

69174-1

691741

No. 691741-I

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

ANNE WHYTE,
a married person on behalf of her marital community,

Appellant/Plaintiff,

v.

CHRISTOPHER JACK and PETRA JENNINGS,
and their respective marital community,

Respondents/Defendants.

APPELLANT ANNE WHYTE'S OPENING BRIEF

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ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR	4
III.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	4
IV.	STATEMENT OF THE CASE.....	5
	A. The Parcels.....	5
	B. The Reciprocal Easements and the Driveway	6
	C. The Use of the Driveway by Whyte’s Predecessor, including the Portion Located Exclusively on the Jack Parcel	7
	D. The Use of the “9-Foot Teardrop” Within the “Bulb” by Whyte’s Predecessor	8
	E. The Genesis of the Current Dispute.....	10
	F. Summary Judgment as to Whyte’s Claim for Prescriptive Easement Should Have Been Denied	11
	G. Summary Judgment as to Whyte’s Claim for Adverse Possession Should Have Been Denied.....	12
V.	ARGUMENT AND AUTHORITY	14
	A. Standard of Review.....	14
	B. The Record Does Not Support an Inference of Permissive Use of the Driveway Required to Defeat Whyte’s Claim for Prescriptive Easement	15
	1. There is No Presumption of Permission in Washington Prescriptive Easement Cases Involving Developed Land	15
	2. Use of a Commonly Constructed, Shared Driveway Which is the Sole Means of Access to a Parcel is Indicative of Adversity in Claims for Prescriptive Easement.....	17

3. The Trial Court Erred When it Disregarded Genuine Issues of Material Fact Regarding Use of the Driveway.....	19
C. The Trial Court Erred in Concluding that Whyte Had Not Established Hostility Over the 9-Foot Teardrop for Purposes of her Claim for Adverse Possession.....	22
1. Whyte Proved Hostile Possession of the 9-Foot Teardrop	22
2. Washington Does Not Require the Dominant Estate Holder to Meet a Higher Burden of Proof to Establish Adverse Possession	25
3. Use of the 9-Foot Teardrop by Whyte’s Predecessor Was Outside the Scope of the JUMAE.....	28
D. The Judgment in Favor of Jack Should be Reversed.....	31
E. Whyte is Entitled to Statutory Attorneys’ Fees and Reasonable Expenses	31
VI. CONCLUSION.....	31

TABLE OF AUTHORITIES

Cases

Atherton Condo. Apartment–Owners Assoc. Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 799 P.2d 250 (1990).....	14
Beebe v. Swerda, 58 Wn. App. 375, 793 P.2d 442 (1990).....	27
Brown v. Voss, 105 Wn.2d 366, 715 P.2d 514 (1986).....	29
Chaplin v. Sanders, 100 Wn. 2d 853, 676 P.2d 431(1984).....	23
City of Seattle v. Nazarenus, 60 Wn.2d 657, 374 P.2d 1014 (1962).....	29
Cole v. Laverty, 112 Wn. App. 180, 49 P.3d 924 (2002).....	25, 26, 27
Cuillier v. Coffin, 57 Wn.2d 624, 358 P.2d 958 (1961).....	16
Drake v. Smersh, 122 Wn. App. 147, 89 P.3d 726 (2004).....	16, 17, 18, 19
Dunbar v. Heinrich, 95 Wn.2d 20, 622 P.2d 812 (1980).....	15
Herrin v. O’Hern, 168 Wn. App. 305, 275 P.3d 1231(2012).....	23
Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 93 P.3d 108 (2004).....	14
Howell v. King County, 16 Wn.2d 557, 134 P.2d 80 (1943).....	25
ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 774 P.2d 6 (1989).....	22
Kunkel v. Fisher, 106 Wn. App. 599, 23 P.3d 1128 (2001).....	19
Lilly v. Lynch, 88 Wn. App. 306, 945 P.2d 727 (1997).....	14

Lingvall v. Bartmess, 97 Wn. App. 245, 982 P.2d 690 (1999).....	18
Logan v. Brodrick, 29 Wn. App. 796, 631 P.2d 429 (1981).....	30
Lowe v. Double L Properties, Inc., 105 Wn. App. 888, 20 P.3d 500 (2001).....	29
Maier v. Giske, 154 Wn. App. 6, 223 P.3d 1265, 1272 (2010).....	24
Malnati v. Ramstead, 50 Wn.2d 105, 309 P.2d 754 (1957).....	16
Meshner v. Connolly, 63 Wn.2d 552, 388 P.2d 144 (1964).....	23
Miller v. Jarman, 2 Wn. App. 994, 471 P.2d 704, review denied, 78 Wn.2d 995 (1970).....	17, 19
Morin v. Harrell, 161 Wn.2d 226, 230, 164 P.3d 495 (2007).....	14
Shelton v. Strickland, 106 Wn. App. 45, 21 P.3d 1179 (2001).....	22
Smith v. Breen, 26 Wn. App. 802, 614 P.2d 671 (1980).....	18
Snyder v. Haynes, 152 Wn. App. 774, 217 P.3d 787 (2009).....	30
Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 73 P.3d 369 (2003).....	28, 29
Veach v. Culp, 92 Wn.2d 570, 599 P.2d 526 (1979).....	28
Washburn v. Esser, 9 Wn. App. 169, 511 P.2d 1387 (1973).....	15, 18
Wood v. Nelson, 57 Wn.2d 539, 358 P.2d 312 (1961).....	24
Zobrist v. Culp, 95 Wn.2d 556, 627 P.2d 1308 (1981).....	29

Statutes

RCW 4.16.020 22

Other Authorities

17 Wash. Prac., Real Estate § 2.9 (2d ed.)..... 29

Rules

CR 56(c)..... 14
RAP 14.2..... 31
RAP 14.3..... 31

I. INTRODUCTION

In 1972, owners of adjoining residential parcels together created reciprocal easements, recorded in a Declaration of Joint Use Maintenance Agreement and Easement (“JUMAE”), for the construction and use of a shared driveway for the parcels. (CP 35-36.) Though the owners constructed the driveway (the “Driveway”), its dimensions do not mirror the area covered by the reciprocal easements. Instead, the Driveway curves to the south, so that the east end of the Driveway is located on only one parcel, the “Jack Parcel,” which is currently owned by Respondents Christopher Jack and Petra Jennings (collectively, “Jack”).

