

ORIGINAL

No. 42666-8

(Wahkiakum County Superior Court No. 08-2-00071-0)

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

MICHAEL O. MATTHEWS, and DIANE M. MATTHEWS husband
and wife, and the marital community thereof,

Appellants,

vs.

T. & T. LARSON, a partnership, TERRY V. LARSON and TRACY
V. LARSON, single men,

Respondents.

12/17/22 PM 3:12
STATE OF WASHINGTON
DEPUTY

RESPONDENTS' APPELLATE BRIEF

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III. ASSIGNMENT OF ERROR

Respondents T & T Larson, Terry V. Larson, and Tracy V. Larson ("Larsons"), do not assign error to the trial court's order granting summary judgment dated May 23, 2011, or the trial court's order denying Appellant's Motion for Reconsideration dated September 14, 2011. The trial court correctly ruled in both instances that Appellants could not establish a claim for trespass based on adverse possession in this matter.

IV. STATEMENT OF ISSUES

The Larsons disagree with Appellants' Statement of Issues and submit the following Statement of Issues which more appropriately reflects the questions before this court:

1. Can the Matthews define the disputed area when there is little evidence of a barbed wire fence, which they admit they did not install, maintain, or discuss as a boundary marker with any owners of the Larson property?

2. Where the Matthews casually used uninhabited rural property are there genuine issues of material fact as to whether said use was exclusive, actual, uninterrupted, open, notorious and a hostile possession for a period of more than 10 years?
3. Can the Matthews request relief under RCW 4.24.630 where it was never pleaded at the trial court and their trespass claim was based on common law and not statutory relief?

V. STATEMENT OF THE CASE

A. Factual Background

This case arises out of a Complaint to Quiet Title filed by Appellants Michael and Diana Matthews on December 15, 2008, in Wahkiakum County Superior Court. *CP 7*. The Matthews own real property located in Wahkiakum County to the South of the Altoona-Pillar Rock Road. *CP 11-12*. In December 2004, the Larsons purchased approximately 65 acres of rural property adjacent to and immediately south of the Matthews' property. *CP 234, 235, and 236*.

The Matthews claim ownership of an undefined portion of the Larson property adjacent to their land through the doctrine of adverse possession. In their Complaint, the Matthews state, "Defendants may make some claim to own part or all of the said property, but in fact they have no right, title or interest therein." *CP*

8. The Complaint includes two causes of action:

IV. ADVERSE POSSESSION.

Said lands claimed by Plaintiffs has been used exclusively, openly, notoriously, hostilely and under claim of right made in good faith for over ten years by the plaintiffs and plaintiffs' predecessors in title.

V. TRESPASS.

The Defendants, and/or their employees, without permission of plaintiffs, trespassed upon the lands of Plaintiffs and in so doing destroyed a fence, yard, and rhododendron plants owned by Plaintiffs and causing damage to Plaintiffs in an amount to be shown at trial.

CP 8 - 9.

In 2006 the Larsons retained Mr. Karl Germunson to survey their property in an effort to establish the correct boundary lines in anticipation of logging. *CP 64, 65, and 93.* Mr. Germunson installed survey stakes marking the legal boundary lines. *CP 65.* In the area where the Matthews' property and the Larsons' property meet, Mr. Germunson found a shed that partially encroached on

the Larson property. *Id.* He also found some shrubs and lawn extending onto the Larson property. *Id.* Mr. Germunson created a diagram showing both the surveyed boundary line and the lawn area and shed installed by the Matthews. *CP 66 - 67.* However, surveyor Germunson never saw any barbed wire fence delineating any boundary line during his survey of the property. *CP 65.*

In September 2006, in anticipation of harvesting the timber on their property the Larsons applied for a Forest Practices Permit with the Washington State Department of Natural Resources. *CP 43 - 55.* The application was approved on October 12, 2006, by Ed Bressler, the Elochman Forest Practice Forester for the Pacific Cascade Region of the Washington Department of Natural Resources. *CP 42, 60, and 61.* Mr. Bressler walked the timbered property with Tracy Larson. *CP 41.* During this timber cruise he did not see any barbed wire fence running through the stand of timber the Matthews claim they adversely possessed. *CP 42.*

During the course of the logging operation, the Larsons encountered some barbed wire on their property in the wooded area between the Matthews' yard and the edge of the plateau or ridge on the Larson property. *CP 95, 96, and 129.* The wire was not continuous and it is difficult to establish where it was. *Id.* Some

of it was in the ground. *CP 129*. It was not a “fence” and it was not obvious. *Id.*

