No. 99574-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL S. POKORNY and JOETTA POKORNY,
husband and wife and the marital community composed thereof,

Plaintiffs/Appellants,

vs.

SHOWELL OSBORN and NANCY OSBORN,
husband and wife and the marital community composed thereof;
JOHN DOE and JANE DOE 1-5; NATHANIEL D. JUDD
and BETHANIE R. JUDD, husband and wife and the marital
community composed thereof, d/b/a JUDD TREE SERVICE, a
Washington contractor, JUDDTTS875N2; and WESCO INSURANCE
COMPANY, under Bond No. 46-WB033713,

Defendants/Respondents.

RESPONDENTS' ANSWER TO AMENDED PETITION FOR REVIEW

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I. IDENTITY OF RESPONDING PARTIES

Respondents Showell and Nancy Osborn submit this Answer to Appellant's Amended Petition for Review.

II. INTRODUCTION

Respondents Showell and Nancy Osborn ("Osborn") respectfully request this Court deny Appellants Michael and JoEtta Pokorny's ("Pokorny") petition seeking review of the unpublished decision of Division II of the Court of Appeals and a subsequent denial of Pokorny's Motion for Reconsideration.

This case involves disputed title to real property located in Ocean Shores, Washington. The trial court ruled on summary judgment the Osborns had acquired title to the disputed property through adverse possession and that the Osborns were entitled to an award of attorneys' fees. The Court of Appeals affirmed the summary judgment rulings in its unpublished decision.

The Pokorny's petition fails to establish that any of the considerations governing acceptance of review have been met. Rather, Pokorny's petition primarily argues positions that have already been considered and rejected by the Superior Court and the Court of Appeals It should be denied.

III. COUNTERSTATEMENT OF ISSUES PRESENTED

1. Did the trial court properly determine title to disputed real property had passed to the Osborns by adverse possession?

2. Did the trial court properly award attorneys' fees to the Osborns?

3. Did the trial court properly dispose of the Pokorny's remaining claims once it determined title vested in the Osborns?

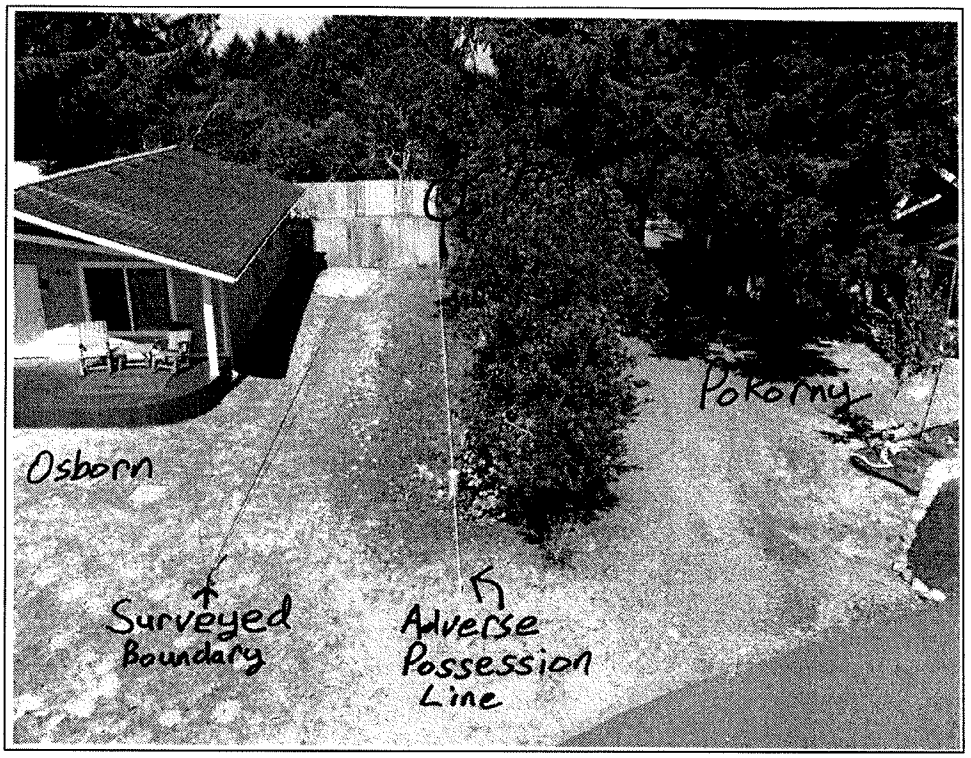
4. Did the Court of Appeals properly affirm the trial court's decisions?

