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**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

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Court of Appeals
Division III
State of Washington

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

v.

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

Appeal from the Superior Court for Spokane County
Cause No. 2013-02-05154-5

LEBLEUS' RESPONSE BRIEF

ORIGINAL

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I. INTRODUCTION

The parties own adjacent parcels of land in Chattaroy near Mt. Spokane. A survey performed in 2013 revealed that the Aalgaards' home and outbuildings are located on the LeBleus' property. LeBleus brought a claim in equity for ejectment, and Aalgaards asserted counterclaims seeking to quiet title by adverse possession (among other theories). The trial court awarded summary judgment to LeBleus and ordered Aalgaards to remove the encroaching structures. Aalgaards now appeal the dismissal of their adverse possession claim.

The doctrine of adverse possession does not apply on the facts presented. By their own admission, Aalgaards entered into an oral agreement with LeBleus' predecessor, Eric Deno, to resolve uncertainty about where the boundary between the properties was located. Aalgaards and Mr. Deno described the agreement as drawing a new line that was based on natural features of the land, not as marking what they thought was the property line referenced in their deeds. Aalgaards built their home and outbuildings on their side of the "agreed line." These improvements are well over the true boundary line.

As the trial court correctly concluded, the Aalgaard - Deno agreement renders Aalgaards' possession of the land permissive and defeats the hostility element of their adverse possession claim. The fact that Aalgaards thought they owned

the land is irrelevant. Because their claim to the land was not wrongful as against the rights of the true owners, their claim fails as a matter of law.

Aalgaards now argue, for the first time on appeal, that they believed they were “building on the land described in their deed.” Appeal Brief, p. 27. The Court should reject Aalgaards’ novel “mistake” theory given that Aalgaards failed to raise it below. RAP 9.12. In any event, the record reflects that there was no such “mistake.” Aalgaards testified they were “uncertain” as to the deed line. They resolved that uncertainty by drawing a new line along natural features of the land (*e.g.*, “the half way point up the ravine”). Tellingly, in the trial court, Aalgaards referred to the agreement as a “boundary line *adjustment*,” and said they “*established*” the line. They even brought a counterclaim alleging that the line had been adjusted by mutual recognition and acquiescence. These characterizations of the agreement cannot be squared with their present assertions that they set out to mark the true boundary line.

The issue in this case is whether newcomers like LeBleus (including their title company and bank) are entitled to rely on the recording system and the deed line, or whether they must discover handshake agreements reached by neighbors walking through the woods twenty years earlier. Who bears the risk of

such agreements? Aalgaards had every opportunity to have a survey performed before building on the very edge of their 10-acre parcel. They also could have recorded a formal boundary line adjustment or at least built a fence. Aalgaards took a risk in operating outside of the deed and recording system, and must now bear the consequences of that decision.

Finally, the trial court did not abuse his discretion in ordering ejectment. First, Aalgaards did not argue *Arnold* or *Proctor* below, so there is no basis to overturn the trial judge's decision. Second, those cases address a mistake in locating the boundary, which did not occur here. Aalgaards' own evidence establishes they and Deno agreed on what the boundary would be, not what they thought the deed line actually was. Once again, there was no "mistake." Third, Aalgaards did not meet their burden under *Arnold* to establish each of the required factors by clear and convincing evidence.

The trial court should be affirmed.

II. ASSIGNMENTS OF ERROR

LeBleus accept Judge Clarke's order in this case. They do not make any assignment of error.

III. STANDARD OF REVIEW

This Court reviews *de novo* a trial court's ruling on a motion for summary judgment. An order granting the equitable remedy of ejectment is reviewed for abuse of discretion. *Friend v. Friend*, 92 Wn. App. 799, 802 (Div. II 1998).

IV. STATEMENT OF THE CASE

A. Facts:

John LeBleu is a 67 year-old disabled Vietnam veteran. CP 60, ¶2. He and his family bought their property in 2012. CP 65. In 2013, LeBleus had a survey performed and discovered that the Aalgaards' house, barn and shed encroach onto their property. CP 307-308. The land on which these structures sit is generally flat. LeBleus need this land to construct pens and a barn to house their cattle during winter. CP 63.

Eric and Kim Deno owned the property before LeBleus. CP 394, ¶4. According to Aalgaards, Mr. Deno gave them nearly two-acres along the boundary in 1993.¹ Aalgaards admit the agreement was oral. CP 91; 93; 102. There is no fence, wall or other physical marking on the ground that would have

¹ The strip is 812.47 feet long. CP 211. Aalgaards and Mr. Deno agreed to set the boundary next to a transformer which is approximately 100 feet from the true deed line. CP 102. 100' x 812.47' = 81,247 square feet. Two acres = 87,120 sq. feet.

alerted a future buyer like LeBleus to a new boundary line. CP 61; 210-211.² There was no deed conveyed or recorded for the disputed strip and no formal boundary line adjustment was done. CP 91; 93.

The properties are shown in the aerial photo at CP 85. The photo shows LeBleus' home on Tax Parcel No. 9051, in the lower portion of the photo. CP 61, ¶3; 174, ¶3. It sits on relatively flat ground, but that ground falls away to the north, into a shallow, wooded ravine. CP 61; 86. The land then rises toward the Aalgaard structures, where it flattens out. CP 61; 164; 427; 608. As shown in the aerial photo, and contrary to what Aalgaard state on pages 7 and 46 of their Appeal Brief, the distance between the parties' respective homes is not 20 acres. *See* CP 85.

Mr. LeBleu walked the property before he bought it. CP 61, ¶4. Contrary to what Aalgaards contend at page 40 of their Appeal Brief, there was no evidence that LeBleus walked the actual boundary line before buying the property, and no evidence they knew exactly where the north boundary line was located.

² The lack of a physical marker was fatal to Aalgaards' counterclaims for Boundary by Parol Agreement and Mutual Recognition and Acquiescence. CP 451; RP 21.

In or about 1993 or 1994, Aalgaards built the house, a shop and a shed that are shown in the aerial photo. CP 17; 85; 164; 308. It is undisputed that the shop (also called a “barn”), the shed, and all but a small portion of the house are on the LeBleu Property. CP 85; 89-92 (Requests for Admission No. 2, 3, 5, 6, 10, 11); 214.

Aalgaards argued for a boundary that encompassed more land than they actually bought. CP 89; 90. By doing so, they attempted to prove an exception to the statute of frauds prohibiting oral transfers of land. *See* RCW 64.04.010.020. That position makes the details of the Aalgaard/Deno oral agreement critical. Mr. Aalgaard testified that:

We met with Eric Deno and it was agreed that the Inland Power and Light Electrical box was the boundary line, placed approximately 100 feet from the house. Eric Deno assisted us with this task and was in agreement. The half-way point up the ravine was agreed upon as additional boundary line near the shop. Eric Deno then proceeded to assist us building our home based upon the agreed boundary lines.

CP 102.

Aalgaards testified “The boundary line was defined by agreement upon certain physical markers, such as the electrical

box; water lines; power lines; buildings; and our home.” CP 103, lines 16-17. None of those physical markers is referenced in the respective deeds.

The flat area where Aalgaards built their structures is approximately .61 acres in size. CP 214, note 2. That appears to be the only area that Aalgaards seek ownership of in this appeal. Appeal Brief, p. 45 (“LeBleus face no real limitation by not utilizing .61 acres...”). According to Mr. Aalgaard’s description of the agreement, however, the boundary was based on landmarks that have no connection to the boundaries of the clearing area. Specifically, Mr. Aalgaard testified that the boundary he and Deno agreed upon was based on the electrical box that was 100 feet from the house, and the “half point up the ravine.” The 2013 survey and the aerial photo show both those points are well outside the .61 acre “clearing limit area.” *See* CP 85; 214. For whatever reason, Aalgaards now argue for ownership of less ground than what their supposed agreement included. Additionally, the deeds describe the actual property boundaries, but neither of those legal descriptions includes any reference to a “100 feet from the house,” a “half-way point up the ravine,” an “electrical box,” or any improvements. CP 66; 147.

B. Procedural history:

LeBleus accept Aalgaards' summary of the procedural history.

V. ARGUMENT

A. Adverse possession does not apply because Aalgaards took by voluntary agreement.

Permission negates the hostility element of adverse possession. *Roy v. Cunningham*, 46 Wn. App. 409, 411 (1986) (citing *Chaplin v. Sanders*, 100 Wn.2d 853, 861-862 (1984)). True to its name, adverse possession does not apply unless there was "adversity" of possession. As Professor Stoebuck points out:

"Adverse" possession is wrongful possession; possession with the owner's consent is not wrongful. Thus, the doctrine of adverse possession allows a person to gain a right, a legal title, through certain acts only if those acts are wrongful, leading to the popular notion that adverse possession is legalized thievery.

