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No. 70815-5-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

CITY OF REDMOND, a Washington municipal corporation,

Appellant,

v.

BRIAN and MARILYN HOWE, husband and wife,

Respondents.

CITY OF REDMOND'S OPENING APPELLATE BRIEF

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ORIGINAL

TABLE OF CONTENTS

Page

I. ASSIGNMENTS OF ERROR....1

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR....1

III. STATEMENT OF THE CASE....2

A. Redmond Acquires Title to the Parcel at Issue to Use in Long-Planned Public Developments of the Former BNR Property....2

B. The Howes Enter the Parking Parcel Subject to a One-Year Indefinite Term Lease....3

C. The Howes Offer to Purchase the Parking Parcel from BNR....6

D. Procedural History....7

IV. ARGUMENT....7

A. Summary of the Argument....7

B. The Howes' Objective Conduct Acknowledging BNR's Superior Title Defeats Their Adverse Possession Claim....11

1. Actual Notice to the True Owner Is the Paramount Consideration in Adverse Possession Jurisprudence....11

2. The Majority of Courts Distinguish Between Subjective Knowledge and Objective Conduct Acknowledging a Superior Title....15

3. Washington Recognizes the Distinction Between Use and Adverse Use....18

4. *Chaplin* on Its Facts and in Its Holding Did Not Change the Long-Established Rule Regarding Objective Conduct Acknowledging the True Owner's Superior Title....19

5. There Was No Objective Conduct at Issue in *Chaplin*....23

C. The Howes Entered the Parking Parcel with Permission 24

D. The Howes Fail to Show All the Elements of Prescriptive Easement as a Matter of Law 28

V. CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Cases

Agers v. Reynolds,
306 S.W.2d 506 (Mo. 1957) 21

Albright v. Beesimer,
288 App. Div. 2d 577, 733 N.Y.S.2d 251 (2001) 20

Allen v. Johnson,
79 Conn. App. 740, 831 A.2d 282 (2003) 15, 16, 17, 20

Bowen v. Serksnas,
121 Conn. App. 503, 997 A.2d 573 (Conn. 2010) 16

Buckley v. Dunkin,
131 Wash. 422, 230 P. 429 (1924) 28

Burton v. Twin Commander Aircraft, LLC,
171 Wn.2d 204, 254 P.3d 778 (2011) 14

Cahill v. Morrow,
11 A.3d 82 (R.I. 2011) 15, 16, 17, 18

Caluori v. Dexter Credit Union,
No. PC 11-5408, 2012 R.I. Super. LEXIS 57 (R.I. Super. Ct. Apr. 11, 2012) 15

Chambers v. Bessent,
17 N.M. 487, 134 P. 237 (N.M. 1913) 17

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

Chicago Mill & Lumber Co. v. Matthews,
163 Ark. 571, 260 S.W. 963 (Ark. 1924) 20

Crites v. Koch,
49 Wn. App. 171, 741 P.2d 1005 (1987) 25, 26

Dunbar v. Heinrich,
95 Wn.2d 20, 622 P.2d 812 (1980) 21

Eddy v. Clayton,
44 So.2d 395 (Miss. 1950) 17, 20

Ellis v. Jansing,
620 S.W.2d 569 (Tex. 1981) 21

Fulton v. Rapp,
98 N.E.2d 430 (Ohio Ct. App. 1950) 21

Glover v. Glover,
92 P.3d 387 (Alaska 2004) 26, 27

Granston v. Callahan,
52 Wn. App. 288, 759 P.2d 462 (1988) 25, 26

Harris v. Urell,
133 Wn. App. 130, 135 P.3d 530 (2006) .... passim

Headerick v. Fritts,
93 Tenn. 270, 24 S.W. 11 (Tenn. 1893) 17

Heggen v. Marentette,
144 N.W.2d 218 (N.D. 1966) 16

Kerlin v. Tensaw Land & Timber Co.,
390 So. 2d 616 (Ala. 1980) 20

Kunkel v. Fisher,
106 Wn. App. 599, 23 P.3d 1128, *review denied*, 145 Wn.2d 1010 (2001) 28

Manhattan School of Music v. Solow,
175 App. Div. 2d 106, 571 N.Y.S.2d 958, *appeal denied*, 79 N.Y.S.2d 820, 588 N.E.2d 89, 580 N.Y.S.2d 191 (1991) 20