The Driveway serves as the sole means of access to the Jack Parcel. It is also the sole means of access to the north parcel, the “Whyte Parcel,” currently owned by Appellant Anne Whyte (“Whyte”). For more than three decades, residents of both parcels used the Driveway without incident. Specifically, residents of the Whyte Parcel drove over the portion of the Driveway located outside of the easements, and exclusively on the Jack Parcel, without seeking or obtaining permission. (CP 157, 161 (in yellow), 163, 246 (in yellow).) That unrestricted use ended in 2010 when Jack purchased the Jack Parcel and built a concrete barrier (the

“Barrier”) that reduced Whyte’s access to six feet, an insufficient area and turning radius for vehicles, particularly larger cars and trucks. (CP 188, 190, 191, 248.)

In addition to excluding Whyte from adequate use of the Driveway, Jack hired an excavation company to move a teardrop-shaped area nine feet in width (the “9-Foot Teardrop”) that was part of a rockery that had been in place since 1975 (the “Bulb”), located to the north of the Driveway, next to the home on the Whyte Parcel. (CP 157, 159, 161 (9-Foot Teardrop in green), 244, 246 (9-Foot Teardrop in green).) In doing so, Jack removed decades-old landscaping, replacing it with loose gravel, and destroyed the irrigation system that had been in place on the Whyte Parcel for decades.

Whyte initiated litigation, seeking claims for declaratory judgment, prescriptive easement, damage to property, adverse possession, and trespass with respect to the use of the Driveway and regarding ownership and trespass over the Bulb. Trial was scheduled to begin on July 23, 2012. Unfortunately, the dispute never went to trial. Relying on an improper interpretation of Washington law, Jack argued that Washington presumes permission in prescriptive easement cases and moved for summary judgment on that erroneous basis. Though Jack presented no factual

support whatsoever for its faulty argument, in response, Whyte offered copious evidence of the type that Washington courts have routinely held as evidence of adverse use. Despite the genuine issues of material fact raised by Whyte's evidence, the trial court granted Jack's motion and dismissed Whyte's prescriptive easement claim.

Jack also moved to dismiss Whyte's claim for adverse possession, mistakenly claiming that because Whyte seeks to adversely possess an express easement granted by the owners of the Jack Parcel in 1972, Whyte must establish a heightened level of hostility. In addition, Jack wrongly argued that the language in the JUMAE permitted Whyte's use of the 9-Foot Teardrop, thereby precluding adverse possession, even though the JUMAE's plain language is limited to roadway and utilities use, which does not include provisions for use as a rockery or garden. Despite the errors in Jack's motion, the trial court disregarded persuasive facts that establish hostile use of the 9-Foot Teardrop within the Bulb and dismissed Whyte's claims for adverse possession, terminating Whyte's case.

Whyte timely appealed. Subsequently, the trial court entered judgment for Jack in the amount of \$350.00.

II. ASSIGNMENTS OF ERROR

1. The trial court's "Order Granting Defendant's Motion for Summary Judgment" dated July 13, 2012 as to Whyte's prescriptive easement claim was in error.

2. The trial court's "Order Granting Defendant's Motion for Summary Judgment" dated July 13, 2012 as to Whyte's adverse possession claim was in error.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err when it inferred permissive use where the record lacks evidence that Jack's predecessors objected to the use of the Driveway, where the record lacks evidence that Whyte's predecessor ever asked for permission to use the Driveway, where the original owners created the Driveway jointly as the sole access to the Whyte Parcel, and where Whyte's predecessor used the Driveway without incident for over three decades? (Assignment 1)

2. Did the trial court err when it disregarded genuine issues of material fact surrounding Whyte's claim for hostile possession of the 9-Foot Teardrop? (Assignment 2)

3. Must Whyte, a dominant estate holder claiming to adversely possess an easement, meet a heightened standard for hostility

required of a servient estate holder who seeks to adversely possess an easement? (Assignment 2)

4. Where Whyte's predecessor exceeded the scope of the JUMAE for decades, can Jack rely on the language in the JUMAE, which is limited to use as a roadway and for utilities, to defeat Whyte's adverse possession claim? (Assignment 2)

5. Should the judgment against Whyte be reversed?
(Assignments 1 and 2)

6. Is Whyte entitled to statutory attorneys' fees and reasonable expenses as the prevailing party? (Assignments 1 and 2)

IV. STATEMENT OF THE CASE

A. The Parcels

In 2003, Whyte purchased from June Skidmore the Whyte Parcel, a single-family residence located at 6730 West Mercer Way, Mercer Island, Washington. (CP 1.) Ms. Skidmore and her family ("Skidmore") owned and resided at the Whyte Parcel from 1975 to 2003. (CP 122.) Prior to Skidmore, Paul and Carlye Teel ("Teel") owned the Whyte Parcel. (CP 35-36.)

