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DIVISION II  
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No. 44689-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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MARK L. BUBENIK and MARGARET M. BUBENIK,

Appellants,

v.

THOMAS J. MAUSS and KAROL K. MAUSS,

Respondents.

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APPELLANTS BUBENIK'S REPLY BRIEF

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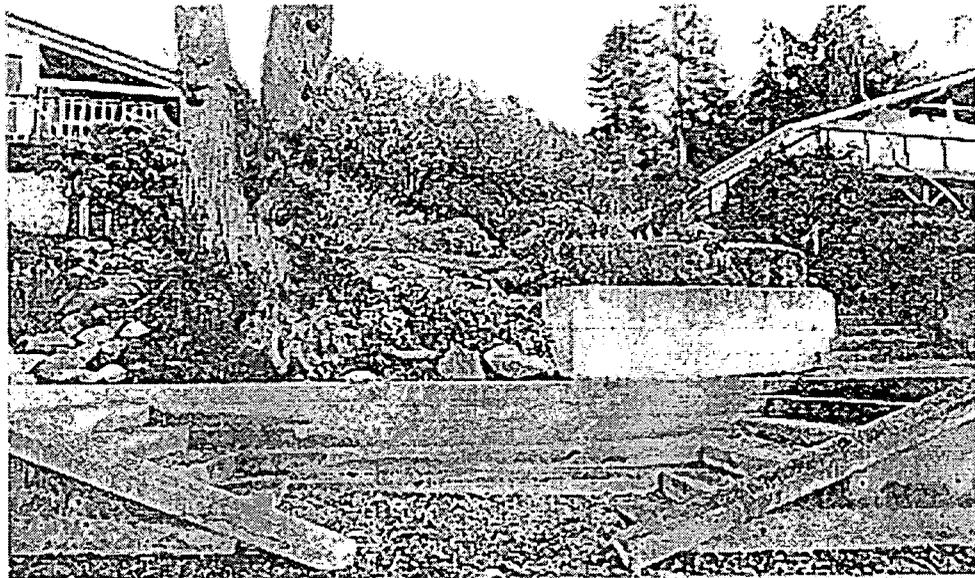
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I.  
**THE RELEVANT ACTIONS OF BUBENIK AND MAUSS IN THE  
DISUTED AREA – THE BUBENIKS OPENLY MAINTAINED IT  
AS IF IT WAS THEIR OWN**

*The circumstances regarding the construction of the stairs imply that if they [Bubenik and Mauss] had considered or known that the stairs were constructed entirely on the Mauss property, Mauss would have granted a pedestrian access easement across that portion of the Mauss Property between the bulkhead and the adjacent embankment to all portions of the three directional stairs and the immediate surrounding beach area.*

*The Honorable Garold Johnson  
Finding of Fact 51<sup>1</sup>*



The above picture (Trial Exhibit 20) depicts the shared stairs, the Bubenik home above and left (northwest) of the stairs, the Mauss home on the right (northeast) and the maple tree immediately above the left side of the stairs.

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<sup>1</sup> CP 196 (underlining added).

When Bubenik,<sup>2</sup> Mauss<sup>3</sup> and Niquette decided to replace the continuous wooden bulkhead in 1995, they did not simply split the costs evenly three ways. The parties were very precise. Bubenik, Mauss and Niquette all testified, and the trial court found, that Bubenik paid for 88 feet of the new bulkhead, Mauss paid for 87 feet, and Niquette paid for 100 feet. (RP 72, 399, 214, CP 192, Finding 25.) This division of payment corresponded directly with the length of waterfront property stated on their respective deeds. (RP 32-33, 214, CP 189, Findings 4 and 6, Exs. 1, 2; *see also* Ex. 14.)

Bubenik and Mauss both testified, and the court found, that Bubenik and Mauss shared equally the cost of the three directional stairs that provide joint beach access for their respective properties. (RP 72, 397-98, CP 192, Findings 24-25.) Both Bubenik and Niquette testified that the stairs were centered at the common boundary line between Bubenik and Mauss. (RP 50-51, 69, 222-23.) After this dispute arose, Mauss' son Mike measured from the center of the stairs to the end of the Mauss bulkhead and testified that, consistent with the cost division, Mauss' bulkhead measured 87 feet. (RP 239-41.) Mike Mauss also measured from the center of the stairs to the common boundary line

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<sup>2</sup> "Bubenik" collectively refers to appellants Mark and Margaret Bubenik.