Miller v. Anderson,
91 Wn. App. 822, 964 P.2d 365 (1998) 13, 25

Myers v. Beam,
551 Pa. 670, 713 A.2d 61 (Pa. 1998) 20

Palumbo v. Heumann,
295 App. Div. 2d 935, 743 N.Y.S.2d 640 (2002) 20

Peeples v. Port of Bellingham,
93 Wn.2d 766, 613 P.2d 1128 (1980) 11, 20, 24

Petersen v. Port of Seattle,
94 Wn.2d 479, 618 P.2d 67 (1980) 28

Qwest Corp. v. City of Bellevue,
161 Wn.2d 353, 166 P.3d 667 (2007) 25

Roediger v. Cullen,
26 Wn.2d 690, 175 P.2d 669 (1946) 28

Shanks v. Collins,
1989 OK 115, 782 P.2d 1352 (Okla. 1989) 17, 20

Smith v. Vermont Marble Co.,
99 Vt. 384, 133 A. 355 (Vt. 1926) 16

Springer v. Durette,
217 Or. 196, 342 P.2d 132 (1959) 21

Tidwell v. Strickler,
457 So. 2d 365 (Ala. 1984) 20

Van Valkenburgh v. Lutz,
304 N.Y. 95, 106 N.E.2d 28 (1952) 21

Washburn v. Esser,
9 Wn. App. 169, 511 P.2d 1387 (1973) 25

Wickert v. Thompson,
28 Wn. App. 516, 624 P.2d 747 (1981) 21

Statutes

RCW 7.28.070 22

RCW 7.28.080 22

Other Authorities

3 American Law of Property § 15.4 (A. Casner ed. 1952) 21

3 American Law of Property § 15.5 (A. Casner ed. 1952) 21

3 Am. Jur. 2d, Adverse Possession § 104 (2002) 20

2 C.J.S., Adverse Possession §§ 185-86 (1972) 20

17 William B. Stoebuck & John H. Weaver, *Washington Practice: Real Estate: Property Law* § 8.6 (2004) 13

4 Tiffany, Real Property (3d Ed. 1975) § 1164 20

Dockray, Adverse Possession and Intention -- I, 1981-82 Conv. & Prop. Law. (n.s.) 256 21

Stoebuck, *The Law of Adverse Possession in Washington*, 35 Wash. L. Rev. 53 (1960) 21

I. ASSIGNMENTS OF ERROR

1. The trial court erred by denying the City of Redmond's ("Redmond") motion for summary judgment dismissing Plaintiffs Brian and Marilyn Howe's ("the Howes") complaint for adverse possession and prescriptive easement as a matter of law.

2. The trial court erred by granting the Howes' motion for summary judgment.

3. The trial court erred by denying Redmond's motion for reconsideration.

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Does a claimant's objective conduct acknowledging to the true owner the true owner's superior title defeat the hostile/claim of right element of adverse possession and prescriptive easement? Assignments of Error 1, 2, 3.

2. Did the Washington Supreme Court's rejection, in *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984), of a subjective state of mind element of adverse possession change existing Washington law regarding a claimant's objective conduct acknowledging to the true owner the true owner's superior title? Assignments of Error 1, 2, 3.

3. Did *Chaplin* limit objective conduct giving notice to the true owner solely to conduct on or use of the real property itself, or must a

court consider any objective conduct by the claimant that gives actual notice to the true owner that the claimant is not making an adverse possession claim, such as conduct seeking permission from the true owner, or conduct acknowledging the true owner's superior title? Assignments of Error 1, 2, 3.

4. Was the Howes' initial entry upon the parking parcel permissive? Assignments of Error 1, 2, 3.

5. Did the Howes fail to make a "a distinct and positive assertion of a right hostile to the owner" after entering into possession under the existing lease? Assignments of Error 1, 2, 3.

6. Are the Howes' claims for adverse possession and prescriptive easement defeated because their use of the property has always been permissive? Assignments of Error 1, 2, 3.

III. STATEMENT OF THE CASE

A. Redmond Acquires Title to the Parcel at Issue to Use in Long-Planned Public Developments of the Former BNR Property

The Howes claim, by adverse possession or prescriptive easement, a parcel of real property located on the former Burlington Northern Railroad Santa Fe Railroad ("BNR") property in Redmond, adjacent to the Howes' commercial property, that the Howes have used to augment their existing parking lot (the "parking parcel"). Clerk's Papers ("CP") 1. The

parking parcel is a small part of a much larger piece of former railroad property, generally referred to as the Redmond Spur, that was formerly owned by BNR and its predecessor, Northern Pacific Railroad. CP 66-69. This larger parcel was transferred by BNR to the Port of Seattle in 2009. *Id.*[1] In June 2010, Redmond acquired title to approximately 3.9 miles of the Redmond Spur. *Id.*

The Redmond Spur runs north to south from a junction with the Woodinville Subdivision in Woodinville, Washington to downtown Redmond, Washington. *Id.* Redmond plans to utilize the former railway for park and trail purposes for the benefit and enjoyment of all citizens of Redmond. *Id.*

B. The Howes Enter the Parking Parcel Subject to a One-Year Indefinite Term Lease

In 1990, the Howes purchased the property located at 16725 Cleveland Street, Redmond, from Kelley Properties ("Kelley"). CP 53; Brian Howe Deposition ("Howe Dep.") 9:12-20. The Howes operated a

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[1] The Redmond Spur conveyance was part of a larger transaction in which the Port of Seattle acquired 33 miles of the Woodinville Subdivision, plus the Redmond Spur from BNR, for a purchase price of $81.4 million. The segments south of Woodinville, including the Redmond Spur, were rail-banked with King County assuming the role of interim trail user. CP 66-69.

sporting goods store called "Sportee's" on the property. CP 53; Howe Dep. 8.

At the time of the sale, Kelley had been leasing the parking parcel from BNR to augment its parking lot. Howe Dep. Ex. 1 (identified as "Lease #227940"). The parking parcel was leased to Kelley on a "one year indefinite term lease which the railroad can cancel with 30 days' notice." CP 59; Howe Dep. Ex. 1. Under the lease, the parking parcel had been striped and paved by Kelley. CP 57; Howe Dep. 31:7-9.