Jack owns the Jack Parcel, a single-family residence located to the south of the Whyte Parcel, at 6740 West Mercer Way. (CP 1, 68.) Jack

purchased the Jack Parcel in June 2010 from Michael and Mehri Moore (“Moore”), who resided at the Jack Parcel from 1990 through 2010. (CP 150-51). Moore purchased the Jack Parcel from James and Carol Gingrich (“Gingrich”), who purchased the Jack Parcel from J. Erik and Ellen Skugstad (“Skugstad”), in 1986. (CP 153-55.) Prior to Skugstad, Charles and Susan Christenson (“Christenson”) owned the Jack Parcel. (CP 35-36.)

B. The Reciprocal Easements and the Driveway

The Whyte Parcel and the Jack Parcel (collectively, the “Parcels”) share a common boundary. (CP 2.) In 1972, the then-owner of the Jack Parcel, Christenson, created an easement for the benefit of the then-owner of the Whyte Parcel and their successors “for the construction, improvement, repair and maintenance for roadway and utilities over, across or upon the North 15 feet” of the Jack Parcel (the “Whyte Driveway Easement”). (CP 35-6.)

The then-owner of the Whyte Parcel, Teel, reciprocated Christenson’s actions and created an easement for the benefit of Christenson and their successors “for the construction, improvement, repair and maintenance for roadway and utilities over, across or upon the South 15 feet” of the Whyte Parcel (the “Jack Driveway Easement”). Id.

Christenson and Teel documented their reciprocal easements in the JUMAE, a Declaration of Joint Use Maintenance Agreement and Easement dated August 30, 1972 and recorded the same year under King County Recording No. 7212070079 . Id. After recording the Driveway Easement in 1972, the then-owners of the Parcels constructed homes on each Parcel. (CP 2.) They also built the Driveway. Id. The dimensions of the Driveway do not mirror the area covered by the reciprocal easements. (CP 3, ¶ 3.11; CP 157.) Instead, the Driveway curves to the South, and as a result, the east end of the Driveway is located entirely on the Jack Parcel. (CP 157, 161 (in yellow), 163).

The Driveway is the sole means of ingress and egress to both Parcels. (CP 157, 188.)

C. The Use of the Driveway by Whyte’s Predecessor, Including the Portion Located Exclusively on the Jack Parcel

When Whyte’s predecessor, Skidmore, bought the Whyte Parcel in 1975, the Driveway was already there. (CP 122, 124.) From 1975 until June Skidmore moved in 2003, the Skidmore family continuously drove over a portion of the paved area outside of the Whyte Driveway Easement — exclusively on the Jack Parcel — for ingress and egress. (CP 135-40, 141-43, 157, 161 (in yellow), 163. 246 (in yellow).) Specifically, Mr.

Skidmore drove every day to and from his job at Boeing, and Ms. Skidmore and her children also frequently drove. (CP 133-34.)

Each member of the Skidmore family employed one of two methods for backing out of their garage and parking areas. (CP 138.) Under the first method, the Skidmores backed directly toward the Jack Parcel onto an area outside of the Whyte Driveway Easement, exclusively on the Jack Parcel. Id. Under the second method, the Skidmores backed to the East of the Driveway into a turnaround area located outside of the Whyte Driveway Easement, exclusively on the Jack Parcel. Id. Whether entering or exiting the Driveway to access the Whyte Parcel, the Skidmores had plenty of room to maneuver their vehicles. Id.

During the 28 years that Skidmore used the Driveway as the sole access to the Whyte Parcel, Skidmore never asked permission to use the paved areas outside of the Whyte Driveway Easement, whether of Moore, Gingrich, or Skugstad, the owners of the Jack Parcel during Skidmore's time at the Whyte Parcel. (CP 144.)

D. The Use of the "9-Foot Teardrop" Within the "Bulb" by Whyte's Predecessor

When Whyte's predecessor, Skidmore, purchased the Whyte Parcel, there was no landscaping. (CP 123.) Skidmore immediately

installed large rocks to the North of the Driveway. (CP 124-26.) Within the rockery, Skidmore planted a garden, with ground cover, grass, and bushes (the “Bulb”). Id. A portion of the Bulb — approximately nine feet at its widest, and with a teardrop shape (the “9-Foot Teardrop”) — fell squarely within the Jack Parcel. (CP 157, 159, 161 (9-Foot Teardrop in green), 244, 246 (9-Foot Teardrop depicted in green)). The 9-Foot Teardrop also encompassed nine of 15 feet of the Whyte Driveway Easement, leaving only six feet for the Easement’s intended use as a roadway. (CP 3 at ¶ 3.11, 161, 246).

Skidmore did not ask permission of Skugstad, Gingrich, or Moore to build or maintain a rockery within the 9-Foot Teardrop. (CP 130-32.) Through the years, Skidmore added rhododendron, may have added azalea, and installed a sprinkler system in the Bulb. (CP 126-28, 145-46.) Skidmore believed the Bulb, including the 9-Foot Teardrop, was hers. (CP 129-30.) To Ms. Skidmore, it was obvious during her 28 years at the Whyte Parcel that she owned the Bulb because it was on the North side, the “correct side,” of the Driveway, and because it was right next to her house. Id.

E. The Genesis of the Current Dispute

For the first few years at the Whyte Parcel, Whyte got along fine with the then-owner of the Jack Parcel, Moore. (CP 168-69.) The relationship deteriorated, in part, when in 2006 Moore challenged Whyte's use of any portion of the Driveway outside of the Whyte Driveway Easement and Whyte ignored Moore's directives. (CP 46.)

