DECLARATION OF MAILING: The undersigned, being first duly sworn upon oath, deposes and states that on the 20 day of March, 2009, (s)he deposited into the mails of the United States a properly posted and addressed envelope to the Plaintiff Atty containing a copy of the document upon which this declaration appears. This declaration is made under penalty of perjury under the laws of the State of Washington.

Signed: Flora Sumers

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WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

JAN K. KERBY and ILONA A. KERBY Husband and Wife, **Plaintiffs,** ***vs.*** **GEORGE AUTTELET and PATSY AUTTELET, Husband and Wife and the marital community thereof,** **Defendants.**	**Case No: 37655-5-II** **APPELLANT BRIEF COVER PAGE Of George and Patsy Auttelet**

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I. STATEMENT OF ISSUES AND ERRORS:

1. Is it a reversible error for the court to conclude permissive use could ripen at some point in time into a prescriptive road easement?

2. Is it error when the trial court concluded that a fence line built in 1982 did not memorialize the boundary line nor provide notice to the Plaintiffs of the Defendant's open and notorious claim?

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3. Is it error when the trial court concluded the fence line built on the believed boundary line in 1982 converts to a stock retention fence in 1987 by the replacement of barb wire with round wire?

4. Has the trial Judge abused his discretion and making a determination to both law and fact?

II. STATEMENT OF FACTS

The Plaintiffs claim is based on their allegation that the fence had not been in existence for 10 years (Complaint).

1 George Auttelet purchased his 15 acres of property at 2040 #A Delameter Road, Castle Rock, WA 98611 on or about March 20, 1976.

2. During the development of the Auttelet property arrangements were made to sell five acres, more or less to Jan Kerby.

3. This agreement was stated in the purchase and sale agreement. *Ex. 20.*

4. George Auttelet, offered Jan Kerby first pick "of either parcel". Mr. Kerby was to handle the paperwork. Mr. Kerby chose the north parcel of land and agreed to either hire a surveyor or to plot out the land himself.

5. George Auttelet began his development of the middle parcel of land in accordance.

6. In 1980, during the hectic property development, George Auttelet allowed Mr. Kerby marked off the boundary line between the two parcels. Mr. Kerby disputes he mark his section of property but stakes were in the ground, and were hung markers in

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trees and on tree branches, at the fences property boundary between parties. The court found markers were present.

7. George Auttelet and Jan Kerby also agreed they would each assist the other in development of their home sites. The northern home site had access described in the Deed of Conveyance 30 feet from the east line. Several large trees were in the way and Mr. Kerby did not want to take the time to get equipment or bear the expense to remove them. After getting permission from George Auttelet to just punch in a road, the parties agreed they would take care of it later (the installation of a correct roadway). Mr. Kerby had made an agreement with Mr. Auttelet to help with construction of the road (lower road), including the bridge; as well as to assist with telephone and electrical installation, help each other with building of homes, and, put in a common well all of which Mr. Kerby failed to do.

8. George Auttelet has, during his entire owner occupancy of his parcel, used this roadway along on his east property line on a consistent daily basis (RP 183 line 6 – page 192 line 16). Access to the front portion of the Auttelet property is gained by use of this road. Auttelets have accessed their property by this roadway in a continuous, uninterrupted, never disturbed, never protested, manner contrary to the testimony.

However, the court concludes:

> "I think that road was intended for the exclusive use to serve the Kerby property. There's you exclusivity; okay? And by that, I mean sure they Auttelets could use it; sure

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my mailman who brought the express mail to my door can use it; sure someone who is visiting me can use it; that doesn't change the exclusive nature of what its purpose is." (RP 143 line 17-12)

9. George Auttelet placed a fence line using the stakes and mark where he believed the boundary was. The barbwire fence (established by 1982 – RP- p. 415 line 3). The fence has never been moved; however, the wire on the fence was changed to accommodate the various uses of the Auttelet property. This fence was constructed of cedar post (1982), set on corners, together with metal "T" posts. The barb wire (1982), round wire (1986), or electrical tape (1990) has been in place continuously upon the same "T' posts at the same location.

10. George Auttelet cleared the line and replaced the barb wire with round electric wire fence in 1986 and 1987.

11. The Kerbys have never, until the institution of this litigation protested the location of the fence. The fence is clearly visible from the Kerbys' property, and from the common roadway. Jan Kerby testified he could see the fence line from 1980 to date (RP p. 53 line 6 through p. 54 line 23) and at p. 79 line 19-81 line 24)

Ilona Kerby testified she could see the fence year round before (1980-1993) moving onto the north from the road (RP p. 114 line 4-24). From 1993, Ilona Kerby could see the fences daily (RP p. 118 line 19 – p. 119, p. 13 line 6-13), 80 feet to 100 feet. Both described their observation of the boundary line fence (RP – p. 131 line 6 -

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13) and (RP p. 80 line 1 through p. 83 line 15).

Phil Gustin testified to clearly seeing the fence running straight from the roadway to the West corner (RP p. 11 line 9 – p. 15 line 22).

Every witness (except Phil Gustin) testified the fence was in place and, observed at the latest 1987.

- Jan Kerby, RP p. 79 line 16 – p. 83 line 15.
- Ilona Kerby, RP p. 114, line 4-9, p. 125, line 7- 12, p. 128 line 8-20, (1992) p. 118-119 line 22. (1990) p. 121 line 14 – p. 122 line 21, (1986) p. 118- saw horses.
- George Auttelet, RP p. 147-149. 1990 – Ex. 4 p. 176, p. 177, p. 169 horses (1988) Ex. 16, p. 182, 221, 219, 167, 168- converted to electric tape. Ex. 31 – p 240 (9/88), 81-82 corner p. 236.
- Dr. George Auttelet, Jr.- RP p. 255 line 17 to p. 257 line 12, p. 266 line 3-10.
- Billie Courtney RP p. 271 line 24 to p.275 line 5
- Bobbie Hampel – RP p. 283 line 18 p. 290 line 12.
- Patsy Auttelet – RP p. 298 line 17 to p. 314 line 17.
- Heidi see Fence Ex. 1. RP P. 272, P. 287. Ex. 2 p. 152 9/88.

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12. At all times material hereto from 1980 to date, there has only been one (1) fence line.

13. George Auttelet began development of his property more vigorously than the Kerbys. The Kerbys located their home at the back of their parcel of property and exercised only minimal care over the approximate south half of their parcel up to the fence line, (RP p. 420, line 11-20).

14. George Auttelet placed his residence more centrally within his parcel and has diligently used the property up to the fence line. George Auttelet's use includes the following: (1) Falling trees; (2) Erection of a fence;(3) Maintenance of the fence; (4) Weekly cleanup and burning and winter tree clean ups; (5) Posting of the fence; (6) Wiring of the fence; (7) Planting of trees; (8) Limbed trees;(9) Weeded the property (twice a year); (10) Sprayed the fence line (on an annual basis 2 a year); (11) Seeded grass (repeatedly for horse pastures); (12) Combated the insects (specifically the nests of ants and termites); (13) George Auttelet cleared the property sufficiently in the early 1980's in order to gain for wood to heat his house; (14) Collected, piled and burned winter debris; (15) Had family outings in the disputed area; (16) Removed rotten trees; (17) Removed stumps and some tree stumps cut in the 1980's are still in the ground and a court view of the property would be decisive in proving the continuous use of improvement of George Auttelet's property up to the boundary line; and (18) Changing the barb wire fence to hot wire in 1986 after the horses came to the property (to accommodate his grazing animals) sometime thereafter in 1988.

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Ilona Kerby- RP p. 114. Ex. 1 p. 147 -149, p 164-166, 219, 221, 234, 272, 143, 240, 152, 167, 256, 158-164, 176-182, 268-277, 120 line 14-20, p. 258 line 11- p. 260 line 9, 268 line 13 – p. 266 line 15, p. 2, p. 285 line 17 – p. 294 line 21.

Jan Kerby- RP p. 29 line 2, p. 24 line 9-17, p. 94.

George Auttelet – RP p. 145 line 9 – 146 line 25, p.147 line 15-22, p. 161 line 4 – p.162 line 21, p. 170 line 17 – p. 175 line 22, p. 189 line 24 p. 191 line 24, p. 220 line 2 p. 221 line 16, p. 222 line 14 p. 223 line 19, p. 227 line 20, Ex. 34.

Dr. George Auttelet Jr. – RP p. 258 line 11 – p. 260 line 9.

Billie Courtney - RP p. 268, line 13 – p. 266 line 15. p. 285 line 17 – p. 294 line 21.