The BNR/Kelley lease was still in effect at the time of the Howes' purchase.[2] CP 59; Howe Dep. Ex. 1. Shortly before completion of the purchase, Kelley's real estate agent notified BNR that if the Howes chose *not to continue the existing lease* they would "reconfigure the existing parking and lawn areas of the building in keeping with the reduced parking requirements in the City of Redmond and do without the Railroad land." CP 59; Howe Dep. Ex. 1. Mr. Howe was aware of the Kelley

[2] Mr. Howe claims he did not know if there was a current lease or not (CP 54; Howe Dep. 16:23-25), but the real estate agent's letter demonstrates that the lease was in place (CP 58-69; Howe Dep. Ex. 1). There was no evidence presented that BNR had cancelled the lease.

lease. CP 16, 23-25, 58; Howe Dep. 1.[3] The Howes were copied on the letter (and the letter was produced in discovery by the Howes). *Id.*

After the purchase, the Howes continued the lease because the Howes did not "reconfigure the existing parking and lawn areas of the building" and "do without the Railroad land." To the contrary, the Howes entered the parking parcel and continued to make the same use of the parking parcel as had their predecessor Kelley. The Howes' conduct – who were fully aware of the letter – gave no notice to BNR that they were acting contrary to the letter, nor did they communicate to BNR, in any way, that they were rejecting the "one year indefinite term lease." Mr. Howe repeatedly testified that the Howes used the parking parcel for parking cars in the same manner as Kelley had.

> Q. And at that time, as I recall, I think you said it was already painted and striped and paved?
>
> A. Yes.
>
> Q. So you just continued that use?
>
> A. Yes.

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[3] "The bottom line is that if the railroad land is priced fairly, say $150-175 per month, our prospective buyer [Mr. Howe] will probably continue the lease. If it is priced too high at $365 per mo plus taxes as you have suggested, he will elect to reconfigure the existing parking and lawn areas of the building in keeping with the reduced parking requirements in the City of Redmond and do without the Railroad land." CP 59; Howe Dep. Ex. 1.

CP 55-57; Howe Dep. 30:22-31:11, 18:20-21, 21:25-22:4, 28:5-21.

C. The Howes Offer to Purchase the Parking Parcel from BNR

After purchasing the adjacent property from Kelley, Mr. Howe never communicated to BNR that he was claiming to adversely possess the parking parcel. CP 57; Howe Dep. 30:11-21. In fact, the only communication the Howes had with BNR was to discuss purchasing the parking parcel from BNR.

In or about 1998, the Howes had lunch with Larry Seyda, a representative of BNR, to discuss a possible purchase of the parking parcel. CP 55; Howe Dep. 21-25. The negotiations for a potential sale proceeded to the point that the Howes applied to their bank for a loan to finance the purchase of the parking parcel from BNR. CP 60-63; Howe Dep. Ex. 2. According to the bank records produced by the Howes, the Howes applied for a loan of $111,600 to fund the purchase of the parking parcel. CP 60.

Apparently, the sale fell through because the parties could not obtain an acceptable title report for the property. Howe Dep. 25. Following these negotiations, the Howes continued using the parking parcel for parking as they had since purchasing the adjacent property. CP 56; Howe Dep. 28:5-21. In 2006 they sold their property to Cleveland

Holdings LLC. CP 30. In 2010, the Howes took the property back in a non-judicial foreclosure sale. *Id.*

For the first time, in or about April 2012, 22 years after the Howes purchased the Kelley property, the Howes stated that they claimed title to the parking parcel by adverse possession in a letter to Redmond. CP 65.

D. Procedural History

The parties filed cross-motions for summary judgment in March 2013. CP 14, 38. The trial court denied Redmond's motion, and granted in part and denied in part the Howes' motion. CP 118, 123. Redmond filed a motion for reconsideration, which was denied. CP 125, 137. The parties then stipulated to a ruling against Redmond on the remaining fact issue for trial, and entered a stipulated judgment and stipulated forms of summary judgment orders. CP 140, 157. Redmond timely appealed.

IV. ARGUMENT

A. Summary of the Argument

In 1984, in *Chaplin*, 100 Wn.2d at 857, Washington joined the majority of states in eliminating the "subjective belief or intent" of a claimant as an element of adverse possession. *Chaplin* excluded the

claimant's subjective beliefs because, unlike objective conduct, the claimant's state of mind cannot give notice to the true owner.[4]

On its facts and in its holding, *Chaplin* addressed only a claimant's subjective belief and intent. Nevertheless, the trial court misinterpreted *Chaplin*. The trial court concluded that the *Chaplin* court limited the adverse possession analysis exclusively to the claimant's conduct on or to the land itself.

> 6. This Court was inclined to accept the argument and policy behind the argument of the City of Redmond that the very act of negotiation is an objective act acknowledging ownership, sufficient to break the ten year statutory period.
>
> 7. However, on re-review of the cases, under these facts, it is clear that the Washington Supreme Court regarded the act of recognition through contract as a mere expression of subjective belief. There, Mr. Howe's acknowledgement, even his acts leading to possible purchase, are acts of subjective intent only. What is determinative is the way the property has been treated.

CP 121; Court's Summary Judgment Ruling at 4 (emphasis in original). Thus, according to the trial court, only conduct on or use of the property itself, like erecting a fence, paving a parking lot, or mowing grass, are to be considered. The trial court held that *Chaplin* required the trial court to exclude consideration of a claimant's objective conduct acknowledging

[4] A relevant quip, attributed to Professor William Stoebuck: "Since a man cannot by thoughts alone put himself in adverse possession, why should he be able to think himself out of it?"

the true owner's superior title if such conduct did not take place on the property itself.

Thus, even though the Howes acknowledged BNR's superior title by negotiating to purchase the parking parcel – objective conduct – because such conduct did not occur on the property itself, the trial court concluded that "Mr. Howe's acknowledgement, even his acts leading to possible purchase, are acts of subjective intent only." *Id.*

The trial court erred in its interpretation of *Chaplin*. Objective conduct giving notice to the true owner – regardless where it occurs – is always relevant. *Chaplin* did not hold otherwise, and a more recent Washington case, *Harris v. Urell*, 133 Wn. App. 130, 142-43, 135 P.3d 530 (2006), rejects the trial court's approach and correctly concludes that use of property is not adverse if the claimant gives actual notice by objective conduct that he or she is not making an adverse possession claim.