IV. COUNTERSTATEMENT OF THE CASE

A. Relevant Factual Background

The Pokornys own a residence located at 856 Hake Court SW, Ocean Shores, Washington. CP 27. The Osborns own a neighboring residence, located at 854 Hake Court SW, Ocean Shores, Washington. CP 4. The properties share a common boundary that runs in a straight line between the back of the properties and Hake Court SW. The disputed area at issue before the trial court runs along the entire length of the properties between a surveyed boundary line and the line historically perceived as the true boundary by all owners. The photograph below shows the two properties, the original surveyed line, and the line the trial court ultimately

determined was the extent of the disputed area acquired by adverse possession. CP 481.



CP 481

The Osborn's predecessor in interest, Mr. Richard Walter, owned what is now the Osborn's house for approximately 16 years, from September 1990 to November 2006. CP 885. He used the home as a residence for himself, his wife, and four children continuously throughout these 16 years. *Id.* Shortly after purchasing his home Mr. Walter attempted to find the boundary line between his parcel and the one next door, which was a vacant lot platted by the City of Ocean Shores, by looking around the borders of his property. CP 886. During this inspection, Mr. Walter found

a galvanized pipe in the ground near the back corner of the lot which he assumed was the rear boundary marker. *Id.* He also found a green utility pedestal near the street which he assumed marked the front property boundary. *Id.* In order to visualize the line between these two markers, he stretched a string from the pipe to the pedestal. *Id.* He believed the string ran along the boundary line between his land and the neighboring lot. *Id.* This belief was based on the prior clearing and landscaping of his property up to that line and "on where the previous owners had established the line." *Id.*

Mr. Walter began building a fence made of driftwood that ran along the perceived boundary line. *Id.* During the entire time he lived in his home, Mr. Walter considered the line where he had stretched the string and where he built his driftwood fence to be the eastern boundary of his property. CP 886-887. Exhibit 1 to Mr. Walter's deposition was the photograph above. CP 891-892. Mr. Walter testified the yellow rope shown in this photo ran along the same perceived boundary line he described during his earlier testimony. *Id.*

During the time he lived in Ocean Shores Mr. Walter and his family continuously used the entire property up to the line where he was building his driftwood fence, which was the same line depicted by the yellow rope in Exhibit 1 to his deposition. *Id.* Mr. Walter mowed the grass between the

house and the boundary line "at least once a week." CP 887. He built a greenhouse in "very, very close proximity to the galvanized pipe" he found in the back corner. *Id.* Mr. Walter also pruned the bushes along the edge of the boundary once a month and cut larger branches and trees along the boundary annually. CP 889. He followed this pruning regime continuously from "almost immediately after I moved in" until the time a cedar fence was built by Pokorny's predecessor-in-interest around early 2003. *Id.*

Mr. Walter's children had a swing and a play area in the backyard. CP 889. They also played in the front yard right up to the trees and shrubs growing on the eastern side of the property, in what became the disputed area. *Id.* The eastern edge of the area the children played in was along a line corresponding to the yellow rope show in Exhibit 1 to Mr. Walter's deposition. *Id.*

In 1996 Mr. Walter built a concrete pad in the disputed area. CP 887-888. He used this pad to park vehicles when he was washing them, which he did regularly. *Id.* He also used the disputed area to drive vehicles into the backyard. *Id.* During the 16-year period he lived on what is now the Osborns' property, Mr. Walter ran a landscaping business. *Id.* He stored materials and supplies from his landscaping business all along the driftwood fence and the bushes at the eastern edge of his property. *Id.* When asked how often he did this his was answer was, "Continuously." *Id.* One reason

Mr. Walter stored his materials in the disputed area right up to the boundary line was because he thought the disputed area was his property and no one ever told him otherwise. *Id.* When asked how frequently he would use the disputed area to access the backyard, Mr. Walter answered, "Daily." CP 896.