15. Auttelet family pictures of evidence. The fence line marking the boundary line. These pictures were not taken for the purpose of memorializing the fence line. The fence line was observable within the pictures.

EX. "1" was taken in September 1988 showing the Auttelet children and family working on the property. To the far right of the picture a steel fence post is visible, it is flagged as well. This picture shows the use of the Auttelet property up to the fence line. (RP p. 147 line 15 – p. 151 line 23, p. 229 line 13- p. 230 line 22, p. 272 line 1-line 4, p. 286 line 17, p.

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287 line 8, p. 301 line 22 – p. 304 line 4.

EX. "2" was taken in September 1988 illustrates the fence line in the back ground as seen from the Auttelets property and extensive stack of wood harvested from the Auttelet property, including the area in dispute. (RP p. 152 line 17, p. 155 line 14, p. 306 line 17, p. 309 line 19)

EX. "3" This is a picture of Patsy together with the shed. There is a white line which is a clothes line beneath the clothes line is the clearly obvious and flagged fence line. This picture was taken during the winter and the fence line is very obvious. Vegetation in the fore ground is on the Auttelet property and the back ground is a stand of trees on the Kerby property. (RP p. 157 line 6 – p. 158 line 16, p. 252 line 3- line 14, p. 255 line 8 – line 14, p. 304 line 14 – p. 306 line 8, p. 311 line 16 – p. 312 line 2)

EX. "4" Picture of George Auttelet picking up limbs. Kerby house in the background running behind Mr. Auttelet's left shoulder the fence line flagged with white ribbon used and illustrates the vegetation difference between the "park like" property of the Auttelets and the forested Kerby property. (RP p. 176 – p. 180 line 25, p. 243 – p. 288, p. 247 line 16- line 25, p. 289 line 18 –p. 290 line 25)

EX. "5" This is the fence line that marks the boundary line. There is a four foot gap running the entire length of the property. The right side is

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post 2005 timber harvest by the Kerbys. Vegetation is Oregon grape, ferns and the vegetation is higher than the grass along the fence line. A tremendous amount of work to keep the brush and blackberries from crossing the line. To the left of the picture is the Auttelet property. The fir trees approximately fifteen years old with the limbs cut away from the fence line not to short the electrical wire pictured on the red "t" posts are white electrical tape together with round wires insulated on the posts. To the left of the picture is the Auttelet property. This strip pictured is sprayed twice a year to kill the grass, to stop the vegetation from growing into and shorting out the fence line which in turn turns orange after it has been sprayed with herbicides. (RP p. 172 line 17 – p. 175 line 24, p. 243 line 6 – line 16, p. 245 line 8-line 19, p. 274 – p.277 line 14, p. 312 line 30 – p. 315 line 17, p. 322 line 1, p. 324 line 12)

EX. "29" shows the Kerby property after their logging of 2005 and shows the fence line running down and through the trees from the east to west corner being memorialized in Ex. 30. This picture is taken from the "road". EXHIBIT "30" Old fence corner discovered in 1980 marks the far west Auttelet fence line.

The barbwires are marked with pink surveyor tape. The vegetation shows a distinct difference in the back ground on the Kerby side of ferns and scrub trees and black berries and on the Auttelet side is low clover,

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bleeding heart and grass. Note that the ferns and Oregon grape only slightly intrude on to the Auttelet property. The court found that this fence line was in existence since 1982. (RP p. 143 line 17 –line 23, p. 14 line 2 -10, p. 222 line 11 – p. 224 line 12, p. 234 line 7 – p. 236 line 3, p. 329 line 21, p. 330 line 6, p. 415 line 3)

EX. "31" Taken in September 1988 shows the horses standing in a clearing and the fence line. In the back ground the Kerby forest and fence lines can be seen. The fence line is at the tree line. (RP p. 158 line 17 – p. 163 line 12, p. 240 line 18, p. 242 line 25, p. 291 line 8, p. 292 line 5, p. 293 line 16, p. 294 line 10, p. 309 line 25, p. 310 line 23)

EX "32" Picture of the 1988 family dog. In the background is the boundary fence line marked by several posts with warning tape and wire. The foreground fence is not the fence line in question. On the Auttelet side is the low grass and on the Kerby side is trees, scrub brush and black berries. (RP p. 164 line 4 – p. 167 line 25)

EXHIBITS "34" Taken in the Spring of 2005 shows the Auttelet "park like" property and the boundary line fence running down the hill in the lower center of the picture. There is a significant difference in vegetation on each side of the boundary line and it has taken the Auttelets many years of maintenance to groom this property. (RP p. 227 – 230, p. 234 line 17, p. 240 line 12, p. 275 line 22, p. 277 line 14, p. 257 line 8-18)

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III. STATEMENT OF FACT

Permitted use Roadway

Jan Kerby stated that road construction began May 18, 1980, the day that Mt. St. Helen's erupted. (RP p. 223 line 10-line 20, p. 185 line 8 – line 21)

The Kerbys asked to borrow George Auttelet's diesel cat to quickly punch in a road. The Auttelet family was busy working on their own project. There was not time for Jan Kerby to cut trees. Mr. Kerby drove around them. Years later, the Kerbys began developing their northern site without improvement to the "easement road".

The roadway allegedly claimed by the Kerbys' is largely located on the Auttelet property. The parties have made a series of agreements (all oral) on the use and repairs of the roadway. Jan Kerby has refused to join in repairs. George Auttelet and his family alone have maintained, surfaced and repaired the roadway – like a true owner and contrary to the courts finding of "intended exclusive use." Kerbys improvement is limited to ballast rock in 1981 (RP p. 56 line 9-15.)

George Auttelet's family has maintained the roadway for their use. The Auttelets family access any part of their property from their road. The Kerbys' abandoned their adverse possession case early in the trial and argued detrimental reliance, (RP p. 405, line 1-3.)

The "new legal theory" is NOT based on any law of real property. This is not a contract case. The Plaintiffs and their attorney say "we have shared the road".

It is a fact that Auttelets have sprayed the weeds along the fence line no less

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frequently then twice a year since 1984. Ex.5; (RP p. 170 line 17, p. 173 line 10, p. 313 line 14 – p. 315 line 17, p. 321 line 10 – p. 324 line 8). The limbs from the Auttelet trees, which were planted fifteen years ago, have been trimmed away from the electric fence line. This strip turned orange from the herbicide used thus making the fence line more than just a fence but actually a four foot orange line with no vegetation on either side. Clearly visible and clearly noticeable. (Ex. 5, RP p. 223, p. 170 line 17 – p. 175 line 21, p. 258 line 11 – p. 260 line 9)

The testimony of Mr. Kerby illustrates the lack of adversity, but also the weakness of his case. Mr. Kerby states he had no clear understanding where the boundaries were. How can Mr. Kerby be heard to argue that the fence isn't on the line?

> At trial Mr. Kerby was asked "You were never shown any corners?" and "You never saw any fence corners?" Mr. Kerby testifies no to a specific "line" or "corners", but only a vague description of the property. Defendant argues Mr. Kerby marked the line, thereafter the fence was built. It is unreasonable to conclude that the Kerbys, have not seen the fence in the last 20+ years. The Kerbys ask the court to "believe" they were unaware of Auttelets timber harvest, building, construction, and constant upkeep with power equipment.

This is especially hard to believe when, 15 years ago, a tree fell over the fence and line from the Kerbys' property into the Auttelets' property. Jan Kerby conversed with Mrs. Auttelet and told her "he would repair the fence." Instead Jan Kerby and a friend of Mr. Kerby's limbed the tree, cut the tree into firewood and hauled the firewood

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back to his home site.

Mr. Kerby states he "pushed in a road" for access to the spring, May 18, 1980. How could he not see the fence that already existed when the road was pushed in a mere matter of feet away? The Kerbys' are neither blind nor deaf, but their excuses are lame.

Mr. Kerby asserts the fact that he did NOTHING to prevent Mr. Auttelet from using the now "disputed parcel" contends the fence was put up to retain the Auttelets' horses in 1988. There has never been any protest of this fence.

The wire type changed from barbwire to round electrical horse wire by the Auttelets in 1986-1987. The wire was changed before the horses arrived. The Kerbys acknowledged the fence is all on one single bearing in a straight line and they did nothing to contest the line, either by activity, word, or any deed.

Mr. Kerby also claims that the <u>first time</u> he saw the line was when he logged his property in 2004.

These admissions are very telling. Mr. Kerby states he knew very little about the fence line. Consequently, he admits he would be unable to assert "ownership", nor refute the uses made by the entire Auttelet family. (RP p. 41 line 10 – p. 42 line 10, p. 46 line 11- p. 47 line 7, p. 51 line 14-19, p. 52 line 6-10, p. 89 line 12 – 22).