The Matthews purchased their property from Carol Larson (nee Swearington) and her husband Dennis Larson in 1980.¹ *CP 11*. Ms. Larson occupied the Matthews’ property between 1970 and 1975. *CP 134*. From 1975-1980 she rented the property out. *Id.* Carol Larson met the prior owners of the Larson property, the Raistakkas, on a single occasion. *CP 135*. She concedes that during that single meeting they did not discuss the property boundaries. Specifically, to this fact she testified:

Q. Did the Raistakka’s ever tell you – well I guess you only met them the one time, right?

A. Right.

Q. That one time that you met them did they say that barbed wire fence marks the property boundary?

A. No, they told me they would fix the fence, and that I wouldn’t have to worry about the cows in my yard again.

CP 136 - 137.

Q. When you sold the property to the Matthews was that fence still present, the barbed wire fence?

¹ Carol and Dennis Larson are not related to Defendants Tracey and Terry Larson.

- A. I would assume that it was still present, because I think there were still some cows down in that field at times, but I could not say yes or no.
- Q. So you don't know if that fence was still existing at that time, do you?
- A. No. You would have to ask them if they had seen it or not.
- Q. I'm asking you at this time, and you don't know, right?
- A. Correct.
- Q. You say that you believe that property to be yours up to that fence line, as did your neighbor, Mr. Raistakka, but he never told you that, did he?
- A. He didn't tell me it wasn't.
- Q. He never told you that was the property line, right Carol?
- A. He was indicating that the property line where the cows were was mine.
- Q. Did you understand the question? He never told you that fence line was the property line, right?
- A. No, he told me he would fix the fence.

CP 139 - 140.

For their part, the Matthews admit they did not have the property surveyed prior to their purchase. *CP 100.* They did not

walk the property boundaries before purchasing. *CP 101*. There were no discussions between the Matthews and any of their neighbors regarding boundary lines when they purchased. *CP 102 - 103*. The Matthews admit that the barbed wire fence they allegedly observed in the woods between their yard and the edge of the plateau was in disrepair. *CP 101, 102, and 107*. The Matthews did nothing to maintain or improve that barbed wire fence. *CP 102 and 107*. The Matthews had no discussions with the Raistakkas regarding whether the fence was the boundary line, or where the boundary line was. *CP 102 - 103*. The Matthews never discussed the barbed wire fence with the Larsons. *CP 106*.

Nonetheless, the Matthews base their claim of adverse possession on their occasional use of the wooded area between the dilapidated, unmaintained barbed wire and the lawn area they maintained. The use they claim supports adverse possession includes dumping yard debris and other waste in the woods, allowing their children to play in the woods, sunbathing in an opening in the woods, and walking through the woods to reach a plateau from which to view elk. *CP 104*.

The Germunson survey confirmed that the Matthews' neighbor to the east, a Ms. Blaine, also erected a fence that

encroached on the Larson Property. *CP 66 - 67*. The fence is identified in the diagram prepared by Mr. Germunson. *Id.* The barbed wire fence in the Larsons' woods adjacent to the Matthews' property, if it was there at all, was not connected to or a continuation of the Blaine fence. *CP 108, 109, 110, and 117*. The Matthews are unsure as to where the fence even ran to, and do not actually know if the Raistakkas built the fence. *CP 111, 117, and 118*.

B. Procedural History

The Larsons brought a motion for summary judgment based on the fact that the Matthews could not meet their burden of proof to establish a claim for adverse possession, let alone trespass. The Matthews opposed the Larsons' motion and brought a counter motion for summary judgment seeking an order that they had adversely possessed the Larson property up to the alleged barbed wire fence as a matter of law. Judge Michael J. Sullivan heard the argument of counsel and granted the Larsons' motion while denying the Matthews'. However, Judge Sullivan did rule that the shed encroachment constituted adverse possession and could remain.

The Matthews filed a Motion to Reconsider which was likewise denied by Judge Sullivan.

VI. ARGUMENT

A. SUMMARY JUDGMENT STANDARD AND ADVERSE POSSESSION.

Summary judgment decisions are reviewed de novo, with the facts and all reasonable inferences viewed in the light most favorable to the nonmoving party. *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn.App. 323, 329, 2 P.3d 1029 (2000). Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, admissions, and affidavits show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A fact is material if the outcome of the litigation depends on it, in whole or in part. *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 803, 23 P.3d 477 (2001). The nonmoving party may not rely on speculation or argumentative assertions. *Pelton v. Tri State Memorial Hosp.*, 66 Wn.App. 350, 355, 831 P.2d 1147 (1992).