17 William B. Stoebuck & John W. Weaver, *Washington Practice* § 8.1 at 503, 504 (2d ed. 2004).

None of the facts presented by Aalgaards establish wrongful or adverse conduct. To the contrary, Aalgaards and

Denos had a common understanding of the terms of their voluntary agreement throughout Denos' ownership. How Aalgaards used the land after taking possession is irrelevant because they obtained it permissively. Washington law is clear on this point: permission negates hostility, regardless of whether a claimant treats the land as an owner would. See *Chaplin*, 100 Wn.2d at 861-62 (*emphasis added*). In *Chaplin*, the Washington Supreme Court held:

[P]ermission to occupy the land, given by the true title owner to the claimant or his predecessors in interest, will still operate to negate the element of hostility.

Id.; see also *Granston v. Callahan*, 52 Wn. App. 288 (1988). Further, subjective belief regarding ownership is irrelevant. *Chaplin*, 100 Wn.2d at 861.

The facts presented by Aalgaards, which LeBleus conceded for purposes of summary judgment, establish that Aalgaards were permissive users throughout Denos' ownership. Aalgaards in fact stressed the cooperative nature of their dealings with Mr. Deno that started when they approached him with their plan to build a home and establish a new boundary. Mr. Deno cooperated with Aalgaards, agreeing on an adjusted boundary and helping build their home. CP 307, ¶10; 340-341, ¶8-11. According to Mr. Deno, they "expressed to me, as their

neighbor, that they intended and desired to build a family home on their property. As a friend and neighbor, I offered to assist them with the construction of their home on their property.” CP 340, ¶8. He went on to testify that he and Mr. Aalgaard then agreed upon the boundary line. *Id.* ¶¶9, 10. Mr. Aalgaard echoes this story, testifying that he and his wife bought their property knowing they were going to build a house, and then met with Mr. Deno to establish a boundary. CP 307, ¶¶4-6. The construction of the house was part and parcel of the boundary agreement. It was not an act of “hostility” for adverse possession purposes.

Mr. Deno also “visited the Aalgaards on numerous occasions over the almost 20 years in which we were neighbors.” CP 341-342, ¶14. He “observed on a continued and uninterrupted basis the entire Aalgaard family utilizing their property, driveway and home based on the boundary line we originally measured and defined by the natural gully and subsequent monuments.” CP 342, ¶16. Denos’ kids and Aalgaards’ kids played together. CP 268, ¶11. As if to underscore the lack of hostility, Mr. Deno testified that he never objected to Aalgaards’ use and from 1993 on “the Aalgaards lived on their property, not mine.” CP 341, 343, ¶¶14; 19.

Aalgaards also contend they became the true owners of the disputed strip upon entering the agreement with Mr. Deno.

CP 327. In making this argument, they further distance themselves from an *adverse* possession claim; becoming the owner upon entry of an agreement is akin to a conveyance. It is not adverse possession following a ten-year period of hostility. It is for these reasons that the trial judge believed the more applicable theories were Boundary by Parol Agreement or Mutual Recognition and Acquiescence. *See* RP 27-28.

These facts, combined with the voluntary agreement supposedly conveying the strip to Aalgaards, establish that the entire notion of “hostility” - legalized thievery as Professor Stoebuck called it - does not apply here. The trial court agreed. RP 21.

B. The “mistake” argument was not made below and is unsupported.

The manner in which Aalgaards and Mr. Deno described their agreement below does not comport with the assertions Aalgaards are making for the first time on appeal—namely that they thought the boundary they selected was the actual deed line. What they described in their testimony and arguments below was entirely different. They did not describe a mistake about the true boundary line that was discovered only upon seeing the 2013 survey map. Instead, Aalgaards and Denos described an agreement whereby they simply set an agreed

upon line. Mr. Aalgaard and Mr. Deno went out and picked the line. *See* RP 27-28.

In addition to the testimony recited above, Aalgaards argued to the trial court that they and Denos were uncertain as to where the boundary line separating their relative properties was located. CP 335. That is the opposite of what they argue on appeal: that they thought they had in fact found the boundary line. Their position below was they did not know where it was so they made a permanent agreement, clearly specifying where the boundary line was located, which resolved the uncertainty. CP 335.

Not only did their testimony and argument below revolve around uncertainty, but the agreement they described was nothing like what one would expect a true deed line to be. For instance, Mr. Aalgaard's description of the agreed upon boundary was not a straight line. It was instead made with reference to the "electric box," the ravine, the water lines and the house." They appear to only seek the .61 acre "clearing area," which is a curved area. *See* CP 214. None of that is remotely like what a deed line would be or what the deeds in fact say. CP 66; 147. Note that the Assessor's map and the aerial photo show the true boundary lines are all straight, as does Mr. Larsen's survey of the disputed boundary. CP 85; 178; 188; 214. The Assessor's map at CP 188 is from 1991. *See* CP

187-188. Aalgaards did not enter their agreement with Deno until 1993, so the map would have been available to them had they chosen to go to the County and look at it. In any case, if Aalgaards believed then that they had found the true boundary line, they would not have had any “uncertainty and confusion,” and they would not have selected a line based on arbitrary features like the “half-way point up the ravine” or “water lines.” Nor would they have concluded that the true boundary was “approximately” 100 feet from the house; deed lines are not based on “approximate” distances.

Moreover, Aalgaards now describe the agreement below as setting the boundary in a different location than what they argued below. Below, they sought nearly two acres, and set the boundary “approximately 100 feet from the house,” near the electrical box. CP 342 (“It was agreed the power box would be placed just over the common boundary line on my property.”). That power box is shown on the survey map at CP 214. It is well outside the .61 acre “clearing limit area.” On appeal, however, they seek only the .61 acres. Appeal Brief, p. 45. This change in what they claim to have “adversely” possessed shows their agreement with Deno was not in fact based on a belief that they had located the true deed line. After all, if they thought they had found the true deed line, the location of that line would

not change, nor would the line bend in the curve shaped .61 acre clearing limit area.

While Aalgaards state in their Appeal Brief that “The disputed strip of property is largely comprised of a shallow wooded ravine until the land rises toward the Aalgaard structures, where it flattens out again,” their actual request for relief on appeal seeks only the .61 acre clearing area, which is entirely flat. Appeal Brief, p. 45; CP 164; 427; 608.

Aalgaards cite *Beck v. Loveland*, 37 Wn.2d 249 (1950), for the proposition that a mistake in identifying a boundary line does not necessarily negate the hostility element of adverse possession. Appeal Brief, p. 11-12, 15. While the case may stand for that proposition generally, there was no evidence of such a mistake presented below. Mistake was never mentioned and *Beck* was never cited.

Moreover, to the extent *Beck* applies at all, it counsels that Aalgaards’ possession of the disputed strip was permissive, not hostile. In *Beck*, adjoining landowners set out to identify the boundary reflected in their deeds. *Beck*, 37 Wn.2d at 252. They used their best efforts to identify the true line and “tentatively agreed” upon its location pending completion of a survey at some point in the future. *Id.* at 253. Both agreed to recognize the future survey line, rather than their fence location, as the official boundary. *Id.* at 253-54. Thus, the identified line was

“always subject to correction if a survey demonstrated that the fence was not along the true line referred to in the deed.” *Id.* at 254. Understandably, the Court rejected the adverse possession claim, holding that the possession had not been hostile because the original landowners had agreed to honor the line established by a future survey. *Id.* at 258-259. Had the original landowners not agreed to abide by the line established by a future survey, the adverse possession claim may have succeeded.

Here, in contrast, there is no evidence of a *mistake* or of an attempt to locate the true boundary. Instead, Aalgaards argued on summary judgment that “[T]he boundary line agreement was a neighborly transaction in order to establish where one another’s relative property was located, so that future contentions could be avoided.” CP 413; *see also* CP 334 (they “were establishing a clear boundary line because there was mutual uncertainty as to the location of the boundary and they wanted to avoid any future confusion or conflict[.]”). The Court should reject Aalgaards’ effort to change their story on appeal to shoehorn a “mistake” theory never argued below.

The Court should also ignore Aalgaards repeated claims in their Appeal Brief that Aalgaard and Deno referenced their deeds while establishing the agreed upon boundary. Citing Mr. Deno’s Declaration at CP 341, Aalgaard’s Appeal Brief says “Mr. Deno and the Aalgaards believed the foundation was

‘clearly placed on the Aalgaards’ property’ as described in the Aalgaard deed.” Appeal Brief, p. 6, emphasis added. Critically, Mr. Deno’s testimony did not include the phrase “as described in the deed.” *See* CP 341. All Deno said was “the home was built at least 50 feet, if not more, from the common boundary line, and clearly placed on the Aalgaards’ property.” *Id.*

Aalgaards make the same overstatement at page 39 of their brief: “The Aalgaards and Mr. Deno then used the description of their property as contained in their deeds, walked the land, and took measurements in a good faith effort to locate their common boundary line. Appeal Brief, p. 30 (emphasis added). They cite Mr. Aalgaard’s and Deno’s sworn statements as support. Neither of those statements, however, say that the men “used the description of their property as contained in their deeds.” Another example is at p. 41: “Here, the facts clearly establish reasonable and good faith efforts to locate the established property line as described in their deeds...” (emphasis added). There is no supporting citation to the record.