Mr. Kerby testified he knew by 1987 the fence line existed. (RP p. 76 line 12, p. 81 line 25, p. 80 line 15, p. 83 line 16, p. 93 line 20, p. 94 line 21 and Ex. 28.)

This lawsuit was filed in 2005. No protest was made within 20+ years, nor in

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1982 of the original barbed wire fence nor the 1986 round horse wire. Mr. Kerby has lost any right that he may have had to the property by adverse possession. The Auttelets position is based on adverse possession and direct agreement of the parties.

The Kerbys both testified to no knowledge of the fence until 1993.

From the photos the fence was flagged. Ex. 3, 30, 32. This is normal course of conduct for people having horses.

IV. STATEMENT OF LAW AND ARGUMENT

Location of Property/Boundary Line

4.1 The Kerbys' have no evidence, based on their testimony, declarations, or documents produced, to dispute the boundary fence line originated in 1982.

4.2 George Auttelet has a wealth of family pictures showing the fence line dating from 1988 to the present date. The fence line is clearly visible. The fence line is obvious from the road.

4.3 Mr. Kerby hired Cal Hampton of Hampstur Corporation, to prepare a boundary line adjustment agreement establishing the legal descriptions to coincide precisely with the fence line. Mr. Kerby prior to instituting the litigation, acknowledged the position of the fence line to a professional land surveyor Phillip R. Gustin.

Mutual Recognition and Acquiescence:

4.4 Plaintiffs and Defendants own adjacent real property since 1980. Defendants gave actual notice of the boundary fence line and have maintained, cared for, improved, and used their property up to the fence line thus respecting the

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established common boundary line. No objections have ever been raised as to the nature and location of the said boundary fence line.

4.5 Further, the common boundary was never contested in any manner by any of Plaintiffs predecessors any encroachment for a period of time in excess of the statutory minimum.

4.6 At no time was the fence "permitted" by Defendant nor was it ever used as a temporary structure. At all times the defendants maintained all portions of the boundary fence line and the encompassed area therein in a consistent manner.

4.7 The elements of mutual recognition and acquiescence are defined in the Lamm v. McTighe, 72 Wn.2d 587, 593 (1967):

1. A certain well-defined boundary line established in some fashion upon the ground;

2. Either:

(a) an express agreement, or;

(b) in the absence of an expressed agreement establishing a designated line, the adjoining owners or their predecessors in interest, acting in good faith, manifested by their acts or occupancy or improvements to their respective property a good faith mutual recognition that the line so designated is accepted as the true line; and,

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3. The requisite mutual recognition and acquiescence in the well-defined line must continue for that period of time required to secure property by adverse possession.

4.8 Recognition of a fence as a boundary line must be by both of the adjoining owners is necessary. Houplen v. Stoen, 72 Wn.2d, 131, 431 P.2d 998 (1968); Thomas v. Harlan, 27 Wn.2d, 512, 178 P.2d 965, 170 A.L.R. 1138 (1947). In order to prevail, the party claiming acquiescence must show that he and his neighbors, or those predecessors in title, recognize the physical boundary line as a true line and not as a barrier for the statutory period necessary to establish adverse possession. Muench v. Oxley, 90 Wn.2d 637, 584 P.2d 939 (1978); Heriot v. Smith, 35 Wn.App. 496, 668 P.2d 589 (1983).

4.9 In order to establish the period of time necessary for acquiescence and mutual recognition, one must look to when the well-defined line was continuously recognized. For this, the time period required for mutual recognition is the same as for adverse possession. *Lamm v. McTighe, supra; Houplen v. Stoen, supra*; *Thomas v. Harlan, supra.*

4.10 These concepts which toll or commence the time line for adverse possession are relevant to the period of acquiescence. Acquiescence in a property line cannot be a unilateral act, it must be bilateral. Both parties must agree or acquiesce, either expressly or by implication. *Houplen v. Stoen, supra.*

4.11 The burden of proof in order to prevail is upon the party claiming the

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doctrine of acquiescence of such, and must be shown by clear, cogent and convincing evidence that he and his neighbor recognized a physical boundary line as a true line, not just as a barrier for a statutory period of time necessary to establish adverse possession. *Muench v. Oxley, supra; Heriot v. Smith, supra.*

4.12 Circumstances may suggest the use was permitted as a matter of neighborly courtesy, Miller v. Jarman, 2 Wn.App. 994, 471 P.2d 704 (1970). However, the inference of permissive use is applicable only to any situation in which it is reasonable to infer that the use was permitted by neighbor, sufferance and acquiescence. Roediger v. Cullen, 26 Wn.2d 690, 175 P.2d 669 (1946); Crites v. Kocch, Supra. Permissive use is not acquiescence.

4.13 The Court has also addressed the issue regarding improvements made upon the property. In the case of Turner v. Creech, 58 Wash. 439, 108 Pac. 1084 and Mullally v. Parks, 29 Wn.2d 899, 906, 190 P.2d 107 (1948), the Court identified that in a boundary line dispute:

> "Practical and agreed location of a boundary line may result from long acquiescence in its location, or when drawn and acted upon by parties, as where valuable improvements are places with reference to it and before it is denied."

4.14 The existence of an expressed agreement is not an indispensable element. It is sufficient if the adjoining parties have for the required period of time, actually demonstrated by their actions on the properties and the asserted line of division

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between them a genuine and mutual recognition and acquiescence of the given line as a mutually adopted boundary line. Lamm v. McTighe, 72 Wn.2d 587, 593 (1967). Acquiescence in a boundary line is established by bilateral acts where both parties act either expressly or by implication. Houplen v. Stoen, 72 Wn.2d, 131, 431 P.2d 998 (1968).

4.15 Plaintiffs have mutually acquiesced to the location of the boundary fence line as the boundary line in this matter, and are statutorily bound by their acquiescence and mutual recognition thereof. Plaintiffs' use of land was for a buffer and forest land; Defendants' use of land was for wood lot, grass pasture, family recreation, agricultural use, live stock, horse boundary and timber harvest.

Estoppel (in Pais):

4.16 Plaintiffs cannot deny the earlier recognition of the boundary fence line as the boundary fence line, by themselves. No cause of action, notice or other form of contact was ever made with Defendants by any person or persons purporting to object to the location of the boundary fence line as the common boundary fence line. Therefore, Plaintiffs, in their constant recognition of the fence line as the common boundary, are estopped from this action at this time.

Adverse Possession:

4.17 Defendants have owned and maintained their property, including the fence line and all property contained therein, in a manner which has at all times been open, notorious, exclusive, and hostile, for a period in excess of ten (10) years. Case

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law establishes that facts that would lead a reasonable person to inquire about a boundary location is sufficient for the establishment of adverse possession. Bryant v. Palmer Coking Coal Co., 86 Wn.App. 204, 936 P.2d 1163 (1997). Defendants' use began in 1988. Plaintiffs concede Defendants' use and possession from 1993 but filed after the statute of limitations.

Actual Possession:

4.18 To be adverse, the possession of another's land must be "actual." This element of adverse possession is extremely important in boundary dispute cases, frequently being the sole issue and usually at least one important one. If there is a general test of how extensive the use must be, it is, as often repeated by Washington opinions, that the use must be the kind of use that a true owner would make of the particular land in all the circumstances of the case. Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984); 17 Wash. Practice, at §8.9. Actually this test is more broadly stated, to define the kind of use that, if "hostile", will have all the other elements of adverse possession. However, the "as-a-true-owner test" seems to apply especially to "actual" possession. The truth of the matter is that the elements overlap a great deal.

4.19 First, for the activities on the disputed strip to amount to possession of it, it is important that they be carried out "with reference to" or so as to mark a boundary line. This especially comes out in cases in which there is a fence; it must be used as a boundary line fence, not as a fence for some other purpose, such as to impound cattle.

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See *Wood v. Nelson, supra* (fence was line fence); and *Roy v. Goerz, supra* (fence was a cattle fence).

4.20 Second, while it is often helpful to the adverse possessor's cause that he have maintained a boundary line fence, this is not necessarily required. See especially Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984); Bryant v. Palmer Coking Coal Co., 86 Wn. App. 204, 936 P.2d 1163 (1997) (perimeter road sufficiently marked extent of adverse possession).