When Jack purchased the Jack Parcel in June 2010, he succeeded in excluding Whyte from using the portion of the Driveway outside of the Whyte Driveway Easement when he constructed an east-west 18-inch concrete Barrier just over the south boundary of the Whyte Driveway Easement. (CP 184, 188, 190-91.) Around the same time, Jack hired an excavation company to move the large rocks that had been in place within the 9-Foot Teardrop since 1975 and removed decades-old landscaping, replacing both with loose gravel. (CP 180-81, 186.) In the process, Jack also destroyed the irrigation system that had been in place for decades within the Bulb. (CP 171.)

As a result of Jack's actions, vehicle access to the Whyte Parcel is limited to six feet of pavement and a few feet of loose gravel. (CP 194.)

F. Summary Judgment as to Whyte's Claim for Prescriptive Easement Should Have Been Denied

On June 8, 2012, Jack moved for summary judgment, asking that the trial court dismiss Whyte's claims for prescriptive easement and adverse possession, arguing that Whyte had not established the elements of adverse and hostile use. (CP 22, 26.)

As to Whyte's claim for prescriptive easement, Jack argued that Whyte could not establish adverse use based on Jack's erroneous belief that Whyte must first overcome a presumption of permission. (CP 26-28.) In response, Whyte offered evidence that the original parties constructed the Driveway to be shared by owners of the Whyte Parcel and the Jack Parcel. (CP 97.) In addition, Whyte's predecessor, June Skidmore, testified that not only did she use the Driveway for 28 years, but she never requested permission to use the Driveway, which was her only access to the Whyte Parcel. (CP 99.) Indeed, for 28 years, there is no record of any challenge to her use. Finally, while Whyte noted that courts may imply permission in certain scenarios, the facts in this case do not support such an inference. (CP 107-09.)

Nonetheless, the trial court granted Jack's motion for summary judgment based on a fleeting reference in June Skidmore's deposition to a

friendship with one of Jack's predecessors who lived at the Jack Parcel from 1975 through 1986 despite little evidence that their friendship had any bearing on Skidmore's use of the Driveway. (CP 48, 240-41.) Indeed, with respect to discussions with Skugstad regarding the Driveway, Ms. Skidmore testified that the issue "never came up" because "they both used it." (CP 144.) Finally, absent from the record is any evidence of Ms. Skidmore's relationship with the next two owners of the Jack Parcel, who collectively owned the Jack Parcel from 1987 through 2010 when Jack purchased the Jack Parcel and built the Barrier. (CP 121-46, 235-39.)

As argued herein, Whyte introduced genuine issues of material fact in response to Jack's erroneous claim that he was entitled to summary judgment as a matter of law. Those facts support Whyte's claim of adverse use, thereby calling into question the trial court's decision that reasonable persons could reach one conclusion.

G. Summary Judgment as to Whyte's Claim for Adverse Possession Should Have Been Denied

As to Whyte's claim for adverse possession, Jack claimed he is entitled to summary judgment based on Whyte's use of the 9-Foot Teardrop, ignoring entirely facts that describe 28 years of use by Whyte's predecessor, Skidmore. Specifically, Jack failed to cite any of June

Skidmore's testimony, including that Skidmore constructed a rockery in the 1970's which stayed in place until Jack hired excavators to move it in 2010. Based on limited facts only, Jack argued erroneously that Whyte, a dominant estate holder, must meet the heightened proof of hostility required of a servient estate seeking to adversely possess an easement. (CP 22-26, 105-06.) Finally, Jack inappropriately interpreted language in the JUMAE to argue that Whyte's use was not hostile, even though the scope of use under the JUMAE is limited to roadway and utilities, not the creation and maintenance of rockeries and other landscaping mechanisms. (CP 22-26, 35-36, 105.) Based on these arguments, and disregarding the type of landscaping activities that Washington courts have routinely upheld as hostile, the trial court granted Jack's motion for summary judgment dismissing Whyte's adverse possession claim. (CP 24-41.)

As a result of the trial court's order granting summary judgment, Whyte's case ended and Whyte timely initiated this appeal. (CP 254.) Subsequently, the trial court entered judgment for Jack in the amount of \$350.00. Appendix A.

V. ARGUMENT AND AUTHORITY

A. Standard of Review

The Court reviews summary judgment orders de novo, performing the same inquiry as the superior court. Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860, 93 P.3d 108 (2004). The superior court properly grants summary judgment only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Morin v. Harrell, 161 Wn.2d 226, 230, 164 P.3d 495 (2007) (citing CR 56(c)).

It is the moving party's burden to demonstrate that summary judgment is proper. Atherton Condo. Apartment-Owners Assoc. Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). This Court will consider all the facts submitted and the reasonable inferences from them in the light most favorable to the nonmoving party. Id. Any doubts about the existence of a genuine issue of material fact are resolved against the party moving for summary judgment. Id. (emphasis added). "Summary judgment is appropriate only if, from all the evidence, reasonable persons could reach but one conclusion." Lilly v. Lynch, 88 Wn. App. 306, 312, 945 P.2d 727 (1997).

B. The Record Does Not Support an Inference of Permissive Use of the Driveway Required to Defeat Whyte's Claim for Prescriptive Easement

Because the facts in this case do not support a reasonable inference of permissive use and there are sufficient facts in the record supporting that Whyte's use was adverse, the trial court erred when it concluded that reasonable persons could reach but one conclusion and granted Jack's motion for summary judgment.

