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No. 677471-1

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

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LEE WRIGHT and NINA WRIGHT, husband and wife,

Appellants

v.

THOMAS EGGLESTON and SHERRY EGGLESTON,  
husband and wife,

Respondents

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REPLY BRIEF OF APPELLANTS

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

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## Table of Authorities

### **Cases**

<i>Chaplin v. Sander</i> , 100 Wn.2d 853, 861, n.2, 676 P.2d 431 (1984) .....	7
<i>Granston v. Callahan</i> , 52 Wn. App. 288, 294, 759 P.2d 462, 465 (1988) .....	17
<i>Hemenway v. Miller</i> , 116 Wn.2d 725, 731, 807 P.2d 863 (1991) .....	5
<i>Heriot v. Lewis</i> , 35 Wn. App. 496, 500-01, 668 P.2d 589 (1983) .....	8, 9
<i>Houplin v. Stoen</i> , 72 Wn.2d 131, 136, 431 P.2d 998 (1967).....	7, 8
<i>Hunt v. Matthews</i> , 8 Wn. App. 233, 236-37, 505 P.2d 819 (1973) .....	21
<i>ITT Rayonier, Inc. v. Bell</i> , 112 Wn.2d 754, 757, 774 P.2d 6 (1989)..	15, 21
<i>Merriman v. Cokely</i> , 152 Wn. App. 115, 215 P.3d 241 (2009).....	10
<i>Muench v. Oxley</i> , 90 Wn.2d 637, 641, 584 P.2d 939 (1978) .....	6, 7
<i>Olson v. Williams</i> , 266 Or. 592, 593-94, 514 P.2d 552 (1973).....	22
<i>Oltman v. Holland America Line USA, Inc.</i> , 163 Wn.2d 236, 249 n. 10, 178 P.3d 981 (2008).....	5
<i>Thomas v. Harlan</i> , 27 Wn.2d 512, 519, 178 P.2d 965 (1947).....	8
<i>Wood v. Nelson</i> , 57 Wn.2d 539, 358 P.2d 312 (1961).....	18

## Table of Contents

I.	INTRODUCTION .....	1
II.	REPLY REGARDING ASSIGNMENTS OF ERROR .	4
III.	ARGUMENT .....	6
A.	The Egglestons' Unsupported, Conclusory Assertions that the Parties Relied on the Fence as Establishing or Indicating the Boundary Line Are Insufficient to Support Summary Judgment in Their Favor. ....	6
B.	The Egglestons Could Not Establish Adverse Possession as a Matter of Law.....	13
1.	The Egglestons Did Not Seek Summary Judgment on the Adverse Possession Claim.....	13
2.	Mr. Clevish Did Not Adversely Possess the Area....	14
3.	Adverse Possession May Not Be Based on Permissive Use. ....	15
4.	The Egglestons Put Forth No Evidence of Use or Possession ..... Beyond the Permissive Repair of the Fence. 16	
5.	Even if Mr. Clevish Used the Area Between the Fence and the Actual Boundary, Any Use Was Not Open and Notorious.....	19
IV.	CONCLUSION.....	21

## I. INTRODUCTION

This case involves a dispute over title to a strip of land in an overgrown area between two neighboring properties on Whidbey Island. Plaintiffs/Respondents Thomas and Sherry Eggleston sued to quiet title to Defendants/Appellants Lee and Nina Wright's property under theories of mutual recognition and acquiescence and adverse possession. Factually, the Egglestons' claims were based solely on their predecessor's (Rodger Clevish) replacement of an old fence to keep in his dogs. That fence was replaced with the express permission of the Wrights.

The trial court prematurely and improperly awarded title to the Egglestons by granting summary judgment on their claim for mutual recognition and acquiescence. To do so, the trial court had to conclude that the Egglestons had established by clear and convincing evidence agreement or acquiescence to the fence as the true boundary line for a period of ten years or more. The trial court necessarily and improperly weighed the facts presented at summary judgment in order to reach that conclusion.

On Appeal, the Wrights argue that the trial court's summary judgment ruling in favor of the Egglestons (which was based solely

on their mutual recognition and acquiescence claim) was in error because the undisputed evidence established at most that the Wrights acquiesced to the existence of the fence at issue, not to the fence establishing a common boundary line. In order to award title to the Egglestons, the trial court had to weigh the evidence presented, and applied the incorrect legal standard.

