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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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No. 37417-0-II

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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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MARTY TEEL and MARY TEEL

Respondents,

vs.

RALPH J. STADING II, individually,  
RALPH C. STADING III; and  
STADING FAMILY TRUST, LLC

Appellants.

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**Appellants' Opening Brief**

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## TABLE OF CONTENTS

	<b>Page</b>
I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR.....	1
III. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR....	2
IV. STATEMENT OF THE CASE.....	3
V. THE EVIDENCE DOES NOT SUPPORT A RULING FOR ADVERSE POSSESSION.....	5
A. The Use of the North Disputed Area was Not Open and Notorious.....	5
B. The Use of the North Disputed Area was Presumed Permissive.....	9
C. The Respondents Used the North Disputed Area With the Express Permission of the Appellants.....	12
VI. CONCLUSION.....	13

## TABLE OF AUTHORITIES

### CASES

<u><i>Anderson v. Hadak,</i></u> 80 Wash. App. 398, 907 P.2d 305 (1995).....	6, 10, 11
<u><i>Bryant v. Palmer Coking Coal Company,</i></u> 86 Wash. App. 204, 936 P.2d 1163 (1997).....	7
<u><i>Chaplin v. Sanders,</i></u> 100 Wash. 2d, 676 P. 2d 431 (1984).....	6, 7, 10, 11
<u><i>Northwest Cities Gas Co. v. Western Fuel,</i></u> 13 Wash. 2d 75, 123 P.2d 771 (1942).....	10
<u><i>Otto v. Cornell,</i></u> 119 Wis. 2d 4, 349 N.W. 2d 703 (1984).....	11
<u><i>Roy v. Cunningham,</i></u> 46 Wash. App. 409, 731 P.2d 526 (1986).....	8, 9
<u><i>Standing Rock Homeowner's Association v. Misich,</i></u> 106 Wash. App. 231, 23 P.3d 520 (2001).....	9
<u><i>State v. Blue Ridge Club,</i></u> 22 Wash. 2d 487, 156 P.2d 667 (1945).....	10

## **I. INTRODUCTION**

Is a fence that is placed along the top edge of the slope, is not straight, constructed of horse wire, attached to metal posts and trees, is overgrown with blackberries and is used exclusively to retain livestock a boundary fence for the purposes of establishing adverse possession. In this case, despite uncontroverted evidence that the north fence to Respondents' property was used for livestock retention, the trial court found the fence was the boundary line under the doctrine of adverse possession. Further, despite finding that the Respondents asked for and received permission to use the Appellants' property, the court found Respondents adversely possessed the Appellants' property to the fence line.

Because the fence was merely a livestock fence and because Respondents' initial entry onto the Appellants' property was with the Appellants' permission, and the permissive use was never vitiated by the Respondents, the trial court's decision must be reversed.

## **II. ASSIGNMENTS OF ERROR**

Appellants assign error to the following findings of fact:

1. Finding of Fact 10 to the extent it states the north fence became overgrown only on the Stading side of the property.
2. Finding of Fact 15.

Appellants assign error to the following Conclusion of Law:

1. Conclusion of Law 2.
2. Conclusion of Law 3.
3. Conclusion of Law 4.
4. Conclusion of Law 5.

The Appellants assign error to the entry of the Judgment Quieting Title in the Respondents.

**III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

This appeal presents the following issues:

1. Did the trial court err in concluding a fence was a boundary fence when it was not straight, constructed of horse wire, supported by metal posts and convenient trees, remained overgrown for many years and was used, and appeared to witnesses to be used, as a livestock retention fence?

2. Did the trial court err in concluding the Respondents established adverse possession when they received express permission from the Appellants to use the Appellants' property and the Respondents' acts were never inconsistent with the initial permissive use?

3. Did the trial court err in concluding the Respondents established adverse possession when their use of Appellants' property was presumed permissive

because it was vacant, unimproved property, where the Respondents' acts were never inconsistent with the initial presumed permissive use?

#### **IV. STATEMENT OF THE CASE**

Respondents Marty Teel and Mary Teel (hereinafter "Teel") brought this action to quiet title to property north of their deeded property line, referred to as the "north disputed area." The Teels purchased their property in 1990.<sup>1</sup> They moved to the country from the city to have more room and raise horses.<sup>2</sup> When they purchased their property they were aware that the general layout of their property was a rectangle plus a lower triangle not at issue in this case.<sup>3</sup> The property beyond the yard around their house, including the north disputed area, was wooded and remained in its natural condition.<sup>4</sup>

Sometime in 1990, a former owner of the property, Mr. Wheatly, offered to point out the north property corners to Marty Teel. They walked north of the house to where Mr. Wheatly described a line 10 feet from a maple tree across to another tree.<sup>5</sup> Based on what Mr. Wheatly said, Marty Teel constructed a fence, but it was not a straight fence.<sup>6</sup> The fence went along the contour

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<sup>1</sup> Report of Proceedings (RP) 4:16.