In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. See *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). If the moving party is a defendant and meets this initial showing,

then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," then the trial court should grant the motion.

Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)).

Where the facts in an adverse possession case are not in dispute, whether the facts constitute adverse possession is for the court to determine as a matter of law. *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 758, 774 P.2d 6 (1989), citing *Peeples v. Port of Bellingham*, 93 Wn.2d 766, 772, 613 P.2d 1128 (1980), overruled on other grounds in *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984). The trial court correctly held that as a matter of law the Matthews cannot meet their burden of proof to prove adverse possession.

B. THE MATTHEWS CANNOT ESTABLISH EXCLUSIVE POSSESSION TO THE ALLEGED BARBED WIRE FENCE.

Adverse possession is ultimately a doctrine of repose. Its purpose is to make legal boundaries conform to boundaries that are long maintained on the ground even if it means depriving an owner

of title. 17 William B. Stoebuck, *Washington Practice: Real Estate* § 8.11, at 501 (1995).

The doctrine of adverse possession provides that if the adverse possessor possesses the property and such possession is (1) exclusive, (2) actual and uninterrupted, (3) open and notorious, and (4) hostile, title to the property in dispute vests in the adverse possessor. Plaintiffs in an adverse possession action must prove each element “concurrently exist[ed]” over a period of 10 years. *Chaplin v. Sanders*, 100 Wn.2d 853, 858, 676 P.2d 431 (1984); RCW 4.16.020. “[T]he party claiming to have adversely possessed the property has the burden of establishing the existence of each element.” *ITT Rayonier, Inc.*, 112 Wash.2d at 757 (citations omitted). Possession is established if it is of such a character as a true owner would exhibit considering the nature and location of the land in question. *ITT Rayonier*, 112 Wn.2d at 759. In *Thompson v. Schlittenhard*, 47 Wn.App. 209, 734 P.2d 48 (1987), the Court rejected an adverse possession suit where the claimant could not show exclusive possession of the disputed strips of land due to the other parties’ maintenance of that area. Similarly, in *Peeples, supra*, the claimant Port could not show that they restricted the access of others or maintained exclusive use of the involved

tidelands, therefore, it could not prevail on its adverse possession claim.

This case is similar to *Peeples*. The Matthews occasionally used the wooded area behind their yard, which was owned by the Larsons and their predecessors in interest, simply because it was there and no one told them to keep out. Mr. Matthews testified that they simply continued using the property in similar fashion as their predecessor in interest. *CP 107*. That is, they traipsed across it from time to time, allowed their children to play in the woods, and put debris back there. This is not the same as “actual possession.” The wooded plateau is in a rural area and there are few people who would seek access to it. Nevertheless, the property does not convert to the Matthews simply because they allowed their children to play back there or walked through the area to access a pleasant vista. If such use constitutes possession of another’s property then contrary to well settled Washington law rural land owners in Washington State need to maintain a constant vigil over their property and are required to build fences surrounding the same. *See, Peeples*, 93, Wn.2d at 773; *Muench v. Oxley*, 90 Wn.2d 637, 642, 584 P.2d 939 (1978)(Possession is presumed to be in

subordination to the title of the true owner.) *overruled on other grounds by Chaplin, supra.*

Under Washington law, “use alone does not necessarily constitute [the] possession” required for acquiring title via adverse possession. *ITT Rayonier*, 112 Wn.2d at 759. Rather, the “ultimate test is the exercise of dominion over the land in a manner consistent with the actions a true owner would take.” *Id.*

The Matthews have nothing to support the claim that they “exercised dominion” over the land. They claim only that they traversed the area, threw out some waste there, and occasionally used the area as storage. *CP 104*. While perhaps not very neighborly, such acts do not constitute adverse possession as a matter of law. Contrary to the Matthews’ assertion in their opening brief, the Larsons concede nothing and have shown that the Matthews’ claim fails as to each element required to prove adverse possession.

1. The Matthews Cannot Establish A Disputed Area By Relying On A Dilapidated Barbed Wire Fence That They Never Maintained And Adjacent Property Owners Never Acknowledged As A Boundary.

