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NO. 64104-2-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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ROGER AND FLOE AND BETTY FLOE, h/w

*Appellants*

v.

DAN N. FIORITO & TIMOTHY T. FIORITO, each as their separate  
property

*Respondents.*

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SKAGIT COUNTY

The Honorable DAVE NEEDY, Judge

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BRIEF OF RESPONDENTS

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## **I. INTRODUCTION**

Dan N. Fiorito Jr. and Timothy Fiorito (“Fiorito’s”), the Respondents in this case, own an undeveloped parcel of real property situated in Skagit County, Washington. The property is bordered to the northwest by Interstate 5 and to the southwest by property owned by the Appellants Roger and Betty Floe (“Floe’s”). Cedardale Road borders the Fiorito’s property to the west. The Fiorito’s land is unoccupied and undeveloped.

The Floe’s property adjoins the Fiorito’s property at the southwest corner of the Fiorito’s lot. The Floe’s lot contains their family home as well as some outbuildings. The Fiorito’s lot does not form a perfect rectangle. Essentially, the property is rectangular in form at its northern most portion and narrows to a single point at its’ southern edge. The southern triangular tip of the Fiorito’s property borders the Floe’s property to the east. This triangular wedge of land, (hereinafter Area “A”) divides the majority of the eastern edge of the Floe’s property from Cedardale Road and is the land from which this dispute arises.

The Floe’s brought suit to quiet title to Area “A” and asserted they had adversely possessed it. The Floe’s claimed that they had periodically cut the wild grass growing on the area for more than ten years. The Floe’s also claimed that they cleared the area of blackberry bushes and other debris in 1991. In response to the Floe’s action, the Fiorito’s moved to quiet title to Area “A.” The case was noted for trial and the parties conducted discovery.

The parties filed cross summary judgment motions. The trial court ruled in favor of the Fiorito’s at the summary judgment hearing finding no

basis for adverse possession. The Floe's filed a motion for reconsideration. As part of the motion for reconsideration, the Floe's submitted evidence that had not been presented at the summary judgment hearing. The additional evidence submitted by the Floe's consisted of declarations from witnesses that testified they engaged in activities on or around Area "A" such as "garbage golf" and barbeques. The Fiorito's objected to the evidence.

Per the Skagit County local court rules, the motion for reconsideration was heard without oral argument. In a written ruling, the trial court ruled that it would not consider the new evidence. In passing, the court noted that even if it had considered the evidence, the additional evidence would not have served as a basis for the court to change its ruling. The court denied the motion. The court entered written Findings of Fact and Conclusions of Law prior to issuing its written decision on the Floe's motion for reconsideration.

## **II. ISSUES**

1. May this court consider evidence included in the Floe's appellate brief when the evidence was submitted to the trial court for the first time by the Floe's on a motion for reconsideration and the trial court explicitly ruled that it would not consider the evidence?
2. Does the act of cutting wild grass on land that is unoccupied and unimproved satisfy the elements of actual and hostile possession?
3. Is there substantial evidence in the record to conclude that the Floe's kept blackberries under control on Area "A" for a period of ten years? If so, does the maintenance of weeds in conjunction with the cutting wild of grass satisfy the elements of adverse possession?

4. Even if this court were to consider the evidence presented by the Floe's on their motion for reconsideration, does the intermittent use of unoccupied and unimproved land for barbeques and games constitute adverse possession when no visible changes are made to the land to accommodate the use?

### **III. STATEMENT OF THE CASE**

#### **A. DESCRIPTION OF THE LAND IN DISPUTE**

The area of land in dispute, Area "A," is situated in Skagit County, Washington. Area "A" is a portion of a parcel owned by the Fiorito's.

The entire parcel is described as:

That portion of the East ½ of the West ½ of the Northwest ¼ of the Northwest ¼ of Section 20, Township 33 North, Range 4 East, W.M., lying South of Drainage District No. 7 right-of-way, as acquired under Decree of Appropriation entered March 30, 1909, in Skagit County. Superior Court Case No. 5271 and West of Cedardale Road right-of-way, EXCEPT right-of-way for Conway Hill Road, lying along the South line thereof. (P16999).

The parcel ("16999") has no improvements and is agricultural in nature. CP 22. The parcel can be accessed from Cedardale Road near exit 221 on Interstate 5 ("I 5"). CP 27. The parcel is bordered to the west by I 5 and two other parcels of land. CP 25. The Floe's have title to parcel 16994. CP 49. The Floe's property borders the Fiorito's property to the southwest. Cedardale Road borders both parcels to the east. CP 27. In Figure One below, both the Fiorito's land and the Floe's land are pictured.