Chaplin did not address a claimant's objective conduct, and did not erase the distinction between the claimant's subjective belief and the claimant's *objective conduct* acknowledging a superior title. Objective conduct acknowledging a superior title breaks the period of adverse possession, and *Chaplin* did not change this rule. Washington remains firmly aligned, and correctly so, with the majority of courts, which hold

that the claimant's objective conduct acknowledging the true owner's superior title breaks the period of adverse possession, whether that conduct takes place on the property or elsewhere. *See infra* at 15-17.

Moreover, the rule proposed by the trial court is unworkable and flies in the face of established adverse possession law and principles. The trial court's rule would permit a claimant to mislead the true owner by acknowledging the superior title to his or her face, all the while running out the 10-year clock simply by using the property.

The trial court also erred by ruling that the Howes' initial entry was not permissive and by not applying the rule that the Howes must revoke such permissive entry by a "distinct and positive" action to start the adverse possession period. The trial court failed to take the facts in the light most favorable to the non-moving party, Redmond. The facts before the trial court at summary judgment showed that the Howes entered into possession of the parking parcel under the existing indefinite term lease of their predecessor. It is well-established that such an entry is permissive, and that a party entering real property permissively must take a "distinct and positive" action to alert the true owner that the party is now claiming adverse possession. The Howes never gave such notice to BNR, and in fact did the opposite by acknowledging BNR's title. Therefore, their possession remained permissive at all times.

Because the Howes' original entry onto the parking parcel was permissive, and such permissive entry was never negated by "a distinct and positive assertion of a right hostile to the owner," and because the Howes acknowledged BNR's superior title by objective conduct, the trial court should have granted Redmond's summary judgment motion and denied the Howes' summary judgment motion.

B. The Howes' Objective Conduct Acknowledging BNR's Superior Title Defeats Their Adverse Possession Claim

1. Actual Notice to the True Owner Is the Paramount Consideration in Adverse Possession Jurisprudence

In the Howes' only direct contact with BNR, they attempted to purchase the parking parcel and applied for a loan to finance the purchase. CP 55-56, 60-63. Accordingly, the Howes' objective conduct gave actual notice directly to BNR that their use of the parking parcel was *not adverse*. Washington, like most states, has long recognized that "[w]here a claimant recognizes a superior title in the true owner during the statutory period, we have held the element of hostility or adversity is not established." *Peeples v. Port of Bellingham*, 93 Wn.2d 766, 613 P.2d 1128 (1980) (citation omitted); see footnote 8 *infra* at 20. And as the court in *Harris*, 133 Wn. App. at 142-43, held, possession by a claimant who by objective conduct acknowledges the superior title of another is not *adverse* possession.

The central issue in this case is whether, as the trial court concluded, *Chaplin* directs or requires Washington courts to ignore such objective conduct acknowledging the superior title of another because such conduct is not conduct on or use of the real property.

The answer is no. *Chaplin* changed Washington adverse possession law regarding subjective belief, but made no changes to the existing rules governing objective conduct. If the trial court's interpretation stands, *Chaplin* would stand alone[5] and, moreover, would have reached this extraordinary result without any discussion of such a major change in adverse possession jurisprudence. *Chaplin* only concluded that subjective belief is not to be considered, but did not in any manner limit objective conduct solely to conduct on or use of the property. The manner in which the claimant "treats the property" includes the objective conduct acknowledging the superior title of another, regardless where it occurs.

The notion that objective conduct that actually gives notice to the true owner should be disregarded simply because the conduct does not take place on the property is directly contrary to adverse possession's

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[5] Redmond's counsel has not located any cases in any jurisdiction that ignore the claimant's objective conduct giving actual notice to the true owner.

notice requirements. Fundamental to adverse possession jurisprudence is notice to the true owner and an opportunity for the true owner to assert its rights to the property: "courts will not permit 'theft' of property by adverse possession unless the owner had notice and an opportunity to assert his or her right." *See, e.g., Miller v. Anderson*, 91 Wn. App. 822, 827, 964 P.2d 365 (1998). "[A]dverse possession is an offense against possession, against the legal right of the person entitled to possession." 17 William B. Stoebuck & John H. Weaver, *Washington Practice: Real Estate: Property Law* § 8.6, at 512 (2004). The holder of legal title is presumed to possess the property.[6] After all, the true owner is the only person being dispossessed of his or her property and *only* the true owner can act, if need be, to prevent that loss. Therefore, actual notice to the true owner is the paramount consideration.

The ultimate purpose, then, to one degree or another, of all the elements of adverse possession – open and notorious, exclusive, hostile, etc. – is to ensure that the true owner is given notice of an adverse claim against its legal title, so that it may act to protect that title. If actual notice is not given, the courts may still permit an adverse possession claim but

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[6] Because the holder of legal title is presumed to possess the property, the party claiming adverse possession bears the burden of proof on each element. *Miller*, 91 Wn. App. at 828.

only where the claimant's objective use of the property at issue provides sufficient constructive notice – open and notorious, exclusive, hostile, etc.[7] – such that it is fair to say that any reasonable true owner should have taken notice.

But there is no reason for any court to conclude that notice by use of the property should be the exclusive manner of giving notice. Because notice to the true owner is a paramount consideration, objective conduct giving actual notice to the true owner – regardless where and how it occurs – is always relevant. The trial court's proposed limitation flies in the face of the fundamental notice requirement of adverse possession law.