A review of the record establishes that there is no evidence whatsoever that Aalgaards or Deno consulted their legal descriptions or even looked for the true deed line. They never testified to having done so and all the actual evidence in fact establishes that they never thought they found the true deed

line. No reasonable finder of fact could conclude otherwise based on this record.

What in fact occurred was more like an attempted oral conveyance of land in the sense that the parties' respective deeds set the true line, but they agreed on their own line, and according to them, that agreement resolved their uncertainty and was binding from that moment forward. By building their house in reliance on such an agreement - without a survey, recording or fence to alert future owners - Aalgaards took a calculated risk. LeBleus took no risk and should not be made to suffer from Aalgaards' choices.

C. Aalgaards are not entitled to a presumption of hostile use.

Aalgaards also suggest they are entitled to a “presumption” of hostile use under *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75 (1942), and *Draszt v. Naccarato*, 146 Wn. App. 536 (2008). Appeal Brief at 12-15. This suggestion is without merit. The ordinary presumption in adverse possession cases is that the use was *permissive*. *Gamboa v. Clark*, --- P.3d ----, 2015 WL 1782334 at *3 (Apr. 16, 2015) (courts examining adverse possession claims “start with the presumption that when someone enters onto another’s land, the person does so with the true owner’s permission and in subordination to the latter’s title”) (citing *Nw. Cities*, 13

Wn.2d at 84). This presumption applies in cases involving (1) unenclosed land, and (2) enclosed or developed land when it is “reasonable to infer that the use was permitted by neighborly sufferance or acquiescence.” *Id.* The evidence here certainly established that Denos made a neighborly accommodation, going so far as to help Aalgaards build their house.

Some courts have interpreted *Northwest Cities* to allow a “competing” presumption of hostile use in cases where the land is enclosed or developed and there is no evidence of neighborly accommodation. *Id.* at *4. That reading of *Northwest Cities*, however, has been “called into doubt.” *Gamboa*, 2015 WL 1782334 at *4, *6 (citing *Cullier v. Coffin*, 57 Wn.2d 624, 627 (1961)). The proper reading of *Northwest Cities* is that “unchallenged use for the prescriptive period is a circumstance from which an inference may be drawn that the use was adverse.” *Id.* at *6 (citing *Cullier*, 57 Wn.2d at 627). Thus, there is no “competing” presumption of hostile use. *Id.*

Aalgaards contend that *Draszt* “affirmed the presumption in *Northwest Cities*.” Appeal Brief at 13. But *Draszt* does not cite *Northwest Cities*. Nor does it discuss or even reference a presumption of hostile use. The only thing that could arguably be interpreted as such is the court’s statement that “construction and maintenance of a structure partially on the land of another almost necessarily is exclusive, actual and uninterrupted, open

and notorious, hostile and made under a claim of right.” *Draszt*, 146 Wn. App. at 542 (citing *Reitz v. Knight*, 62 Wn. App. 575, 582 (1991)). But this statement does not support a hostile use presumption because hostility was not contested in *Draszt*. In fact, the only disputed issue was whether the 10-year continuous possession requirement had been satisfied through tacking. *See id.* at 542 (holding that appellees were in privity with prior landowners). Since *Draszt* does not address hostility, it is of no use to Aalgaards.

Draszt also involved a claim of mutual recognition and acquiescence. *See* 146 Wn. App. at 543-44. The court’s discussion of this claim is irrelevant because Aalgaards cannot satisfy the first element of an acquiescence claim: that the boundary line was “physically designated upon the ground, e.g., by monuments, roadways, fence lines, etc.” *Id.* at 543. *See* CP 451 (Order granting summary judgment: “Defendants did not physically mark the alleged new boundary such that a third party was on notice.”)

D. Building improvements does not necessarily equate with hostility.

Aalgaards argue that their building of a home satisfies the hostility element of an adverse possession claim, citing *Reitz v. Knight*, 62 Wn. App. 575 (1991). The only question in *Reitz* was whether the evidence presented (that the eaves and

cantilevered second floor of the defendant's home encroached slightly onto the plaintiff's lot) supported a claim for adverse possession. *Id.* at 582-85. Answering that question in the affirmative, the court made an offhand comment that such encroachments are "almost necessarily . . . exclusive, actual and uninterrupted, open and notorious, hostile and made under a claim of right." *Id.* at 582. Read in proper context, *Reitz* does not suggest that building a house that encroaches onto a neighboring lot is "necessarily" done under a claim of right. The case simply notes that, in most cases this type of physical encroachment will generally support an adverse possession claim.

Given that Aalgaards' entire theory is based on their taking possession by agreement with Deno, this case is not a typical case. As pointed out above, it is not a proper adverse possession case at all. The case is more suitable for the theories Boundary by Parol Agreement and Mutual Recognition and Acquiescence.

E. The trial did not abuse its discretion in ejecting Aalgaards' improvements.

Aalgaards never asked the trial court to perform an "*Arnold* analysis," so this court should not find an abuse of discretion for its failure to do so. "On review of an order granting or denying a motion for summary judgment[,], the

appellate court will consider only evidence and issues called to the attention of the trial court.” RAP 9.12. Thus, “[i]ssues and contentions neither raised by the parties nor considered by the trial court when ruling on a motion for summary judgment may not be considered for the first time on appeal.” *Cano-Garcia v. King Cnty.*, 168 Wn. App. 223, 248 (2012); *see also Wash. Fed. Sav. v. Klein*, 177 Wn. App. 22, 29 (2013), *review denied*, 179 Wn. 2d 1019 (2014) (arguments neither pleaded nor argued to the trial court cannot be considered for the first time on appeal); *1519-1525 Lakeview Blvd. Condo. Ass’n v. Apartment Sales Corp.*, 101 Wn. App. 923, 932 (2000), *aff’d*, 144 Wn.2d 570, (2001) (declining to consider argument raised for first time on appeal of summary judgment ruling).

The purpose of this rule is to ensure that appellate courts “engage in the same inquiry as the trial court” on review of a summary judgment motion. *Wash. Fed’n of State Employees, Council 28, AFL-CIO v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 163 (1993); *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484 (2011).

Aalgaards argue that the trial court should have ordered a forced sale rather than ejectment. Appeal Brief, p. 34-49. This argument fails for three reasons. First, Aalgaards never *asked* the court to order a forced sale rather than ejectment. Despite having devoted sixteen pages of their appellate briefing to this

issue, Aalgaards didn't say a word about a forced sale in the trial court. CP 319-37. This is a new argument being raised for the first time on appeal. As such, it should not be considered. RAP 9.12; *Cano-Garcia*, 168 Wn. App. at 248; *Klein*, 177 Wn. App. at 29; *1519-1525 Lakeview Blvd.*, 101 Wn. App. at 932.

Aalgaards seem to suggest that the trial court should have considered a forced sale *sua sponte* even though they never requested it. The Court should reject this argument. A forced sale is an incomplete remedy—that is, something less than the ejectment remedy the LeBleus prayed for in their complaint. *Arnold v. Melani* makes clear that ejectment is the presumptive remedy when a plaintiff prevails on an ejectment claim. *See* 75 Wn.2d 143, 152 (1968) (“Ordinarily, even though it is extraordinary relief, a mandatory injunction will issue to compel the removal of an encroaching structure.”). The case simply holds that a court may *deny* the plaintiff this remedy in “the exceptional case” in which the defendant proves—by clear and convincing evidence—that ejectment would be too oppressive. *Id.*; *Cogdell v. 1999 O’Ravez Family, LLC*, 153 Wn. App. 384, 391 (2009).

This is not a “balancing of the equities” test, but rather a defense to a prayed-for remedy that must be raised, argued and ultimately proven by the defendant. *Cogdell*, 153 Wn. App. at 153; *Proctor v. Huntington*, 169 Wn.2d 491, 500 (2010). After

all, how can a court find that the defendant has proven each of the *Arnold* elements by clear and convincing evidence if the defendant never attempts to make such a showing?

Second, Aalgaards' reliance on *Arnold* and *Proctor* is misplaced. Both cases are distinguishable in that the subject encroachments resulted from mistakes made by professional surveyors in locating a true boundary line. *Arnold*, 75 Wn.2d at 145-46; *Proctor*, 169 Wn.2d at 494. As discussed above, the encroachment in this case resulted from an oral agreement to set an *arbitrary* line that Aalgaards and Denos could easily identify by reference to geographic features of the land. Having built their home with knowledge that the agreed-upon line was not the true boundary line, thus taking a calculated risk, Aalgaards cannot be heard to complain that ejectment would be too oppressive.

Finally, Aalgaards have failed to carry their heavy burden of proving that ejectment would be inequitable. To defeat the presumptive ejectment remedy, Aalgaards must prove each of the following elements by clear and convincing evidence: (1) that they did not take a "calculated risk" or act "negligently, willfully, or indifferently" in locating the encroaching home; (2) that damages to LeBleus are slight and that the benefit of having the encroachment removed is equally small; (3) that there is no real limitation on the LeBleus' future use of their

property; (4) that relocating the encroachment would be impracticable; and (5) that there is an “enormous disparity” in the resulting hardships. *Cogdell*, 153 Wn. App. at 391 (citing *Arnold*, 75 Wn.2d at 152). These elements are conjunctive, *id.*, and failure to prove any one is fatal to a forced sale defense.