The Matthews specifically request this Court reverse the trial court’s ruling and find that they adversely possessed the Larson

property to an alleged barbed wire fence. However, the Matthews have no evidence that any barbed wire fence actually existed or that its purpose was to delineate the property line. In fact, the Matthews' testimony regarding the barbed wire fence reveals how tenuous a claim they are making. The Matthews admit:

- Their predecessor in interest neither showed them the barbed wire fence nor told them it was the property boundary. *CP 101, 102, and 103.*
- They never maintained the barbed wire fence and it was in disrepair. *CP 101, 102, and 107.*
- They never discussed the barbed wire fence with the prior owner of the Larson property, the Raistakkas. *CP 102 and 103.*
- They never discussed the barbed wire fence with the Larsons either. *CP 106.*

Furthermore, the prior owner of the Matthews' property, Carol Larson, admits that the Raistakkas never acquiesced that the barbed wire fence demarcated the property boundary. *CP 139 - 140.* Rather, Mr. Raistakka told her the fence was to keep the cattle from getting into her yard and nothing more. *CP 140.*

In order to prevail on their claim, the Matthews must be able to show that every referenced element existed over the entire disputed area for a period of at least 10 years. The Matthews cannot even establish the disputed area. The Matthews describe their improvements of a yard and various plantings as improvements in the disputed area. However, in reality this is but a small section of the overall area they claim to have adversely possessed. The alleged barbed wire fence they claim demarcated their shared boundary with the Larsons was in a stand of timber and nowhere near the yard and shed. *CP 66 – 67, and CP 203*. Logically, the barbed wire fence would run from the encroaching fence that their neighbors to the east, the Blaines, built. *Id.* But, the Matthews deny that their fence had any relation to the neighbor's fence. *CP 108, 109, 110, and 117*. Rather, they claim that their dilapidated barbed wire fence was well into the stand of timber that the Larsons harvested.

The Matthews rely on *Riley v. Andres*, 107 Wash. App. 391, 27 P.3d 618 (2001) to support their proposition that they do not have to establish a clearly demarcated line because the Court can project a line between two objects where it is reasonable and logical to project a line based on the open and notorious use by the

claimant. However, the Matthews' explanation of where the alleged barbed wire fence ran is so ill defined and uncertain that they invite the Court to speculate. The survey they Matthews had Calvin Hampton perform is completely unpersuasive and based on hearsay. See, *CP 201*. Surveyor Hampton did nothing more than plot a line where Mr. Matthews told him to plot it. *Id.* Surveyor Hampton does not criticize or find any error with the Germunson survey. *CP 201 – 202*. Rather, he looks at the GLO plat from 1873 and speculates that if one projected the east west boundary from an adjacent section that does not control the disputed boundary line then it would be "close" to where Mr. Matthews instructed him to plot his line. *CP 202*. The Court is restricted to project a line between two objects where it is reasonable and logical and the claimant's use was open and notorious. See, *Riley v. Andres*, 107 Wash. App. 391, 396, 27 P.3d 618 (2001). The Matthews are not pointing to any two objects for the Court to draw a line, but rather to a certain demarcated line they cannot identify themselves. The Court cannot follow this lead, as it is not based on any credible evidence.

Furthermore, under Washington law, an old, dilapidated fence present when a party purchases land will not support an

adverse possession claim. For example, in *Muench v. Oxley*, 90 Wn.2d 637, 642-43, 584 P.2d 939 (1978), *overruled on other grounds by Chaplin v. Sanders, supra*, the Court refused to permit adverse possession (or find a boundary by mutual acquiescence) of a disputed strip based on an old, dilapidated fence around which the ground had become covered with brush. The Court reasoned that such a dilapidated fence could not be said to rise to the level of “possession as would put a person of ordinary prudence on notice of a hostile claim.” *Id.*

The same situation exists in this case. The Matthews rely on the possible existence of an old, dilapidated barbed wire fence to mark the claimed boundary between their property and the Larsons’ property. But, in the next breath the Matthews admit that they did not install or maintain that fence, they cannot state with any level of certainty it was placed there to mark a boundary rather than keep in cattle, and they never had any discussions about the fence with their neighbors. The fence is only intermittently in place and it does not run in a straight line. While admitting they saw barbed wire here and there, the Larsons never considered it a fence. In addition, prior to the timber harvest surveyor Germunson never saw this alleged fence, forester Bressler never saw this alleged fence,

and Barry Wayne Wagler never saw this alleged fence. *CP 232*. This is not the sort of evidence which Courts rely upon to divest a titled property owner such as the Larsons of their property under a claim of adverse possession. The Matthews' claims have no basis under Washington law.