<sup>2</sup> RP 5:16 ; RP 5:22.

<sup>3</sup> Finding of Fact 6.

<sup>4</sup> Finding of Fact 7, 14.

<sup>5</sup> Finding of Fact 8.

<sup>6</sup> Finding of Fact 9; RP 264:15.

of the property at the top of the slope, was attached to trees and metal posts and was made of barbless horse wire.<sup>7</sup> Witnesses claimed the fence looked like a livestock retention fence.<sup>8</sup> The Respondent's complaint described the fence as "livestock fencing."<sup>9</sup> Marty Teel testified that the fence became overgrown and remained in that condition for the past 13 years.<sup>10</sup>

Soon after moving onto the property, Ms. Teel encountered Respondent Ralph J. Stading and requested permission to use his property to the north to graze horses. Mr. Stading granted permission.<sup>11</sup>

Between 1990 and 2006, the Respondents used the north disputed area to graze horses, raise pigs for two years, hiring Hulk Haulers to remove old cars which took one day, sprayed for weeds and whacked weeds.<sup>12</sup>

In the fall of 2000, the Stadings hired Hagedorn Surveying to locate and flag the property line between their property and the Teels. The flag line showed a discrepancy between the survey line and the fence line.<sup>13</sup> The Stadings requested the Teels remove

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<sup>7</sup> Finding of Fact 9; RP 77:2-22; RP 150:13; Exhibit 14.

<sup>8</sup> RP 143:22; RP 158:17.

<sup>9</sup> Clerk's Papers (CP) 1-19.

<sup>10</sup> RP 125:14; RP 126:4; Exhibit 14.

<sup>11</sup> Finding of Fact 5.

<sup>12</sup> Finding of Fact 13.

<sup>13</sup> Finding of Fact 11.

their fence in fall 2000, but the Teels indicated they wanted to verify the line. The fence line was never changed.<sup>14</sup>

In 2006 the Appellants removed the north fence and this litigation ensued.<sup>15</sup>

Following a bench trial, the court ruled there was adverse possession to the north fence line. The Appellants filed this appeal.

The evidence does not support a finding of adverse possession. The north fence line was not open and notorious and the use was not hostile to the fence line. At most, the fence was a livestock fence creating no notice to the Appellants that the Respondents considered the fence to be a boundary fence.

Moreover, the use of the north disputed area was always permissive. The area was used with the express permission of Appellant Ralph J. Stading. And, it was presumed permissive because the north disputed area was always left in its natural condition. The judgment of adverse possession must be reversed.

**V. THE EVIDENCE DOES NOT SUPPORT A RULING FOR ADVERSE POSSESSION**

**A. The Use of The North Disputed Area Was Not Open and Notorious**

The holder of legal title is presumed to have legal ownership of the property. Therefore, the party claiming to have adverse possessed the property must establish the elements of adverse

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<sup>14</sup> Finding of Fact 12.

<sup>15</sup> CP 1-19.

possession by clear, cogent and convincing evidence. The elements of adverse possession are firmly established. The Teels must prove their possession of the disputed area was 1) exclusive, 2) actual and uninterrupted, 3) open and notorious, 4) hostile, and 5) for a 10-year period.<sup>16</sup>

The central flaw in Plaintiff's claim to the north disputed area is their failure to prove open and notorious use. In Chaplin v. Sanders<sup>17</sup>, the Defendants placed a road and mobile home on Plaintiffs' property at the time it was owned by Plaintiffs' predecessor, Mr. McMurray. In 1960, Mr. McMurray conducted a survey and discovered the encroachment, informing Defendants' predecessor.

In the early 1970's, Mr. McMurray's successor, the Chaplins, sued the current owner of the trailer park, the Sanders, to quiet title. The Court held that "the requirement of open and notorious" is satisfied if the title holder has actual notice of the adverse use throughout the statutory period.<sup>18</sup> Because Chaplins' successor, McMurray, knew of the encroachment, the open and notorious element was satisfied.

The Court found that the Defendants' use of the land was itself, open and notorious. Specifically, the Court found that:

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<sup>16</sup> Anderson v. Hadak, 80 Wash. App. 398, 401, 907 P.2d 305 (1995).

<sup>17</sup> 100 Wash. 2d 853, 676 P.2d 431 (1984).

<sup>18</sup> Chaplin v. Sanders, 100 Wash. 2d at 862.