The Wrights assert that they were in fact entitled to summary judgment on the mutual recognition and acquiescence claim because there was no credible evidence presented of mutual acquiescence to the fence as a boundary line. Indeed, even the Egglestons' witness, their predecessor in title, Mr. Clevish, testified that he did not know where the boundary line was and did not replace the fence to establish the boundary line. He asked permission to replace the fence to control his dogs.

In response, the Egglestons do not refute the case law cited by the Wrights to assert that it is necessary to establish more than acquiescence to the existence of a fence in order to acquire title to property via mutual recognition and acquiescence. The Egglestons simply argue, without reference to specific facts or citation to the record, that there was recognition of the fence as a boundary.

But the undisputed evidence only demonstrates acquiescence to the existence of the fence as a barrier—not as establishing the common boundary line. The Egglestons did not and cannot prove by clear, cogent, and convincing evidence that the fence was intended to serve any purpose other than to contain pets nor that the fence line has been acquiesced to as a boundary for a period of ten consecutive years. The Wrights presented sufficient evidence to at least create a dispute of fact as to whether the parties mutually acquiesced to the fence as the boundary.

In addition, the Wrights assert that the trial court should have granted their motion for summary judgment to dismiss the Egglestons' claim for adverse possession, because there was no evidence presented that the Egglestons and their predecessors used and possessed the disputed area in a hostile and open and notorious manner for ten years or more.

In response, the Egglestons rely exclusively on the fact that their predecessor, Mr. Clevish, enclosed the disputed area by replacing the dilapidated fence. But the Egglestons fail to address the undisputed fact that Mr. Clevish did so by first obtaining the Wrights' permission to replace the fence. This fact alone entitles

the Wrights to summary judgment on the adverse possession claim; adverse possession cannot be supported by permissive use.

The Egglestons have failed to refute the Wrights' factual and legal arguments in favor of reversal. The Wrights ask the Court to reverse the trial court's award of summary judgment in favor of the Egglestons, as well as the order denying their motion for summary judgment on the acquiescence and adverse possession claims.

## II. REPLY REGARDING ASSIGNMENTS OF ERROR

Appellants Wright assigned error to the trial court's order and judgment *granting* the Egglestons' motion for summary judgment on their claim for mutual recognition and acquiescence; and the order *denying* the Wrights' motion for summary judgment for dismissal of the Egglestons' mutual recognition and acquiescence and adverse possession claims. Br. of App. at 7-8. The Wrights then raised specific issues with respect to such error. *Id.* at 8.

In response, the Egglestons asserted that the Wrights "fail to assign error to any specific factual findings made by the trial judge." Br. of Resp. at 1. The Egglestons assert that "findings" made by the trial court are therefore "verities" on appeal. *Id.*

The Egglestons' assertion that the trial court "found" facts at summary judgment that must be adhered to on appeal if

unchallenged contradicts the very nature of a summary judgment proceeding. Findings of fact are inappropriate on summary judgment. *Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, 249 n. 10, 178 P.3d 981 (2008); see also *Hemenway v. Miller*, 116 Wn.2d 725, 731, 807 P.2d 863 (1991) (“findings of fact on summary judgment are not proper, are superfluous, and are not considered by the appellate court”).

The Egglestons’ repeated reliance on the so-called “findings” supports the Wrights’ arguments that the trial court improperly weighed and found facts. See Br. of Resp. at 2-3, 6-7 (relying on facts “found” by the trial court). If it was necessary for the trial court to “find” facts in order to rule in favor of the Egglestons, as they assert, summary judgment was improper, and should be reversed.

An award of title to the Wrights’ property under the theory of mutual recognition and acquiescence did, indeed, require the weighing of evidence and the finding of fact. Key among the improper factual findings was the trial court’s conclusion, after weighing the various evidence presented, that there was “a mutual recognition, in my mind, of the fence as being: ‘This is my side and that’s your side.’” RP at 28. Mr. Wright expressly denied any such acquiescence and the trial court necessarily had to weigh the

evidence to make that conclusion. See RP at 28-30 (discussing and weighing the evidence presented). The trial court's award of summary judgment should therefore be reversed.