1. There is No Presumption of Permission in Washington Prescriptive Easement Cases Involving Developed Land

A prescriptive easement is established by showing: (1) use adverse to the right of the servient owner, (2) open, notorious, continuous, and uninterrupted use for 10 years, and (3) knowledge of such use by the owner at a time when he was able to assert and enforce his rights. Dunbar v. Heinrich, 95 Wn.2d 20, 22, 622 P.2d 812 (1980). A claimant may assert a prescriptive easement claim as successor-in-interest to prescriptive rights established by claimant's predecessor-in-interest. Washburn v. Esser, 9 Wn. App. 169, 511 P.2d 1387 (1973). "A party can establish a prescriptive right even though the owner of the servient estate and others who wanted to go on the property also used it, so long as the claimant exercises and claims his right independent of others." Drake v. Smersh,

122 Wn. App. 147, 15-52, 89 P.3d 726 (2004).

Adverse use means “use of property as the owner himself would exercise, entirely disregarding the claims of others, asking permission from no one, and using the property under a claim of right.” Malnati v. Ramstead, 50 Wn.2d 105, 108, 309 P.2d 754 (1957). In Washington, no presumptions exist surrounding use on developed lands. In other words, courts will neither presume adversity, nor permission. Drake, 122 Wn. App. at 154. Rather, an adverse claimant’s proof that her use has been unchallenged for the prescriptive period “is a circumstance from which an inference may be drawn that the use was adverse.” Cuillier v. Coffin, 57 Wn.2d 624, 627, 358 P.2d 958 (1961).

The inference of adversity may be overcome in certain circumstances. For example, “when the facts in a case support an inference that use was permitted by neighborly sufferance or accommodation, a court may imply that use was permissive and accordingly conclude the claimant has not established the adverse element of prescriptive easements.” Drake, 122 Wn. App. at 154 (emphasis added). However, whether use is adverse or permissive is a question of fact. Id. at 152.

2. Use of a Commonly Constructed, Shared Driveway Which is the Sole Means of Access to a Parcel is Indicative of Adversity in Claims for Prescriptive Easement

In considering the facts of a case to determine whether use is adverse or permissive, the trial court is required to examine all of the circumstances. Miller v. Jarman, 2 Wn. App. 994, 997, 471 P.2d 704, review denied, 78 Wn.2d 995 (1970). In Washington, use of a shared driveway which is the sole means of access to a parcel signifies adversity. The same has been found for roadways constructed jointly for reciprocal use by adjoining parcels. Both circumstances exist here, but the trial court disregarded each one. Because the use by Whyte's predecessor, June Skidmore, represents genuine issues of material fact, the trial court erred in granting Jack's motion for summary judgment.

The fact that a driveway across another's property provides the sole means of access to a parcel is indicative that use of that driveway is hostile. See, e.g., Drake, 122 Wn. App. at 154. In Drake, this Court considered whether the trial court correctly found no evidence to support a reasonable inference of permissive use, such as to rebut the presumption of hostility in a prescriptive easement case involving a shared driveway. Id. In affirming the trial court's decision, the Drake Court concluded there

was no basis on which a court could reasonably infer that claimant's use was permitted by neighborly sufferance or acquiescence. Id. at 155-56. In addition to the fact that the claimant did not ask for, or receive, permission to use the driveway, a compelling factor in Drake was that the driveway in question was the sole means of access to the property. Id. at 154. See also Lingvall v. Bartmess, 97 Wn. App. 245, 253, 982 P.2d 690 (1999) (affirming prescriptive easement where claimant and her tenant's regular and continuous use of a driveway for ingress and egress as sole means of access was notice to the world that she used the driveway under a claim of right).

Washington courts have also held that where parties jointly construct a roadway that benefits and burdens each other's land, such use is adverse. See Washburn, 9 Wn. App. at 173 (affirming trial court's finding that original owners and their successors in interest had acquired an easement by prescription for ingress and egress on the existing road); see also Smith v. Breen, 26 Wn. App. 802, 805-06, 614 P.2d 671 (1980) (affirming trial court's finding of prescriptive easement over shared roadway that was intended for use by both parties, where the parties acquiesced to use for more than 10 years, and there was no challenge to the use for 30 years). Indeed, "joint efforts of adjacent property owners in

constructing a common driveway to be utilized by both is a circumstance tending to indicate adverse use, or use under a claim of right.” Miller, 2 Wn. App. at 998.

3. The Trial Court Erred When it Disregarded Genuine Issues of Material Fact Regarding Use of the Driveway

Only if essential facts are not in dispute can the question of adverse versus permissive use be resolved as a question of law. Drake, 122 Wn. App. at 152. Here, Jack offered no facts to support its argument that Jack and its predecessors permitted Whyte and its predecessors to use the driveway. (CP 26-28.) Rather, Jack relied erroneously on Kunkel v. Fisher, 106 Wn. App. 599, 23 P.3d 1128 (2001), to argue that all prescriptive easement claims carry a presumption of permission, failing to cite Drake, supra, in which this Court held three years later that it was error for a trial court to apply a presumption of permissive use. (CP 26-28.) There, this Court specifically acknowledged that its analysis in Kunkel “extended the implication of permissive use by neighborly accommodation too far when [the court] applied a presumption of permissive use.” 122 Wn. App. 147, 151, 89 P.3d 726 (2004).

In response, Whyte offered the very evidence that Washington courts have held as indicative of adverse use. Specifically, Whyte

established that the original parties constructed the Driveway to be shared by owners of the Whyte Parcel and the Jack Parcel. (CP 35-36.) Whyte's predecessor, June Skidmore, testified that not only did she use the Driveway for 28 years, but she never requested permission to use the Driveway, which was her only access to the Whyte Parcel, and there is no evidence that her use was ever challenged. (CP 144.)