“during the relevant statutory period, 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 Parcel B as their back yard. The trial court concluded that the contrast between the fully developed parcel east of the drainage ditch and the overgrown underdeveloped parcel east of the drainage ditch was insufficient to put the owners of the eastern parcel on notice of the Sander’s Claim of ownership. We disagree.”<sup>19</sup>

More recently, Washington courts held:

“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.”<sup>20</sup>

The north fence was not sufficiently obtrusive as to support adverse possession. The fence was placed along the top of the slope using trees, metal posts and round horse wire.<sup>21</sup> The fence was not straight.<sup>22</sup> The fence appeared, even to Respondents’ witnesses, to be a fence to contain horses.<sup>23</sup> The fence was, for the majority of its existence, overgrown with blackberries and

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<sup>19</sup> *Chaplin v. Sanders*, 100 Wash. 2d at 863-864.

<sup>20</sup> *Bryant v. Palmer Coking Coal Company*, 86 Wash. App. 204, 212, 936 P.2d 1163 (1997).

<sup>21</sup> Finding of Fact 9; RP 77:2-22, RP 150:13, Exhibit 14.

<sup>22</sup> Finding of Fact 9; RP 264:15.

<sup>23</sup> RP 143:22; RP 158:17.

virtually hidden from view.<sup>24</sup> Further, in Respondents' complaint, they repeatedly refer to the fence as "livestock fencing."<sup>25</sup>

The character and use of the fence does not meet the open and notorious requirement sufficient to support adverse possession.

Neither was the Respondents' use of the disputed area open and notorious to support a ruling of adverse possession. In Roy v. Cunningham<sup>26</sup> the court held the actual use of a fence controls its character. In Roy, an old fence existed 47 to 52 feet east of the survey line. The court held that the land between the new fence line and old fence line was acquired by adverse possession. On appeal, the appellant argued the old fence line was permissive because it was initially constructed to contain livestock. The court disagreed, holding that

"The nature of the actual use rather than the original purpose for constructing the fence is controlling."<sup>27</sup>

Roy requires the court to look at the actual use of the land claimed through adverse possession. In this case, the north disputed area and fence was used to contain livestock. The Respondents grazed horses in the area. The weed whacking, removing rotted trees, removing old cars and spraying were all

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<sup>24</sup> RP 125:14, 126:4; Exhibit 14.

<sup>25</sup> CP 1-19.

<sup>26</sup> 46 Wash. App. 409, 731 P.2d 526 (1986).

<sup>27</sup> 47 Wash. App. at 412.

consistent with keeping the area safe for their horses, or the pigs they raised for two years. The evidence and undisputed Findings show only that the Respondents maintained a livestock fence and nothing more.<sup>28</sup> Because the use of the fence as a boundary was not open and notorious, the court's decision must be reversed.

B. The Use of The North Disputed Area Was Presumed Permissive

Finding of Fact 14 states:

"14. The north disputed area remained in its natural condition during the Teel's ownership."

This finding creates a presumption of permissive use.

"Permission to occupy the land...will operate to negate the element of hostility in an adverse possession claim."<sup>29</sup>

In order to prove adverse possession the Respondents must first overcome the presumption of permissive use. Neither the quality nor quantity of their use overcomes this presumption.

In Standing Rock Homeowner's Association v. Misich,<sup>30</sup> Mr. Misich claimed he had acquired an easement by prescriptive across the Homeowner's Association property. The court observed that use of unimproved land is presumed permissive.

"Prescriptive rights are not favored in the law, and the burden of proof is upon the one who claims such a right. The claimant must prove that his use of the land has been open and notorious, continuous and uninterrupted for 10

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<sup>28</sup> Finding of Fact 9, 13, 14.

<sup>29</sup> Roy v. Cunningham, *supra*, at 411.

<sup>30</sup> 106 Wash. App. 231, 23 P.3d 520 (2001).

years over a uniform route adverse to the owner. The claimant has the burden to prove all of the required elements. Where land is vacant, open, unenclosed, and unimproved, use is presumed permissive. In such case, evidence is required indicating that the use was indeed adverse and not permissive.<sup>31</sup>

In State v. Blue Ridge Club,<sup>32</sup> the court relied on Northwest Cities Gas Co. v. Western Fuel, 13 Wash. 2d 75, 123 P.2d 771, to reach the same conclusion.

“We said that 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; that a user, 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 dominate owner of a right hostile of the servient estate; that there is no presumption that the use has been adverse where the lands in question are vacant, open, unenclosed and unimproved. In such cases mere use of the land of another will not of itself give right to the presumption that the use has been adverse, that is, courts do not, in such cases, infer adverse user but require evidence of facts or circumstances indicating that the user was indeed adverse and not permissive.”<sup>33</sup>

In Chaplin,<sup>34</sup> the court cited the use of guest parking, garbage disposal, gardening, picnicking, the use of the parcel as a back yard, and the contrast between the fully developed parcel and adjacent overgrown underdeveloped parcel to show adverse use.