Aalgaards were required to establish each of the above elements by clear and convincing evidence. They did not even attempt to do so. Moreover, the trial court’s decision to grant ejectment is reviewed for an abuse of discretion. *Cogdell*, 153 Wn. App. at 390. The facts presented below demonstrate that ejectment was warranted and that reversal is not.

1. Aalgaards took a calculated risk.

Aalgaards conceded below they were uncertain about where the true boundary was located. CP 335. Why else would they have been out in the field with Deno trying to establish a line? They admitted they chose not to have a survey performed. CP 91; 102. A survey would have resolved the issue. They admitted they did not do a boundary line adjustment. CP 91. Nor did they build a fence or other marker that would have alerted others to the supposedly new boundary. CP 61; 210-211; 451.

Aalgaards and Denos settled their mutual uncertainty about the location of the deed line by agreeing to abide by a new line. By building their home in reliance upon the agreed

line, Aalgaards took a deliberate, calculated risk that the home would encroach over the deed line. Indeed, building so close to the agreed line without knowing for certain where the true line was located can fairly be described as deliberate indifference. As a result, Aalgaards cannot satisfy the first element and are not entitled to a forced sale.

2. The damage to LeBleus is not small.

The disputed strip is nearly two acres in size. Losing a strip that large is not insignificant. Moreover, the .61 acre clearing has special significance because it is the only flat portion of the disputed strip. CP 61; 164; 427; 608. Aalgaards likely chose that land to build their structures on because it was flat. LeBleus paid for that land and need their own flat area to build pens and a barn for their livestock. CP 63. It would be difficult, to say the least, to build a barn in a wooded ravine. There is no evidence in the record regarding whether other portions of the LeBleu property would be suitable for barns and pens, and there no basis in the record to suggest others know better than Mr. LeBleu, who has been in the livestock business for 25 years. CP 602.

Aalgaards argue without accurate citation that LeBleus did not believe they owned the disputed clearing when they bought the land. Appeal Brief, p. 46. No such facts are in the record. The Court should not consider this argument.

3. Losing the property will limit LeBleus' use of their land.

As noted above, the land at issue is flat and particularly well-suited for a barn and cattle pens, which LeBleus will not be able to build if the Aalgaard home remains in its current encroaching location. This limitation on the LeBleus' use of their property precludes Aalgaards from satisfying the third element of the *Arnold* test.

4. There is no evidence about the practicability of removing Aalgaards' encroaching structures.

Aalgaards presented no evidence whatsoever about the cost of removing the structures, or whether there is an absence of suitable locations elsewhere on their ten-acre parcel. They therefore did not establish this element by clear and convincing evidence.

5. Both parties face hardships.

LeBleus face hardships of their own if they lose the disputed property, not the least of which is that they paid for it. Losing this particular portion of their property would be particularly painful because it is uniquely flat, and therefore more valuable as a building site and generally more useful than the ravine, for instance.

F. The purposes of allowing takings by adverse possession are not advanced on these facts.

Not only do Aalgaards' facts not fit the requirements of adverse possession, but application of the doctrine on these facts would further none of the purposes of the doctrine. The doctrine was formulated to assure the maximum use of land, encourage the rejection of stale claims, and quiet titles. *Gorman v. City of Woodinville*, 175 Wn.2d 68, 75-76 (2012) (Madsen, J., concurring) (citing *Chaplin*, 100 Wn.2d at 859-60).

"Modern commentators have concluded that adverse possession is out of place in America's free market economy." *Id.* at 77.

None of those interests is implicated here. Denos and Aalgaards had perfectly good legal descriptions to rely upon to find their boundaries. Both families lived there. There was no need to quiet title, or encourage the use of land. There is no issue here of unused land or advancing the westward expansion of the nation.

"Adverse possession is an offense against possession, against the legal right of the person entitled to possession." *Gorman*, 175 Wn.2d at 75-76 (Madsen, J., concurring) (citing 17 William B. Stoebuck & John W. Weaver, *Washington Practice* § 8.6 at 512). That is why it is called "adverse" possession. It is someone taking the land of another, like

thievery. There was nothing adverse here; to the contrary, there was a neighborly handshake agreement.

Moreover, the recording system, supported by the statute of frauds, is a vital part of real estate transactions generally. The purpose is to give notice to others as to what the boundaries are. Notice is vital to real estate transactions and the law of adverse possession. LeBleus had no way to discover the oral agreement Aalgaards and Deno reached between themselves. LeBleus did what they were supposed to do and what they were entitled to do: rely on the deed line. They should not lose a portion of their land because they failed to discover an orally created boundary they had no way to find.

VI. ATTORNEY FEES ON APPEAL

Washington law allows the prevailing party in an adverse possession case to recover its attorneys' fees and costs:

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.

RCW 7.20.083(3).

In the event the trial court is affirmed, LeBleus will have prevailed on all their claims and all relief sought by Aalgaards will have been denied. Such an award is just and equitable because LeBleus did nothing to create the boundary dispute that resulted in this litigation. Aalgaards took the risk of building on property they did not own, failing to record a boundary line adjustment, and failing to build a fence or other physical marker that would have alerted LeBleus.

VII. CONCLUSION

For the reasons stated above and in the pleadings below, the trial court should be affirmed and the Court should award LeBleus their reasonable attorneys' fees and costs.

DATED this 3rd day of June, 2015.

Respectfully submitted,

K&L GATES LLP

By 

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PROOF OF SERVICE

I hereby certify that on the 3rd day of June, 2015, I caused to be served a true and correct copy of the foregoing upon the following person Via Hand Delivery:

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A handwritten signature in black ink, appearing to read 'TR' followed by a stylized flourish.

Todd Reuter, WSBA # 20859

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VIII. Appendix A
To LeBleus' Response Brief

Non-Washington State Case (Foreign Cases)

A-1 Gamboa v Clark--- P.3d ----, 2015 WL 1782334 (Apr. 16, 2015)

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Other Authorities (Foreign Source)

A-2 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, *Washington Practice* § 8.1 at 503, 504 (2d ed. 2004)

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2015 WL 1782334

Only the Westlaw citation is currently available.

Supreme Court of Washington,

En Banc.

Magdaleno GAMBOA and Mary J. Gamboa, husband and wife, Petitioners,

v.

John M. CLARK and Deborah C. Clark, husband and wife, Respondents.

No. 90291-7. | April 16, 2015.

Synopsis

Background: Claimants brought action against holders of title to roadway, alleging existence of a prescriptive easement. The Superior Court, Yakima County, Rodney K. Nelson, J., entered judgment awarding claimants a nonexclusive easement over title holders' roadway. Title holders appealed. The Court of Appeals, 180 Wash.App. 256, 321 P.3d 1236, affirmed in part and reversed in part. Claimants appealed.

Holdings: The Supreme Court, Owens, J., held that:

[1] an initial presumption of permissive use applies to enclosed or developed land cases in which there is a reasonable inference of neighborly sufferance or acquiescence, abrogating *Drake v. Smersh*, 122 Wash.App. 147, 89 P.3d 726;

[2] evidence supported reasonable inference of neighborly accommodation and thus title holders were entitled to rely on presumption of permissive use; and

[3] claimants failed to overcome presumption of permissive use as would support a finding of prescriptive easement.

Affirmed.

West Headnotes (15)

[1] **Easements** ⇌ Prescription

Prescriptive easement rights are not favored in the law, since they necessarily work corresponding losses or forfeitures of the rights of other persons.

Cases that cite this headnote

[2] **Easements** ⇌ Prescription

To establish a prescriptive easement, the person claiming the easement must use another person's land for a period of 10 years and show that (1) he or she used the land in an "open" and "notorious" manner, (2) the use was "continuous" or "uninterrupted," (3) the use occurred over "a uniform route," (4) the use was "adverse" to the landowner, and (5) the use occurred with the knowledge of such owner at a time when he was able in law to assert and enforce his rights.

Cases that cite this headnote

[3] **Easements** ⇌ Presumptions and Burden of Proof

The claimant bears the burden of proving the elements of a prescriptive easement.

Cases that cite this headnote

[4] **Easements** ⇌ Questions for Jury

Whether a claimant has established the elements of a prescriptive easement is a mixed question of law and fact.

Cases that cite this headnote

[5] **Appeal and Error** ⇌ Conclusiveness in General

A trial court's factual findings are reviewed for abuse of discretion.

Cases that cite this headnote

[6] **Appeal and Error** ⇌ Cases Triable in Appellate Court

A trial court's conclusion that the facts, as found, constitute a prescriptive easement is reviewed de novo.

Cases that cite this headnote

[7] **Easements** ⇌ Adverse Character of Use

Supreme Court generally interprets the term adverse use, in the context of a prescriptive easement, as meaning that the land use was without the landowner's permission.