### III. ARGUMENT

#### A. **The Egglestons' Unsupported, Conclusory Assertions that the Parties Relied on the Fence as Establishing or Indicating the Boundary Line Are Insufficient to Support Summary Judgment in Their Favor.**

A claimant seeking to quiet title to property through the doctrine of mutual recognition and acquiescence must establish by clear, cogent and convincing evidence that both parties to the action recognized a physical boundary as a true boundary line, not just a barrier, for ten years. *Muench v. Oxley*, 90 Wn.2d 637, 641, 584 P.2d 939 (1978) *overruled on other grounds by*, *Chaplin v. Sander*, 100 Wn.2d 853, 861, n.2, 676 P.2d 431 (1984). Mutual recognition and acquiescence cannot be unilateral; both parties must agree or acquiesce. *Houplin v. Stoen*, 72 Wn.2d 131, 136, 431 P.2d 998 (1967).

In the case of a fence allegedly establishing the boundary line, the mere existence of a fence in a place other than the legal boundary line is not sufficient to establish title by mutual acquiescence.

In the absence of an agreement to the effect that a fence between the properties shall be taken as a true boundary line, mere acquiescence in its existence is not sufficient to establish a claim of title to a disputed strip of ground.

...

In all cases, it is necessary that acquiescence must consist in recognition of the fence as a boundary line, and not mere acquiescence in the existence of a fence as a barrier.

*Thomas v. Harlan*, 27 Wn.2d 512, 519, 178 P.2d 965 (1947)  
(Emphasis added; internal citations omitted).

In their opening brief, the Wrights discussed at length numerous cases applying the reasoning in *Thomas v. Harlan* in other “fence cases,” to conclude that there was insufficient evidence of acquiescence in a fence as the true boundary line. Br. of App. at 22-28 (discussing *Thomas*, 27 Wn.2d at 513-19; *Houplin*, 72 Wn.2d at 135-37; *Muench*, 90 Wn.2d at 641-42; and *Heriot v. Lewis*, 35 Wn. App. 496, 500-01, 668 P.2d 589 (1983)).

In each case analyzed, the court concluded based on similar facts that there was merely acquiescence to the existence of a fence as a barrier, not as the true property line. *See id.* The cases analyzed repeatedly held insufficient evidence of mutual acquiescence in a fence as a boundary where the area on each side of the fence was unoccupied, wild, or overgrown, and where

the parties did not use and occupy their properties up to the fence line. *See id.*; *see also, e.g., Heriot*, 35 Wn. App. at 500 (affirming the trial court's conclusion that an old fence did not establish the boundary line between two properties by acquiescence where the land on each side of the fence was "bushy" and was not used by either party or their predecessor in interest).

The Wrights analyzed those cases to conclude that the factual circumstances repeatedly found to be insufficient to establish acquiescence in a fence as a boundary line were present in this case. Br. of App. at 28-32. Specifically, like the numerous cases analyzed, in this case the undisputed evidence established that the fence was located in a densely vegetated and overgrown area, and that neither party used or occupied their property near or up to the fence. *Id.*

In response, the Egglestons agree that "where the parties have not expressly agreed that the fence is the boundary line, there must be some evidence that they have acquiesced in it as the boundary line." Br. of Resp. at 10 (citing *Merriman v. Cokely*, 152 Wn. App. 115, 215 P.3d 241 (2009)). Yet, the Egglestons point to no specific evidence to support a conclusion of acquiescence in the fence as the boundary line. *Id.*

Instead, the Egglestons assert, without any specific factual support or citation to the record, that “there was no other purpose for the fence, other than a boundary to the property” and that “both neighbors used the fence as an indicator of the property line.” Br. of Resp. at 10 & 12.

The assertion that there was “no other purpose” merely assumes the conclusion at issue, in contravention of the undisputed facts. The undisputed evidence makes clear the purpose of the fence—to replace an existing fence in order to enclose Mr. Clevish’s dogs. The Egglestons presented no evidence of the purpose of the original fence that Mr. Clevish replaced. The Egglestons also point to not one piece of evidence establishing use of the properties up to the fence for a period of ten years or more.

The Egglestons also assert, without evidentiary support, that “[c]learly, the purpose of the fence was to enclose the property, and to the extent that Mr. Clevish enclosed *more* property than he owned, he gained ownership either by mutual acquiescence or adverse possession.”<sup>1</sup> Br. of Resp. at 12. Again, this assertion assumes the legal conclusion without providing factual support.

