

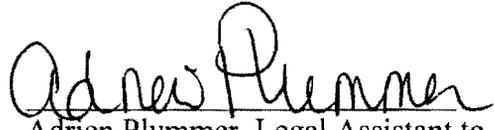
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DECLARATION OF SERVICE:

On the 24<sup>th</sup> day of July, 2015, I caused the foregoing document described as Appellants' Reply Brief to be served via Hand Delivery at the address listed below on all interested parties to this action as follows:

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