Cases that cite this headnote

[8] **Easements** ⇌ Prescription

There is no requirement that a prescriptive easement claimant believe he or she owns the property to establish adverse use, as a claimant's subjective intent is irrelevant.

Cases that cite this headnote

[9] **Easements** ⇌ Presumptions and Burden of Proof

The prescriptive easement claimant may defeat the presumption of permissive use when the facts demonstrate that the user was adverse and hostile to the rights of the owner, or that the owner has indicated by some act his admission that the claimant has a right of easement.

Cases that cite this headnote

[10] **Easements** ⇌ Use by Permission or Agreement

When a court finds a land use is permissive in its inception, it cannot ripen into a prescriptive easement right, no matter how long it may continue, unless there has been a distinct and positive assertion by the dominant owner of a right hostile to the owner of the servient estate.

Cases that cite this headnote

[11] **Easements** ⇌ Use by Permission or Agreement

A land use is “permissive in its inception” when a landowner actually gives a claimant permission to use the land, and the claimant's license to use the land can never ripen into a prescriptive easement right unless the user distinctly asserts that he or she is using the land as of right.

Cases that cite this headnote

[12] **Easements** ⇌ Presumptions and Burden of Proof

An initial presumption of permissive use, whereby a person entering onto another's land does so with the true owner's permission and in subordination to the latter's title, applies to enclosed or developed land cases in which there is a reasonable inference of neighborly sufferance or acquiescence, in prescriptive easement cases; abrogating *Drake v. Smersh*, 122 Wash.App. 147, 89 P.3d 726.

Cases that cite this headnote

[13] **Easements** ⇌ Presumptions and Burden of Proof

Evidence supported a reasonable inference of neighborly accommodation by holders of title to roadway, and demonstrated claimants' noninterfering use, in common, of a roadway that was constructed by the title holders' predecessor, which the claimants did not improve, and thus title holders were entitled to rely on a presumption of permissive use in claimants' action alleging prescriptive easement over roadway; parties were neighbors, both used the roadway for years without any disputes and were aware of the other's use of the roadway, and neither party objected to the other's use until a recent dispute arose.

Cases that cite this headnote

[14] **Easements** ⇌ Adverse Character of Use

For a prescriptive easement claimant to show that land use is “adverse and hostile to the rights of the owner,” the claimant must put forth evidence that he or she interfered with the owner's use of the land in some manner.

Cases that cite this headnote

[15] **Easements** ⇌ Weight and Sufficiency

Claimants, who used gravel road adjacent to their property as a driveway to access their home, failed to overcome presumption of permissive use, and thus, failed to establish a prescriptive easement over the road, where claimants' occasional blading of the road did not interfere with road's title holders' use of the road, and title holders had not indicated that the claimants had an easement over the road.

Cases that cite this headnote

Appeal from Yakima Superior Court; 09–2–03594–5, Honorable Rodney K. Nelson, Judge.

Attorneys and Law Firms

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Christopher Martin Constantine of Counsel Inc. PS, Tacoma, WA, for Respondents.

Opinion

OWENS, J.

*1 ¶ 1 For many years, Magdaleno and Mary Gamboa have used a gravel road adjacent to their property as a driveway to access their home. The road is primarily on the property of their neighbors, John and Deborah Clark. The Gamboas and Clarks used the road for their respective purposes for many years without an objection from either family. After disputes arose between them, the Gamboas filed suit to obtain a legal right to use the road.

¶ 2 This case requires us to determine whether the Gamboas met one of the requirements of the rule that would allow them to continue using the road. Specifically, the Gamboas must show that their use of the road was adverse to the Clarks (i.e., without the Clarks' permission). Since the evidence shows a reasonable inference that the Clarks let the Gamboas use the road out of neighborly acquiescence, we hold that the Gamboas did not show that their use of the road was adverse to the Clarks. Therefore, the Gamboas may not continue using the road, and we affirm the Court of Appeals.

FACTS

¶ 3 The Gamboas and Clarks own adjoining parcels of land separated by a gravel road in a rural area in Yakima County. The Gamboas own a 17-acre western parcel to farm alfalfa, and the Clarks own a 25-acre eastern parcel to farm grapes. The parcels were created in 1964 when the original co-owners, the Padghams and McConnells, split up the 42-acre parent parcel into the 17- and 25-acre parcels described above. The Padghams and McConnells sold the 25-acre eastern parcel (which included the road) to the Slouin family, the family preceding the Clarks to that parcel. The Padghams and McConnells retained the 17-acre western parcel. The Padghams and McConnells sold their parcel to the Gamboas in 1992, and the Slouins sold their parcel to the Clarks in 1995.

¶ 4 Since coming to the parcel in 1992, the Gamboas used the gravel road as a driveway to access their home and some of their alfalfa crop. The Gamboas have occasionally bladed the road and on one occasion applied gravel to maintain its condition. When the Clarks came to their parcel in 1995, they used the road to farm grapes, including watering the grape plants and spraying for weeds. The trial court found that “[t]he Gamboas and the Clarks both used the roadway as described above without any disputes until 2008. Each party was aware of the other's use of the roadway, but no one objected to the other's use until a dispute arose in 2008.”Clerk's Papers (CP) at 195.

¶ 5 A dispute arose in 2008 over the Gamboas' dogs and the Clarks' irrigation practices, and “it eventually escalated into a dispute over which of them owned the land on which the roadway was situated.”*Id.* Land surveys revealed that a small portion of the gravel road (the portion where it connects with East Allen Road) is on the Gamboas' property, but that the rest of the gravel road is on the Clarks' property until the road reaches an area where the Gamboas have an express easement over the Clarks' property (the express easement dating back to 1964 when the parent parcel was split).

*2 ¶ 6 At trial, the trial court listed the elements for a prescriptive easement as follows:

that the claimant's use must be adverse to the right of the owner of the servient parcel; that the use by the claimant be open, notorious, continuous, hostile and uninterrupted over the prescriptive period of ten

years, and that the servient owner has knowledge of such use at the time when he or she would be able at law to assert and enforce his or her rights.

Id. at 196. The trial court noted that “the primary element in dispute ... is whether the use by the Plaintiffs Gamboa was ‘adverse’ to the rights of the Defendants Clark over a period of at least ten years.”*Id.* at 196–97. The court defined “adverse use” as follows: “A claimant's use is adverse unless the property owner can show that the use was permissive.”*Id.* at 197. It found “that Mr. Clark did not give the Gamboas[] express or implied permission to use the road, and therefore, the use of the road was adverse.”*Id.* Additionally, the court concluded that the Gamboas' land use was adverse “[i]n view of the fact that the use made of the roadway ... by the Plaintiffs Gamboa was ‘open, notorious, continuous, uninterrupted,’ and in a fashion that a true owner would use his own land, all for more than a ten-year period.”*Id.* at 198 (quoting *Nw. Cities Gas Co. v. W. Fuel Co.*, 13 Wash.2d 75, 85, 123 P.2d 771 (1942)).

¶ 7 The Court of Appeals reversed, concluding that the trial court applied the wrong legal presumption and burden of proof regarding adverse use. *Gamboa v. Clark*, 180 Wash.App. 256, 280–82, 321 P.3d 1236 (2014). The Court of Appeals held that the trial court erred by applying a presumption that the claimant's use is adverse unless the property owner can show it was permissive. *Id.* at 280–81, 321 P.3d 1236. Instead, the Court of Appeals cited *Northwest Cities* for the proposition that the initial presumption is that the claimant's use is permissive and the claimant can shift the presumption from permissive use to adverse use depending on the facts. *Id.* at 267, 321 P.3d 1236. The Court of Appeals cited this court's decisions in *Roediger v. Cullen*, 26 Wash.2d 690, 175 P.2d 669 (1946), and *Cuillier v. Coffin*, 57 Wash.2d 624, 358 P.2d 958 (1961), however, to say that the presumption of permissive use will not shift to adverse use if the evidence supports a reasonable inference of neighborly accommodation or if the evidence demonstrates noninterfering use of a roadway constructed by the landowners' predecessor. *Gamboa*, 180 Wash.App. at 282, 321 P.3d 1236. Here, the Court of Appeals found the evidence supported a reasonable inference of neighborly accommodation and demonstrated noninterfering use of a roadway constructed by the Clarks' predecessor. *Id.* Thus, the court held that those inferences prevented the presumption of permissive use from shifting to a presumption of adverse use. *Id.*

¶ 8 We granted discretionary review. *Gamboa v. Clark*, 181 Wash.2d 1001, 332 P.3d 984 (2014).

ISSUE

*3 ¶ 9 Is there an initial presumption that a claimant's use of land is permissive in prescriptive easement cases?

ANALYSIS

¶ 10 The seminal case on prescriptive easements is *Northwest Cities*, 13 Wash.2d 75, 123 P.2d 771. In that case, we articulated a set of principles about prescriptive easements by looking to both our case law and scholarly texts. *See id.* at 82–86, 123 P.2d 771. Although we did not originally intend the principles to be a “compendium of the general law of easements,”*id.* at 88, 123 P.2d 771, we have reaffirmed many of those principles, calling them “fundamental propositions” that are “binding upon us.” *Roediger*, 26 Wash.2d at 706, 175 P.2d 669. The propositions relevant to this case are as follows.