4.21 Third, the activities or objects that constitute possession need not all be carried on or maintained at all points along the boundary line. They may exist here and there, as long as together, they point to possession up to the boundary. *See especially Frolund v. Frankland, supra; El Cerrito, Inc., v. Ryndak, 60 Wn.2d 847, 855, 376 p.2d 305 (1995). Washington Practive Real Estate: Property Law, William B. Stobuck section 8.10.*

a. Uninterrupted: One of the required elements of adverse possession is that it be "uninterrupted" or "continuous". For one thing, this means the occupation of another's land must not consist of only sporadic acts. Peeples v. Port of Bellingham, 93 Wn. 2d 766, 613 P.2d 1128 (1980).

"Uninterrupted" also means that the possessor who has once commenced acts that constitute adverse possession may not have a significant break in the period of possession. Such a break will cause what is called abandonment of adverse possession. In that case the period of possession up to that point is lost and may not be added onto

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the second period that may begin later. However, the break apparently does not need to be a very long one, especially if the true owner re-enters the property during the break. For instance, in one case, a break of five days ended the period when the owner re-entered during that period. See George v. Columbia & P.S. R.R., 38 Wash. 480, 80 P. 767 (1905); 17 Wash. Practice, at§8.17, Page 511.

b. Exclusive: To be adverse, possession of another's land must be "exclusive". This does not mean that an adverse possessor may not pass through a tenant he puts into possession, for he may. Nor does it mean that two persons may not possess as co-tenants; they may acquire adverse possession title as tenants in common. Rather, exclusivity means that the adverse possessor may not share possession with the true owner; if the true owner is in possession, the would-be adverse possessor is not, though his acts alone might otherwise have constituted adverse.

The concept that the claimant's possession need not be absolutely exclusive in order to satisfy the exclusive conditions of adverse possession has been well established. Lilly v. Lynch, 88 Wn. App. 306 (1997); Crites v. Koch, 49 Wn. App. 171, (1987).

c. Open and Notorious: Though "open" and "notorious" are usually stated as if they were separate adverse possession elements, they are so closely linked that they may be discussed together. The gist of it is that the adverse possessor's acts of occupation are sufficiently visible or discernible that the diseased owner can, if he looks,

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learn of them. The owner need not have actual knowledge of the adverse possession, even an absent owner is charged with the notice the acts would impart to an owner who did reasonably look after the land. Doyle v. Hicks, 78 Wn. App. 538, 897, P. 2d 420 (1995). Denny Restaurant, Inc. v. Security Union Title Insurance Co. 71 Wn. App 194 (1993).

d. Hostile: First, the issues of hostility and some of its sub-issues, state of mind (intent), claim of right, and good faith, have always been particularly presented in boundary cases.

Second, in the most dramatic development in the history of Washington adverse possession law, Chaplin v. Sanders, 100 Wn. 2d 853, 676 P. 2d 431 (1984) has swung like a giant scythe through all the previous hostility decisions.

Possession that is "hostile" is possession by one who is on the land without legal right: it is possession by one who has neither the possessor estate nor permission of the one who has it. Hostility does not import enmity or ill will nor, indeed, that the discisor or decisee even know each other. In boundary dispute cases, it simply means possessor is in possession of a strip or area on the other side of the boundary line without his neighbor's permission.

The most useful general test of hostility is: 'Considering the character of possession and the locale of the land, is the possession of such a nature as would normally be objectionable to owners of such land?' People's Sav. Bank v. Bufford, 90 Wash. 204, 155 P. 1068 (1916); 17 Wash. Practice, at §8.12. Possession is hostile

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when one holds property as his own, whether under mistaken belief or willful belief. Chaplin v. Sanders, 100 Wn. 2d, 860; Stokes v. Kummer 85 Wn. App. 682, (1997).

e. Time: In order for a claim of adverse possession to be established, the above elements must be shown. The period through which these elements must concurrently exist is ten (10) years. RCW 4.16.020. *See Chaplin v. Sanders, supra.* The fact is that any ten (10) year period is sufficient to establish adverse use. Therefore, adverse use could be established from 1976 to 1986, 1986 to 1996 or at any point where the elements exist for ten (10) consecutive years.

The fact is that the boundary fence line does not encroach on the Plaintiffs' property. However, the location and existence of the said boundary fence line has been established since 1987, and as such, the Defendants' herein claim that they have fulfilled the obligations set forth under the theory of adverse possession and as such, all other claims should be quieted thereby to the defendants.

V. ARGUMENT

ISSUE No. 1: Does permissive use become adverse use?

The court requested briefing outlining and defining the concept of permissive use. The argument presented by defendant's counsel at the time of the trial was "permissive use never ripens into adverse use".

Permissive use never ripens in to an adverse for prescriptive use.

> "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

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subordination to the latter's title. *Long v. Leonard, supra. Peoples Savings Bank v. Bufford,* 90 Wn. 204, 155 P. 1068."

There is a presumption that when one enters upon another's property that the entering person does so with the true owner's permission and in subordination with the latter's title.

> "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 dominant owner of a right hostile to the owner of the servient estate. *Scheller v. Pierce County, supra; Schulenbarger v. Johnstown, supra; Buckley v. Dunkin,* 131 Wn. 422, 230 P.429. Accord, *Long v. Leonard, supra; Leinweber v. Gallaugher,* **2 Wn.2d 388**, **98 P.2d 311**."

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 dominant owner of a right hostile to the owner of the servient estate. *NORTHWEST CITIES GAS CO. v. WESTERN FUEL COMPANY,* 13 Wn.2d 75 84, 123 P.2d 771(1942). This is well established law. *CHAPLIN v. SANDERS, 100 Wn.2d 853, 676 P.2d 431 (1984).*

The Washington State Bar: Real Property Deskbook (1997 & Supps. 2000-02) - § 10.3, states:

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"Permissive use – that is, use with the full knowledge and cooperation of the servient owner – does not constitute adverse use and cannot result in an easement by prescription. *Ormistonv. Boast,* 68 Wn.2d 548, 413 P.2d 669 (1966); *Millard v. Granger,* 46 Wn.2d 163, 279 P.2d 438, (1955). Therefore, use permitted out of neighborly courtesy does not *constitute* prescriptive use. *Roediger v. Cullen,* 26 Wn.2d 690, (1946); *Bulkey v. Dunkin*, 131 Wn. 422, 230 P. 429 (1924), *aff'd,* 236 P. 301 (Wash. 1925); *Miller v. Jarman,* 2 Wn.2d 690.

Similarly, use that is unchallenged by the owner of the servient estate is merely one circumstance from which one determines whether use is permissive or adverse. *Cullier v. Coffin,* 57 Wn.2d 624, 358 P.2d 958 (1961). Permissive use may change into adverse use and thus start the running of the statue of limitations, but a distinct and positive assertion by the claimant of a right hostile to the servient estate is required. *Washburn v. Esser*, 9 Wn. App. 169, 511 P.2d 1387 (1973). A permissive use terminates when the licensor dies or alienates the servient estate, and at that time a formerly permissive use becomes adverse. *Granston v. Callahan*, 52 Wn. App. 288, 759 P.2d 462 (1988).

The nature of the estate upon which the servitude is allegedly impressed may aid in determining whether use by a nonowner is permissive or adverse. A presumption of permissive use is present when

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the estate is open and unenclosed. *Todd v. Sterling*, 45 Wn.2d 40, 273 P.2d 245 (1954); *State ex rel Shorett v. Blue Ridge Club,* 22 Wn.2d 487, 156 P.2d 667 (1945)."

While prescription rights are not favored in the law, a prescription easement may be acquired by proof of an adverse use known to the owner or conducted in the open, notorious, exclusive and continuous manner for 10 years.

Not only is there a presumption the use is permissive, there is also a requirement that a manifest act hostile distinct and assertive against the owners rights must be made. No actor, no act or use was testified to defying the owner until 2006.

Throughout time the court continues to come back to the concept that permissive use never ripens into adverse use. The Washington State Appellate Court in *Granston v. Callahan*, 52 Wn. App. 288 (1988) addresses permissive use as follows:

"Permissive Use."

Those rules are well stated in *Northwest Cities Gas Co. v. Western Fuel Co.,* 13 Wn.2d 75, 84, 123 P.2d 771 (1942) as follows:

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.

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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 dominant owner of a right hostile to the owner of the servient estate.

Permission is defined in Black's Law Dictionary 1298 (4th ed. 1968) as:

'A license to do a thing; an authority to do an act which, without such authority, would have been unlawful.'

Permission can be express or implied, and a use which is initially permissive cannot ripen into a prescriptive right unless the claimant makes a distinct and positive assertion of a right hostile to the owner. *Roediger v. Cullen,* 26 Wn.2d 690, 175 P.2d 669 (1946); *Crites v. Koch,* 49 Wn.App. 171, 177,, 741 P.2d 1005 (1987).