<sup>3</sup> "Mauss" collectively refers to respondents Tom and Karol Mauss.

between Bubenik and Niquette and confirmed that it measure 88 feet.  
(*Id.*)

Tom Mauss confirmed at trial that he only paid for portions of the bulkhead located on the northeast side of the stairs (facing upland, to the right of the stairs); and he did not share in the costs for any bulkhead on the northwest (left) side of the stairs. (RP 397-98.) The costs of the bulkhead northwest (left) of the stairs were born by Bubenik. (*Id.*) Despite this deliberate and careful division for the bulkhead construction costs, unbeknownst to Bubenik, Mauss or Niquette, a surveyed deed line would place approximately 17 feet of the bulkhead that Bubenik paid for and all of the stairs (for which Bubenik paid half) on the Mauss property. (Exs. 3, 4.) Nonetheless, as if he were the true owner, Bubenik took full and exclusive financial responsibility for the permanent improvements constructed on this 17 feet of waterfront property in 1995, and remaining still today.

With regard to the maple tree located immediately above the northwest (left) side of the stairs (*see* photo at page 1 of this brief, Ex. 20), the testimony of both Bubenik and Mauss is consistent. Tom Mauss testified that Bubenik maintained the tree for the entirety of Mauss' 30+ year residency. (RP 395.) Bubenik's maintenance of the tree included regularly cutting suckers that shoot out from the tree trunk and limbs. (RP

317-18, 51-52.) It including planting at the base of the tree wild geranium and stargazer lily, and annually, without missing a year, also planting and maintaining zinnias. (RP 315-17, 51-53, 197-201.) Tom Mauss was aware that Bubenik was planting at the base of the tree. (RP 360.) Though Mauss testified that he was not “offended” by the fact that Bubenik did not ask permission to plant, he also testified that Bubenik never asked for permission and permission was never granted. (RP 361-63.) Mauss never lodged any objection to Bubenik’s use. (*Id.*) Bubenik’s maintenance of the maple tree even included hiring and paying a professional tree service to remove several dead limbs from the tree. (RP 317-18, 171-72.) Mauss was fully aware that Bubenik was taking this action and incurring this expense.<sup>4</sup> (RP 394-95, 425.) Mauss did not contribute to the cost of this effort, nor did they themselves maintain the tree or the flowers planted at its base. (RP 395, 234-35, 425.)

The testimony was again in complete accord with regard to the camellia further upland next to the retaining wall leading to Bubenik’s garage. Only Bubenik maintained the camellia and no member of the Mauss family ever participated in its maintenance. (RP 62-63, 311, 237-38, 265, 425.) In fact, Mike Mauss confirmed that Bubenik not only

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<sup>4</sup> Mauss not only knew about it, he hired the same tree service to trim a different tree on Mauss’ side of the Observed Line. Mauss paid to have this other tree trimmed. (RP 394-95.)

maintained the camellia, but took care of everything on the other side of the garage retaining wall (which wall is a permanent improvement in the Disputed Area,<sup>5</sup> but located on the Mauss side of the survey lines). (RP 237-38, Ex. 4.) Mauss' gardener confirmed that only Bubenik cared for the camellia. (RP 133.)

Finally, as for the rock encircled garden area between the upland camellia and the waterside stairs and maple tree (*see* Exs. 4, 7A), Tom Mauss confirmed that Bubenik created a "pretty garden" in this area. (RP 362.) On the Bubenik side of the Observed Line in this area, Bubenik planted and maintained rhododendrons, azaleas, dahlias and daffodils. (RP 54-57, 61, 319-20.) Mauss notes in their brief that the professional yard service they hired also performed work on the Bubenik side of the disputed line in this area. This is true. The Mauss' yard service cut dahlias and roses that Bubenik planted and killed a planted chrysanthemum that Bubenik received as a gift from Margaret Bubenik's parents. (RP 59-60, 323-24.) As a property owner would, Bubenik complained to Mauss. (*Id.*) The yard service clearly did not take these actions at the instruction of Mauss. Mauss was surprised it happened and

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<sup>5</sup> As explained in the Bubenik's opening brief, the "Disputed Area" is the area between the "Observed Line" and the surveyed deed line. The "Observed Line" is the line Bubenik's claim was observed by the parties and reflects the true boundary line. Both the Observed Line and the Disputed Area are depicted on the survey admitted as Trial Exhibit 4.

apologized. They also attempted to instruct their service not to clear this area again, but the language barrier made it difficult to communicate the instruction. (RP 364, 430-31.) Thereafter, to prevent further unauthorized clearing, Bubenik placed “Do Not Cut” signs in this garden area on the Bubenik side of the Observed Line. (RP 59-60, 323-24.)