Indeed, Redmond's counsel could find no cases or authority that supported the trial court's theory. *Chaplin* does not remotely suggest it changed this fundamental aspect of adverse possession law.

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[7] To establish title by adverse possession, the Howes must show possession of the parcel for 10 years that was (1) exclusive; (2) actual and uninterrupted; (3) open and notorious; and (4) hostile and under a claim of right made in good faith. *Chaplin*, 100 Wn.2d at 857. Failure to establish any one of these elements is fatal to a claim of adverse possession. *Burton v. Twin Commander Aircraft, LLC*, 171 Wn.2d 204, 223, 254 P.3d 778 (2011).

2. The Majority of Courts Distinguish Between Subjective Knowledge and Objective Conduct Acknowledging a Superior Title

Chaplin addressed only the subjective knowledge or belief of the claimant. But the difference between subjective knowledge of a superior title – the subject of the *Chaplin* opinion – and objective conduct acknowledging a superior title is well-established.

> The Supreme Court distinguished mere knowledge concerning a record owner's superior property right – which does not destroy an adverse possessor's claim of right – from an objective manifestation acknowledging another's superior title in disputed property – which is now fatal to an adverse possession claim.

Caluori v. Dexter Credit Union, No. PC 11-5408, 2012 R.I. Super. LEXIS 57, at *16 (R.I. Super. Ct. Apr. 11, 2012).

> Likewise, in *Tavares*, 814 A.2d at 351, with regard to "establishing hostility and possession under a claim of right," we explained that "the pertinent inquiry centers on the claimants' objective manifestations of adverse use rather than on the claimants' knowledge that they lacked colorable legal title." ... Essentially, *Tavares* turned on the difference between the adverse possession claimant's "knowledge" regarding the owner's title and his "objective manifestations" thereof.

Cahill v. Morrow, 11 A.3d 82, 90-91 (R.I. 2011) (emphasis added); *Allen v. Johnson*, 79 Conn. App. 740, 831 A.2d 282, 287 (2003).

> "[A]n adverse possessor may interrupt his or her continuous possession by acting in a way that acknowledges the superiority of the real owner's title.["]

Bowen v. Serksnas, 121 Conn. App. 503, 997 A.2d 573, 579 (Conn. 2010) (emphasis added; citation omitted). The Rhode Island Supreme Court recently discussed and explained this distinction:

> Analogously here, Cahill did not deny Morrow's title when she sent her 1997 letter to George Morrow. Rather, she was outwardly declaring to the rightful owner himself the viability of his title and fully acknowledging her subservient interest to that owner's title. This manifestation from Cahill interrupted the accrual of her claim. *See Heggen v. Marentette*, 144 N.W.2d 218, 242 (N.D. 1966) ("[T]he recognition of the owner's title by an adverse claimant interrupts the adverse possession."); *Smith v. Vermont Marble Co.*, 99 Vt. 384, 133 A. 355, 358 (Vt. 1926) ("Nothing can more effectively interrupt the running of the [adverse possession] statute than an express acknowledgment of the true owner's title. *** This recognition of another's title may be by acts, as well as words. So when one who was wrongfully [using another's land] *** yields to the latter's demands *** and offer[s] to buy the right, his adverse use is interrupted, and his claim of prescriptive right fails."); *see also Bowen v. Serksnas*, 121 Conn. App. 503, 997 A.2d 573, 579 (Conn. App. Ct. 2010) ("[T]he possession of one who recognizes or admits title in another, either by declaration or conduct, is not adverse to the title of such other. *** Such an acknowledgment of the owner's title terminates the running of the statutory period, and any subsequent adverse use starts the clock anew.") (quoting *Allen v. Johnson*, 79 Conn. App. 740, 831 A.2d 282, 286 (Conn. App. Ct. 2003))

Cahill, 11 A.3d at 90 (emphasis added; other alterations in original). The claimant's claim was defeated in *Cahill* because the claimant offered to purchase the property, much as the Howes did here.

> In the case before this Court, Cahill went beyond mere knowledge that she was not the record owner by sending

> the offer-to-purchase letter. As distinguished from the Tavares claimant who did not communicate his survey findings with anyone, Cahill's letter objectively declared the superiority of George Morrow's title to the record owner himself. *See Tavares*, 814 A.2d at 352; see also *Eddy v. Clayton*, 44 So.2d 395, 397 (Miss. 1950) ("Moreover, the request of appellant to purchase the land, which was later repeated, is a pointed answer to any contention of an adverse claim, since it was an acknowledgment of a superior title and claim of [the record owner]."); *Chambers v. Bessent*, 17 N.M. 487, 134 P. 237, 240 (N.M. 1913) ("It may safely be assumed as a general proposition that, if a defendant in possession of disputed territory concede[s] that the true title is in another, and offer to purchase from him, then the continuity of adverse possession is broken.") (quoting *Headerick v. Fritts*, 93 Tenn. 270, 24 S.W. 11, 12 (Tenn. 1893)); *Shanks v. Collins*, 1989 OK 115, 782 P.2d 1352, 1355 (Okla. 1989) ("A recognition by an adverse possessor that legal title lies in another serves to break the essential element of continuity of possession.").

Id. at 91 (emphasis added; other alterations in original).

Chaplin joined the majority of states in abandoning subjective intent as an element of adverse possession. But *Chaplin* did not simultaneously, and *sub silentio*, abandon the majority rule that the claimant's objective conduct acknowledging a superior title breaks the period of adverse possession.