Permissive use is applicable to any situation in which it is reasonable to infer that the use was permitted by sufferance and acquiescence. It is not necessary that permission be requested. *Cuillier v. Coffin,* 57 Wn.2d 624, 626, 358 P.2d 958 (1961); *Roediger v. Cullen, supra* at 707, *Crites v. Koch, supra* at 177. A finding of permissive use is supported by evidence of a close, friendly relationship or a family relationship between the claimant and the property owner. Stoebuck, *The Law of Adverse Possession in Washington,* 35 Wn. L. Rev. 3, 75 (1960).

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A friendly relationship between parties is a circumstance more suggestive of permissive use than adverse use and the trial court was free to find use was permitted as neighborly courtesy.

Miller v. Jarman, 2 Wn.App. 994, 997, 471 P.2d 704 (1970).

In *Pickar v. Erickson,* 382 N.W.2d 536, 538 (Minn. Ct. App. 1986), the court declined to find adverse use, stating as follows:

There is at least an inference, if not a presumption, that a use is permissive where the owners of the two estates have a close family relationship. This inference of a permissive use applies in this case where one brother bought property adjoining his two brothers' property.

The facts of the case demonstrate a clear, undisputable, case of permissive use.

A finding of permissive use is supported not only by a presumption of permissive use under these circumstances, but also by the fact that improvements were made on both properties for reasons of convenience completely uninfluenced by the location of the property line dividing the properties.

The facts of this case provide no support for the conclusion of law made by the trial court that each was operating under a claim of right that was adverse to the ownership of the other such that uninterrupted use over a 10-year period could ripen into a prescriptive right.

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A permissive use necessarily terminates when the licensor dies or alienates the servient estate. The grant of permission being personal to him, it cannot continue beyond his termination of ownership.

Change in the title and ownership of the alleged servient estate operates as a revocation of a permissive use previously granted and such use may then become adverse and ripen into an easement.

G. Thompson, *Real Property* § 345, at 241-42 (1980)."

"A permissive easement can be terminated by a valid revocation of the permission, and both parties to this agreement had the power to terminate the use of his property by the other at the time the agreement was executed. The agreement applies to the driveway and walkway only.

The trial court held that each party had a nonexclusive prescriptive easement to use that portion of the corral, barn, garden and gas tank located on the property of the other. Those areas were not affected by the agreement.

Callahan's use of improvements located on Bill Granston's property became adverse in 1962 and has now ripened into a prescriptive right except for the driveway and walkway. Her adverse use of the driveway and walkway was interrupted by the May 1, 1971, agreement, making use of the driveway and walkway permissive only.

The portion of the judgment granting Callahan a prescriptive right to use the driveway and walkway is reversed.

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Permissive easement can be terminated by a valid revocation. *GRANSTON v. CALLAHAN,* 52 Wn. APP. 288 (1988).

Furthermore permissive use necessarily terminates upon the death of the user or the alienation of the servient of the estate. The granted permission is personal only it cannot continue beyond the termination of ownership or to whom the permission is granted. *GRANSTON v. CALLAHAN, 52 Wn. APP. 288 (1988).*

Permission to occupy the land given by the new true owner to the claimant or his predecors in interest still operates to negate the element of hostility *CHAPLIN v. SANDERS, supra.* As such the permission terminates "hostility." Therefore, Kerbys can never achieve an adverse use over and across property. See attached Ex. 7 and Ex. 8: Washington Bar: Real Property Deskbook (1977 & Supps. 2000-02) - § 64.3.

The defendants ask the court to reverse its ruling and reconsider, attached as Trial Exhibit At 9 are pertinent pages from the Washington Bar Real Property Deskbook (2997 & Supps. 2000-02) - § 64.3, and find (1) that permissive use never ripens in to adverse use, and further that the Kerbys need to either compensate the Auttelets for the use of the land not with the scope of their easement or move their roadway. There is no contention that buried lines would need to be moved; (2) that adverse use be established up to the fence line and property quieted to the Auttelets.

The position advocated by plaintiff's attorney that at some point in time permissive use should, as a matter of equity, evolve into an acquired use. This is not the law in

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the State of Washington. Defendants respectfully request the Appeals Court to reverse the ruling of the trial court.

ISSUE No. 2: OPEN AND NOTORIOUS and "THERE TO BE SEEN."

The concept of "If it is there to be seen, it is deemed to have been seen or should have been seen," permeates through Washington State law. Though "open" and "notorious" are usually stated as if they were separate adverse possession elements, they are so closely linked that they may be discussed together. The gist of it is that the adverse possessor's acts of occupation are sufficiently visible or discernible that the diseased owner can, if he looks, learn of them. The owner need not have actual knowledge of the adverse possession, even an absent owner is charged with the notice the acts would impart to an owner who did reasonably look after the land. Doyle v. Hicks, 78 Wn. App. 538, 897, P. 2d 420 (1995). Denny Restaurant, Inc. v. Security Union Title Insurance Co. 71 Wn. App 194 (1993).

The Appellants brief here illustrates the concept that if it is there on land, it is deemed to be seen.

This principal is involved in personal injury cases, criminal cases, criminal traffic cases, adverse possession cases. The law states "a claimant can satisfy the open and notorious element by showing either (1) that the title owner had actual knowledge of the adverse use throughout the statutory period or (2) that the claimant used the land such that any reasonable person would have though he owned it." *RILEY v. ANDRES, 107Wn. App. 391, 396, 27 p.3d 618 (2001).* All that is required is the claimant treat the

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land as his own against the world throughout the statutory period. *CHAPLIN v. SANDERS, 100 Wn.2d 853, 676 p.2d 431 (1984).*

A. NEGLIGENCE: *Woodridge v. Pacific Coast Coal Co.,* 22 Wn.2d 314 (1945). *Young v. Carter,* 38 Wn.App. 147 (1984). *Morse v. Antonelles,* 112 Wn.App. 941 (2002).

B. PERSONAL INJURY: *Jerard v. Sinclair,* 540 Wn.2d 565, (1959). Bad faith insurance: *Ellwein v. Hartford Co.,* 142 Wn.2d 766 (2001).

C. CRIMINAL: *State v. Myers,* 117 Wn.2d 332 (1991), *State v. Rose,* 75 Wn.App. 28 (1994). *State v. Thompson,* 151 Wn.2d 793 (2004).

D. CRIMINAL THEFT: *State v. McDonald,* 74 Wn.2d 474 (1968).

E. TRANSPORTATION/PUBLIC CARRIER: *McBeth v. Northern Pacific Railroad Co.,* 32 Wn.2d 910, (1949).

F. GOVERNMENT LIABILITY: *Henyon v. Yakima County,* 76 W.2d 271 (1969). *Chmela v. Motor Vehicle,* 88 Wn.2d 385 (1977). He cannot be hard to say that he didn't see that which was there to be seen.

The concept, "If it is there to be seen, is it deemed to be seen," is not specific to real estate law. It does, applied to adverse possession. A party who over the last 20+ years walks or drives by the end of a fence that they can see goes 100' by their own admission and that they are able to testify was not parallel with the timber line surveyed and cut by Jorgenson in 1987, clearly has seen the fence. They saw the fence and are able to evaluate that the two fence lines from 1987 forward were not parallel.

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Remember the Auttelet-Kerby fence line was installed before Keith Jorgenson surveyed and cut north of Kerbys.

At hearing it was ruled that the fence is a fence in the woods and as such provided no "notice" to the Kerbys.

This goes to the issue of open and notorious. It is argued by Plaintiff that "fence in the woods" was just that, "fence in the woods."

The fact is that the fence is a fence line that was established with three to four wires running the length of the property. The fence marks the boundary line and the uses made by the property owners on their side of the fence. On the Kerby side, sylvan culture; on the Auttelet side, pasture, horse, woodcutting, family recreation, basically an open park. Please see Ex. 34.

The term "open and notorious" was briefed. Although the words, "open and notorious," usually are stated separately in adverse possession cases, they are closely linked. The point being that the adverse possessor's acts of occupation are sufficiently visible or discernable; that an owner can, if he looks, "learn of them." The owner need not have actual knowledge of adverse possession. Even an absent owner is charged with the notice of the acts would provide to an owner who would reasonably look after his land. *DOYLE v. HICKS,* 78 Wn.App. 538 (1995).

The issue involved here is not that the Kerbys "knew that the land was being used adversely to them." Both Jan and Ilona Kerby saw the Auttelet family replacing the round wire for the barb wire in 1987. Both Jan and Ilona Kerby worked to remove the

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fir tree which fell across the fence in 1990. The Kerby's then worked to repair the very fence.