Although Ms. Skidmore also testified in passing that she was friendly with Skugstad, who lived at the Jack parcel from 1975 through 1986, there is no evidence that their friendship had any bearing on Skidmore's use of the Driveway. (CP 144.) Rather, the issue "never came up" because "they both used it." (CP 144.) Moreover, absent from the record is any evidence of Skidmore's relationship with the next two owners of the Jack Parcel, who collectively owned the Jack Parcel from 1987 through 2010 when Jack purchased the Jack Parcel and built the Barrier. (CP 150-55.)

Based on sparse evidence of a friendship from long ago, and having disregarded the evidence that Whyte offered, the trial court dismissed Whyte's prescriptive easement claim, concluding:

The issue of whether the plaintiff's use of the "teardrop" was permissive or hostile can be established as a matter of law in this situation where essential facts are not in dispute. The Skidmores use of their neighbors' and good friends' teardrop was of a type, and under circumstances, consistent with implied permission (a friendly, neighborly accommodation) and inconsistent with adverse, hostile use....

(CP 241.)¹

In summary, Jack offered no facts in support of its motion for summary judgment. Because the facts that Whyte offered in support of her prescriptive easement claim, namely (1) that the Parcels share the Driveway, (2) the Driveway is the sole access to the Whyte Parcel, (3) the Driveway was jointly constructed for use by both the Whyte Parcel and Jack Parcel, and (4) the use of the Driveway was unchallenged for three decades, are indicative of adverse use, genuine issues of material fact exist that should have precluded summary judgment for Jack with respect to Whyte's claim for prescriptive easement.

¹ Although Whyte uses the term "teardrop," specifically "9-Foot Teardrop," to refer to the area subject to the adverse possession claim, in its order the trial court utilized that same term to refer to the area of the driveway subject to the prescriptive easement claim. (CP 98, 241.) The trial court's use of "teardrop," when placed in context, appears related only to the discussion of prescriptive easement.

C. The Trial Court Erred in Concluding that Whyte Had Not Established Hostility Over the 9-Foot Teardrop for Purposes of her Claim for Adverse Possession

The trial court erred in accepting the incorrect argument that Whyte must meet a higher than usual standard to establish hostility for purposes of adverse possession over the 9-Foot Teardrop, which is within an easement subject to the JUMAE. Because Washington courts have held that the type of landscaping activities performed by Whyte's predecessor-in-interest establish adverse possession, and because Skidmore's use went beyond the scope of permissible use under the JUMAE, the trial court erred in granting summary judgment to Jack.

1. Whyte Proved Hostile Possession of the 9-Foot Teardrop

To establish a claim of adverse possession, the burden is on the claimant to prove by a preponderance of the evidence that the claimant's possession is (1) exclusive, (2) actual and uninterrupted, (3) open and notorious, and (4) hostile. ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 757, 774 P.2d 6 (1989). Each of the necessary elements must have existed for ten years. Id. (citing RCW 4.16.020). The claimant can establish adverse possession based on her predecessor's use of the land. Shelton v. Strickland, 106 Wn. App. 45, 51-52, 21 P.3d 1179 (2001). Because Jack's motion disregarded genuine issues of material fact regarding hostile use by

Whyte's predecessor, Skidmore, the trial court erred in granting summary judgment to Jack.

The "hostility/claim of right" element of adverse possession requires only that the claimant treat the land as her own as against the world throughout the statutory period. Chaplin v. Sanders, 100 Wn. 2d 853, 860-61, 676 P.2d 431(1984). The nature of her possession will be determined solely on the basis of the manner in which she treats the property. Id. Her subjective belief regarding her true interest in the land and her intent to dispossess or not dispossess another is irrelevant to this determination. Id. Hostility is not personal animosity or adversarial intent, but instead connotes that the claimant's use has been hostile to the title owner's, in that the claimant's use has been akin to that of an owner. Herrin v. O'Hern, 168 Wn. App. 305, 311, 275 P.3d 1231(2012) (reversing summary judgment for record owner where genuine issue of material fact existed on element of hostility).

An adverse claimant need not enclose the property she claims with a fence to establish her claim. Meshner v. Connolly, 63 Wn.2d 552, 557, 388 P.2d 144 (1964). Rather, Washington courts have repeatedly found adverse possession based on landscaping-based activities alone. See Meshner, 63 Wn.2d at 556 (affirming adverse possession where claimant

had maintained a rockery and taken care of certain plants within a disputed strip); Lingvall, 97 Wn. App. at 254 (finding hostile use where adverse possessor planted trees, cleared land, landscaped, mowed, and maintained the property); Wood v. Nelson, 57 Wn.2d 539, 358 P.2d 312 (1961) (finding that cutting wild grass up to an ancient fence was sufficient use to show possession of a foot strip of land); Maier v. Giske, 154 Wn. App. 6, 19, 223 P.3d 1265, 1272 (2010) (finding hostility established where claimant installed planks and built a berm, planted trees and shrubs between the planks, and generally landscaped and maintained the area as her own).

Here, Jack relied solely on Whyte's testimony regarding her use of the 9-Foot Teardrop, ignoring entirely facts that describe 28 years of use by Whyte's Predecessor, Skidmore. (CP 14-15.) Specifically, Jack failed to cite any of June Skidmore's testimony, including that Skidmore constructed a rockery in the 1970's which stayed in place until Jack hired excavators to move it in 2010. Accordingly, June Skidmore's testimony regarding her use of the 9-Foot Teardrop that was located next to her home, including that she did not ask permission of Skugstad, Gingrich, or Moore to build or maintain a rockery in the 9-Foot Teardrop, to plant shrubs, or to install a sprinkler system, establishes the hostility required

under Washington case law. (CP 126-28, 130-32, 145-46.) The trial court's decision to the contrary should be reversed.