The relevant facts in this case are not disputed. The Howes by objective conduct acknowledged the superior title of BNR to BNR. "[T]he possession of one who recognizes or admits title in another, either by declaration or conduct, is not adverse to the title of such other." *Allen*

v. Johnson, 831 A.2d at 286; *Cahill*, 11 A.3d at 90. The Howes failed to establish adverse use.

3. Washington Recognizes the Distinction Between Use and Adverse Use

In *Harris*, 133 Wn. App. at 142-43, the court addressed the crucial difference between use and adverse use. In *Harris*, the claimant was making actual use of the property, and based its adverse possession claim on this grounds – exactly as the Howes propose to do in this case. But the court in *Harris* concluded that use of the property was insufficient when the actual notice to the true owner was that claimant's use was not adverse.

> Although Harris had actual notice that the Watts had used the disputed property during the statutory seven-year adverse-possession period, she had no notice that their use was adverse. On the contrary, she had notice only that their use was not adverse because they had repeatedly asked and received her permission to use the driveway.

Id. at 142 (emphasis added).

Contrary to the trial court's reasoning in this case, the *Harris* court did not limit its analysis solely to conduct on or use of the property itself. The Watts' conduct in *Harris* of "repeatedly asking" for permission is not conduct on the property itself, but the court in *Harris* did not disregard this conduct simply because it did not take place on the property itself.

As *Harris* recognized, regardless of a claimant's use of the property, if the claimant gives actual notice to the true owner that he or she is not making an adverse possession claim, for example by seeking permission from the true owner, or by acknowledging the true owner's superior title, as in this case, the claimant cannot establish adverse use.

It was the Howes' burden to give notice they were making an adverse possession claim. Here, even assuming that the Howes were using the parking parcel for parking, the Howes gave BNR notice that this use was *not adverse* because of the Howes' objective conduct in negotiating to purchase the parking parcel from BNR.

The Howes gave BNR actual notice that they acknowledged its superior title. Accordingly, the Howes' actual use of the parking parcel cannot establish an adverse possession or prescriptive easement claim.

4. ***Chaplin*** **on Its Facts and in Its Holding Did Not Change the Long-Established Rule Regarding Objective Conduct Acknowledging the True Owner's Superior Title**

Redmond's position in this case relies upon well-established adverse possession principles. Washington, like most states, has long recognized that "[w]here a claimant recognizes a superior title in the true owner during the statutory period, … the element of hostility or adversity

is not established." *Peeples v. Port of Bellingham*, 93 Wn.2d 766, 613 P.2d 1128 (1980) (citation omitted).[8]

Did *Chaplin* change this long-standing rule? The answer is no.

When the Washington Supreme Court in *Chaplin* decided to abandon the role of the subjective belief and intent of the claimant as an element of an adverse possession, the court overruled *Peeples*, but only to the extent that it held that the *subjective belief* of the claimant was relevant

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[8] "An offer to purchase the legal title, or an acceptance of a conveyance of title, as distinguished from a mere outstanding claim or interest, is a recognition of that title. Although efforts to obtain deeds from other claimants to the property do not disprove the hostile character of a possession, efforts to buy the property from the record owner constitute an acknowledgment of the record owner's superior title, and thus disprove the adverse holding, because there has been no claim of right." 3 Am. Jur. 2d, Adverse Possession § 104 (2002); *see Tidwell v. Strickler*, 457 So. 2d 365, 368 (Ala. 1984); *Kerlin v. Tensaw Land & Timber Co.*, 390 So. 2d 616, 619 (Ala. 1980); *Manhattan School of Music v. Solow*, 175 App. Div. 2d 106, 107, 571 N.Y.S.2d 958 ("offer made by one in possession without title to purchase from the record owner during the statutory period is a recognition of the owner's title and prevents adverse possession from accruing"), *appeal denied*, 79 N.Y.S.2d 820, 588 N.E.2d 89, 580 N.Y.S.2d 191 (1991); *Albright v. Beesimer*, 288 App. Div. 2d 577, 579-80, 733 N.Y.S.2d 251 (2001) (same); *Palumbo v. Heumann*, 295 App. Div. 2d 935, 935-36, 743 N.Y.S.2d 640 (2002) (same); *Shanks v. Collins*, 1989 OK 115, 782 P.2d 1352, 1355 (Okla. 1989) (recognition by adverse possessor that title was in another as evidenced by adverse possessor's offer to purchase property negated requisite hostility); *Eddy v. Clayton*, 44 So. 2d 395, 397 (Miss. 1950) (same); *Chicago Mill & Lumber Co. v. Matthews*, 163 Ark. 571, 260 S.W. 963, 964 (Ark. 1924) (same); *Myers v. Beam*, 551 Pa. 670, 713 A.2d 61, 62-63 (Pa. 1998); 2 C.J.S., Adverse Possession §§ 185-86, pp. 905-906 (1972); 4 Tiffany, Real Property (3d Ed. 1975) § 1164, p. 869." *Allen*, 831 A.2d at 287.

to adverse possession.[9] The *Chaplin* court's opinion makes clear it is only addressing subjective belief and is not making any other changes.