The triangular area in dispute, Area "A" is designated with a black backfill.

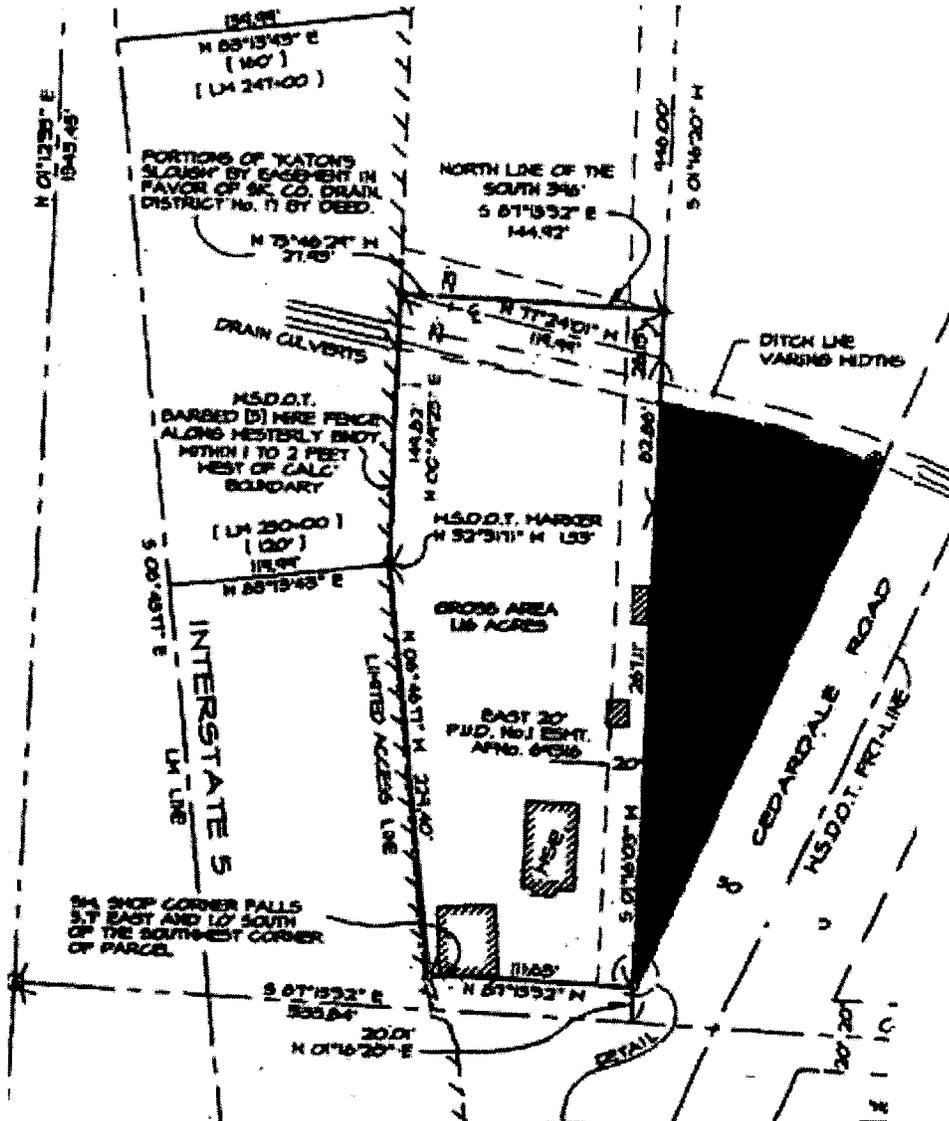


Figure One (visual depiction of Area "A").

A drainage easement cuts between parcels 16994 and 16999.

CP 31. The easement contains blackberry bushes and other vegetation.

CP 34, 37. There is a fifty foot right of way easement in favor of the county between the Fiorito's property, and Cedardale Road. CP 31. In order to access the Fiorito's property from Cedardale Road, one must cross this easement. *Id.*

The nature of this dispute arises over the portion of the Fiorito's land situated between the Floe's parcel and Cedardale Road on the south side of the drainage easement. The Floe's are able to access Cedardale Road from the southwest portion of their parcel. The Floe's have a driveway to their home on this portion of the parcel. CP 40. If one was to stand on Cedardale Road and look west onto the Floe's parcel, one would not be able to access that parcel without walking across the property owned by the Fiorito's, as well as a fifty foot right of way easement in favor of Skagit County . CP 31, 43.