2. Washington Does Not Require the Dominant Estate Holder to Meet a Higher Burden of Proof to Establish Adverse Possession

The argument that Whyte must meet a higher standard proof because she seeks to adversely possess an easement fails. The heightened standard of proof for adverse possession applies to a servient estate attempting to possess a dominant estate, but not here, where the dominant estate adversely possesses the servient estate. Because Jack's argument is unsupported in law or in fact, the trial court erred when it granted Jack's motion for summary judgment.

A private easement may be lost by adverse possession. Howell v. King County, 16 Wn.2d 557, 134 P.2d 80 (1943). However, when a servient estate tries to extinguish an easement-holder's right to use an express easement, the servient estate must establish use of the easement that is "clearly hostile to the dominant estate's interest in order to put the dominant estate owner on notice." Cole v. Laverty, 112 Wn. App. 180, 183-84, 49 P.3d 924 (2002).

Here, Whyte asserts a claim for adverse possession as the dominant estate holder. Nonetheless, Jack argues erroneously that the principles outlined in Cole v. Lavery, which pertains to claims for adverse possession made by the servient estate holder, apply in this case. In Cole, the servient estate owner (Lavery), blocked the dominant estate's access to an easement by constructing a fence and planters across the right of way. 112 Wn. App. at 183. Cole, the dominant estate owner, requested that Lavery remove the obstructions and Lavery refused. Id. Cole sued to quiet title in the easement. Id. Lavery counterclaimed, arguing the easement was terminated by adverse possession, and the trial court granted summary judgment in his favor. Id. at 183-84. But because there were issues of fact whether the dominant estate holder, Cole or his predecessors-in-interest, had previously used the easement, the Court of Appeals reversed the summary judgment order holding that Lavery failed to establish that its obstruction was adverse to Cole's interests. Id. at 186-87.

Here, in contrast to Cole, it is the dominant estate that has used and possessed the Whyte Driveway Easement since 1975. Thus, Jack's reliance on Cole, which turned on the meaning of the parties' respective interests as servient and dominant estate holders, is misplaced. In Cole,

and all other cases in which the servient estate seeks to extinguish an easement that was created for the benefit of a dominant estate, the servient estate possesses the property, and therefore has the right to use his land in any way that does not permanently interfere with the dominant estate's reserved easement. Beebe v. Swerda, 58 Wn. App. 375, 384, 793 P.2d 442 (1990). Accordingly, "to start the prescriptive period ... [his] adverse use of the easement must be clearly hostile to the dominant estate's interest in order to put the dominant estate owner on notice." Cole, 112 Wn. App. at 184. In other words, it is the very nature of the servient estate — a fee interest with rights to use the land as the owner — that makes establishing adverse possession over an easement difficult.

When a servient estate imposes reasonable restraints over its fee (as in Cole), that a dominant estate holder may not be able to distinguish between a fee-holder's rights to his land and hostile actions that would impinge on the dominant estate's use rights is understandable. But those problems do not exist here. Whyte is the dominant estate holder and Jack, the servient estate holder, was on notice that the dominant estate's use of the 9-Foot Teardrop was outside the scope of the JUMAE, and above and beyond any use that was acceptable under the JUMAE.

Whyte was required only to establish that she and/or her predecessors treated the 9-Foot Teardrop as a true owner would to prove adverse possession, which results in the merger of title over the easement and the fee (as to the 9-Foot Teardrop) in Whyte. Where, as here, Whyte has sufficiently established the hostility necessary to prove adverse possession — that Skidmore built the Bulb, which included large rocks and landscaping within the 9-Foot Teardrop that prevented use of the 9-Foot Teardrop as a driveway and treated the 9-Foot Teardrop as her own — the trial court erred in granting summary judgment to Jack.

3. Use of the 9-Foot Teardrop by Whyte's Predecessor Was Outside the Scope of the JUMAE

Finally, the trial court erroneously interpreted the JUMAE and used its erroneous construction to dismiss Whyte's adverse possession claim. The interpretation of an easement's scope is a mixed question of law and fact: the original parties' intent is a question of fact and the legal consequence of that intent is a question of law. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003); Veach v. Culp, 92 Wn.2d 570, 573, 599 P.2d 526 (1979). The appellate court's review determines whether the trial court properly construed an easement's terms to give effect to the parties' intention. Brown v. Voss,

105 Wn.2d 366, 371, 715 P.2d 514 (1986). The intent of the original parties to an easement is determined from the deed as a whole. Zobrist v. Culp, 95 Wn.2d 556, 560, 627 P.2d 1308 (1981). If the plain language is unambiguous, extrinsic evidence will not be considered. City of Seattle v. Nazarenius, 60 Wn.2d 657, 665, 374 P.2d 1014 (1962). Here, there is no evidence in the record that either party found ambiguities in the easement language.

Although the scope of an easement can be expanded for future demands if the express terms of the easement manifest a clear intention by the original parties, this does not mean that the easement could ever be used for a wholly different purpose than its original purpose. Sunnyside, 149 Wn. 2d at 884; 17 Wash. Prac., Real Estate § 2.9 (2d ed.). “For instance, an easement that began as an easement for utility lines could never become a roadway easement, nor probably could a walkway easement become a motor vehicle easement.” 17 Wash. Prac., Real Estate § 2.9 (2d ed.) (emphasis added).

In other words, the dominant estate holder may increase an existing intended or imposed use, but may not compel a change in use on the servient estate holder. Lowe v. Double L Properties, Inc., 105 Wn. App. 888, 894, 20 P.3d 500 (2001); see also Snyder v. Haynes, 152 Wn.

App. 774, 781, 217 P.3d 787 (2009) (holding use of unlicensed vehicles was not contemplated in easement because they cannot legally travel onto a public road). The question of reasonable use or unreasonable deviation is one of fact. See Logan v. Brodrick, 29 Wn. App. 796, 800, 631 P.2d 429 (1981).