In the response brief, Mauss places great emphasis on the shared maintenance and use of the shared lawn area. Bubenik has never denied that this small area, which makes sense to be commonly maintained, is used and cared for by both families. (RP 44-46, 185-86, 229-36, 355-56.) However, the affirmative and deliberate decision to share the maintenance of this single, confined area does not change the nature of Bubenik’s possession, use, and maintenance of the bulkhead, stairs, maple tree, garden area and camellia earlier that all connect to create the Observed Line. Bubenik has treated these areas and taken financial responsibility for these areas as if they are the true owners. The substantial evidence and Washington law direct a conclusion that Bubenik is the true owner of the Disputed Area, by adverse possession and/or by mutual recognition.

**II.**  
**THE SUSBTANTIAL EVIDENCE AND WASHINGTON LAW**  
**DIRECT THAT BUBENIK OWNS THE DISPUTED AREA VIA**  
**ADVERSE POSSESSION**

**1. Bubenik's possession and use of the Disputed Area was hostile and it was exclusive.**

When asked if, prior to this lawsuit, he “always had a good neighborly cordial relationship with Mr. and Mrs. Mauss and their children,” Mark Bubenik responded: “We still do.” (RP 298.) He testified that the families have and continue to be respectful of and courteous to one another.” (*Id.*) The trial court was impressed by the friendly and amicable relationship between these two families and commented that “the nature of the relationship between these parties ... is quite friendly, even to this day, thank goodness.” (2/18/13 RP 5.) The friendly nature of the parties influenced the trial court in concluding that Bubenik’s use was not “hostile” for purposes of an adverse possession claim. (*Id.* at p. 6.) Mauss takes the same approach, arguing that Bubenik’s use was neither hostile nor exclusive, but was shared use and permissive through neighborly acquiescence.

However, the law does not require demonstration of animosity or import ill will to establish “hostility.” Rather, hostility it means that the claimant is in possession as the record owner and not in a manner that is subordinate to the title of the true owner. *El Cerrito v. Ryndak*, 60 Wn.2d

847, 854, 376 P.2d 528 (1962); *Malnati v. Ramstead*, 50 Wn.2d 105, 108, 309 P.2d 754 (1957). Hostility requires that the claimant treat the land as his own as against the world throughout the statutory period. *Nickell v. Southview Homeowners Ass'n*, 167 Wn. App. 42, 50, 271 P.3d 973 (2012).

Similarly, “exclusive” possession is established through demonstration that the claimant possessed the property as a true owner would make considering the nature and location of the land in question.<sup>6</sup> *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 759, 774 P.2d 6 (1989). “The ultimate test is the exercise of dominion and control over the land in a manner consistent with actions a true owner would take.” *Id.*; *Timberlane Homeowners Ass'n v. Brame*, 79 Wn. App. 303, 309, 901 P.2d 1074 (1995). A claimant’s possession need not be absolute to satisfy the exclusivity condition of adverse possession. *Lilly v. Lynch*, 88 Wn. App. 306, 313, 945 P.2d 727 (1997). An “occasional, transitory use by the true [record] owner usually will not prevent adverse possession if the uses the adverse possessor permits are such as a true owner would permit a third person to do as a ‘neighborly accommodation.’” *Id.* “Cases where the courts have found a lack of exclusivity involve use by the title owner that

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<sup>6</sup> Adverse possession does not require a clearly demarcated line. *Riley v. Andres*, 107 Wn. App. 391, 396, 27 P.3d 618 (2001) (“The court need not find a ‘blazed or manicured trail’ establishing a disputed boundary; rather the court may project a line between objects where it is reasonable and logical and the claimant’s use of the land was open and notorious.”).

indicates ownership.” *Id.*, quoting *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 217, 936 P.2d 1163 (1997).

In this case, the substantial evidence in the record readily establishes that Bubenik adversely (hostilely) and exclusively possessed the disputed area – Bubenik used and possessed the land as the true owners.

**The bulkhead and stairs.** Bubenik caused and paid for construction of permanent structures, a bulkhead and stairs, in the Disputed Area.<sup>7</sup> The structure remains since its construction in 1995. Of course, unknown to Bubenik or Mauss at the time, a surveyed deed line would place approximately 17 feet of the bulkhead that Bubenik paid for and all of the stairs (for which Bubenik paid half) on the Mauss property. (Exs. 3, 4.) If the survey line was the line historically treated by the owners as the true boundary line, it would mean that Bubenik contributed more than \$4,500<sup>8</sup> to permanent improvements constructed on Mauss’

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<sup>7</sup> Mauss argues that Bubenik did not actually possess any portion of the Disputed Area because there were no permanent improvements in this area. (Brief at p. 24.) Of course this is factually untrue. The bulkhead and stairs are permanent improvements that have remained in place for 18 years, just as the retaining wall leading to Bubenik’s upland garage is also a permanent structure. (See Exs. 3-4.) The argument is also legally incorrect. Activities such as regularly planting and caring for flowers, rhododendrons and other plants and tree trimming are activities consistent with that of a true owner and may give rise to adverse possession. *Riley v. Andres, supra*, 107 Wn. App at 396.

