

FILED  
COURT OF APPEALS  
DIVISION II

No. 38036-6-II

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IN THE COURT OF APPEALS, DIVISION II, STATE OF WASHINGTON  
OF THE STATE OF WASHINGTON BY cm  
DEPUTY

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JEAN I SIMMONDS, a married woman as her separate estate,

Plaintiff-Respondent,

v.

GUY SODERLIND, individually and as Personal representative of the  
Estate of Guy Egan Soderlind, deceased; and as Personal Representative  
of the Estate of Charlotte J. Soderlind, and all other person or parties  
unknown claiming any right, title estate, lien or interest in the real estate  
described in the complaint, herein,

Defendants-Appellants.

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APPEAL FROM THE SUPERIOR COURT OF JEFFERSON COUNTY  
THE HONORABLE CRADDOCK VERSER, PRESIDING

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APPELLANT'S REPLY BRIEF

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### III. ARGUMENT

#### A. THE TRIAL COURT ERRED IN QUIETING TITLE TO THE DISPUTED AREA IN RESPONDENT.

##### 1. STANDARDS OF REVIEW

Jean disputes whether review of the trial court's determination that the facts support adverse possession is *de novo*.<sup>1</sup> Jean argues that the *de novo* review of that issue in *Happy Bunch, LLC v. Grandview North, LLC*, 142 Wn. App. 81, 88, 173 P. 3d 959, *review denied*, 164 Wn. 2d 1009 (2008) was proper, as there was no verbatim report of proceedings in that case. To the contrary, the *de novo* standard of review applies even in a case where, as here, a verbatim report of proceedings has been provided. In *Happy Bunch*, in support of its conclusion that a *de novo* standard of review applied, the court relied upon *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 936 P. 2d 1163 (1997). *Happy Bunch*, 142 Wn. App. 88. In *Bryant*, the court applied a *de novo* standard of review, but did not limit its application to cases not involving a verbatim report of proceedings. 86 Wn. App. 210. *Bryant* relied upon *Peeples v. Port of Bellingham*, 93 Wn. 2d 766, 771, 613 P. 2d 1128 (1980). *Bryant*, 86 Wn. App. 210 n.6. *Peeples* held that the determination whether the facts constitute adverse possession is purely a question of law. 96 Wn. 2d 772. *Peeples*, like *Bryant* and *Happy Bunch*, did not limit the *de novo* standard

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<sup>1</sup> BR at 14.

of review in adverse possession cases to those cases not involving a verbatim report of proceedings. Jean's attempt to so limit the *de novo* standard of review in adverse possession cases is not supported by any authority, and should therefore be rejected.

**2. THE TRIAL COURT ERRED IN FINDING THAT RESPONDENT USED THE DISPUTED AREA AS A PROPERTY OWNER.**

Jean acknowledges that the nature, character and locality of the property involved greatly affects whether her use of the disputed area was the same as that of a true owner.<sup>2</sup> The authorities cited by Jean do not aid her, as the property here bears no resemblance to the disputed areas in *Chaplin v Sanders*, 100 Wn. 2d 853, 676 P. 2d 431 (1984), *Frolund v. Frankland*, 71 Wn. 2d 812, 431 P. 2d 188 (1967), and *Heriot v. Lewis*, 35 Wn. App. 496, 668 P. 2d 589 (1983). In *Chaplin*, unlike this case, the disputed parcel was demarcated by a drainage ditch and a road, the adverse claimants' property was occupied by a mobile home park, and the disputed parcel was used by the adverse claimants and their tenants for parking, picnicking, growing flowers, and the adverse claimants installed underground wiring and surface power poles in the disputed area. 100 Wn. 2d 856. In *Frolund v. Frankland*, the disputed area was demarcated by a fence, and the adverse claimants' use consisted of bulldozing the

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<sup>2</sup> BR 15.

western portion of a triangle between a survey line and an existing line fence, removing the fence, mowing grass and storing a swimming float. 71 Wn. 2d 816-17. In *Heriot*, the adverse use consisted of cutting brush in an area between a fence and the true property line lying north of a state highway. 35 Wn. App. 505-06. Thus, the disputed areas in *Chaplin*, *Frolund*, and *Heriot* bear no resemblance to the disputed area in this case.