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<sup>1</sup> The Egglestons moved for summary judgment exclusively on their claim for mutual recognition and acquiescence. See CP at 261-283; RP at 25:13-21 (“Going to the – the rest of the – the motion. The Motion for Summary

The Egglestons did not establish at summary judgment and on appeal have not pointed to evidence sufficient to prove by clear, cogent and convincing evidence that the Wrights recognized and acquiesced to the fence at issue as the true boundary line for a period of ten years. The undisputed evidence instead established that the Wrights were entitled to summary judgment dismissing the Egglestons' acquiescence claim because there was evidence only of acquiescence to the existence of the fence, not to it establishing the boundary. At the very least, the Wrights presented sufficient facts to create a dispute of material fact as to acquiescence.

The deposition testimony of Mr. Clevish, the Egglestons' predecessor in title, was unequivocal about the purpose of the old fence – even after he repaired it –to keep his dogs contained, not to establish a boundary line.

Q. Well, what -- what was the fence there for, and why did you feel like you wanted to --

A. Well, somebody else had built the fence --

Q. Okay. Well, what did you --

A. -- and I'm just going to replace the fence

---

Judgment, we – we only raised one theory in that motion, which was mutual acquiescence.”). The Egglestons' claim for adverse possession was before the trial court solely on the Wrights' cross motion for summary judgment to dismiss both the Egglestons' mutual recognition and acquiescence claim and their adverse possession claim. CP at 221-234.

because I had a couple dogs and I wanted to keep them in my property.

Q. That was the purpose of the fence.

A. Yes.

CP at 156 (Clevish Dep. at 18:14-22).

Q. The disputed area has been outlined in yellow. The survey shows the boundary lines on the map. What I'm interested in knowing from you is whether you and Mr. Wright attempted to legally establish your boundary line, or if you were just trying to find a fair location for the fence that didn't bother either one of you?

A. We didn't really try to establish a legal boundary line. We were just -- like I say, I was replacing the old fence line that was there.

CP at 163 (Clevish Dep. at 25:23- 26:6) (Emphasis added).

Further, the undisputed evidence established that neither Mr. Clevish nor the Wrights occupied their properties up to the fence in recognition of the fence as the boundary. Mr. Clevish never used or occupied the area east of the fence. CP at 207 & 209 (Wright Decl. at 4 & 6); CP at 167 (Clevish Dep. at 29:8-16). The area on each side of the fence was densely vegetated, inaccessible, and unused. *Id.* CP at 185 (Clevish Dep. at 23:8-19). Clevish expressly intended the area to remain wild as a "buffer" zone. CP at 189 (Clevish Dep. at 32:8-14).

In addition, the undisputed evidence established that Mr. Wright had advised Mr. Clevish that he did not know where the property line was. CP at 209 (Wright Decl. at 6). Mr. Wright asserted that he had never acquiesced the fence as the actual boundary—that alone was sufficient to defeat the Egglestons' motion for summary judgment:

That fence was never treated by me or anyone else as a boundary line. Instead, it was an old fence that was repaired by the plaintiff's predecessor in title (Roger Clevish) for the sole purpose of keeping his dogs from getting away.

CP at 207 (Wright Decl. at 4).

Mr. Clevish corroborated that Mr. Wright did not know where the line was and stated that he also did not know where the boundary line was. CP at 183 (Clevish Dep. at 21:21-23). Further, Mr. Clevish stated that he “wasn't trying to put up a keep-out fence.” CP at 182 (Clevish Dep. at 20:18-19).

Mr. Clevish asked for and Mr. Wright gave him permission to rebuild the fence even though neither knew where the property line was. CP at 208-09 (Wright Decl. at 5-6). Mr. Clevish would not have asked him permission if he believed the fence established the boundary line or was on his property. Mr. Clevish even offered to put a gate in the fence. CP at 182 (Clevish Dep. at 20:18-19).

The undisputed evidence established, at most, that the Wrights and Clevish acquiesced to the existence of the fence as a barrier. No credible evidence was presented to support acquiescence to the fence as a boundary line.