<sup>8</sup> Bubenik, Mauss and Niquette all paid \$160 per lineal foot of bulkhead, plus sales tax and permitting costs. (RP 72.) Bubenik still had their contract and it was admitted at trial. (Ex. 5.) The \$4,500 estimate is calculated by multiplying 17 feet x \$160 and

property. It would also mean that Bubenik consented to and financially participated in construction of a replacement bulkhead that left the Bubenik property with no beach access.

Of course the trial court recognized that a person would not undertake such costly construction if he did not expect he was entitled to use the improvements. The trial court found:

The circumstances regarding the construction of the stairs imply that if they had considered or known that the stairs were constructed entirely on the Mauss property, Mauss would have granted a pedestrian access easement across that portion of the Mauss Property between the bulkhead and the adjacent embankment to all portions of the three directional stairs and the immediate surrounding beach area.

(CP 196, Finding 51.) If not acting as the true property owners, Bubenik certainly would have demanded an easement before agreeing to share in the significant cost of the stairs. That they did not demand an easement demonstrates they were, in fact, taking action in manner and character consistent with that of a true owner of the property upon which the stairs were located.

When Bubenik undertook the significant financial obligation of constructing a concrete bulkhead and half of the associated stairs on the 17

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adding the cost of the stairs (\$1,800) as stated on the Bubenik contract. This calculated cost is exclusive of sales tax.

feet of waterfront in the Disputed Area, they were acting as the true owners of the waterfront property would act – they thus took hostile and exclusive possession. That Bubenik was mistaken with regard to the accurate location of the deed line is irrelevant. *Reitz v. Knight*, 62 Wn. App. 575, 581, 814 P.2d 1212 (1991). To demonstrate hostility, Washington law does not require that the parties occupying the property subjectively intend to or even know that they occupy the land of another. *Chaplin v. Sanders*, 100 Wn.2d 853, 860-61, 676 P.2d 431 (1984). “The doctrine of adverse possession was formulated to protect both those who knowingly appropriated the land of others, and those who honestly held the property in belief it was their own.” *ITT Rayonier, supra*, 112 Wn.2d at 760.

**The waterside maple tree and the upland camellia.** All who testified regarding maintenance of the maple tree and the bed at the tree base are in accord. Bubenik exclusively maintained the tree, without financial contribution from Mauss. (RP 394-395, 317-18, 51-52, 171-72.) Bubenik likewise exclusively and consistently maintained the bed at the base of the maple tree. (RP 315-14, 197-201, 360, 234-35, 425.) Bubenik possessed the maple tree area as the true owner. Their actions must have been convincing. Karol and Mike Mauss both believed that the maple tree was located on Bubenik’s property. (RP 234-35, 417.) The same is true

with regard to maintenance of the camellia. Members of the Mauss and Bubenik families consistently testified that only Bubenik maintained the camellia located next to the garage retaining wall. (RP 62-63, 311, 237-38, 265, 425, 133.) Bubenik acted as though they were the true owners of these locations in the Disputed Area.

That Bubenik acted as the true owner when they maintained these areas is further confirmed by the fact that Mauss did not maintain the same areas. Mauss did not ignore all yard and garden work required on their property. Rather, they exclusively maintained the trees, bushes and plants on the Mauss side of the Observed Line. (RP 58, 120-25, 128-29, 144.)

**The garden area.** Mauss concedes “the Bubeniks performed most of the gardening and yard maintenance on their side of the disputed line.” (Brief at p. 6.) Activities such as regularly planting and caring for flowers, rhododendrons and other plants, such as Bubenik carried out are activities consistent with that of a true owner. *Riley, supra*, 107 Wn. App. at 396.

Mauss, however, attempt to negate this fact by arguing that maintenance of the rock encircled garden area was shared.<sup>9</sup> For this argument, they cite to the trial court finding:

Mr. and Mrs. Bubenik performed the majority of the gardening work on the Bubenik side of the Observed Line in the garden area adjacent to the shared lower lawn; however, Mrs. Mauss, Mike Mauss, and a professional yard clean up services hired by Mauss also worked in and maintained the garden areas on the Bubenik side of the Observed Line.