2. The Matthews Cannot Show Their Use Of The Alleged Disputed Area Was Actual And Uninterrupted.

The Matthews' use of the possessed area was not actual or uninterrupted. As stated in the *Washington Real Property Deskbook*, 3rd Ed., Vol. IV, Sec. 64.3(1):

The general principle is that actual possession involves possession of a character which a true owner would assert toward the land in view of its nature and location. *Frolund v. Frankland*, 71 Wn.2d 812, 817, 431 P.2d 188 (1967)...Rather obviously, this element overlaps with the "hostility" and "open and notorious" elements....The mowing of an entire area of lawn between neighboring houses is not considered "actual possession" but the mowing of a lawn up to a "line" between the houses is –apparently because the act of mowing up to a line, which may be on a neighbor's lawn, is indicative of ownership." *Mesher v. Connoley*, 63 Wn.2d 552, 388 P.2d 144 (1964).

There is no question in this case that the Matthews *used* a portion of the Larson property. This does not mean such use was "actual and uninterrupted." The Matthews testified they believed their ownership extended up to a dilapidated barbed wire fence in

the wooded area behind their yard, however, they did not maintain that fence, nor did the lawn area they mowed extend to that fence. CP 107, and 66 - 67. The Matthews have no photographs of that fence. Meanwhile, the Larsons observed only inconsistent pieces of wire that were partially buried in the ground. CP 95 and 129. The Matthews claim that they would step over the old barbed wire to access a view point on the other side, and acknowledge they did not believe the viewpoint was on their property. CP 106, 107, and 124.

This is akin to the *Mesher v. Connoley*, 63 Wn.2d 552, 388 P.2d 144 (1964) lawn-mowing scenario. Arguably, the Matthews occasionally used the entire area of the plateau, knowing it was not all their land, simply because it was there. Artificially determining the boundary lay with a decaying fence that *no one* had ever claimed marked the true boundary runs afoul of every traditional notion of property ownership, especially when the Larsons' predecessors in interest allegedly repaired the fence for the purpose of keeping in cattle, not establishing a property line. CP 136 - 137. "A fence erected to control pasturage or cattle and not as a boundary does not establish adverse possession." *Roy v. Goerz*, 26 Wn.App. 807, 813-14, 614 P.2d 1308 (1980) *overruled*

on other grounds by *Chaplin v. Sanders, supra* (Court rejected adverse possession claim where the evidence showed that the party who erected the fence did so not to establish a boundary, but “simply [as] a cattle fence.”)

3. The Matthews’ Use Of The Alleged Disputed Area Was Not Open and Notorious.

The open and notorious element of adverse possession requires proof that (1) the true owner has actual notice of the adverse use throughout the statutory period, or (2) the claimant (and/or predecessors) uses the land in a way that any reasonable person would assume that person to be the owner. *Shelton*, 106 Wn.App. 45, 51-52, 21 P.3d 1179 (2001) *citing Anderson v. Hudak*, 80 Wn.App. 398, 404-05, 907 P.2d 305 (1995).

In *Anderson v. Hudak*, 80 Wn.App. 398, 404-05, 907 P.2d 305 (1995), the Court refused to find adverse possession where a plaintiff claimed property up to a row of trees she planted. In rejecting her claim, the Court held she failed to satisfy the “open and notorious” or “hostility” requirements for adverse possession because she “could not show that she or her family ever maintained or cultivated the trees.” *Id. at 405*.

In *Cole v. Laverty*, 112 Wn.App. 180, 184, 49 P.2d 305 (1995), the Court held a “fence, locked gates, and bathtub planters [did] not constitute permanent obstructions that would otherwise put [the true owner] on notice that the claimants were asserting hostile, exclusive interest over the easement” at issue. *Cole*, 112 Wn.App. at 186.