It is not "possession" which must be within the knowledge of the recorded owner; it is possession which is adverse in contrary to the claim of the record owner. The ultimate test is the exercise of the dominion over the land in a manner consistent with the actions a true owner would take.

Adverse possession in this state focuses on the nature of possession and not on the thought process of the possessor or the record owner. *ITT RAYONIER, INC. v. BELL,* 112 Wn.2d 754, *757, 774* P.2d 6 *(1989) (quoting William B. Stoebuck, the Law of Adverse Possession in Washington, 35 Wn. L. Rev. 53 (1960)* (adverse possession revolves around the character of possession, not secret thoughts)).

The element of open and notorious and hostile elements of adverse possession requires only "that the claimant treat the land as own as against the world through out the statutory."

The nature of his possession will be determined solely on the basis of the matter in which he treats the property.

"Adverse possession requires proof of 10 years' possession that (1) exclusive, (2) actual and uninterrupted, (3) open and notorious, and (4) hostile. RCW 4.16.020; *ITT RAYONIER, INC. v. BELL,* 112 Wn.2d 754, *757,* 774 P.2d 6 *(1989)* (citing *CHAPLIN, 100 Wn.2d at 857).* The 10-year period may be shown by tacking a predecessors adverse use if privity

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exists between them, and they have held continuously and adversely to the title holder. *Roy,* 46 Wn. App. at Page 828." *CHAPLIN v. SANDERS,* 100 Wn.2d 853, *676* p.2d 431 *(1984) and DOYLE v. HICKS,* 78 Wn.App. 538 *(*1995).

The law is very clear on this point, the words "open and notorious" together mean that the possessors use and occupancy must indicate to a reasonable person that possessor owns or thinks he owns the property. *SKOGG v. SEMOUR, 29 Wn.2d 355, 187 p.d. 304 (1948).*

The "open and notorious" element is satisfied if the true owner has knowledge of the adverse possessor's use. *CHAPLIN v. SANDERS, 100 Wn.2d 853, 676 p.2d 431 (1984).*

Kerbys saw the fence line, saw the Auttelet family replacing barbwire with round electrical wire (1986- 1987) and saw the horse (1988) and "presumed there must be a fence there in 1988. (RP p. 74 line 19, page 82 line 10)

An express declaration by the occupant of the intention to claim the property is not required. *O'BRIEN v. SCHULTZ, 45 Wn2d 769, 278 p.2d 322 (1955); REYMORE v. THARP, 16 Wn. App. 150, 553 p.2d 456 (1976).*

Only unequivocal action by the occupant evidencing his or her belief that he or she owns the property. "Hostility under claim of right is the claimants good faith treatment of the land and his own as against the world throughout the statutory period." *Chaplin v. Sanders supra.*

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It is actions of the possessor that are relevant. The true owner, even if absent, is held to the same standard, that is, that they would have known or should have known that the land was being used.

The Kerbys not paying attention, as they alleged, being ignorant of what is going on, is not a defense to the law of adverse possession or the concept of open and notorious and hostile use. In fact, the very act of not paying attention to all of the activities going on Auttelets' property evidences the Auttelets' claim, as a matter of law, and fact the Kerbys made no use or claim to dispute the 23+ years. All of the activity on the Auttelet property should have given them notice. The issue is how the possessor has used the property.

It has been argued that the fence line was a stock retention fence. This is claimed as an exception to the rule of adverse possession, but the exception is not intended to swallow the rule.

The fact is that the fence existed for two years before the horses were brought in.

The fact is George Auttelet opposed bringing the horse home to walk on his planted trees. His wife "prevailed" on him that is why the barb wire (installed in 1982 (RP p. 415 line 3-9) was replaced by a "new type of fence in 1988 (RP p. 414 line 10- p. 415 line 10). A boundary line fence used to retain stock is not a "stock retention fence".

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Plaintiff's stock retention fence argument is recently contrive defense and is a façade to mischaracterize the fence line as established only as a means of convenience, not as any form of claim of right. Logic alone defeats the Plaintiffs claim. In 1982, the forest was on both sides of the fence. It was more "convenient to push the fence through on its 1982 location as any other.

The stock retention fence concept also predates *CHAPLIN v. SANDERS supra, and DOYLE v. HICKS supra,* and the family of case law thereafter. The question is how did the possessors treat the fence line. The answer is as a property line. The barbwire was strung in 1982. Horse fencing (round wire) replaced it in 1986/1987 (courts says 1988).

Plaintiffs argue the fence line can't be easily seen. Such an argument is not determinative. The over story is the canopy of the trees as viewed from a thousand feet does not reveal the fence line. Neither do people normally view the fence lines from a thousand feet.

People are on the ground; people walk past the fence line; people see the ribbons on the fence line; people see fence line going in a straight direction at least one hundred feet; people see the different agricultural uses on either side of the fence line; people see that the fence line in question is not parallel that the fence line to the north which was surveyed and harvested in 1987; people see smoke and the burning debris; people see the family activities conducted by the Auttelets; people can hear the chains saw running and can smell burning of debris; people see

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the horses pasturing up to the fence line; people see horses themselves; people see the stark color contrast between the orange of sprayed dying vegetation going 100' along the fence contrasted against the evergreen Oregon grape (Kerbys side) & grass (Auttelets' side); people see the swath cut into the trees. People see the park like nature of Auttelets vs. the clearly obvious fence line versus the Kerby tangled woods or clear cut debris.

People are charged with a duty "to see what there is to be seen."

Parallel, by definition means "extending in the same direction everywhere equidistant and not meeting. The Kerbys saw both the northern Jorgenson fence and the southern Autellet fence and were able to determine the two fences – marking Kerbys boundary lines – were not parallel (in 1987).

By this testimony the Kerbys concede to knowing (seeing and evaluating) the two boundaries were not parallel.

The trial court is wrong about the law. The trial court did not apply the fact which the trial court found.

This is NOTICE. This is unrefuted evidence and court finds the Auttelets used the property as a true owner and it is not a defense to adverse possession, nor does it defeat Auttelets' use that the Kerbys contend that they did not notice the use. Notice has been proven clearly by all of the Plaintiffs and Defendants.

Even assume no notice, the question becomes under the language of *Sanders* which is that the claimants use the land such that a reasonable person would have

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thought that he owned it. The Auttelets clearly used the land in a way that all people would believe that they owned it.

Generally, throughout Washington State law this quotation is:

> "He can't be heard to say that he didn't see that which was there to be seen."

This concept and quotation appears throughout the law.

These are undisputed facts:

1. The corner post at the west end of the boundary line has existed for many years predating 1980. All witnesses including testified to the old corner post. Judge found to be 1982.

2. All parties testified that the fencing was replaced in 1987. This is affirmed by the Kerbys and all of the witnesses. Clearly, the fence line was in existence from 1988 to present in the same location surveyed by Phil Gustin. (RP p. 11 line 9 – p.15 line 22)

3. The original law suit filed claims that the fence line was not in existence for ten years. The original complaint acknowledges that the Auttelets used the land in an open and notorious manner satisfying all principles of adverse possession accepting ten years statutory period.

Judge Wooley was oblivious to several vital facts.

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Judge Wooley after finding that a fence line of some kind or nature had been marked on the ground in 1982, became oblivious to the relevant facts that the first fence line that the Auttelet's built was made of barb wire.

In 1987 or 1988 the fence wire was changed from barb wire to round wire or electrical wire. Both Plaintiffs testified seeing the fencing being rewired. Citing to the transcript has been extensive. This was not the first fence post. This was the second stringing of the wire on the same fence. (RP p. 415 line 3-10)

The first fence was barb wire. There was no intention of bringing the horses to the property at the time the first fence was built (as testified barb wire is not used for horses.) See the testimony of Billy Courtney. (RP p. 269 line 19 – p. 277 line 10). Mr. Auttelet was opposed to having the horses brought up; he feared damage to the trees he and his family had planted.

Some two years after the barb wire fence, the barb wire was removed from the fence posts and round wire replaced it. Thereafter the horses were brought to the property – 1989. (RP p. 269 line 19 – p. 277 line 10)

The Kerby's testified they were aware that there were horses on Auttelets land. (RP p. 80 line 13 – p. 81 line 24)

They testified they presumed that there was a fence. Kerbys testified that they had seen the Auttelet family building the fence in 1987-1988. (RP p. 120 line 3-17)

It is a fact the Auttelet family cleared the fence line, sprayed the fence line twice a year. It is a fact herbicides turned the vegetation on the both side of the fence line

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orange, creating a path of orange in stark contrast to the green Oregon grape on Kerby side and the green pasture grass on the Auttelet side. (RP p.170 line 18, p. 176 line 17.) It is a fact the vegetation witness the different land uses between the Auttelets and the Kerbys.