Jean argues that any reasonable person would have noticed the substantial difference between the disputed area and the brushy hillside on Lot 17 to the North.<sup>3</sup> Jean fails to support her argument with any authority. Her argument should therefore not be considered. RAP 10.3 (a) (6) (“*The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated: ... ) The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record...*”); *Saviano v. Westport Amusements, Inc.*, 144 Wn. App. 72, 84, 180 P. 3d 874 (2008).

To the extent that it merits consideration, Jean’s argument is contrary to *Hunt v. Matthews*, 8 Wn. App. 233, 238, 505 P. 2d 819 (1973). In *Hunt*, the plaintiff maintained an irregular and undefined extension of a lawn on plaintiff’s property that extended onto the defendant’s adjacent vacant parcel. The disputed area was bordered by a tangle of blackberry

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<sup>3</sup> BR at 16.

bushes on the defendant's parcel. The plaintiff's actions in maintaining the lawn in the disputed area, and planting a garden therein, were insufficient, given the character of the disputed area, to establish adverse possession of that area. 8 Wn. App. 236-38. *Hunt* compels a similar conclusion here. Jean fails to cite, let alone discuss, *Hunt*.

Jean cites the beach log and row of beach rocks in support of the trial court's conclusion that her use of the disputed area was exclusive.<sup>4</sup> The beach log is located at a right angle to the platform, and the log ends before the platform.<sup>5</sup> Photographs introduced at trial by Jean show the log covered with moss.<sup>6</sup> Jean testified that the rocks get covered with sand.<sup>7</sup> As with the dilapidated fence in *Hunt*, a mossy beach log and sand-covered rocks were insufficient to provide Guy or his father with notice of Jean's claim of adverse possession of the disputed strip.

Jean fails to address the fact that she admitted that she never excluded the Soderlinds from the disputed area.<sup>8</sup> Likewise, Jean fails to address photographs introduced by Jean, and testimony of Guy, Linda Bryan, Garret Ray, Shelia Miller and Jean that detail decades of joint use by Jean and the Soderlinds and their guests of the areas surrounding the

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<sup>4</sup> BR at 17.

<sup>5</sup> RP I at 29, 75-76; RP II at 189; EX 69.

<sup>6</sup> RP I at 76; EX 38.

<sup>7</sup> RP V at 596, 599-600; EX 83.

<sup>8</sup> RP VI at 690.

platform to recreate, and to store their boats and oars.<sup>9</sup> Jean admitted that she saw Guy Sr. using the platform on several occasions.<sup>10</sup> The beeline trail built by the Soderlinds along the south boundary of Lot 17 traverses the disputed area and ends at the platform.<sup>11</sup> The foregoing matters demonstrate shared possession with the Soderlinds of the disputed area, thereby precluding exclusive possession by Jean. *ITT Rayonier, Inc. v. Bell*, 112 Wn. 2d 754, 774 P. 2d 6 (1989); *Scott v. Slater*, 42 Wn. 2d 366, 369, 255 P. 2d 377 (1953); *Crites v. Koch*, 49 Wn. App. 171, 174, 741 P. 2d 105 (1987); *Thompson v. Schlittenhart*, 47 Wn. App. 209, 734 P. 2d 48, *rev. denied*, 108 Wn. 2d 1019 (1987); W. B. Stoebuck, 17 Washington Practice, Real Estate, 8.19.

Jean dismisses, as did the trial court in Conclusion 6, the Soderlinds' use of the platform and disputed area as mere neighborly accommodation by Jean.<sup>12</sup> As in *ITT Rayonier, Inc. v. Bell*, the decades of joint use of the platform and disputed area by Guy, the Soderlinds, and their guests cannot be dismissed neighborly accommodation. 112 Wn. 2d 758-59.

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<sup>9</sup> RP VII at 835, 845; RP VII at 853, 860-61; RP VII at 781-82; EX 54; RP VII at 782-84; RP VII at 784; RP VII at 813-15; RP VII at 786-790, 852; RP VIII at 930-33, 949-950; EX 18, 19, 21, 25; RP VII at 765, 792, 850; RP VIII at 914-15; EX 50, 52, 54.

<sup>10</sup> RP VI at 709.