The piece of property in dispute is triangular in shape and is covered with wild grass and weeds. CP 96. The distance between Cedardale Road and Area "A" is smallest at the southern edge of said parcel. CP 31. This southern boundary of Area "A" forms the tip of the triangle. The distance between Cedardale Road and the Floe's lot is greatest at the northern edge of the Area "A.". CP 31. The size of Area "A" is approximately 19,339 square feet. The Fiorito's entire parcel is

5.63 acres or 245,242 square feet. CP 22. The Fiorito's acquired this parcel of land by way of a quit claim deed on December 31, 1992. CP 46.

The Floe's have owned their lot since 1988. CP 135-142. The Floe's parcel is approximately 1.33 acres in size or 57,934 square feet. CP 49. The Floe's filed a lawsuit to quiet title in Skagit County Superior Court on March 15, 2007 under cause number 07-2-00441-9. CP 1-2. The Fiorito's subsequently filed a counterclaim to quiet title in their favor. CP 147-150.

## **B. APPELLANTS' THEORY OF ADVERSE POSSESSION**

At the trial court level, plaintiffs' alleged that they adversely possessed area "A" by cutting wild grass on the property and by removing some debris on the property when they first purchased the adjacent lot. Both Roger and Betty Floe were deposed by Respondents. CP 51-68; CP 84-93.

### **1. Deposition Testimony**

#### **i. Testimony of Roger Floe**

Mr. Floe testified that he is a field service superintendent for the Robbins Company, a large drilling company and that he has worked there since 1971. CP 54. Mr. Floe testified that on account of his work, he travels away from home approximately 50% of the time and has done so

since he started with the company. CP 54. For example, in 2000, Mr. Floe was away from home 247 days out of the year. CP 71-79. In 2001, he was away for 236 days of the year. *Id.*

Roger Floe testified that when he bought parcel 16994 in 1988, there were four improvements on the property including a house, a workshop, and two small outbuildings. CP 56. Mr. Floe testified that he had recently added two buildings to the land. *Id.* One building was a portable mocha stand and the other building was a fixed fruit stand. *Id.* Both of these improvements were added within the last year or so of Mr. Floe's testimony. *Id.* Mr. Floe testified that he intended on operating a mocha business and a fruit and vegetable business from these stands. *Id.*

During the deposition, Mr. Floe designated the proposed location of these businesses on a map by drawing two boxes. CP 82. He intended to operate the businesses on the northern portion of his lot. CP 82. Mr. Floe testified that for a potential customer to get to his business, that customer would have to enter his driveway at the southwest corner of the lot and drive northbound along his property and adjacent to the family home. CP 56, p. 16:8-9. Mr. Floe testified that he learned about adverse possession from other people and acknowledged that if he owned the land

in dispute, he would have better access to his business from Cedardale Road. CP 58, p. 24:2-6.

Mr. Floe testified that in 1991 he removed some blackberries that had covered his two outbuildings on the north portion of his lot. CP 59, p. 26:1-20, p. 27:6. He testified that the blackberries were probably three-quarters of the way out to Cedardale Road on the Respondents' property. CP 59, p. 26: 22-23. He testified that he also removed some culvert tile and some rotten forms from the Fiorito's property. CP 59, p. 29:20-21. His testimony was that he did this work on and off over a period of six months in 1991. CP 60, p. 30:3.

Mr. Floe testified that he mowed his parcel and Area "A" "certain times of the year, twice a week, sometimes three times a week...just in the spring and summer months. CP 60, p. 33:20-21; CP 61, p. 34: 8. At the time he mowed the grass, Mr. Floe believed he owned the property. CP 57, p. 21:20. Mr. Floe testified that he mowed "all" of the defendants' property up to Cedardale Road. CP 61, p. 34:20-22. This would include the county's right of way easement. There is no evidence in the record as to when Mr. Floe allegedly began to mow the defendants' property. Mr. Floe testified that the only other person that mowed the lawn was his daughter, "occasionally." CP 61, p. 36:5.

Mr. Floe testified that the basis for his adverse possession claim was: (1) allegedly mowing the defendants' grass; (2) allegedly removing some blackberries and debris in 1991 from defendants' property; and (3) planting three willow trees about five to seven years before his deposition. CP 61, p. 36:3. Mr. Floe provided an estimation of where he believed the parties' property lines were by drawing the lines on a photograph of the disputed area. CP 99.