The JUMAE plainly limits the scope of the Whyte Easement for roadway use and utilities, as follows: “for the construction, improvement, repair and maintenance for roadway and utilities...” (emphasis added). Based on this unambiguous language, the trial court should have concluded that due to the JUMAE’s purpose for roadway and utilities uses, the Whyte’s and Skugstad’s use of the 9-Foot Teardrop as a rockery was inconsistent with, and outside the scope of the JUMAE.

Nevertheless, in dismissing Whyte’s adverse possession claim, the trial adopted Jack’s misinterpretation of the JUMAE, concluding: “The evidence, together with all favorable inferences, establishes a use that is consistent with the intended use, as set forth in the JUMAE.” At a minimum, the trial court should have found genuine issues of material fact as to whether Skidmore’s use was reasonable or unreasonable. Because the trial court’s interpretation is inconsistent with the scope of use that the original parties intended, the trial court erred in awarding summary

judgment to Jack on this basis.

D. The Judgment in Favor of Jack Should be Reversed

After the trial court ordered summary judgment for Jack, the trial court entered judgment for Jack, comprised of taxable costs and fees, in the amount of \$350.00. Appendix A. Because summary judgment was improper, Whyte respectfully requests that the appellate court reverse the judgment in favor of Jack.

E. Whyte is Entitled to Statutory Attorneys' Fees and Reasonable Expenses

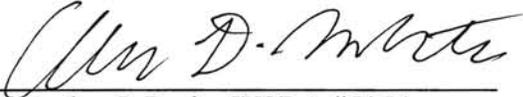
Under RAP 14.2, a commissioner or clerk will award costs to the party that substantially prevails on review. Accordingly, Whyte requests an award of costs, as defined in RAP 14.3, for statutory attorneys' fees and reasonably necessary expenses on review.

VI. CONCLUSION

For all the reasons stated above, Whyte respectfully requests that the appellate court reverse the summary judgment ruling of the trial court dismissing Whyte's claims for prescriptive easement and adverse possession, and remand for further proceedings.

DATED this 3 day of December, 2012.

TOUSLEY BRAIN STEPHENS PLLC

By 

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Attorneys for Appellant/Plaintiff

CERTIFICATE OF SERVICE

I, Betty Lou Taylor, hereby certify that on the 3rd day of December, 2012, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

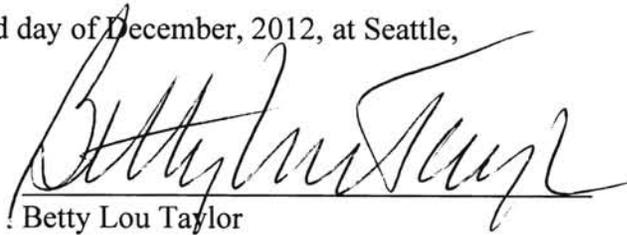
David J. Wieck, WSBA #16656
Coreen Wilson, WSBA # 30314
WIECK SCHWANZ PLLC
400 112th Ave., NE, Suite 340
Bellevue, WA 98004

- U.S. Mail, postage prepaid
- Hand Delivered
- Overnight Courier
- Facsimile
- Electronic Mail

Attorneys for Respondents/Defendants

I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 3rd day of December, 2012, at Seattle, Washington.


Betty Lou Taylor

APPENDIX A

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The Honorable Barbara Linde

IN THE SUPERIOR COURT, STATE OF WASHINGTON
FOR KING COUNTY

ANNE WHYTE, a married person on behalf) No. 11-2-05845-0 SEA
of her marital community,)
Plaintiff,)
vs.) JUDGMENT
CHRISTOPHER JACK and PETRA)
JENNINGS, and their respective marital)
community,)
Defendants.)

I. JUDGMENT SUMMARY

Judgment Creditor: Christopher Jack and Petra Jennings
Judgment Debtor: Anne Whyte and her marital community

Taxable Costs & Fees to be
Assessed Against Plaintiff
Pursuant to RCW 4.84 and CR 54(d): ~~\$ 880.00~~

Total Amount Of Judgment: ~~\$ 880.00~~ (BL)
(which shall bear interest per RCW 4.56.110) \$ 350.00

NOTICE OR PRESENTATION
OF JUDGMENT -- 1

WIECK SCHWANZ, PLLC
400 112th Ave. NE, Suite 340
Bellevue, Washington 98004
425-454-4455 / Fax 425-454-4457

ORIGINAL

1 Attorney For Creditor:

Adrienne D. McEntee
Tousley Brain Stephens, PLLC
700 7th Ave., Suite 2200
Seattle, WA 98101-4416

4 II. JUDGMENT

5 **This Matter** having Come On Regularly Before The Undersigned Court, It Is
6 Hereby:

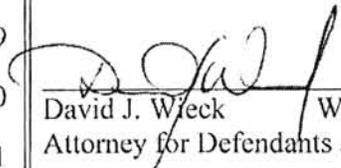
7 **Ordered, Adjudged, And Decreed** that the defendants Christopher Jack and Petra
8 Jennings are entitled to Judgment against plaintiff Anne Whyte, and her marital
9 community, in the amount of ~~\$880.00~~ ^{\$ 350.00} which shall bear interest per RCW 4.56.110

10 DATED this 28 of August, 2012.

11 

12 THE HONORABLE BARBARA LINDE
13 KING COUNTY SUPERIOR COURT JUDGE

14
15
16
17 Presented By:

18
19 
20 David J. Wieck WSBA#16656
21 Attorney for Defendants Jack and Jennings