<sup>11</sup> RP VIII at 915-16; RP VII at 826-27; RP VII at 811-12; RP VII at 774-75; RP VII at 774; EX 75; RP VIII at 843.

<sup>12</sup> BR at 18-19; CP 205.

Neither *Crites v. Koch, supra*, nor *Lilly v. Lynch*, 88 Wn. App. 306, 945 P. 2d 727 (1997), nor *Harris v. Urell*, 133 Wn. App. 130, 135 P. 3d 530 (2006), relied on by Jean, compels a conclusion contrary to *ITT Rayonier*. In *Crites*, the adverse claimant's use of the northern part of the disputed parcel was perceived by the farming community as a neighborly accommodation, thus negating the adverse claimant's claim of a prescriptive easement. 49 Wn. App. 177-78. *Crites* does not support the trial court's Conclusion 6 that the record owner Soderlind's use of his own property was a neighborly accommodation by the adverse claimant. In *Lilly v. Lynch*, 88 Wn. App. 306, 945 P. 2d 727 (1997), summary judgment for the adverse claimant was reversed on appeal, the court finding issues of material fact regarding the extent and nature of control exerted over the boat ramp by the adverse claimant and her predecessors. 88 Wn. App. 315-16. In *Harris v. Urell*, the court found that the record owners' act of felling a single tree was an occasional, transitory use, and there was evidence that the felled tree was located north of the disputed property. 133 Wn. App. 138-39. Here, in contrast, the Soderlinds' use of the disputed parcel was far more intense, and continued for decades.<sup>13</sup> Instead, the Soderlinds' use of the disputed parcel thus more closely resembles the joint use in *ITT Rayonier*.

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<sup>13</sup> n. 9, *supra*.

Jean argues that her actions in the disputed area demonstrate hostility, yet she fails to address the presumption that, from its inception, her use of the disputed area was permissive.<sup>14</sup> *Peterson v. Port of Seattle*, 94 Wn. 2d 479, 486, 618 P. 2d 67 (1980); *Granston v. Callahan*, 52 Wn. App. 288, 294, 759 P. 2d 462 (1988); *Crites v. Koch*, 49 Wn. App. 171, 177, 741 P. 2d 1005 (1987). As it was permissive in its inception, Jean's use of the disputed area therefore cannot ripen into a prescriptive right unless Jean made a distinct and positive assertion of a right hostile to the owner. *Granston v. Callahan*, 52 Wn. App. 294; *Washburn v. Esser*, 9 Wn. App. 169, 171, 511 P. 2d 1387 (1973).

An inference of permissive use is applicable to any situation in which it is reasonable to infer that the use was permitted by sufferance and acquiescence. *Granston v. Callahan*, 52 Wn. App. 294; *Crites v. Koch*, 49 Wn. App. 177. A friendly relationship between the parties is a circumstance more suggestive of permissive use than adverse use. *Granston v. Callahan*, 52 Wn. App. 294; *Miller v. Jarman*, 2 Wn. App. 994, 997, 471 P. 2d 704 (1970) Permission once granted is presumed to continue. *Miller v. Anderson*, 91 Wn. App. 822, 831, 964 P. 2d 365 (1998). Jean and her ex-husband, Ben, maintained friendly relations with

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<sup>14</sup> BR at 19-20.

the Jorays and Guy's father, mother and Guy for years.<sup>15</sup> Jean's friendly relations with them reinforce the presumption that Jean's use of the disputed area was permissive.

Nor does Jean address the trial court's failure to enter a finding whether her use of the disputed area was permissive. In *Happy Bunch, supra*, the court concluded that the trial court's findings did not establish that the appellant had met its burden of proving its adverse possession claim, noting the trial court's failure to enter a finding whether the appellants' use was permissive. 142 Wn. App. 90. Therefore, as in *Happy Bunch*, the trial court's findings do not support its conclusions regarding adverse possession. Jean also fails to address whether the failure of the trial court to make a finding on permissiveness constitutes an implied negative finding on that issue. *Rhodes v. Gould*, 12 Wn. App. 437, 441, 576 P. 2d 914, *rev. denied*, 90 Wn. 2d 1026 (1978); *Crites v Koch*, 49 Wn. App. 176-77; *Pacific NW Life Ins. Co. v. Turnbull*, 51 Wn. App. 692, 702, 754 P. 2d 1262, *rev. denied*, 111 Wn. 2d 1014 (1988).