#### **ii. Testimony of Betty Floe**

Betty Floe testified that she had her property surveyed in 2002 because she wanted to know where her property lines were. CP 88, p. 10:8-9. According to her testimony, she did not really know where the boundary lines were to the property prior to the survey but knew some of the land between their property and Cedardale Road belonged to somebody else. CP 88, p. 12:6-16. Mrs. Floe also testified that she did not know that the defendants owned the land in dispute when she and her husband bought their home. CP 88, p. 11:9-12.

Mrs. Floe testified that her husband mowed all of the Fiorito's property, not just a portion of it. CP 99, p. 14:20. Mrs. Floe testified that she never cut the grass but she watched her husband do it. CP 88, p. 11:13.

Mrs. Floe testified that she originally had planned on building a driveway across her property so that customers could access the proposed businesses on the northwest corner of their property from the driveway. CP 89, p. 17:11-21. Ms. Floe testified that she had had eight trees taken off of her property so that she could build the driveway. CP 89, p. 17:20-25. Mrs. Floe testified that she was going to build the driveway adjacent to the house and that it would go right by her bedroom window. CP 89, p. 18:9-12. Mrs. Floe testified that she never thought about building a driveway from Cedardale Road to the back portion of her lot until a year or so before the deposition. CP 90, p. 19:7. Mrs. Floe testified it would be more cost-effective to build a driveway directly through the Fiorito's property as opposed to building a driveway along the side of their home. Ex. 11, p. 22:11.

## **2. Summary Judgment Motion**

Both the Floe's and the Fiorito's moved for summary judgment. Oral argument was held before the Honorable Judge Dave Needy on June 22, 2009. The Floes argued that they used Area "A," "continuously, exclusively, openly, and notoriously in an adverse fashion since they moved into the property." RP 3:13-16. When asked by the court how they used Area "A," the Floe's responded that they used it as a lawn by mowing

it. RP 3. The Floes did not provide any case on point to address whether cutting wild grass on a vacant lot constituted adverse possession. RP 4:10-18. There was no evidence that the Floe's landscaped Area "A" or placed or constructed any structures on Area "A." The Fiorito's submitted declarations indicating that they viewed the property in dispute on a quarterly basis. CP 121-124. They had never seen the Floe's using Area "A" or otherwise maintaining it. *Id.*

The court ruled in favor of the Fiorito's stating that the most important element that seemed to be missing from the case was "use." RP 18:23. The court ruled that it could not find a basis for adverse possession "simply by the mowing or maintaining" of the property. RP 20:10-13. Taking the evidence most favorable to the Floe's, the court made its rulings based on the finding that the Floe's had been "maintaining and mowing" the property since the early 1990's and that they had performed the "eradication of blackberries" in 1991. RP 21-22: 23-25; 1-3. The court noted that the Fiorito's land was unimproved and unoccupied. RP 22:10-13.

### **3. Findings of Fact and Conclusions of Law**

On July 28, 2009, the court filed findings of fact and conclusions of law. CP 127-130. The court found in part that "cutting wild grass in

unfenced, rural, and unimproved land does **not**<sup>1</sup> constitute actual or hostile possession.” The court also found that the Floe’s had removed brush and debris from Area “A” in 1991 prior to the Fiorito’s taking possession of the property. The court found that the Floe’s did not physically remove any other vegetation from Area “A” after 1991. CP 127-130.

#### **4. Floe’s Motion For Reconsideration**

On July 21, 2009, the Floe’s filed a motion for reconsideration. CP 132-134. In that motion, the Floe’s argued that there were several issues of material fact and that the Floe’s did more than just “mow” the lawn. CP 133. The Floe’s argued that they used Area “A” for “barbeques, family gatherings, garbage golf tournaments and parking.” CP 134. To support this argument, the Floe’s submitted declarations from witnesses who had allegedly participated in various gatherings on the property. CP 143; CP 145-146, CP 101-103. None of this evidence had been presented before the court at the summary judgment hearing and there was no argument presented that the evidence had been discovered after the hearing.

The Fiorito’s objected to the admission of new evidence. CP 152-

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<sup>1</sup> As Appellants point out in their Notice of Appeal, the word “not” was erroneously omitted from the Findings entered by the court.

161. The trial court issued a written opinion on August 31, 2009 in response to the Appellants Motion for Reconsideration. CP 163. Judge Needy ruled as follows:

Plaintiff has submitted evidence not previously argued at the Summary Judgment Motion. The Court believes this evidence was readily available and known to the Floe's at the time of the motion. There is no basis to consider that information at this time. However, even if the evidence were included in the Court's review, it would not be sufficient to overcome the granting of Summary Judgment." CP 163.