Ilona Kerby stated that she could see from the east corner of the driveway and the Auttelet north line (Kerby south line) 80 to 100 feet and determined that the fence was straight. (RP p.. 114 line 6 – p. 115 line 2, p. 118 line 19 – p. 120 line 16, p. 131 line 6-14) Not only was there observation of the fence, there was a determination by mental process that the fence line was straight. Ilona Kerby testified she observed the fence line was not hooked to trees but on metal "t" posts. Ilona Kerby saw the fence line at least by 1987 if not 1982.

Jan Kerby saw the orange dying vegetation and the different ground vegetation and the fence. (RP p. 171 line 19 – p. 81 line 24)

In 1990, a large tree fell from the Kerby side across the existing fence line to the Auttelet side. This tree damaged the boundary line fence. Kerbys remove the tree and Ilona Kerby testified that she had staff members from her office assist, (RP p. 121 line 14 – p. 122 line 21). That fell across an established fence line in 1990. Kerby's acknowledged the fence line was Auttelets and removed the tree and repaired the fence.

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It is respectfully submitted that a tree falling across a fence which is acknowledged by the Plaintiffs as being their tree damaging the Auttelet fence certainly puts Kerbys on notice that a fence existed.

This "notice" occurred fifteen years before kerbys filed the lawsuit.

It is argued Judge Wooley has abused his discretion as to matters of fact within this case. This is one of many illustrations.

It is submitted that by Judge Wooley's determination, that a fence line existed in 1982; that the fence was changed in 1989 from barb wire to round wire, that a tree fell across the fence in 1990, that Kerbys acknowledgement of the fence line and removal of the tree from the Auttelet property, that the repair of the fence line in 1990, that Kerbys began occupying the property in 1993, that the Kerby's drove past the property in separate vehicles no less frequently than twice a day per work day, that the Kerbys acknowledged they could see eighty to a hundred feet of the fence running from the east road way towards the west. That the Kerbys acknowledged the logging operation by Jorgenson in 1987 exposed the fence line on their North line and the Kerby's determined that the south line fence was not parallel, that Kerbys saw the horses, that the Kerbys presumed that the fence line existed on their south line that Kerbys saw the fencing along the margin of the road connect to the boundary fence line that the purpose of their survey was not because of any fence line, boundary line dispute, that the Kerby's testified that they weren't aware of their southern margin. All evidence

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shows the Kerbys were either reckless, disregarded the fence line or the Kerbys were aware of the fence line and acquiesced in its continued existence since 1982.

It is submitted that Judge Wooley abused this discretion in determining the facts do not support the historic fence line location and did not provide notice to the Kerbys. The fence existed for a period of 23+ years.

The trial judge abused his discretion in determining that the Doyle case does not stand for the proposition, that if it is there to be seen it should be seen. No opposing case law was cited at trial or in the opposition to motion for reconsideration.

It is undisputed the Kerbys did not use the disputed area from 1982 to date (RP p. 415 line 3-10) in 1982 by the Judge, to the present. Only the Auttelet family has used the land enclosed by their fence. It is undisputed the Auttelet property is completely different in vegetation type than the Kerby property was and still is.

The Auttelet property is park-like. Ex. 34. There are substantial and grass beneath the trees where the horses graze and the family picnics and recreation since 1988. This park setting is open, visible, to the Kerbys from the roadway they each travel upon daily when they enter their property.

Before the Kerbys logged in 2005, the property line was marked not only by the clearly visible fence draped with white, pink and yellow survey ribbon tape or the round wire draped with pink and yellow surveyor tape and the survey flags (1989 to 1996). The fence is also marked by significantly different vegetation types.

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For the Kerbys to argue that they were unaware of the line separating Auttelets and Kerbys, founders on the facts and on human reason.

Clearly Kerbys "wall of trees" was clearly visible. Kerbys may argue they didn't see the fence line but to argue they could not see the forest because of their trees is absurd. The fence marks the Kerby forest tangles.

From 1986 to date there was a clear cutting line that existed. It was there to be seen.

The trial court was told in a brief and heard in argument that permissive use never ripened into adverse use. No opposing case law was presented – ever. The trial court is just wrong.

The trial court acknowledged the court did not understand the area of law and relied on the attorneys to educate the court. The law has been briefed, both as a Trial Memorandum and as a Motion for Reconsideration. It is submitted that the trial Judge abused his discretion by not reading the either the Trial Memorandum or the Motion for Reconsideration.

COURT: "I just glanced at briefing, counselor, and you do not cite any cases on this permissive use."

MR OTT: "Actually, I did, Your Honor, and let me show you the place where – I just didn't phrase it really good, but I did."

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COURT: "Okay, I'm looking at the latest courtesy copy that you send down as a Trial Memorandum, that I got yesterday right before I left the courthouse. (RP p. 384 line 17-line 25).

The court struggled to understand the concept that permissive use never ripens in to adverse use but determined that principle of law seemed one word inconsistent to the courts reasoning. (RP p. 384 line 17 to 403 line 23)

The court abused its discretion in making a determination that permission can ripen in to an adverse use. And further that permissive use ripens to adverse use based on detrimental reliance!

Adverse possession required exclusivity. Defendants constantly and continuously used the road. The Defendant's maintenance, use and repair of the road deprives Kerbys of exclusive use and that the trial court errored in removing from exclusivity from the elements of adverse possession.

A finding that exclusivity was intended is irrelevant. How was the property used? Intent at the time of granting permission, it is not within the scope of the elements of adverse possession. How was the property used? Was it used exclusively by Kerbys? Here the answer is clear.

No. In fact, the Auttelets used the road more frequently then the Kerbys.

VI. CONCLUSION

ISSUE 1. It is a reversible error for the court to conclude permissive use could ripen at some point in time into a prescriptive easement (This is on the road access).

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In conclusion, the court concludes that the easement was intended for the exclusive use of the Plaintiffs. The standard established by the court is wrong, it is not what was intended, it was what was done. The case law clearly establishes the court is error on the legal standard applied.

ISSUE 2. Further, the court is wrong by ignoring the facts established that the Defendants rocked this road, maintained this road, are the only ones who cared for the road, cared for the margins of the road, used the road for their benefit to the upper portions of their property, all without any protest of any kind or nature from the Plaintiffs.

Exclusivity clearly is lacking. Open, hostile, notorious, claim is clearly lacking. In fact, the claim on the use of the roadway was not made until the lawsuit was filed. Please note that the argument of Plaintiff and their counsel is that permissive use should at some point and time, rise prescriptive use. This is completely contrary to all Washington law and to the facts in this case.

ISSUE 3. The court is wrong in concluding that the Plaintiffs were not on notice of the fence. The court establishes that the fence was first a barbwire fence in 1982 and that this barbwire fence went from the far west corner over to the east corner by the "easement road" addressed above.

ISSUE 4. The court concludes that the facts show that every witness concluded that the fence line was obviously in place and that the fence line wire was changed in 1986-87-88. The fence line wire was changed from barbwire to round wire. For the Plaintiffs

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to know the change was made from barbwire to round wire is an admission (although not expressed) that they saw the fence line being put in.

Both Plaintiffs testified that could see down the fence line eighty to one hundred feet. Both plaintiffs testified that in 1990 when the tree fell across the fence line they recognized the fence line as being Auttelet's fence line and removed the tree and repair the fence line.

No protest was ever made regarding this fence line until the filing of the suit.

Phil Gustin testified that the Plaintiffs survey intention was not to dispute a boundary line but to get a boundary line adjustment. The Plaintiff's needed a boundary line adjustment and in order to be able to refinance their property.

The Plaintiffs position was that the fence line had not been in position for more than 10 years. This is obviously false. Attached is a diagram showing the history of the fence line for pictorial representation.

The court ruled that the Plaintiffs were not on notice and would not know that the fence line was indeed being treated as a boundary line by the Successors.

The Plaintiffs stated that they were very much aware that there were horses on the property and they presumed the horses were contained by something.

The fence line was built in 1982. A fact not disputed by the Plaintiffs. The Plaintiffs were aware of the fence line. The Plaintiffs were able to make conclusion based on facts they observed that the fence line in on their south boundary was not parallel to the fence line in survey established in 1987 on the north property. There is a

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specific mental process that goes on here to evaluate the fact that the fence lines were not parallel. Clearly the Plaintiffs were aware. The plaintiffs made no less frequently than four trips during the weekdays past this fence line which they could see extended straight at least 80 to 100 feet towards the west corner. Please see pages 6-7 of Appellant Brief for testimony of all parties.