[1] [2] ¶ 11 “Prescriptive rights ... are not favored in the law, since they necessarily work corresponding losses or forfeitures of the rights of other persons.”*Nw. Cities*, 13 Wash.2d at 83, 123 P.2d 771. To establish a prescriptive easement, the person claiming the easement must use another person's land for a period of 10 years and show that (1) he or she used the land in an “open” and “notorious” manner, (2) the use was “continuous” or “uninterrupted,” (3) the use occurred over “a uniform route,” (4) the use was “adverse” to the landowner, and (5) the use occurred “with the knowledge of such owner at a time when he was able in law to assert and enforce his rights.”*Id.* at 83, 85, 123 P.2d 771. Whether the Gamboas' use was adverse is the sole issue in this case.

[3] [4] [5] [6] ¶ 12 The claimant bears the burden of proving the elements of a prescriptive easement. *Id.* at 84, 123 P.2d 771. We review whether a claimant has established those elements as a mixed question of law and fact. *Petersen v. Port of Seattle*, 94 Wash.2d 479, 485, 618 P.2d 67 (1980). A trial court's factual findings are reviewed for abuse of discretion; a trial court's "conclusion that the facts, as found, constitute a prescriptive easement" is reviewed de novo. *Lee v. Lozier*, 88 Wash.App. 176, 181, 945 P.2d 214 (1997).

1. Adverse Use and the Presumption of Permissive Use

[7] [8] [9] ¶ 13 We generally interpret adverse use as meaning that the land use was without the landowner's permission. *See, e.g., Roediger*, 26 Wash.2d at 707, 175 P.2d 669. There is no requirement that the claimant believe he or she owns the property to establish adverse use—a claimant's subjective intent is irrelevant. *Dunbar v. Heinrich*, 95 Wash.2d 20, 27, 622 P.2d 812 (1980); *see Chaplin v. Sanders*, 100 Wash.2d 853, 860–61, 676 P.2d 431 (1984) (abandoning a subjective intent requirement to establish hostility, i.e., adversity, in adverse possession cases). That being said, we start with the presumption that when someone enters onto another's land, the person "does so with the true owner's permission and in subordination to the latter's title." *Nw. Cities*, 13 Wash.2d at 84, 123 P.2d 771. However, we have limited the presumption of permissive use to three factual scenarios. First, the presumption applies to cases involving unenclosed land. *See Roediger*, 26 Wash.2d at 710–11, 175 P.2d 669 (saying that "[i]f it be true that the lands are un[e]nclosed, the presumption is that the use was permissive, and, therefore, that no easement was acquired"). Second, the presumption applies to enclosed or developed land cases in which "it is reasonable to infer that the use was permitted by neighborly sufferance or acquiescence." *Id.* at 707, 175 P.2d 669. Third, the presumption applies when the evidence demonstrates that 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. The claimant may defeat the presumption of permissive use "when the facts and circumstances are such as to show that the user was adverse and hostile to the rights of the owner, or that the owner has indicated by some act his admission that the claimant has a right of easement." *Nw. Cities*, 13 Wash.2d at 87, 123 P.2d 771.

*4 ¶ 14 Our decision in *Roediger* used the word "impl[y]ing" permissive use interchangeably with the word "presumption" of permissive use, and it has caused confusion and led to a split in the Court of Appeals. 26 Wash.2d at 707–11, 175 P.2d 669. Division One has strictly limited the presumption of permissive use to vacant and unenclosed land cases—in all enclosed and developed land cases, it has held that courts may infer permission only if the record "support[s] a reasonable inference of permissive use." *Drake v. Smersh*, 122 Wash.App. 147, 153–54, 89 P.3d 726 (2004). Differently, in this case, Division Three broadly held that a presumption of permissive use applies to all cases, regardless of whether the land is enclosed or developed. *Gamboa*, 180 Wash.App. at 268, 321 P.3d 1236.

[10] [11] ¶ 15 The confusion over a use being implied or presumed permissive is compounded by another presumption rule from *Northwest Cities* in which a court can find a person's land use "permissive in its inception." 13 Wash.2d at 84, 123 P.2d 771. When a court finds a use "is permissive in its inception," it "cannot ripen into a prescriptive right, no matter how long it may continue, unless there has been a distinct and positive assertion by the dominant owner of a right hostile to the owner of the servient estate." *Id.* A land use is "permissive in its inception" when a landowner actually gives a claimant permission to use the land—the claimant's license to use the land can never ripen into a prescriptive right unless the user distinctly asserts that he or she is using the land as of right. *Bulkley v. Dunkin*, 131 Wash. 422, 425, 230 P. 429 (1924), *affd*, 236 P. 301 (1925). 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). This presumption is more difficult for claimants to rebut because it requires them to distinctly and positively assert a claim of right.

2. The Competing Presumption of Adverse Use

¶ 16 The Court of Appeals did not limit the presumption of permissive use to the factual scenarios discussed above. Instead, it found that an initial presumption of permissive use applies in *every* case and that a competing presumption of adverse use can potentially apply in every case. *Gamboa*, 180 Wash.App. at 267–68, 321 P.3d 1236. In *Northwest Cities*, we said that a

presumption of adverse use can be created when a claimant meets all of the elements of a prescriptive easement other than adverse use “unless otherwise explained.” 13 Wash.2d at 85, 123 P.2d 771. The Court of Appeals interpreted that language as saying that certain “explanations” or factual scenarios will prevent the shift from a use being presumed permissive to being presumed adverse. *Gamboa*, 180 Wash.App. at 267–68, 321 P.3d 1236. The three scenarios that the Court of Appeals stated would prevent this shift are the same three scenarios that prescribe the presumption of permissive use, as discussed above. *See id.* at 270–72, 321 P.3d 1236 (listing vacant and unenclosed land cases, cases where there is a reasonable inference of neighborly accommodation, and cases where the property at issue is a road constructed by the servient owner used in common with the claimant). However, in a later case, we questioned whether this competing presumption of adverse use is actually a “presumption.” *See Cuillier*, 57 Wash.2d at 627, 358 P.2d 958 (stating that “a more accurate statement” of the law is that there are “circumstance[s] from which an inference may be drawn that the use was adverse”). That discrepancy is an academic question in this case, and we leave it for another day. Here, we must determine whether there is a presumption of *permissive use* under our precedent.

3. An Initial Presumption of Permissive Use Applies to Enclosed or Developed Land Cases in Which There Is a Reasonable Inference of Neighborly Sufferance or Acquiescence

*5 [12] ¶ 17 We find that our case law, particularly our *Roediger* decision, and policy considerations support 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. In *Roediger*, a group of claimants sought a prescriptive easement to use a footpath over the land of beachfront homeowners on Vashon Island that they had used for roughly 30 years. 26 Wash.2d at 691–92, 700, 175 P.2d 669. The path was located between the beach and the homes. *Id.* at 692, 175 P.2d 669. The path was created by “neighborly usage,” and none of the persons claiming an easement had ever asked for or received permission to cross the property of the homeowners. *Id.* at 692, 697, 175 P.2d 669. We “suspect[ed] that all the properties involved in this case [were] un[e]nclosed,” but we did “not decide the case on that theory.” *Id.* at 710–11, 175 P.2d 669. We rejected a presumption of adverse use in this scenario, saying it “completely disregards the well-established rule that permissive use may be implied.” *Id.* at 707, 175 P.2d 669. We said that although the rule of inferring permissive use “has been chiefly applied in cases involving un[e]nclosed lands, ... it is applicable to any situation where it is reasonable to infer that the use was permitted by neighborly sufferance or acquiescence.” *Id.* That language about “inferring” or “implying” permission notwithstanding, we also said that there is a presumption of permissive use whenever there is a reasonable inference of neighborly accommodation. *Id.* at 711, 175 P.2d 669 (“where persons traveled the private road of a neighbor in conjunction with such neighbor and other persons, nothing further appearing, the law presumes such use was permissive, and the burden is on the party asserting a prescriptive right to show that his use was under claim of right and adverse to the owner of the land.” (quoting 2 GEORGE W. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 521, at 106 (perm. ed.1939))).

¶ 18 Considering the facts of the case, we went on to hold that the claimants' use was “permissive in its inception” because we found a reasonable inference that “the use of the pathway *arose out* of mutual neighborly acquiescence.” *Id.* at 713, 175 P.2d 669 (emphasis added). Because we deemed the use permissive in its inception, we applied the stronger presumption of permissive use, requiring the claimants to put forth evidence that they made a positive assertion that they claimed to use the path as of right. *Id.* at 713–14, 175 P.2d 669. We determined that the claimants failed to provide any evidence that they “ever made a positive assertion to the [landowners] ... that [they] claimed to use the path as of right,” and we therefore held that the claimants failed to show adverse use. *Id.* at 714, 175 P.2d 669.