> Thus, when the original purpose of the adverse possession doctrine is considered, it becomes apparent that the claimant's motive in possessing the land is irrelevant and no inquiry should be made into his guilt or innocence. *Accord, Springer v. Durette*, 217 Or. 196, 342 P.2d 132 (1959); *Agers v. Reynolds*, 306 S.W.2d 506 (Mo. 1957); *Fulton v. Rapp*, 98 N.E.2d 430 (Ohio Ct. App. 1950); *see also* Stoebuck, *The Law of Adverse Possession in Washington*, 35 Wash. L. Rev. 53, 76-80 (1960).
>
> Washington is not the only state which looks to the subjective belief and intent of the adverse claimant in determining hostility. *See, e.g., Ellis v. Jansing*, 620 S.W.2d 569 (Tex. 1981); *Van Valkenburgh v. Lutz*, 304 N.Y. 95, 106 N.E.2d 28 (1952); *see generally* 3 American Law of Property § 15.4 (A. Casner ed. 1952). However, the requirement has been regarded as unnecessarily confusing by many legal commentators, *see* Dockray, Adverse Possession and Intention -- I, 1981-82 Conv. & Prop. Law. (n.s.) 256; C. Callahan; Stoebuck, 35 Wash. L. Rev. at 76-80; and A. Casner; and has been abandoned by the apparent majority of states. 3 American Law of Property § 15.5, at 785. For these reasons, we are convinced that the dual requirement that the claimant take possession in "good faith" and not recognize another's superior interest does not serve the purpose of the adverse possession doctrine. *See Dunbar v. Heinrich*, 95 Wn.2d 20, 622 P.2d 812 (1980); *Wickert v. Thompson*, 28 Wn. App. 516, 624 P.2d 747 (1981). The "hostility/claim of right" element of adverse possession requires only that the claimant treat the land as his own as against the world throughout the statutory period. The nature of his

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[9] *Chaplin*, 100 Wn.2d at 861 n.2 ("Accordingly, we overrule the following cases, and any other Washington cases, to the extent that they are inconsistent with this opinion[.]").

> possession will be determined solely on the basis of the manner in which he treats the property. His subjective belief regarding his true interest in the land and his intent to dispossess or not dispossess another is irrelevant to this determination. Cf. RCW 7.28.070 and 7.28.080. Under this analysis, permission 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. The traditional presumptions still apply to the extent that they are not inconsistent with this ruling.

Chaplin, 100 Wn.2d at 860-62 (emphasis added).

The trial court's analysis took one sentence out of context from the quote above to reach its erroneous conclusion. But read in context, nothing in the *Chaplin* opinion remotely suggests that the court intended, expressly or implicitly, to change any rules except the rule addressing subjective belief. The *Chaplin* court did not change the fundamental role actual notice by objective conduct plays. The *Chaplin* opinion, read as a whole and in context, and limited to the facts before the court, can only be read to change Washington law regarding subjective knowledge or intent.

It would also be truly odd to conclude that the Washington Supreme Court, without any explanation or discussion, eliminated the objective conduct of the claimant giving actual notice as a relevant consideration in adverse possession law. Such a rejection of mainstream adverse possession law would relegate Washington to a lonely outpost far outside the majority of courts. To conclude that the Supreme Court

rendered such a radical change in the law without any discussion whatsoever simply finds no support in the *Chaplin* opinion itself.

5. There Was No Objective Conduct at Issue in *Chaplin*

The trial court concluded that *Chaplin* limited the relevant conduct solely to conduct on or use of the real property and concluded that all other objective conduct of the claimant was "a mere expression of subjective belief." CP 121.

But, in fact, in *Chaplin* only subjective knowledge or belief was at issue. The relevant facts in *Chaplin* are as follows: the two adjoining properties at issue in *Chaplin* had been transferred several times before the Sanders, the claimants in the case, and the Chaplins, the "true owners" came into title. *Chaplin*, 100 Wn.2d at 855. Before the Sanders obtained title, their property was owned by the Hibbards. *Id.* The Hibbards cleared some brush and built a driveway that encroached upon the adjoining property, then owned by Mr. McMurray. *Id.* In 1960, Mr. McMurray notified the Hibbards that their driveway encroached on his property, and when the Hibbards sold their property to the Gilberts in 1962, the parties (the Hibbards and Gilberts) included in their recorded contract of sale a provision expressly acknowledging the encroachment and further providing that the purchaser would not claim ownership. *Id.* at 856. The

property was then sold to Mr. Finch in 1967, and then to another intervening party, before being purchased by the Sanders in 1976. *Id.*

The only question addressed in *Chaplin* was whether the Sanders' *subjective* knowledge of a prior existing contract provision operated to bar their adverse possession claim. "The Sanders were given actual notice of the contract provision, but purportedly mistook the road to which it referred." *Id.*

Unlike the Howes in this case, the Sanders took no objective actions to acknowledge the Chaplins' superior title. The Sanders simply were aware of – had subjective knowledge of – a provision in a contract created by several predecessor owners. The "act of recognition through contract" in *Chaplin* was the Sanders' subjective knowledge of this prior contract provision.

Contrary to the trial court's ruling, *Chaplin* never addressed objective conduct acknowledging the true owner's superior title at all. *Chaplin* did not reverse *Peeples* on the effect of objective conduct giving notice because the issue was not before the *Chaplin* court and because such a ruling would be a radical change in adverse possession law.

C. The Howes Entered the Parking Parcel with Permission

The Howes' claim should also be rejected because they initially entered the parking parcel with permission and never made "a distinct and

positive assertion of a right hostile to the owner." *Crites v. Koch*, 49 Wn. App. 171, 177, 741 P.2d 1005 (1987). At summary judgment, all facts in reasonable inferences therefrom are viewed in the light most favorable to the non-moving party. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007).

The Howes' predecessor was leasing the property under an indefinite term lease. *See* pp. 4-6 *supra*. The Howes, knowing of the leasing agent's letter to BNR, continued using the parking parcel rather than abandoning it, never notified BNR that they had rejected the lease, and then, less than 10 years later, offered to purchase the parking parcel. *Id.*

Permission to occupy the land, given by the true title owner to the claimant or his or her predecessors in interest, will operate to negate the hostility element. *Miller*, 91 Wn. App. at 828. Permissive use is not hostile and does not commence the running of the prescriptive period. *Washburn v. Esser*, 9 Wn. App. 169, 171, 511 P.2d 1387 (1973). The adverse possessor bears the burden of proving that permission terminated. *Miller*, 91 Wn. App. at 832.