In order to facilitate driving vehicles through the disputed area into the backyard, Mr. Walter laid down two strips of rocks in the ground where the wheels of his vehicles would travel. CP 888. Mr. Walter identified strips of rocks that can still be seen in the driveway to this day as the rocks he placed in the disputed area in the 90's. CP 905. He testified that these rocks were visible in the photograph made Exhibit 1 to his deposition. *Id.*

In 2003 Jim Moors, together with his business partner Bill Green, acquired the lot that is now the Pokorny's home with the intention to build a house on it. CP 956. Mr. Walter testified that during the time Moors was building the house next door, Mr. Walter remembered having a conversation with a person he believed to be the owner of that property. CP 888. One of the topics of this conversation was the owner's intention to build a cedar slat fence along the boundary between the two lots. *Id.* Mr. Walter pointed out the galvanized pipe in the back corner of the lot he assumed was the property marker. *Id.* The man he was speaking with told Mr. Walter he was already aware of the pipe and knew it was there. *Id.*

Later, Mr. Walter saw the same person stretch a string to mark the line where the slat fence was being built. CP 891. The string line marked for the slat fence was in the same place where Mr. Walter marked the boundary line a decade earlier to build his driftwood fence. *Id.*

Mr. Walter sold his home to Mr. Justin Millard on November 21, 2006. CP 52. The Osborns purchased the property from Mr. Millard on July 11, 2007. *Id.*

Mr. Moors, the developer who bought the vacant lot next to Mr. Walter's home described above, built a house on the land and sold it to Anthony and Karen Woodbeck on September 19, 2005. CP 933, 955-956. The Woodbecks defaulted on the loan securing their purchase and the Pokornys purchased their home in a foreclosure sale on April 20, 2011. CP 52.

B. Relevant Procedural Background

In 2015, the Osborns cut down part of a hedge growing along the perceived boundary line between the Pokorny and Osborn properties. After this cutting took place, the Pokornys learned the surveyed boundary line between the two properties did not run along the length of the hedge that had been cut, but was instead located several feet closer to the Osborns' home.

The Pokornys brought an action for trespass, timber trespass, ejectment and to quiet title in a disputed strip of land that ran the entire length of the boundary between the Osborn and Pokorny lots. In their answer to the complaint, the Osborns asserted that title to the disputed area had passed to them and/or their predecessors in interest by adverse possession before the cutting took place.

The parties brought motions and cross-motions for summary judgment on the issue of adverse possession a total of three times in Grays Harbor Superior Court. After hearing extensive oral arguments on the third iteration of the summary judgment motions, the Honorable Stephen Brown granted the Osborns' motion for summary judgment and found title to the disputed area had passed to the owners of the Osborn property before the alleged trespass took place. After this finding, Judge Brown also granted subsequent motions (1) establishing a new legal description for the Osborns' property that included the disputed area, (2) dismissing the Pokornys' trespass and ejectment causes of action, and (3) awarding statutory attorneys' fees and costs to the Osborns as the prevailing party in an adverse possession lawsuit. The Pokornys appealed all of the trial court's findings and orders, which were subsequently affirmed in their entirety by the Court of Appeals.

V. REVIEW SHOULD BE DENIED

The Pokornys rely on all four bases of RAP 13.4 in seeking review of the Court of Appeals' affirmation of the trial court's orders. Because the appellate court's decision is not in conflict with any decision of this Court or the Court of Appeals, there is no basis for review under RAP 13.4(b)(1) or (2). Because no constitutional issues are implicated, there is no basis for review under RAP 13.4(b)(3). Because the unpublished appellate decision does not involve any issue of substantial public interest, there is no basis for review under RAP 13.4(b)(4). Review should be denied.

A. Division II's Affirmation of the Trial Court's Orders Granting Summary Judgment, Attorneys' Fees, and Dismissal Is Not in Conflict with Any Decision of this Court or the Court of Appeals

1. No Presumption of Permissive Use in Adverse Possession Analyses.

The Pokornys argue that Division II's affirmance of the trial court's determination that title to the disputed area passed to Mr. Walter by adverse possession conflicts with decisions by the Court of Appeals and this Court relating to various presumptions the Pokornys contend are applicable to adverse possession analysis. Because the presumptions relied on by the Pokornys do not apply no conflict exists between Division II's unpublished decision and the cases relied on by the Pokornys; *Workman v Klinkenberg*, 6 Wn. App. 2d 296, 305, 430 P.3d 716 (2018); *Boyd v. Sunflower*

Properties, LLC, 197 Wn. App. 137, 143, 389 P.3d 626 (2016); *Kunkel v. Fisher*, 106 Wn. App. 599, 602-03, 23 P.3d 1182 (2001); *Miller v. Anderson*, 91 Wn. App. 822, 823-33, 964 P. 2d 365 (1998), *Gamboa v. Clark*, 182 Wn.2d 38, 44, 348 P.3d 1214 (2015), and *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984).