ISSUE 5. Is it error when the trial court concluded that a fence line built in 1982 did not memorialize the boundary line nor notice was provided to the Plaintiffs of the Defendant's open and notorious claim.

Is it error when the trial court concluded the fence line built on the believed boundary line in 1982 converts to a stock retention fence in 1987 by the replacement of barb wire with round electrical wire. The fence line was never moved. The fence line existed as a boundary line fence which the Plaintiffs saw repeatedly. The Kerbys do not claim <u>they didn't see the fence</u>. The Kerbys claim is that they didn't interpret the fence as being a boundary line fence. The Kerbys weren't paying attention to what the Kerbys saw, hear, smell or what the Auttelets did. It is respectfully submitted that Kerbys argument is completely make weight and completely ignores what a reasonable property owner would think and how a reasonable property owner would act. Especially when property owner believed that <u>his</u> property is been trespassed upon in the situation where animosity existed between the neighbors.

ISSUE 6. The trial Judge abused his discretion and making a determination to both law and fact. The trial judge abused his discretion by ignoring the facts clearly

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established in the record. The court abused its discretion in interpreting the law of adverse possession and ignoring the principle briefed in the Trial Memorandum, the Motion for Reconsideration on notice.

Court errored by finding that the extensive use, multiple uses by the Auttelet family would not have put Kerbys not notice. The Auttelet family treated the property as their own.

The Defendants have been wronged in this case.

The encroaching roadway should be removed; the court should reverse the trial court conclusion.

RESPECTFULLY SUBMITTED this 20 day of March, 2009.

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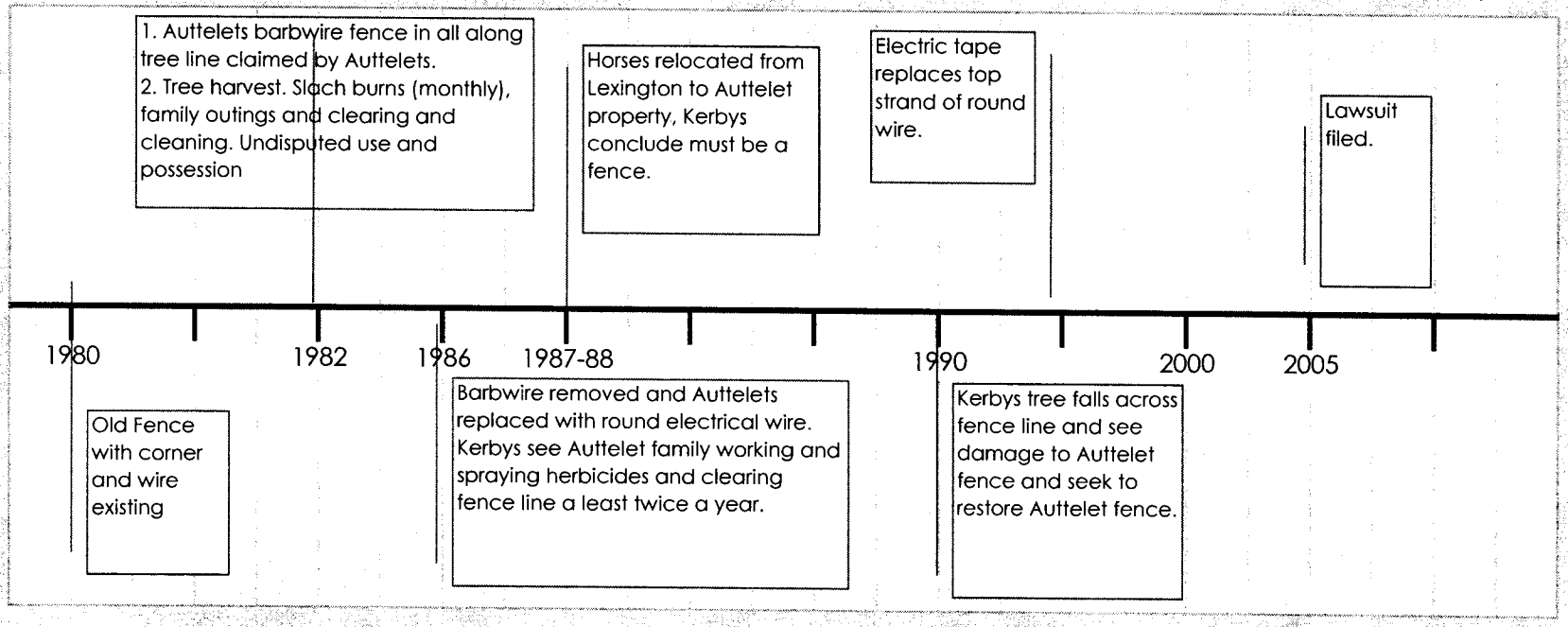
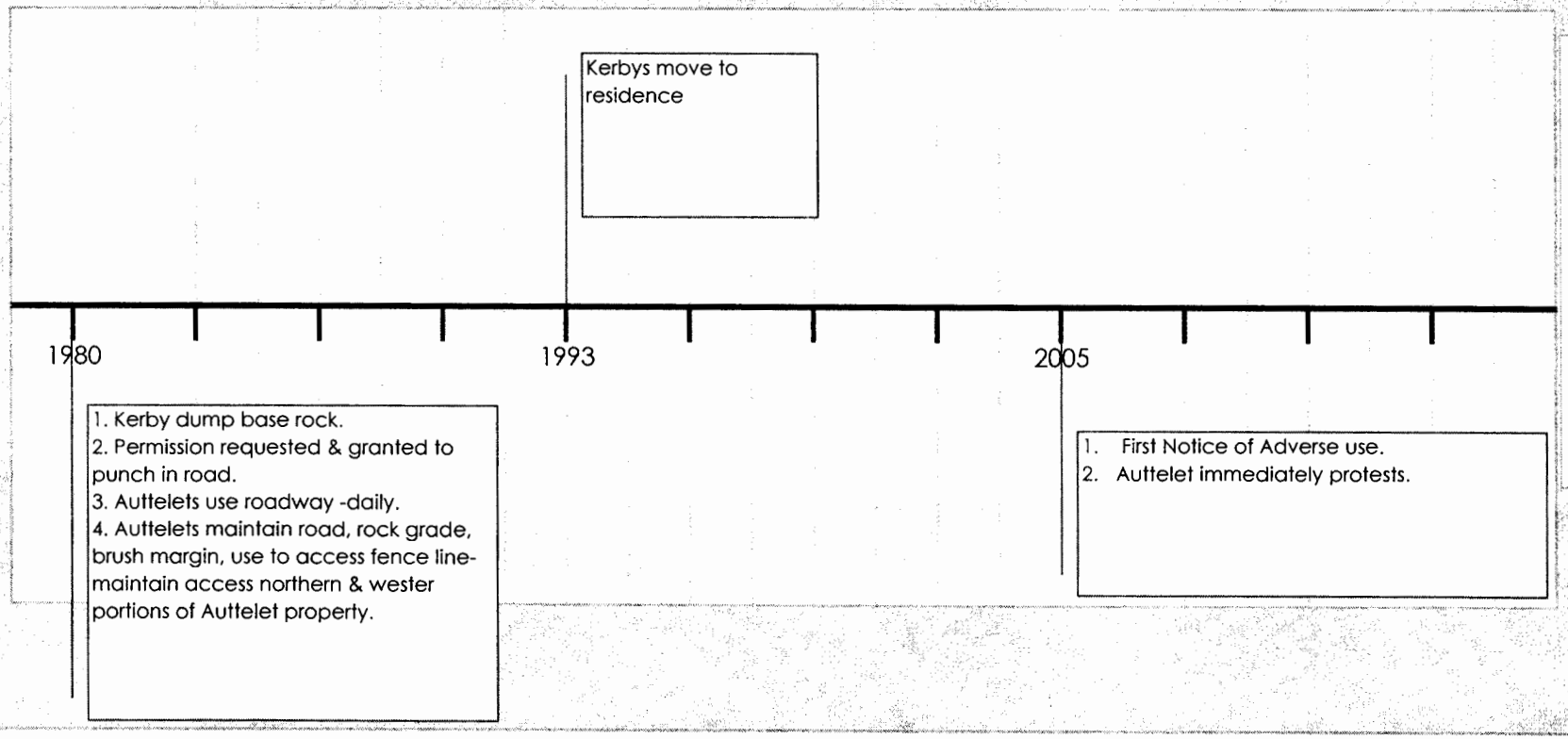
Pictorial History of Auttelet fenceline from Transcript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