(CP 194, Finding 37.) Based on this finding (to which error has been assigned), they argue, Bubenik's use was not exclusive and their ongoing maintenance activities were allowed by neighborly acquiescence and sufferance.

Of course, Bubenik complained when the yard service cleared the garden area on the Bubenik side of the line, causing Mauss to apologize and instruct the service to stay out of Bubenik's garden. (RP 59-60, 323-24, 364, 430-31.) Bubenik thereafter erected signs to prevent further action by the yard service in their garden. (RP 59-60, 323-24.) The Bubenik's use and action were thus of a character that a true owner would assert. While, Mauss' conduct was that of a user in a subordinate position.

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<sup>9</sup> Again, there is no dispute that there was shared use and maintenance and neighborly acquiescence within the shared lawn area. However, this represents only a limited area of the Disputed Area. Moreover, the neighborly accommodations ran both ways in this area.

With regard to Karol Mauss' supposed maintenance, Karol Mauss did not routinely maintain this area. Karol Mauss herself characterized her gardening in this area as follows: "[I]f the weather is nice, and I'm out and if I see weeds, I pull them. It's not like a routine thing, not something on my head, but if I see them, I pull them." (RP 421.) Finally, Mike Mauss testified: "I raked some leaves." (RP 246.) Unlike, Bubenik, he did not deadhead the rhododendrons in that area, nor did he weed. (*Id.*)

Bubenik regularly planted and maintained this garden area on the Bubenik side of the Observed Line. Mauss never objected. To the contrary, when Bubenik complained about the yard service's destructive activity in Bubenik's garden, Mauss acted in a manner that indicated Mauss' use was subordinate to the Bubenik's ownership by apologizing and attempting to prevent further unauthorized clearing. Bubenik's action in this regard, unlike Mauss' reaction, was consistent with the nature of the area, and constituted action of a true owner. Unchallenged use of an area for more than ten years cannot be characterized as permissive. *See Timberlane Homeowners Ass'n, supra*, 79 Wn. App. at 311.

Frankly, if there was any neighborly sufferance or acquiescence it was by Bubenik to Mauss for Mauss' occasional weed pulling and raking. Again, an occasional use by the title owner usually will not prevent adverse possession if the uses the adverse possessor permits are such as a

true owner would permit a third person to do as a ‘neighborly accommodation.’” *Lilly, supra*, 88 Wn. App. at 313.

**2. Bubenik’s use of the Disputed Area was open and notorious.**

There is no requirement that the adverse user give the owner express notice of a hostile claim. *Gray v. McDonald*, 46 Wn.2d 574, 579-80, 283 P.2d 135 (1955). Rather, to establish the open and notorious element of adverse possession, Bubenik must establish that Mauss had actual notice of the adverse use throughout the statutory period or that the land was used in a way that a reasonable person would assume that person to be the owner. *Shelton v. Strickland*, 106 Wn. App. 45, 51, 21 P.3d 1179 (2001); *Chaplin, supra*, 100 Wn.2d at 862.

Mauss argues that Bubenik’s use was not open and notorious because, according to Mauss, the use was “sporadic” and comprised of activities of the sort that are “informal” and “neighborly” and reasonably anticipated by neighbors with a shared yard. (Brief at p. 21.) In unilaterally applying this description, Mauss only acknowledges three activities: (1) payment for one-half of the three directional stairs and 88 feet of shared bulkhead; (2) maintenance of the maple tree, and (3) maintenance of the camellia. (Brief at p. 20.)

Of course contracting and paying substantial funds for construction of permanent structures along 17 feet of waterfront, which structures have remained in place for 18 years, cannot credibly be characterized as either sporadic or informal and neighborly actions.

The camellia is physically separated by the garage retaining wall (another permanent structure in the Disputed Area) and a substantial distance from the shared lawn area. (*See* Ex. 7A.) Moreover, everyone who testified about the camellia confirmed that it is exclusively maintained by Bubenik. (RP 62-63, 311, 237-38, 265, 425, 133.) Again, Mike Mauss confirmed that Bubenik took care of everything on what Mike Mauss considered, despite the later discovered location of the deed line, the Bubenik side of the retaining wall. (RP 237-38.)

Finally, with regard to the maple tree (which is also separated from the shared lawn),<sup>10</sup> Mauss confirmed their knowledge of the planting around and maintenance of this tree. (RP 360-61, 395.) Mauss did not maintain this significant tree, and Mauss was aware that Bubenik did maintain the tree for the entirety of Mauss' 30+ year residency. (RP 395, 234-35, 417.) Tom Mauss never testified that he was unaware of the planting and weeding around this tree – only that the Bubenik's maintenance activities did not “offend” him. (RP 360-61.)