Consistent with long-standing precedent and authority, Division II properly refused to apply presumptions of permissive use or neighborly acquiescence when it affirmed the trial court's order on summary judgment. No such presumptions apply when determining whether the elements of adverse possession have been met. Nothing in Appellants' Amended Petition for Review identifies a conflict between Division II's unpublished decision and any other controlling authority nor establishes a basis for review, which should be denied.

In *Nickell v. Southview Homeowner's Ass'n*, 167 Wn. App. 42, 271 P.3d 973 (2012) the court held prescriptive easements are disfavored while adverse possession is not. *Id.* at 52. The court also held there is a presumption that easements are permissive, but refused to apply such presumptions in an adverse possession case. *Id.* Notably, the *Nickell* court examined and rejected application of the vacant lands doctrine articulated by this Court in *N.W. Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 86,

123 P.2d 771 (1994), in cases involving adverse possession rather than claimed easement. *Id.* 51-52.

Division II cited *Nickell* for the proposition that none of the presumptions relied on by the Pokornys apply to this case. Moreover, Division II also noted at page 26 of its unpublished decision that the Pokornys had not "identified any adverse possession cases wherein the court applied this presumption."

The Pokornys have also failed to identify any adverse possession case applying any of the presumptions they rely on to this Court. In their Amended Petition for Review, the Pokornys do not identify a single adverse possession case applying a presumption of permissive use, whether based on neighborly sufferance and acquiescence, the Vacant Lands doctrine, or any other principle. Instead, they cite *Workman v. Klinkenberg,* 6 Wn. App. 2d, 291, 305, 430 P.3d 716 (2018) (prescriptive easement case, decision expressly based on prescriptive easement principles), *Boyd v. Sunflower Properties, LLC*, 197 Wn. App. 137, 389 P.3d 626 (2016) (implied easement case with a single reference to adverse possession in dicta), and *Kunkel v. Fisher*, 106 Wn. App. 599, 602, 23 P.3d 1128 (2001). The Pokornys argue without citation to any authority that "Washington courts consider the elements of adverse possession and prescriptive easement to

be the same." Petition, pg. 4. As a threshold matter, this statement is directly contradicted by the holding of *Nickell*, *supra*.

Moreover, the Pokorny's citation to *Kunkel* in particular illustrates and disposes of the fallacy in all of their presumption arguments. Just as in every other case cited to this Court by the Pokornys, *Kunkel* is a prescriptive easement case and did not involve any claims for adverse possession. Appellants seize on a single sentence of this opinion and cite it badly out of context:

> The requirements to establish a prescriptive easement are the same as those to establish adverse possession.

Id., at 602.

The complete and actual holding of *Kunkel* is the opposite of the Pokorny's contention:

> Although adverse possession and easements by prescription are often treated as equivalent doctrines, they have different histories and arise for different reasons. .....The differences in the historical origins and rationales behind prescriptive easement and adverse possession have resulted in a single but important difference in how they are applied. In a claim for a prescriptive easement there is a presumption that the servient property was used with the permission of, and in subordination to, the title of the true owner.

Id., at 603 (underlining added).

Ironically, when challenged by Division II to identify authority for their flawed presumption arguments, the Pokornys respond by citing a case that holds exactly the opposite; the presumption of permissive use is the

single and important difference between prescriptive easement and adverse possession analyses. The Pokornys' reliance on *Gamboa v. Clark*, 183 Wn. 2d 38, 51, 348 P.3d 124 (2015) does not change the result. *Gamboa* was a prescriptive easement case that was decided entirely by application of easement principles. No claims of adverse possession were considered by this Court and nothing in the holding or analysis of *Gamboa* conflicts with Division II's unpublished decision.

Because there is no presumption of permissive use in cases involving adverse possession, Division II's decision does not conflict with any other Court of Appeals decision or a decision of this Court.

2. The Vacant Lands Doctrine Does Not Apply.

As discussed above, *Nickell v. Southview Homeowners Ass'n*, 167 Wn. App. 42, 51-52, 271 P.3d 973 (2012) holds that the vacant lands doctrine is inapplicable to cases involving adverse possession. Moreover, in *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984), this Court held title to vacant property can be acquired through adverse possession.