The Wrights therefore ask the Court of Appeals to reverse the trial court's order granting the Egglestons' motion for summary judgment and to remand to the trial court with instructions either: (1) to enter an order granting the Wrights' cross motion for summary judgment; or (2) to proceed with trial on acquiescence.

**B. The Egglestons Could Not Establish Adverse Possession as a Matter of Law.**

**1. The Egglestons Did Not Seek Summary Judgment on the Adverse Possession Claim.**

While the Egglestons assert on appeal that they were entitled to summary judgment on their adverse possession claim, the Egglestons did not request summary judgment on their adverse possession claim and put forth no evidence to support that claim. See CP at 261-283. The only issue with respect to the adverse possession claim is whether this Court should reverse the trial court's order denying the Wrights' motion for summary judgment, and remand with direction to the trial court to enter summary judgment dismissing the Egglestons' adverse possession claim.

## **2. Mr. Clevish Did Not Adversely Possess the Area.**

To establish adverse possession, one must prove actual possession of the subject property that satisfies the following elements for ten consecutive years:

- (1) open and notorious, (2) actual and uninterrupted,
- (3) exclusive, and (4) hostile.

*ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989).

Because the Egglestons only owned the property they acquired from Mr. Clevish for a period of seven years before filing suit (and there is no evidence that they paid taxes on the strip), nothing they did or could have done would be sufficient alone to establish adverse possession. See CP at 205. Only by “tacking” the actions of Mr. Clevish to their claim of an adverse use could the Egglestons reach the ten year mark. But there was nothing in Mr. Clevish’s declaration or deposition testimony that would support the conclusion that he used and possessed the disputed area in a manner sufficient to establish adverse possession for the three years before he sold to the Egglestons (or for any other period).

### 3. Adverse Possession May Not Be Based on Permissive Use.

In responding to the Wrights' opening brief on appeal, the Egglestons combine their arguments on adverse possession with their arguments on mutual recognition and acquiescence. See Br. of Resp. at 7-14. Despite the fact that courts often address these two claims together, they are indeed distinct claims, with distinct standards, and should be analyzed separately.

A primary distinction between the two claims is at the heart of this case. While mutual recognition and acquiescence is based on agreement (either express agreement, or implicit agreement in the form of acquiescence) and can be established with express permission, permissive use is a complete bar to establishing title by adverse possession. The Egglestons fail even to address the "hostile" element of adverse possession, the most important element in this case.

"When one enters into the possession of another's property there is a presumption that he does so with the true owner's permission and in subordination to the latter's title." *Granston v. Callahan*, 52 Wn. App. 288, 294, 759 P.2d 462, 465 (1988). "A use which is permissive in its inception cannot ripen into a

prescriptive right, no matter how long it may continue, unless there has been a distinct and positive assertion by the dominant owner of a right hostile to the owner of the servient estate.” *Id.*

The minimal “uses” that Mr. Clevish made of the disputed area asserted by the Egglestons were permissive, not hostile, as is required to establish adverse possession. It is undisputed that Mr. Clevish asked Mr. Wright for his permission to rebuild the fence at issue. CP at 181, 208-09. Mr. Clevish even offered to build a gate into the fence to let the Wrights enter. CP at 182. Mr. Wright and Mr. Clevish agreed that the fence could be repaired so that Mr. Clevish could contain his dogs. Any use that Mr. Clevish made of the Wrights’ property was therefore with their permission.

The Egglestons therefore cannot establish the hostile element of adverse possession. The Egglestons’ failure to present any facts creating a dispute of fact as to the hostility of the alleged use alone entitled the Wrights to summary judgment dismissing the adverse possession claim.

**4. The Egglestons Put Forth No Evidence of Use or Possession Beyond the Permissive Repair of the Fence.**

In responding to the Wrights’ opening brief, the Egglestons rely exclusively on the fact that Mr. Clevish “enclosed” the area at

issue with a fence. Br. of Resp. at 7-9. It is undisputed that Mr. Clevisch replaced the fence at issue and, in doing so, enclosed the area now in dispute (though it was not in dispute at the time). However, again, he did so with the Wrights' permission and he offered to install a gate. That enclosure, with permission, was not enough to "possess" the disputed area.