Moreover, it is not necessary that permission be requested. *Granston v. Callahan*, 52 Wn. App. 288, 294, 759 P.2d 462 (1988). Permission can be express or implied; an inference of permissive use

arises when it is reasonable to infer "that the use was permitted by sufferance and acquiescence." *Id.*

Finally, "a different set of rules applies when the initial use is permissive." *Id.* at 293. A party must "make a distinct and positive assertion of a right hostile to the owner" to overcome the initial permissive use and trigger the running of the adverse possession period. *Crites*, 49 Wn. App. at 177.

Here, the Howes continued to use the parking parcel and in 1998, in their only direct contact with BNR, they offered to purchase it. Thus, when the Howes had contact with BNR, with both the obligation and opportunity to assert their adverse possession claim, they instead did the opposite: the Howes acknowledged BNR's superior title and did not assert an adverse possession claim.

On this record, there is no evidence that the Howes made any "distinct and positive assertion" necessary to extinguish their original permissive entry and start the running of an adverse possession claim. The Alaska Supreme Court, in *Glover v. Glover*, 92 P.3d 387, 393 (Alaska 2004), which applies the same requirement of a "distinct and positive assertion" as Washington, explained what is required:

> An adverse claimant who entered land as a tenant must usually show some distinct act, like an open announcement of his claim or a change in his use of the land, sufficient to

> serve as a distinct and positive assertion of his claim to own the property. This is more than is required of other adverse possessors, who may establish a claim simply by acting toward the land as if they owned it, without a particular assertion.

Id. at 394. In short, just using the parking parcel in the same manner as Kelley is not sufficient. To the contrary, the Howes' only "open announcement" to BNR was an attempt to purchase the parking parcel, an action universally recognized as an acknowledgment of BNR's superior title.

The fact that the Howes did not pay rent to BNR is also not sufficient. "Nonpayment of rent does not establish hostility. The passive failure to make payments is not a 'distinct and positive assertion' of ownership." *Id.*[10]

In short, the Howes' initial entry onto the parking parcel was permissive, and the Howes never made such a "distinct and positive assertion" to start the running of the adverse possession period.

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[10] "If nonpayment terminated the lease, it only turned Snyder's interest in the land into a tenancy at sufferance. 'An estate at sufferance is an interest in land which exists when a person who had a possessory interest in land by virtue of an effective conveyance, wrongfully continues in the possession of the land after the termination of such interest, but without asserting a claim to a superior title.' A tenancy at sufferance is a permissive interest and cannot be the basis for adverse possession. Furthermore, we decline to establish a rule that gives tenants an incentive to stop paying rent in the hope of establishing an adverse possession claim." *Glover*, 92 P.3d at 393 (footnotes omitted).

D. The Howes Fail to Show All the Elements of Prescriptive Easement as a Matter of Law

The rules governing prescriptive easements are very similar to those governing adverse possession and, consequently, the result is the same. The Howes cannot state a claim for prescriptive easement.

> A prescriptive right cannot grow out of a permissive use, because such a use is not hostile or adverse.

Buckley v. Dunkin, 131 Wash. 422, 429-30, 230 P. 429 (1924). Use of an easement is not adverse if it is permissive. *Kunkel v. Fisher*, 106 Wn. App. 599, 602, 23 P.3d 1128, *review denied*, 145 Wn.2d 1010 (2001). The party benefiting from the prescriptive easement bears the burden of proving its existence. *Roediger v. Cullen*, 26 Wn.2d 690, 706, 175 P.2d 669 (1946).

At its inception, the use of a property is presumed to be permissive. *Petersen v. Port of Seattle*, 94 Wn.2d 479, 486, 618 P.2d 67 (1980). For the same reasons that the Howes cannot establish adverse possession as a matter of law, the Howes cannot establish a prescriptive easement. The Howes' predecessor-in-interest leased the parking parcel for parking, and the Howes entered and continued that same use. The Howes' initial use was permissive at its inception, and such use cannot ripen into an adverse use without the Howes making a "distinct and positive assertion of a right hostile to the owner." When given an opportunity to do so in 1998, the

Howes instead acknowledged the title of BNR and discussed purchasing the parking parcel. The Howes' use never changed from their initial permissive use. The Howes' claim for a prescriptive easement fails as a matter of law.

V. CONCLUSION

The trial court misinterpreted *Chaplin* and failed to follow *Harris*. The Howes' objective conduct acknowledging BNR's superior title by offering to purchase the parking parcel defeats their adverse possession and prescriptive easement claims. Moreover, the Howes' initial entry upon the parking parcel was permissive, and the Howes never made a "distinct and positive assertion" to terminate their permissive use. The Court is respectfully requested to reverse and deny the trial court's order granting summary judgment to the Howes and to reverse and grant Redmond's summary judgment motion dismissing the Howes' complaint.

DATED: December 4, 2013.

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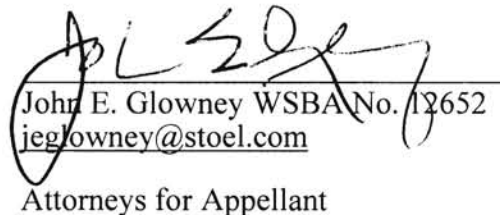

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CERTIFICATE OF SERVICE

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