In Anderson v. Hadak,<sup>35</sup> Anderson planted a row of trees on the neighbor’s property. The trial court found Anderson adversely

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<sup>31</sup> 106 Wash. App. at 238-239.

<sup>32</sup> 22 Wash. 2d 487, 156 P.2d 667 (1945).

<sup>33</sup> 22 Wash. 2d at 494-495.

<sup>34</sup> 100 Wash. 2d 853.

<sup>35</sup> 80 Wash. App. 398, 907 P.2d 305 (1995).

possessed the property. The court of appeals reversed, holding that planting a row of trees alone, “without some use that is open and hostile”<sup>36</sup> does not satisfy the elements of adverse possession. The court recounted the kind of use that established adverse possession.

“This usage included acts such as clearing land, moving grass and maintaining shrubs and plants. In Otto v. Cornell, 119 Wis. 2d 4, 349 N.W. 2d 703 (1984), a strikingly similar case, the claimant mistakenly planted a line of trees on what he thought marked the boundary between his lot and his neighbors lot. The court found that the claimant established adverse possession up to the tree line because evidence showed that the claimant planted the trees to mark his boundary; he replaced a tree that had been destroyed with another tree; he at all times claimed, maintained, and occupied the land around the trees; and he posted a thermometer on one of the trees.”<sup>37</sup>

The thread that passes through Chaplin, Anderson and Otto is a use that establishes adverse possession is one that creates a positive and unmistakable mark on the land that is readily observed to the true owner.

Despite Plaintiffs’ claims of weed eating, spraying and clearing trees and junk cars from the disputed area, overhead<sup>38</sup> and ground photographs<sup>39</sup> show that the disputed area remained undeveloped and that no change occurred over the years. The photographs show no use of the area over the years that would be

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<sup>36</sup> 80 Wash. App. at 399.

<sup>37</sup> 80 Wash. App. at 404.

<sup>38</sup> Exhibit 16, 23.

<sup>39</sup> Exhibit 14.

observable by the Stadings. Accordingly, the Teels cannot and do not overcome the presumption of permissive use.

C. The Respondents Used the North Disputed Area With the Express Permission of the Appellants

Finding of Facts No. 5 makes clear that the Respondents began using the north disputed area with the Appellants' express permission.

"5. After moving onto the property, Ms. Teel ran into Mr. Ralph J. Stading on the Stading property north of the Teels' and asked permission to ride and graze horses on the Stading property. Mr. Stading gave his permission but stated he was not giving up a square inch of his property. The Defendant did not know where the south boundary line was located because the fence had been buried for some time."

Because Respondents' use of the north disputed area was with the express permission of the Appellants at the inception, the question is whether there was ever a distinct and positive assertion of a hostile right. There was no such right asserted. The character and use of the fence was consistent with use as a livestock fence and not a boundary fence. The use of the north disputed area was consistent with raising livestock and not under a claim of right. The evidence is that the north disputed area was left in its natural condition,<sup>40</sup> further evidence that there was no positive assertion of a hostile right to defeat the express permission given by Ralph J. Stading. Because the use of the north disputed area was at all

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<sup>40</sup> Finding of Fact 14.

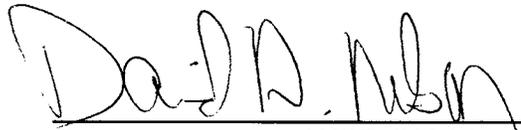
times permissive, the ruling of adverse possession must be reversed.

**VI. CONCLUSION**

Conclusions of Law Nos. 2, 3 and 4 are not supported by substantial evidence. The location, character and use of the "livestock fence" do not support the element of open and notorious use by the clear, cogent and convincing standard. Further, because the north disputed area was left in its natural state, the Respondents' use is presumed permissive. Moreover, Respondents were given express permission to use the Appellants' property by Ralph J. Stading, and the permissive use was never overcome by a distinct and positive assertion of hostile to the Appellants' ownership. The ruling of adverse possession must be reversed and judgment entered in favor of the Appellants.

DATED this 11<sup>th</sup> day of December, 2008.

NELSON LAW FIRM, PLLC

  
David A. Nelson WSB #19145  
Attorney for Appellants

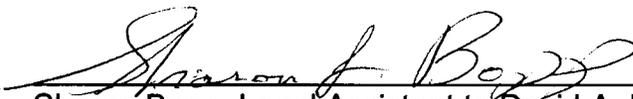
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### CERTIFICATE OF SERVICE

I hereby certify that under penalty of perjury of laws of the State of Washington that I served the document to which this certificate is attached on the attorney for Respondent, Cassie Crawford, by first class mail, postage prepaid on the date signed below.

DATED this 11th day of December, 2008, at Longview, Washington.

  
\_\_\_\_\_  
Sharon Bopp, Legal Assistant to David A. Nelson