Appellants filed their Notice of Appeal on August 19, 2009.

#### **IV. ARGUMENT**

##### **A. THE TRIAL COURT DID NOT ERR WHEN IT DECIDED NOT TO REVIEW THE SUPPLEMENTAL EVIDENCE PRESENTED IN THE FLOES' MOTION FOR RECONSIDERATION**

The Floe's argue on appeal that contrary to the findings of fact entered by the court entered on July 28, 2009, there is evidence in the record to suggest that they did more than mow the lawn. Specifically, the Floe's make reference in their opening appeal to declarations submitted by Tyler Floe, Brandon Crandall, Cory Shriner and Betty Floe. Brief of Appellants, p. 8. This evidence was submitted to the court on July 21, 2009, **after** the court had orally granted the Fioritos' Motion for Summary Judgment and before the findings of fact were entered. CP 132-134. The

court denied the Floe's motion to reconsider and ruled that there was no basis to reconsider the evidence submitted by the Floe's. CP 163.

As part of the motion to reconsider, the Floe's allege that they used the property in dispute for the purpose of "garbage golf" and barbeques. CP 132-134. In the two years that this litigation ensued prior to summary judgment, no evidence pertaining to these claims had been submitted to the trial court. In their depositions, neither Roger nor Betty Floe alleged that they did anything on the property other than clear debris and brush and periodically mow the lawn. Only after the trial court granted summary judgment in favor of the Fiorito's did the plaintiffs present this evidence. This evidence was not "newly discovered." Rather, it was provided as an afterthought even though the testimony in the declarations related to events that took place well before the Floe's commenced their action to quiet title.

In Washington, the law is clear. Motions for reconsideration are addressed to the sound discretion of the trial court; a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of that discretion. *Perry v. Hamilton*, 51 Wn. App. 936, 938, 756 P.2d 150 (1988). A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or bases it upon untenable grounds or

reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). If there is ample opportunity for the moving party to submit evidence prior to a summary judgment hearing, it is not error for the trial court to refuse additional evidence on reconsideration. *Wagner Development, Inc. v. Fidelity*, 95 Wn. App. 896, 907, 977 P.2d 639 (1999). If the evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to submit that evidence. *Meridian Minerals Co. v. King County*, 61 Wn. App. 195, 203, 810 P.2d 31 (1991); *Adams v. Western Host, Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989).

For example, the court in *Holaday v. Merceri*, 49 Wn. App. 321, 330, 742 P.2d 127, review denied, 108 Wn.2d 1035 (1987) held that when a motion for reconsideration is brought after a trial has been completed, the court must base its decision on evidence heard at trial. Both a trial and a summary judgment hearing afford the parties ample opportunity to present evidence.

In their motion for reconsideration pursuant to CR 59, the Floe's submitted evidence that was **not newly** discovered. In fact, the evidence presented by the Floe's was directly within their knowledge and involved

conduct going back fifteen years. While CR 59(a)(4) allows for vacation of a judgment based on “newly discovered evidence, material for the party making the application, which he could not within reasonable diligence have discovered and produced at trial,” there was no basis under the rules or case law for the court to review evidence that was not newly discovered. Thus, the trial court’s decision to not consider the evidence submitted in the Floe’s motion for reconsideration should be affirmed and this court should limit its review to what was presented at the summary judgment hearing.

If this court were to review the evidence submitted by the Floe’s on their motion for reconsideration, it would be condoning conduct precluded under the law. As previously argued, unless evidence is newly discovered within the meaning of CR 59, it must be submitted at the summary judgment motion. Otherwise, parties would be encouraged to pile on evidence after a motion for summary judgment knowing that the other party may not have an opportunity to adequately dispute the evidence. For example, in Skagit County, oral arguments on a motion for reconsideration are precluded unless requested by a judge. Skagit County Local Rule 3(h). Clearly, the policy behind “showing all your cards” at the dispositive motion hearing supports the notion of fair play and judicial

economy. Thus, this court must limit its review to the evidence outlined in the court's order granting summary judgment in favor of the Fiorito's.