Jean argues that there is no evidence that her family ever asked permission to build the boat platform, extend the woodshed, place the pulley, or plant trees.<sup>16</sup> The fact that such actions were taken without

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<sup>15</sup> RP I at 91; RP VI at 709-10, 719; RP VII at 766, 776, 830, 852; EX 3; EX 54.

<sup>16</sup> BR at 19.

permission is not conclusive that such actions were hostile. *Crites v. Koch*, 49 Wn. App. 177; *Miller v. Jarman*, 2 Wn. App. 997.

Jean misplaces reliance upon *Anderson v. Hudak*, 80 Wn. App. 398, 907 P. 2d 305 (1995).<sup>17</sup> In *Anderson*, the adverse claimant's actions in planting trees in the disputed area, absent evidence that he maintained the trees, was insufficient to establish hostile possession. 80 Wn. App. 402-04. Here, as in *Anderson v. Hudak*, Jean offered no evidence that she or her family maintained the trees they allegedly planted in the disputed area.

Jean labels the Soderlinds' use of the disputed area as "occasional", yet she fails to explain how her use of the disputed area differs from the Soderlinds' use.<sup>18</sup> The Soderlinds' activities on the disputed property mirrored Jean's activities, including walking, sunbathing, recreating, boating, crabbing, and storing their boats and oars.<sup>19</sup> As in *Crites v. Koch, supra*, such joint use suggests that Jean's use of the disputed area was a neighborly accommodation by the Soderlinds.

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<sup>17</sup> BR at 19.

<sup>18</sup> BR at 20.

<sup>19</sup> RP VII at 835, 845; RP VII at 853, 860-61; RP VII at 781-82; EX 54; RP VII at 782-84; RP VII at 784; RP VII at 813-15; RP VII at 786-790, 852; RP VIII at 930-33, 949-950; EX 18, 19, 21, 25; RP VII at 765, 792, 850; RP VIII at 914-15; EX 50, 52, 54.

Jean continues to misplace reliance upon *Frolund v. Frankland*, 71 Wn. 2d 812, 431 P. 2d 188 (1967).<sup>20</sup> Jean overlooks that in *Frolund*, the disputed area was demarcated by a fence, and the adverse claimants began their use of the disputed property by bulldozing the area and removing the fence. 71 Wn. 2d 816-17. The actions of the adverse claimants in *Frolund* were clear acts of dissiezen. In contrast, Jeans' actions in the disputed area do not resemble the facts in *Frolund*.

Jean argues that her activities in the disputed area open and notorious.<sup>21</sup> Jean again fails to address the rule in *Hunt v. Matthews*, *supra*, that “[g]reater use of a vacant lot would be required to be notorious to an absentee owner than to one occupying the land who would observe an offensive encroachment daily.” 8 Wn. App. 237. In *Hunt*, the adverse claimant's actions in maintaining an irregular extension of lawn and a garden on an adjacent parcel, in an area bordered by blackberry bushes, was insufficient to establish adverse possession. 8 Wn. App. 236-38. A similar conclusion is warranted here.

Jean relies upon the subjective beliefs of her neighbors to establish her claim of adverse possession of the disputed area.<sup>22</sup> Subjective beliefs are no longer relevant to the determination of adverse use. *Chaplin v.*

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<sup>20</sup> BR at 20.

<sup>21</sup> BR at 20-21.

<sup>22</sup> BR at 20-21.

*Sanders*, 100 Wn. 2d 861. Therefore, the subjective beliefs of Jean's neighbors do not constitute substantial evidence of adverse possession.

Jean argues, again without authority, that the difference between the Simmonds property and the Soderlinds' property is substantial.<sup>23</sup> Because she fails to support her argument with authority, Jean's argument should not be considered. RAP 10.3 (a) (6); *Saviano v. Westport Amusements, Inc.*, 144 Wn. App. 84. In *Hunt v. Matthews, supra*, the claim of adverse possession failed, despite a similar difference between the lawn maintained by the adverse claimant on the disputed parcel and the blackberry bushes bordering that parcel.