In *Chaplin*, a dispute arose over a strip of land bordering two properties. The western parcel was developed and had a trailer park located on it. The other property, to the east, was vacant and undeveloped. There was no obvious boundary between the two parcels other than a drainage ditch. The owners of the western property installed a blacktop driveway on

their side of the ditch. They mowed and maintained the grass between the driveway and the ditch and installed utilities in this area. The successors-in-interest to the neighboring vacant property had a survey conducted and learned the recorded boundary line was much further west than the perceived boundary, with the mowed grass, utilities and driveway all in the disputed area.

Affirming title to the disputed area had passed by adverse possession, this Court held :

> In the present case the trial court found that...the western parcel was cleared up to the drainage ditch while the eastern parcel remained vacant and overgrown. The residents of the trailer park mowed the grass in Parcel B and put the parcel to various uses: guest parking, garbage disposal, gardening and picnicking. Some residents used portions of Parcel B as their backyard. The trial court concluded that the contrast between the fully developed parcel west of the drainage ditch and the overgrown, undeveloped parcel east of the drainage ditch was insufficient to put the owners of the eastern parcel on notice of the Sanders' claim. We disagree.

Chaplin, 100 Wn.2d, at 863 (internal citations omitted, underlining added).

By refusing to apply the vacant lands doctrine to this case, Division II followed controlling and precedential authority from this Court. There is no basis for review under RAP 13.4(b)(1) or (2).

B. Division II's Affirmation of the Trial Court's Orders Granting Summary Judgment, Attorneys' Fees, and Dismissal Does Not Implicate a Significant Question of Constitutional Law

Because Division II correctly applied existing law and controlling, precedential authority, the Pokornys were not deprived of their Due Process in this matter. Moreover, their unsupported contention they had no opportunity to be heard on the issue of presumption is factually wrong. As noted in Division II's unpublished decision, the trial court's ultimate ruling on summary judgment occurred after a number of prior motions. These include Appellants' Motion for Summary Judgment filed November 9, 2016, Respondents Cross Motion for Summary Judgment in response, Respondents' Motion for Summary Judgment filed March 9, 2017, Appellants' Motion for Summary Judgment filed May 4, 2018, Respondents' Cross Motion for Summary Judgment in response, and a lengthy hearing on July 16, 2018. The Pokornys fully briefed and argued their contentions regarding the putative presumption of permissive use in each of these motions, at the hearing on summary judgment, and to Division II in their Opening and Reply briefs as well as in their Motion for Reconsideration to the Court of Appeals. There is no factual basis for their current contention they have had no opportunity to be heard on this issue and no violation of Appellants' Due Process rights has taken place. In the

absence of a significant question of constitutional law, there is no basis for review under RAP 13.4(b)(3).

C. No Issue of Substantial Public Interest Exists

The Pokornys fail to identify any issue of substantial public interest created by Division II's unpublished decision. Their only contention that RAP 13.4(b)(4) is implicated by this case is predicated on their flawed presumption and vacant lands doctrine arguments. Because Division II properly decided this matter using well established principles of adverse possession, there is no impact on any public interest generated by that decision. Moreover, because the affirmance of the trial court's orders was not selected for publication, Division II's decision has no precedential value and cannot be cited as authority in any other matter.

"A decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue." *In Re Flippo*, 185 Wn.2d 1032, 380 P.3d 413 (2016). See, also, *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005).

The Pokornys do not contend that Division II's holding has any potential to affect pending matters, the development of adverse possession jurisprudence, or has any impact other than on the parties to this proceeding.

There is no issue of substantial public interest implicated by Division II's decision and there is no basis for review under RAP 13.4(b)(4).

VI. CONCLUSION

The Pokornys have provided no basis for review. The trial court's orders on summary judgment quieting title to the disputed area, awarding the Osborns their attorneys fees and dismissing the Pokornys' trespass claims, and the Court of Appeals' affirmation, were based on established legal precedent. Though the Pokornys cite RAP 13.4(b)(1), (2), (3), and (4) as bases to grant their petition, they have not met the requirements of the Rule. Therefore, their Amended Petition for Review should be denied.

DATED this 14th day of April, 2021.

FORSBERG & UMLAUF, P.S.

By:_____

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing RESPONDENTS' ANSWER TO AMENDED PETITION FOR REVIEW on the following individuals in the manner indicated:

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SIGNED this 14th day of April, 2021, at Seattle, Washington.

Elizabeth S. Sado

FORSBERG & UMLAUF, P.S.

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