**B. THE TRIAL COURT'S DECISION TO GRANT SUMMARY JUDGMENT IN FAVOR OF THE FIORITO'S MUST BE UPHOLD**

**1. Standard of Review**

On review of an order for summary judgment, Washington appellate courts perform the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Thus, the standard of review is de novo. *Id.* Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). Summary judgment is granted if reasonable persons could reach but one conclusion from all the evidence. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

An appellate court reviewing a trial court's findings of facts and conclusions of law engages in a two-step process. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). First, the reviewing court determines if substantial evidence in the record supports

the trial court's findings of fact. *Id.* If substantial evidence supports the findings, then the reviewing court determines whether those findings support the trial court's conclusions of law. *Id.* "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) (citing *State v. Halstien*, 122 Wn.2d 109, 129, 857 P.2d 270 (1993)). Unchallenged findings of fact are verities on appeal. *Hill*, 123 Wn.2d at 644. On matters of credibility, the appellate court reviewing findings of fact will not substitute its judgment for that of the trial court. *Fisher Props. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369-70, 798 P.2d 799 (1990).

## **2. The Elements of Adverse Possession**

To establish ownership of a piece of property through adverse possession, a claimant must prove that his or her possession of the property was: (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, (4) hostile and under a claim of right, (5) for a period of 10 years. *ITT Rayonier v. Bell*, 112 Wn.2d 754, 757; 774 P.2d 6; (1989). As the presumption of possession is in the holder of legal title, the party claiming to have adversely possessed the property has the burden of establishing the existence of each element. *Id.* at 757. Possession is

established if it is of such a character as a true owner would exhibit considering the nature and location of the land in question. *Id.* at 759. “The disseisor 'must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest.'” *People's Savings Bank v. Bufford*, 90 Wash. 204, 208, 155 P. 1068 (1916).

Adverse possession is a mixed question of law and fact: whether the essential facts exist is for the trier of fact, but whether the facts constitute adverse possession is for the court to determine as a matter of law. *Peeples v. Port of Bellingham*, 93 Wn.2d 766, 771, 613 P.2d 1128 (1980) (overruled on other grounds).

### **3. Cutting Wild Grass on Unimproved and Unoccupied Property Does Not Constitute Grounds for Adverse Possession**

The courts in Washington have long recognized that the cutting of wild grass on wild, unimproved, **or** unfenced land does not of itself conclusively establish adverse possession thereof. *Wood v. Nelson*, 57 Wn.2d 539, 540, 358 P.2d 312 (1961) (emphasis added). *See also Smith v. Chambers*, **112** Wash. 600, 603, 192 P. 891 (1920), (the acts of piling wood, mowing the grass, and planting vegetables upon the property in question were held insufficient to establish adverse possession)

In the case at bar, Area “A” is unimproved and unfenced. Moreover, it was undisputed that the grass on the property, to the extent it existed, was wild. There was no evidence of any attempt by the Floe’s to improve the area with landscaping. The mere act of cutting grass on this unoccupied, rural, undeveloped property, regardless of its duration or frequency, is not enough to satisfy the actual possession element of adverse possession.

On appeal, the Floe’s suggest that they used Area “A” as their “lawn.” At the trial court level, they did not submit any evidence to demonstrate how they used the land other than cutting the grass and removing debris at a time prior to the Fiorito’s taking possession of the property. At the summary judgment hearing, the trial court asked counsel for the Floe’s how they used the property. The Floes’ counsel stated that they used it as “part of their lawn. They mow it.” RP 3:19-21. No other theory was advanced beyond the assertion that the Floe’s cut the grass for a period of over ten years. The court found that the Floe’s cut the grass for ten years. Regardless, this evidence is insufficient to establish adverse possession. Even under a de novo standard, there is nothing in the record to suggest the trial court’s rulings are erroneous.

The Floe's mistakenly assert on appeal that in addition to mowing the lawn, there was evidence that they continued to clear brush throughout the time they owned the land. Brief of Appellant at p. 6. They argue that this was a material fact in dispute that warrants this court to remand the case. This argument contradicts the record from the trial court. Mr. Floe testified that he cleared blackberries over a period of six months in 1991 prior to the Fiorito's acquiring the property. There was no testimony that he continued to clear brush after its initial removal. Consequently, the court found that Roger Floe cleared blackberries and assorted debris from Area A in 1991 but that this removal took place before the Fiorito's took possession of the property and that after 1991, no further removal of brush occurred. CP 59. p. 26:1-20, p. 27:6. This finding is supported by substantial evidence in the record. The Floe's did not plant any grass or continue to cut down or otherwise remove any brush. Thus, the only evidence in the record of upkeep to the disputed property is the cutting of wild grass. Any attempt by the Floe's to imply on appeal that they continued to remove brush from Area "A" is a complete contradiction to the record before the court.