Jean again relies on the beach log and riprap to establish open and notorious use, but she overlooks that the beach log was covered with moss and the riprap was covered with sand.<sup>24</sup> The beach log and riprap were therefore no more effective in providing notice of Jean's adverse use than was the dilapidated fence in *Hunt v. Matthews*.

Jean argues that the evidence was overwhelming that the Simmonds have used the disputed property since the early 1980's, but she fails to support her argument with any reference to the record.<sup>25</sup> Jean's argument should therefore not be considered. RAP 10.3 (a) (6); *Saviano*

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<sup>23</sup> BR at 21.

<sup>24</sup> BR at 21; RP I at 76; EX 38; RP V at 596, 599-600; EX 83.

<sup>25</sup> BR at 22.

*v. Westport Amusements, Inc.*, 144 Wn. App. 84. Jean overlooks a wealth of evidence that her maintenance of the lawn in the disputed area was sporadic. Jean testified that foliage sometimes was allowed to grow up south of the northern boundary of the disputed area.<sup>26</sup> Jean testified that the trail to the beach near the platform was obscured by brush and spring growth in a photograph taken in 1993.<sup>27</sup> Jean's neighbor, Phyllis Blum, testified that sometimes the grass and weeds and brush would be high on Jean's property.<sup>28</sup> Elizabeth Bryant, Jean's daughter, testified that the standard for the lawn went up considerably after 1997.<sup>29</sup>

**6. THE TRIAL COURT ERRED IN ADMITTING EXHIBITS 10 AND 11.**

It is an abuse of discretion if the trial court relies on unsupported facts. *Proctor v. Huntington*, 146 Wn. App. 836, 852, 192 P. 3d 958 (2008). The trial court abused its discretion by admitting Exhibits 10 and 11 without an adequate foundation, and based upon Arnold Wood's unsupported assumption that Jean ought to have additional room around the platform to maintain it. Jean fails to identify any evidence in the record to support the admission of Exhibits 10 and 11.<sup>30</sup>

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<sup>26</sup> RP VI at 692.

<sup>27</sup> RP V at 534-36; EX 20.

<sup>28</sup> RP IV at 408.

<sup>29</sup> RP III at 293.

<sup>30</sup> BR at 22-23.

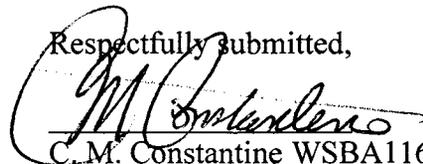
Jean misplaces reliance upon *Lloyd v. Montecucco*, 83 Wn. App. 846, 924 P. 2d 927 (1996).<sup>31</sup> In *Lloyd*, the trial court projected a line between a fence at the top of a slope and a bulkhead at the bottom of the slope, based upon the intensity of use of the slope by the adverse claimant. 83 Wn. App. 853-54. Here, in contrast, Jean offered no evidence that she needed an area around the platform to maintain it, or that she had ever maintained it. *Lloyd* therefore does not support the trial court's adoption of Mr. Woods' legal description of the disputed area.

Jean misplaces reliance upon *Shelton v. Strickland*, 106 Wn. App. 45, 21 P. 3d 1179, *review denied*, 145 Wn. 2d 1003 (2001).<sup>32</sup> The rule in *Shelton* is limited to urban property. 106 Wn. App. 51. In this case, the disputed area is not urban property.

## VII. CONCLUSION

The trial court's findings of fact, conclusions of law, judgment and order on reconsideration should be reversed, and appellant should be restored to rightful ownership of the disputed parcel.

Respectfully submitted,



C. M. Constantine WSBA11650

Attorney for Appellant Guy  
Soderlind

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<sup>31</sup> BR at 23-24.

<sup>32</sup> BR at 24.

**VII. CERTIFICATE OF MAILING**

The undersigned does hereby declare that on April 22, 2009, the undersigned deposited a copy of APPELLANT'S REPLY BRIEF filed in the above-entitled case into the United States mail, first-class postage addressed to the following persons:

Richard L. Shaneyfelt  
1101 Cherry St.  
Port Townsend, WA 98368-4057

Dated: April 22, 2009



FILE  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY S. M. [Signature]  
DEPUTY