The case that the Egglestons rely on exclusively for the proposition that "enclosure" is sufficient to establish possession is *Wood v. Nelson*, 57 Wn.2d 539, 358 P.2d 312 (1961). In that case, the trial court visited the properties at issue—developed, shoreline parcels on Hood Canal—and weighed evidence presented at trial. Based on the evidence presented, the trial court found that the fence was "recognized by the parties on both sides as the boundary line, and that the property up to it has been occupied and used by the parties for such a period of time as to establish plaintiff's claim by adverse possession, if not by agreement." *Id.* at 541. The trial court made numerous findings of fact in order to reach that conclusion. Further, key to the court's conclusion was that the property was in a "populated area and that the land on all sides has been occupied as residences for many years." *Id.*

On appeal, the Court of Appeals concluded that the trial court's factual conclusion that the fence was "built as a line fence is one of the determinative facts in the case." *Id.* It therefore appears that the trial court relied on the theory of mutual acquiescence as much as adverse possession. Further, there was factual evidence that the properties were densely populated and were used up to the fence line.

The *Wood* case is easily distinguished from this case, considered by the trial court at summary judgment—not after a full trial and visit to the property. Here, unlike the *Wood* case, the fence was built with permission and there was no evidence, let alone undisputed evidence, of mutual acquiescence in the fence as the boundary. Also here, unlike in *Wood*, the undisputed evidence demonstrated that the area around the fence was overgrown and the properties were not used and occupied up to the fence.

Indeed, Mr. Clevish testified that he did not use the disputed area at all, but rather left it wild as a "buffer" area. CP at 160-61 (Clevish Dep. at 22:21-23:11).

Q. At the time that you sold the property to Mr. Eggleston it's my understanding that the disputed area that's shown here on Exhibit 1 which is outlined in the green highlighter was completely covered in

Douglas fir and undergrowth and salal and that you were putting no use to it of any type; correct?

A. Not that particular area, no.

Q. No, you were not putting a use to it?

A. No.

CP at 167 (Clevish Dep. at 29:8-16).

The “uses” the Egglestons put forth are immaterial and need not be debated because, at most, they could have only spanned the seven years that the Egglestons owned the property prior to filing suit. It is beyond dispute that neither the Egglestons nor their predecessor in interest made sufficient use and possession of the disputed area to establish title to it by adverse possession.

**5. Even if Mr. Clevish Used the Area Between the Fence and the Actual Boundary, Any Use Was Not Open and Notorious.**

The ultimate test for adverse possession is whether the adverse possessor exercises such dominion over the land that the legal owner should recognize that the adverse possessor is treating the land as an owner. *Bell*, 112 Wn.2d at 759.

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. . . . Real property will be taken away from an original owner by adverse possession only when he was or

should have been aware and informed that his interest was challenged.

*Hunt v. Matthews*, 8 Wn. App. 233, 236-37, 505 P.2d 819 (1973) (emphasis added).

Use of rural or uninhabited property must be more obvious and regular than use of inhabited property to establish adverse possession. *Hunt*, 8 Wn. App. at 237. Use camouflaged by brush cannot be open and notorious. *Olson v. Williams*, 266 Or. 592, 593-94, 514 P.2d 552 (1973). “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.” *Hunt*, 8 Wn. App. at 238.

The Egglestons put forth no evidence that established that the Wrights should have been on notice of anything being done by Mr. Clevish other than the permissive repair of the old fence to keep his dogs in. Any other use by Mr. Clevish in the densely vegetated area—which he conceded did not take place—could not establish open and notorious use sufficient to establish title by adverse possession.

#### **IV. CONCLUSION**

Claims to title in another's real property based on theories of mutual recognition and acquiescence and adverse possession result in the corresponding loss of property. The right to take another's property cannot be easily established. Indeed, the claim of mutual recognition and acquiescence requires proof by clear and convincing evidence. The claim of adverse possession requires proof that one used and possessed property as his own, answering to no one, for ten years or more.

The facts of this case are insufficient to establish the Egglestons' right to take the area in dispute from the Wrights, especially at the summary judgment stage, where the weighing of evidence is not permitted. Instead, based on the undisputed evidence put forth by the Wrights in their cross motion for summary judgment, both title claims should have been dismissed, or at the very least required to proceed to trial.

The Wrights ask the Court to reverse the trial court and to remand for entry of summary judgment in their favor, or for a trial.

Respectfully submitted this 16<sup>th</sup> day of April, 2012.



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