Even if there had been a finding to suggest that the removal of blackberry brush had occurred throughout a period of ten years, the

removal of brush does not constitute actual use, even if done in connection with cutting wild grass. The Floe's have not submitted any authority to suggest that the removal of brush, even if performed in conjunction with the cutting of wild grass, constitutes actual use. Such use cannot be said to put an owner on notice of a claim or be categorized as actual use.

#### **4. The Floe's Cannot Establish Hostile Possession**

Hostility does not import enmity or ill will; rather, it "requires only that the claimant treat the land as his own as against the world throughout the statutory period." *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 860-611, 676 P.2d 431 (1984). The nature of possession is determined objectively by the manner in which the claimant treated the land. *Id.* Greater use of a vacant lot would be required to be notorious to an absentee owner than to one occupying the land who would observe an offensive encroachment daily. *Hunt v. Matthews*, 8 Wn. App. 233, 237, 505 P.2d 819 (1973) (overruled on other grounds). The property must be used beyond the use it would receive because it was handy and convenient and, instead, must be utilized and exploited as by an owner answerable to no one. *Id.* at 238. The acts constituting the warning which establishes notice must be made with sufficient obtrusiveness to be unmistakable to an adversary, not

carried out with such silent civility that no one will pay attention. *Id.* at 236.

At least one Washington commentator has noted that the most useful test of hostility is whether, considering the character of possession and the location of the land, the possession is "of such a nature as would normally be objectionable to owners of such land." *William B. Stoebuck, The Law of Adverse Possession in Washington*, 35 Wash. L. Rev. 53, 73 (1960) (citing *People's Savings Bank v. Bufford*, 90 Wash. 204, 155 P. 1068 (1916)). Articulating this test, the *Bufford* court pointed out that the would-be possessor must clearly demonstrate hostile intent:

The acts of the invader are sufficient if they clearly show actual appropriation to his permanent and exclusive dominion and benefit; but they must visibly indicate intention of permanent occupation and appropriation. *Bufford*, 90 Wash. at 207, 208 (quoting *Sinclair v. Atlas Lumber Co.*, 147 N.W. 655, 657 (Minn. 1914)).

At least one case has addressed the cutting of grass with regard to residential property. For example, in *Mesher v. Connolly*, 63 Wn. 2d 552, 554-555, 388 P.2d 144 (1964), the plaintiff adverse possessor testified that he had mowed the lawn up until three feet to the north of his concrete walkway. Through a survey it was discovered that the northern edge of his walkway was the true boundary line and that the additional

three feet of lawn he had mowed was positioned in the neighboring lot. *Id.* at 554. The defendant presented evidence that the previous owners had mowed the entirety of the lawn between his home and the adverse possessor's home which included the three foot buffer. *Id.* at 556. The court held "limitations by the plaintiff of lawn-cutting efforts, between the house on the defendant's lot and the north line of the plaintiff's sidewalk, to a narrow strip adjacent to the sidewalk is much more indicative of a claim of ownership than a cutting of the entire area..." *Id.* at 556. The court explained that "the cutting of the entire lawn between the two houses could well have been an act of neighborly accommodation and does not evidence any intent to claim any right of ownership" *Id.* at 556. Also, it noted that even according to the defense, "the only visible boundary lines... (w)as when the grass was freshly cut." *Id.* at 557. Thus, by cutting only a portion of the grass, the plaintiffs were demonstrating the hostility requirement. *Id.* It should also be noted that the eaves to the plaintiff's home extended over the three foot area and that there were other improvements made by the plaintiff to the east and west of the buffer zone including the maintenance of a fence and a rockery. *Id.* at 555-557.

While the *Mesher* holding appears limited to residential lots whereby the area in dispute is in between two residences, the holding can

be applied by analogy. In the present case, the cutting of grass cannot be viewed as anything other than a neighborly accommodation. Not only did the Floe's mow the entirety of Area "A," they also mowed the land subject to the county easement. Certainly, cutting the grass and weeds on the entirety of Area "A" **in addition to** cutting grass on land subject to a government easement is objectively viewed as a neighborly gesture and does not fulfill the hostility requirement<sup>2</sup>. The inference of permissive use is applicable to any situation in which it is reasonable to infer that the use was permitted by neighborly sufferance and acquiescence. *Roediger v. Cullen*, 26 Wn.2d 690, 707, 175 P.2d 669 (1946). *See also Crites v. Koch*, 49 Wn. App. 171, 177, 741 P.2d 1005 (1987).