There is no evidence establishing the “open and notorious” element in this case. The Matthews both testified that they had no discussions with any of their neighbors regarding boundary lines. They specifically had no communications with the Raistakkas, the Larsons’ predecessors in interest, regarding whether the fence was the boundary line, or where the boundary line was at all. There is no evidence that the Raistakkas (or the Larsons) knew of the Matthews’ occasional use of the wooded area of this rural property. No “reasonable person” would assume that the property to the north of the dilapidated barbed wire fence was the Matthews’ property as at least two unconnected witnesses walked the area in question and did not see the fence nor did the prior owner of the Larson property. *CP 42, 65, and 232*. The Matthews’ practice of throwing yard waste and compost into the area invokes the same situation in *Cole*: these were difficult to see, temporary

encroachments that fail to put the Larsons on notice that the Matthews claimed ownership up to the dilapidated fence.

4. The Matthews' Use Of The Disputed Area Was Not Hostile Or Under A Claim Of Right Made In Good Faith.

The hostility element requires that the claimant treat the land as his own against the world through the statutory period. The nature of the plaintiffs' possession will be determined solely on the basis of the manner in which they treat the property. *Chaplin, supra*, at 860-61; *Shelton*, 106 Wn.App. at 50-51 ("Subjective beliefs regarding a true interest in the land and any intent to dispossess or not dispossess another are irrelevant to the determination.") "It is enough to establish adverse possession in this type of case that the party claiming ownership held, managed, and cared for the property." *Reitz*, 62 Wn.App. at 853.

In *Crites v. Koch*, 49 Wn.App. 171, 176-78, 741 P.2d 1005 (1987), the Court denied a claimant's assertion of ownership by adverse possession where he used the area in dispute "primarily to turn around his equipment and as access to the [other] southern part" of the property and "sprayed the weeds" in that area. The Court reasoned this use occurred "as a neighborly courtesy," particularly since "it was common for farmers to cross and park

equipment on their neighbors' fields." *Id. at 177*. The Court concluded "[s]uch use was recognized as a neighborly courtesy, whether or not permission was expressly granted, and was not perceived as a trespass." *Id. at 177-78*.

Here, as in *Crites*, the Matthews used the Larsons' property in the manner in which rural landowners often use a neighbors' wooded land: a place for kids to play, throw some yard clippings, or temporarily store an old car. Such use can perhaps be expected and should not result in the Larsons' loss of property they paid for and have rightful title to. "[P]remission to occupy the land, given by the true title owner to the claimant or his predecessors in interest, will...operate to negate the element of hostility." *Chaplin*, 100 Wn.2d at 862. If anything, the Matthews' use of the disputed land in this case was permissive, as their neighbors to the south doubtless had little reason to ask the Matthews' children to stop playing in an area they seldom used. The "hostility" element has not been met.

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C. THE MATTHEWS CANNOT REQUEST AFFIRMATIVE RELIEF UNDER RCW 4.24.630 AS IT WAS NEITHER PLEADED NOR CONSIDERED AT THE TRIAL COURT LEVEL.

The Matthews specifically request the Court not only reverse the trial court's granting of summary judgment in favor of the Larsons, but also that the Court ". . . remand the case to the trial court for an assessment of damages under the trespass claim, and attorney fees under RCW 4.24.630." *App. Opening Brief, pg. 1.*

The Matthews never brought a claim under RCW 4.24.630. Rather, their claim of trespass at the trial court level sounded in common law. *CP 7 - 12.* The Matthews' request for relief under RCW 4.24.630 violates RAP 2.5. The issue was never presented in any pleadings at the trial court level. To allow the Matthews to effectively amend their Complaint for the first time on appeal so as to propose a new theory of the case violates equitable rules of estoppel, election of remedies, and the invited error doctrine. *JDJF Corp. v. International Raceway, Inc.*, 97 Wash. App. 1, 7, 970 P.2d 343 (1999).

VII. CONCLUSION

The trial court correctly ruled that other than a very small area where a shed is located the Matthews could not meet their

burden of proof to establish a claim for adverse possession of a poorly defined area. In short, the uses the Matthews claim would allow the Court to divest the Larsons of their property are wholly inadequate for such rural property. The Larsons respectfully request the Court affirm the trial court's order.

DATED this 22nd day of March, 2012

FALLON & MCKINLEY

Respectfully submitted:

By: 
Mark Thompson, WSBA #29730
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Attorneys for Respondent Larsons

CERTIFICATE OF SERVICE

Nichole J. Chittick, being first duly sworn on oath, deposes and states:

That on the 22nd day of March, 2012, she caused to be sent a copy of Respondents' Appellate Brief; and this Certificate of Service to the below listed party of record in the above-captioned matter, as follows:

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Nichole J. Chittick

12:00:02 PM 3/12
STATE OF WASHINGTON
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