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<sup>10</sup> *See* Ex. 7A.

Where Bubenik maintained the trees, bushes and gardens as a true owner would, Mauss would refrain from such maintenance. Mauss knew about an allowed Bubenik to pay for bulkhead structures in the Disputed Area, tree trimming in the Disputed Area and planting in the Disputed Area. Bubenik's adverse use was, indeed, open and notorious and well-known to Mauss.

**3. Bubenik's use was uninterrupted.**

Mauss does not really respond to Bubenik's argument that their adverse use was uninterrupted other than to unilaterally label Bubenik's use (including the construction of permanent structures) as sporadic.

Continuous and uninterrupted use does not require a claimant to prove constant use. "Instead, the claimant need only demonstrate use of the same character that a true owner might make of the property considering its nature and location." *Double L. Properties, Inc. v. Crandall*, 51 Wn. App. 149, 158, 751 P.2d 1208 (1988). "[I]t has become firmly established that the requisite possession requires such possession and dominion 'as ordinarily marks the conduct of owners in general in holding, managing and caring for property of like nature and condition.'" *Howard v. Kunto*, 3 Wn. App. 393, 396, 477 P.2d 210 (1970), *overruled on other grds. by Chaplin, supra*, (holding occupancy only during summer months of a beach home did not destroy the continuity of the claimants

use, where the surrounding homes were also used as summer recreational retreats). *See also, Reymore v. Tharp*, 16 Wn. App. 150, 153, 553 P.2d 456 (1976) (occupancy during the summer only does not destroy the continuity of possession in adverse possession case); *Lee v. Lozier*, 88 Wn. App. 176, 185, 945 P.2d 214 (1997) (holding use of a dock in the summer time only was “continuous and uninterrupted” for purposes of a prescriptive easement analysis because the seasonal use was of the “same character that a true owner might make of the property considering its nature and location.”).

Bubenik’s seasonal maintenance of the garden area and trees during the times the true owner would be expected to conduct such maintenance qualifies as continuous and uninterrupted use. Their maintenance was consistent with that performed by Mauss on the Mauss side of the Observed Line.

**III.  
THE SUSBTANTIAL EVIDENCE AND WASHINGTON LAW  
DIRECT THAT BUBENIK OWNS THE DISPUTED AREA VIA  
MUTUAL RECOGNITION**

With regard to mutual recognition, Mauss essentially repeats the trial court’s findings and conclusions in the form of an argument. The trial court rejected the mutual recognition claim because it rejected Bubenik, Niquette and Mauss’ actions and agreement regarding the bulkhead

replacement as an express agreement regarding the common boundary lines. (See CP 193, Finding 29.) The court accepted Niquette and Bubenik's testimony in this regard as true, but merely found that Mauss was, purportedly, unaware. (CP 192, Finding 27.) Though, Mauss agreed that the three directional stairs would be shared, Mauss argues that the center of those stairs cannot represent an obvious demarcation of a common boundary line. Mauss never responds, however, to Bubenik's rebuttal to the trial court's findings and conclusions, which rebuttal is well-supported by the substantial evidence in the record.

Though Mauss' attorney argued and the trial court accepted that there was no "meeting of the minds," Mauss never contradicted Bubenik and Niquette's testimony regarding the bulkhead measurements, placement of the stairs and the distribution of construction costs. He simply testified that he did not have a good and complete memory of the events. (RP 348-51, 399.) Mauss acknowledged that his bulkhead was 87 feet and he only paid for that portion of the bulkhead southwest of the replacement stairs. (RP 397-98.) The objective measurements by Mauss' own son, confirmed Bubenik and Niquette's testimony. Mauss' bulkhead measured 87 feet from the center of the stairs to the southwest end of Mauss' bulkhead. (RP 239-41.)

Most significantly, the trial court's Finding 51 (CP 196) that, if Mauss and Bubenik knew the stairs were not being centered on the property line, they would have granted pedestrian easements to ensure both parties could use the stairs they paid for, proves an express agreement. Mauss and Bubenik must have agreed that the stairs were located at the boundary line. Otherwise, the pedestrian easements would have been created. Mauss and Bubenik's exclusive maintenance of their respective sides of this boundary line for the decades following installation of the bulkhead installed, further confirmed this agreement.

Three property owners agreed to pay the significant costs for reconstruction of only their respective bulkheads. The trial court's Finding 51 confirms that this agreement necessarily required a good faith understanding regarding the location of the common boundary lines. The substantial evidence and the trial court's Finding 51 establish Bubenik's mutual recognition claim.