Because permissive use negates the element of hostility, *Chaplin v. Sanders*, 100 Wn.2d 853, 861-862, 676 P.2d 431 (1984), the Floe's cannot under any circumstance establish that their mowing of defendants' entire property meets the hostility requirement. Mowing weeds and grass on wild and unimproved land that is not owner occupied does not constitute the warning which establishes notice made with sufficient obtrusiveness to

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<sup>2</sup> Maintaining government land is clearly an example of a neighborly accommodation as one cannot adversely possess land owned by the government. *West Seattle v. West Seattle Land & Improvement Co.*, 38 Wash. 359, 80 Pac. 549 (1905).

be unmistakable to an adversary. If the trial court had held that it was, it would have departed erroneously from Washington law.

In the present case, the Floe's cut the grass on the Fiorito's property and initially removed some shrubs. They did not make any attempt to improve the area nor did they attempt to delineate a specific portion of the area for their exclusive use. Cutting somebody else's grass under these circumstances is not evidence of hostile use.

**5. Evidence of Intermittent or Casual Use Such as Garbage Golf or Intermittent Gatherings Does Not Satisfy The Continuous And Actual Use Elements of Adverse Possession**

Even if this court were to consider the declarations that were not relied on by the trial court in reaching its decision, such evidence is not sufficient to establish adverse possession. As discussed above, the trial court properly decided not to review the evidence. However, assuming *arguendo* that there is a basis for this court to review that evidence, the evidence does not serve as a basis for a different conclusion than what was reached at the trial court level.

The courts in Washington have held that using an area for occasional picnics is not such an adverse use so as to evidence a hostile claim, nor is it sufficiently continuous to establish a right. *See Harkins v. Del Pozzi*, 50 Wn.2d 237, 242, 310 P.2d 532 (1957). Likewise, using an

area to play a game or park a car on occasion is not an adverse use. The Floe's have provided no law to the contrary.

The supplemental declarations that the Floe's want this court to consider indicate that Area "A" was used at times for parking, garbage golf tournaments, and family gatherings. The declarations do not specify when these events took place. They do not specify what periods of time the activities occurred. For example, Betty Floe discusses a garbage can golf tournament that allegedly took place on the disputed property in 2002. CP 145-146. This one-time event certainly does not constitute actual or continuous use. Even if this tournament happened sporadically over the years, this is not the type of use that gives notice to a landowner of hostile or actual possession. The Floe's did not leave any trace that the property had ever been used for recreation, parking, or barbequing.

Moreover, from the pictures submitted, it is not clear whether the events took place on Area "A". The Floe's alleged use of "both properties" for barbeques and bonfires on occasion does not constitute adverse possession. Such sporadic use cannot be said to be actual, hostile or continuous. Again, there is no evidence of any fixtures that remained on the property after the events allegedly took place.

Even if this appellate court were to review the evidence not considered by the trial court, the Floe's have submitted no case law to support the proposition that their alleged use constituted adverse possession. Instead, they have asked this court to find questions of fact that are not relevant to the underlying analysis. This is precisely why the Floe's should not be permitted to rely on evidence on appeal that was not considered by the trial court.

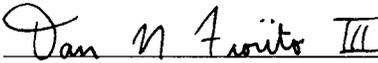
#### **V. CONCLUSION**

In the present case, the trial court correctly ruled in favor of the Fiorito's at the summary judgment hearing. The trial court correctly found that the cutting of wild grass on unimproved and unoccupied land does not constitute adverse possession. The court's conclusions of law are based on substantial evidence in the record. The trial court properly decided not to review evidence submitted by the Floe's subsequent to the court's granting of summary judgment in favor of the Fiorito's. While the Floe's filed for reconsideration, there was no basis for the court to consider any of the additional evidence that the Floe's submitted. Regardless, even if that evidence is reviewed by the court, it does not substantiate a different finding.

The Fiorito's respectfully request that this court affirm the trial court's findings and conclusions of law and award the Fiorito's costs pursuant to RAP Title 14.

DATED this 19<sup>th</sup> day of January, 2010.

**The Law Office of Dan N. Fiorito III**

  
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**CERTIFICATE OF SERVICE**

I declare under penalty of perjury according to the laws of the State of Washington that on January 19, 2010, I caused to be mailed by first class mail, postage pre-paid, a true and correct copy of the Respondents'

Brief to:

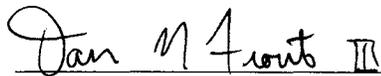
Attorney for Appellants  
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I further certify that on this 19<sup>th</sup> day of January 2010, I had delivered the original Respondent's Brief and one copy to the Division I

Court of Appeals at:

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Signed this 19<sup>th</sup> day of January, 2010 in Seattle WASHINGTON

  
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