¶ 19 We discussed policy considerations that uniformly supported applying a presumption of permissive use. We said,

“The law should, and does encourage acts of neighborly courtesy; a landowner *who quietly acquiesces* in the use of a path, or road, across his uncultivated land, resulting in no injury to him, but in great convenience to his neighbor, ought not to be held to have thereby lost his rights. It is only when the use of the path or road is clearly adverse to the owner of the land, and not an enjoyment of neighborly courtesy, that the landowner is called upon ‘to go to law’ to protect his rights.”

*6 *Id.* at 709, 175 P.2d 669 (quoting *Weaver v. Pitts*, 191 N.C. 747, 133 S.E. 2, 3 (1926)). Applying a presumption of permissive use incentivizes landowners to allow neighbors to use their roads for the neighbors' convenience. We do not want to require a landowner "to adopt a dog-in-the-manger attitude in order to protect his title to his property." *State ex rel. Shorett v. Blue Ridge Club, Inc.*, 22 Wash.2d 487, 495–96, 156 P.2d 667 (1945). Not applying a presumption of permissive use in these circumstances punishes a courteous neighbor by taking away his or her property right.

The Gamboas' Argument That the Presumption of Permissive Use Is Limited to Unenclosed Land Cases Under Roediger and Cuillier Is Incorrect

¶ 20 The Gamboas primarily rely on *Roediger* and *Cuillier* to support their argument that there is no presumption of permissive use in enclosed or developed land cases. They contend that permission or adversity is a question of fact for the trier of fact to infer from the circumstances of the case. However, they misinterpret the holdings from *Roediger* and *Cuillier*.

¶ 21 First, the Gamboas contend that *Roediger* did not apply the presumption of permissive use that is ordinarily applicable in vacant land cases, but rather held narrowly that a "use that is permissive in its inception cannot become adverse until 'a distinct and positive assertion of a right hostile to the owner' is 'brought home to [the servient owner].'" "Suppl. Br. of Pet'rs at 9 (alteration in original) (quoting *Roediger*, 26 Wash.2d at 714, 175 P.2d 669). They fail to recognize, though, that in *Roediger*, we also stated that there is a presumption of permissive use whenever there is a reasonable inference of neighborly accommodation. 26 Wash.2d at 711, 175 P.2d 669 (" 'where persons traveled the private road of a neighbor in conjunction with such neighbor and other persons, nothing further appearing, the law presumes such use was permissive, and the burden is on the party asserting a prescriptive right to show that his use was under claim of right and adverse to the owner of the land.' " (quoting THOMPSON,*supra*, § 521, at 106)). The "permissive in its inception" discussion occurred in the context of our finding that the evidence supported a reasonable inference that the land use *arose out of*, or resulted from, neighborly sufferance and acquiescence. *Id.* at 707, 713–14, 175 P.2d 669. That finding created a stronger presumption of permissive use than would be typical in neighbor accommodation cases. *See id.* Thus, the petitioners misinterpret *Roediger*—*Roediger* does not limit the presumption of permissive use to vacant and unenclosed land cases.

¶ 22 Second, the Gamboas' reliance on *Cuillier* is misguided. *Cuillier* does not limit the presumption of permissive use to unenclosed land cases—to the contrary, it recognizes an additional factual scenario in which the presumption of permissive use is appropriate. 57 Wash.2d at 627, 358 P.2d 958. *Cuillier* primarily limits the *competing presumption of adverse use*, and thus the main focus of *Cuillier* is irrelevant to this case. In *Cuillier*, the claimants wanted to use a landowner's orchard road. *Id.* at 625, 358 P.2d 958. The claimants argued that because they used the road for the prescriptive period without permission, "there was a presumption that their use was adverse and that the burden was then upon the owner to show the use was permissive." *Id.* at 626, 358 P.2d 958. We called the rule presuming adverse use into doubt, saying, "We think, however, a more accurate statement, based on the results and holdings in all of our cases, would be that such unchallenged use for the prescriptive period is a circumstance from which an inference may be drawn that the use was adverse." *Id.* at 627, 358 P.2d 958. However, we also recognized that there is a presumption of permissive use when the evidence demonstrates that the owner of the property created or maintained a road and his or her neighbor used the road in a noninterfering manner. ¹ *Id.* Thus, the core portion of *Cuillier* that is about "inferences" applies only to the competing presumption of adverse use and is irrelevant to this case. Further, *Cuillier* actually recognizes a scenario (in addition to unenclosed land cases) in which a presumption of permissive use is appropriate.

*7 ¶ 23 Thus, the petitioners misinterpret *Roediger* and *Cuillier*. We hold that an initial presumption of permissive use applies to enclosed or developed land cases in which there is a reasonable inference of neighborly sufferance or acquiescence.

4. The Evidence Supported a Reasonable Inference of Neighborly Sufferance or Acquiescence

[13] ¶ 24 What constitutes a reasonable inference of neighborly sufferance or acquiescence is a fairly low bar. As discussed above, we have cited the following as an example of a neighborly accommodation: " 'persons travel[ing] the private road of a neighbor in conjunction with such neighbor and other persons, nothing further appearing.' " *Roediger*, 26 Wash.2d at 711,

175 P.2d 669 (quoting THOMPSON,*supra*, § 521, at 106). Again, that case involved people using a private footpath over homeowners' beachfront property without express permission in conjunction with the homeowners. *Id.* at 691–92, 697–98, 175 P.2d 669. We inferred from those facts “no more than the usual accommodation between neighbors.” *Id.* at 712, 175 P.2d 669.

¶ 25 Here, there is a similar reasonable inference of the usual accommodation between neighbors. The trial court found that the Gamboas used the road as a driveway to access their home and that the Clarks used it to farm grapes. Both the Gamboas and Clarks “used the roadway as described above without any disputes until 2008. Each party was aware of the other's use of the roadway, but no one objected to the other's use until a dispute arose in 2008.”CP at 195. Like the example in *Roediger*, here the Gamboas and Clarks are neighbors and they used the road for their own purposes in conjunction with each other without incident. Thus, we find a reasonable inference of neighborly sufferance or acquiescence.

5. The Gamboas Failed To Overcome the Presumption of Permissive Use

[14] ¶ 26 As mentioned above, a claimant may defeat the presumption of permissive use when the facts demonstrate (1) “the user was adverse and hostile to the rights of the owner, or” (2) “the owner has indicated by some act his admission that the claimant has a right of easement.”*Nw. Cities*, 13 Wash.2d at 87, 123 P.2d 771 (citing THOMPSON,*supra*, § 523, at 111). For a claimant to show that land use is “adverse and hostile to the rights of the owner” in this context, the claimant must put forth evidence that he or she interfered with the owner's use of the land in some manner. *See id.* at 90–91, 123 P.2d 771 (finding that the claimant's direct predecessor's acts of laying out a “definite road across the premises” and regularly improving and maintaining the road were sufficient to indicate a hostile intent to the owner's rights and use of the property).

[15] ¶ 27 Here, the Gamboas cannot demonstrate either that they interfered with the Clarks' use of the driveway or that the Clarks indicated that the Gamboas had an easement over the driveway. The Gamboas' occasional blading of the road did not interfere with the Clarks' use of the road in any manner because the Clarks used the road as a road (to access their grape plants). Indeed, the trial court found that both parties “used the roadway ... without any disputes until 2008. Each party was aware of the other's use of the roadway, but no one objected to the other's use until a dispute arose in 2008.”CP at 195. The fact that the Gamboas thought they owned the road was irrelevant. *Dunbar*, 95 Wash.2d at 27, 622 P.2d 812. Thus, the Gamboas failed to overcome the presumption of permissive use because they did not demonstrate a use that was adverse and hostile to the rights of the Clarks, and they did not demonstrate that the Clarks indicated that they had an easement.

CONCLUSION

*8 ¶ 28 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. We find that the evidence supports a reasonable inference of neighborly sufferance or acquiescence because the Gamboas and Clarks both used the road for their own purposes in conjunction with each other without incident. The Gamboas failed to overcome the presumption of permissive use. Accordingly, the Gamboas failed to establish a prescriptive easement, and we affirm the Court of Appeals.

WE CONCUR: BARBARA A. MADSEN, Chief Justice, CHARLES W. JOHNSON, MARY E. FAIRHURST, DEBRA L. STEPHENS, CHARLES K. WIGGINS, STEVEN C. GONZ[LEZ, SHERYL GORDON McCLOUD, and MARY I. YU, Justices.

¹ Unlike the Court of Appeals below, we do not find that this presumption from *Cuillier* applies to this case. Here, the record does not demonstrate that the Clarks or their predecessor (the Slouins) created or maintained the gravel road. The road preexisted both the Clarks and Gamboas coming to the property.

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17 Wash. Prac., Real Estate § 8.1 (2d ed.)