**IV.  
THE TRIAL COURT ERRONEOUSLY RESOLVED SURVEY  
DISCREPANCIES**

Mauss defends the trial court's decision to resolve a discrepancy between two different professionally prepared surveys by pointing to the court's broad equitable powers in a quiet title action. Mauss misses the point of Bubenik's challenge.

Without a request for affirmative relief from Mauss and without testimony from the surveyor who prepared the subject survey, the trial court, on its own initiative, declared the AHBL survey (Ex. 3) as the true boundary line. It did so after advising the parties that the court considered the AHBL survey a “more reliable document, marginally so.” (1/18/13 RP 11 (emphasis added).)

The trial court selected a survey that stripped Bubenik of even more waterfront – even more of the bulkhead they paid for – without providing Bubenik a fair opportunity to litigate the issue. Had Bubenik been provided notice that the trial court would resolve the survey discrepancy (either through a counterclaim or even some announcement before trial and before the parties rested), they would have fully addressed the issue. At a minimum, they would have called the AHBL surveyor to testify.

While the trial court has broad equitable powers in quiet title actions, it did not do equity here. Rather, the trial court further negatively affected Bubenik’s property rights without notice.

**V.  
ATTORNEYS’ FEES**

Mauss requests attorneys’ fees pursuant to RCW 7.20.083, which statute gives the court discretion to award attorney fees to the prevailing

party in an adverse possession claim if the court deems it just and equitable. Even if the statute applied, this is not a case in which the equities support an award of fees. Regardless, the Legislature expressly provided that the statute may only be applied to lawsuits filed on or after July 1, 2012. (Engrossed Substitute House Bill 1026, Ch 255, Laws of 2011, Section 2 (“This act applies to actions filed on or after July 1, 2012.”) (A copy is attached as Appendix A.) This lawsuit was filed on January 13, 2012. (CP 1.)

Perhaps Mauss was aware that the statute does not apply. In a footnote (which is not an appropriate means of requesting affirmative relief),<sup>11</sup> Mauss alternatively requests fees pursuant to RAP 18.9, asserting this appeal is frivolous.

In determining whether an appeal is frivolous, five considerations guide us: (1) a civil appellant has a right to appeal, (2) we resolve any doubts about whether an appeal is frivolous in the appellant's favor, (3) we consider the record as a whole, (4) an unsuccessful appeal is not necessarily frivolous, and (5) an appeal is frivolous if it raises no debatable issues on which reasonable minds might differ and it is so totally devoid of merit that no reasonable possibility of reversal exists.

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<sup>11</sup> *State v. Johnson*, 69 Wn. App. 189, 194, n.4, 847 P.2d 960 (1993) (placing and argument in a foot note “is at best, ambiguous or equivocal as to whether the issue is truly intended to be part arguments” and the court need to consider such arguments).

*Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 220, 304 P.3d 914, 924 (2013).

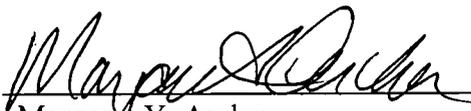
The Bubenik appeal is far from frivolous. To the contrary, Bubenik has presented strong grounds for reversal that are well supported by the substantial evidence in the record and the law.

**VI.  
CONCLUSION**

The Bubenik's met their burden at trial and the trial court's decision is erroneous. This Court should reverse the trial court and remand with instruction to enter judgment quieting title to the Disputed Area to Bubenik.

Respectfully submitted this 11<sup>th</sup> day of December, 2013.

GORDON THOMAS HONEYWELL LLP

By   
Margaret Y. Archer  
Attorneys for Appellants Bubenik  
WSBA No. 21224

# **APPENDIX A**

**Engrossed Substitute House Bill 1026, Ch 255  
Laws of 2011  
And  
Final Bill Report, ESHB 1026**

CERTIFICATION OF ENROLLMENT  
ENGROSSED SUBSTITUTE HOUSE BILL 1026

Chapter 255, Laws of 2011

62nd Legislature  
2011 Regular Session

ADVERSE POSSESSION

EFFECTIVE DATE: 07/22/11

Passed by the House April 21, 2011  
Yeas 96 Nays 1

FRANK CHOPP

\_\_\_\_\_  
Speaker of the House of Representatives

Passed by the Senate April 21, 2011  
Yeas 47 Nays 0

BRAD OWEN

\_\_\_\_\_  
President of the Senate

Approved May 5, 2011, 9:56 a.m.