Washington Practice Series TM

Real Estate: Property Law

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Chapter 8. Adverse Possession and Related Doctrines

§ 8.1. Introduction

West's Key Number Digest

West's Key Number Digest, Adverse Possession ¶1 to 13

Legal Encyclopedias

C.J.S., Adverse Possession §§ 2 to 29

C.J.S., Adverse Possession § 213

C.J.S., Adverse Possession §§ 327 to 328

C.J.S., Adverse Possession § 331

C.J.S., Conflict of Laws § 76

Washington's law of adverse possession will consume the large bulk of the chapter. That part of the chapter will be based upon Stoebuck, *The Law of Adverse Possession in Washington*, which was published in the *Washington Law Review* back in 1960.¹ Reference to the article may be useful, as it contains some older citations and some historical detail that will not be included here. It is an interesting and humbling experience to return after more than 40 years to one's first lead article, begun as a law student and published after less than a year in practice. The propositions of law in the article were accurate when written and still hold good in Washington law today, only a few details having changed, with one major exception. That major exception is in the important area of states of mind (subjective intent), where the Washington State Supreme Court finally brought a sweeping change for the better in its 1984 decision in *Chaplin v. Sanders*.² And yet, though the 1960 article is *accurate*, it is not the article its author would write today. Thirty years of practice, writing, teaching, and speaking on the subject of adverse possession have wrought many changes in his *thinking about* adverse possession, about the policies behind it, about analysis, about its very nature. As a result, this chapter explains things in a different way than did the article; even its organization is quite different. The author has changed more than the law has.

At the end of this chapter, following the subject of adverse possession, several sections will be devoted to some other doctrines that serve the same purpose as adverse possession usually does, to settle disputed land boundaries. These doctrines, four in number, are usually called "parol agreement," "acquiescence," "estoppel," and "common grantor." They are not well understood or defined in decisions of Washington courts or American courts generally. They tend to overlap each other. But they also tend to be available in just those situations in which adverse possession theory will not work. For instance, one owner's permission to a neighbor to occupy a portion of his land will prevent the neighbor's possession from being adverse, but the permission given will, if certain other facts are present, tend to feed one or more of the other theories. Thus, the four doctrines to be discussed at the end of the chapter should be thought of, and used in practice, as alternative doctrines to adverse possession to settle boundaries.

A person who is in "adverse possession" of another's land for the period of limitations on actions to recover land will acquire a new, original estate that is the same as the present possessory estate that existed when the adverse possession began. That present possessory estate is extinguished; it is not transferred to the adverse possessor. "Adverse" possession is wrongful possession; possession with the owner's consent is not wrongful. Thus, the doctrine of adverse possession allows a person to gain a right, a legal title, through certain acts only if those acts are wrongful, leading to the popular notion that adverse possession is legalized thievery. What strong policies can justify such an unusual and violent result? Adverse possession, like statutes of limitation, is a doctrine of repose; it says that at some point legal titles should be made to conform to appearances long maintained on the ground. Suppose there were no doctrine of adverse possession. There would still be a statute of

limitations on actions to recover land, as there are on every kind of civil action. Suppose the statute ran against a given owner's action to recover land from a trespasser. Without the doctrine of adverse possession, the owner's action to recover the disputed area would still be barred. How good would the owner's title, still technically surviving, be?³ Would anyone pay good money for it; would it be "marketable title"? What about the rights of third persons, such as mortgagees, who may have built up expectations based upon the apparent ownership of the disputed area? On balance, is it not better to have the title settled in the adverse possessor? Would critics of adverse possession be mollified if the statute of limitations were 20 years instead of ten? How about 50 years? Most criticisms of adverse possession, if scrutinized, probably are not so much against the gaining of title as of the length of time required to gain it.

There is another explanation for adverse possession title that, though highly technical and theoretical, has a basis in history. Adverse possession speaks of a time of misty memory, in the dawn of English legal history, when our present concepts of title and possession were not clearly separated in thought. What is title or ownership but that right of possession which our courts will protect against everyone in the world? We know that even today a person may become the owner of an unowned chattel, such as a wild animal, by taking possession of it. Was original possession of land not the origin of title in the law's theoretical Garden of Eden? A wrongful possessor of land or chattels, who has taken them from the hand of the true owner, has rightful and legally protected possession against everyone but the true owner. This is the doctrine known historically as "relativity of seisin." The point is that mere possession, rightful or wrongful, is a kind of title, a "shadow title," we might call it. Mere possession is something quite substantial, not only of value to the possessor, but also worth something in our thinking about adverse possession title. It is both theoretically correct and practically useful to think of an adverse possessor as having "inchoate title" until the statute runs out and then as having "perfected title," phrases that will be used here freely. Adverse possession and prescriptive acquisition of easements, which was covered in section 2.7 of chapter 2, are connected subjects. Today it is accurate for nearly all purposes to say that they are the same doctrine, except in one case the adverse claimant has possession, and in the other he makes only use of the land. But it was not always so. Prescriptive acquisition of "incorporeal hereditaments," meaning easements and related rights such as "commons," was known very early in English law. At the beginning, they could be acquired by "long and peaceable" use. Gradually the quoted phrase was fleshed out, to read something like our modern incantation for both adverse possession and prescription, "actual, open, notorious, hostile, continuous, and exclusive." However, the doctrine of prescription for incorporeal interests was not applied to the acquisition of estates in land, nor was the phrase "adverse possession" used, until 1757. Apparently, title to land could be obtained simply by running out the statutes of limitations on all actions to recover land, for a 1699 English decision, which seemed to be applying established law, said and held that title could be so acquired.⁴ Finally, in 1757 *Taylor ex dem. Atkyns v. Horde*, using the phrase "adverse possession," imported the elements of "actual, open, notorious," etc., from the law of prescription into the law governing acquisition of title.⁵ Thus, our modern law of adverse possession has borrowed heavily from the ancient law of prescription, not the other way around. In America, the doctrines of prescription and adverse possession have become so blended as to be nearly the same, as just stated.⁶

To think about adverse possession, one needs to think first of its two principal aspects or divisions. First, there must be a statute of limitations on actions to recover land. In Washington the general statute of limitations is RCWA 4.16.020, which provides that no action to recover possession of land may be brought unless the plaintiff or his predecessor was seised or possessed of the land within ten years before the action was commenced. It is simply a statute of limitations, saying nothing about the elements of adverse possession, and this is true of most American statutes of limitations on actions to recover land. Some statutes do more or less supply adverse possession elements; usually they add elements to the common law ones. In Washington, for instance, RCWA 7.28.070 allows an adverse possessor to gain title in seven years if he has color of title in good faith and has paid taxes. Generally, however, the doctrine of adverse possession, the second aspect or division of the subject, is a common law doctrine, supplied by judicial decisions; it is a kind of judicial gloss on the statute of limitations. It is technically possible, though quite rare, for a trespasser to run the statute of limitations and not to be in adverse possession. This can occur if a trespasser occupies another's land in some way that is not "open and notorious," such as possessing a cave deep underground with no clue to the trespasser's presence.⁷ In this chapter, as in all discussions of adverse possession, little time and space is spent discussing statutes of limitations and much in discussing the judicial doctrine.

As to organization, the discussion of adverse possession will first take up the three Washington statutes of limitation and related matters, such as tolling. Then we will cover several general matters, such as persons who may gain title by adverse

§ 8.1.Introduction, 17 Wash. Prac., Real Estate § 8.1 (2d ed.)

possession and entities against whom title may not be so gained. Remaining sections, the bulk of our discussion, will be organized under headings that are taken from a typical judicial recitation of the elements of adverse possession: (1) actual; (2) open and notorious; (3) hostile, including claim of right, states of mind (intent), and good faith; (4) uninterrupted (continuous); and (5) exclusive.⁸

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1 Stoebeck, *The Law of Adverse Possession in Washington*, 35 Wash. L. Rev. 53 (1960) [hereinafter cited as “Adverse Possession in Washington”].

2 Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984).

3 Even this question may concede too much. Does the running of a statute of limitations merely bar the plaintiff's cause of action, or does it also bar the plaintiff's legal right? May a legal right exist if there is no legal remedy? This is a profound jurisprudential question, upon which there is endless debate. If one chose to say that the running of the statute of limitations barred the disseised owner's title but did not create a new title in the disseisor, would that be a desirable result, to have an area of land unowned? Our law admits of no unowned land; if the owner of the fee simple dies intestate without heirs, the land escheats to the state.

4 Stokes v. Berry, 2 Salk. 421, 91 Eng. Rep. 366 (K.B. 1699).

5 1 Burr. 60, 97 Eng.Rep. 190 (K.B. 1757).

6 For more on the history of prescription and adverse possession, see Stoebeck, *The Fiction of Presumed Grant*, 15 Kan. L. Rev. 17 (1966).

7 See Marengo Cave Co. v. Ross, 212 Ind. 624, 10 N.E.2d 917 (1937) (cave); City of Houston v. Church, 554 S.W.2d 242 (Tex.Civ.App.1977) (underground pipeline).

8 For a current recitation of these elements, in different order from the list in text, see ITT Rayonier, Inc., v. Bell, 112 Wn.2d 754, 774 P.2d 6 (1989). “Claim of right” and “good faith” were not listed in ITT Rayonier v. Bell, but one or both of them sometimes are. See, e.g., Chaplin v. Sanders, 100 Wn.2d 853, 857, 676 P.2d 431 (1984). The significance of the various words and phrases is mostly what this chapter is about.

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