CHRISTINE GREGOIRE

\_\_\_\_\_  
Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE HOUSE BILL 1026** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BARBARA BAKER

\_\_\_\_\_  
Chief Clerk

FILED

May 6, 2011

Secretary of State  
State of Washington

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ENGROSSED SUBSTITUTE HOUSE BILL 1026

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AS AMENDED BY THE SENATE

Passed Legislature - 2011 Regular Session

State of Washington                      62nd Legislature                      2011 Regular Session

By House Judiciary (originally sponsored by Representatives Rolfes, Orcutt, Carlyle, Blake, Angel, and McCune)

READ FIRST TIME 01/21/11.

1            AN ACT Relating to adverse possession; adding a new section to  
2 chapter 7.28 RCW; and creating a new section.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4            NEW SECTION.    **Sec. 1.** A new section is added to chapter 7.28 RCW  
5 to read as follows:

6            (1) A party who prevails against the holder of record title at the  
7 time an action asserting title to real property by adverse possession  
8 was filed, or against a subsequent purchaser from such holder, may be  
9 required to:

10            (a) Reimburse such holder or purchaser for part or all of any taxes  
11 or assessments levied on the real property during the period the  
12 prevailing party was in possession of the real property in question and  
13 which are proven by competent evidence to have been paid by such holder  
14 or purchaser; and

15            (b) Pay to the treasurer of the county in which the real property  
16 is located part or all of any taxes or assessments levied on the real  
17 property after the filing of the adverse possession claim and which are  
18 due and remain unpaid at the time judgment on the claim is entered.

1 (2) If the court orders reimbursement for taxes or assessments paid  
2 or payment of taxes or assessments due under subsection (1) of this  
3 section, the court shall determine how to allocate taxes or assessments  
4 between the property acquired by adverse possession and the property  
5 retained by the title holder. In making its determination, the court  
6 shall consider all the facts and shall order such reimbursement or  
7 payment as appears equitable and just.

8 (3) The prevailing party in an action asserting title to real  
9 property by adverse possession may request the court to award costs and  
10 reasonable attorneys' fees. The court may award all or a portion of  
11 costs and reasonable attorneys' fees to the prevailing party if, after  
12 considering all the facts, the court determines such an award is  
13 equitable and just.

14 NEW SECTION. **Sec. 2.** This act applies to actions filed on or  
15 after July 1, 2012.

Passed by the House April 21, 2011.

Passed by the Senate April 21, 2011.

Approved by the Governor May 5, 2011.

Filed in Office of Secretary of State May 6, 2011.

# FINAL BILL REPORT

## ESHB 1026

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C 255 L 11

Synopsis as Enacted

**Brief Description:** Changing provisions relating to adverse possession claims.

**Sponsors:** House Committee on Judiciary (originally sponsored by Representatives Rolfes, Orcutt, Carlyle, Blake, Angel and McCune).

**House Committee on Judiciary**  
**Senate Committee on Judiciary**

**Background:**

The doctrine of adverse possession allows a person who without permission physically possesses another's land to make a legal claim against the title holder in order to gain title to the property. For a person to make a successful claim, he or she must have sufficiently possessed the property for a set period of time and meet several additional conditions stemming both from common law and state statutes. Adverse possession claims often arise as a defense to actions for ejectment or to quiet title to a parcel.

Statutes of Limitations. Washington law generally requires plaintiffs or their predecessors to have possessed the land at issue for at least 10 years before an adverse possession action is commenced. In certain situations, state statutes reduce the length of possession necessary. The "payment-of-taxes" statute allows an adverse possessor to gain title in only seven years if, in addition to meeting the usual common-law requirements, he or she has "color of title," has paid all taxes on the land for seven successive years, and has a "good faith" belief that he or she has title. The less-commonly used "connected-title" statute reduces the period to seven years for a possessor who has a title to the land traceable to a public deed.

Common-Law Elements. Judicial decisions generally require an adverse possession to be: (1) open and notorious, such that possession is visible and discoverable to the true owner; (2) actual and uninterrupted, requiring sufficient physical possession or use of the land over a continuous, specified length of time; (3) exclusive, or not shared with the true owner; and (4) hostile, or objectionable to the owner of the land considering the character of possession and locale of the property. Courts presume the holder of legal title to the land has possession, so the party claiming to have adversely possessed the property has the burden of establishing the existence of each element for the requisite period. In Washington, courts do not take account of the adverse possessor's good faith belief, or lack thereof, that he or she owns the land.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

Costs and Fees. Adverse possession claimants generally are not required to pay defending parties' legal costs or attorneys' fees. When a landlocked property owner wants to acquire access through a private condemnation of a way of necessity, however, the owner must pay attorneys' fees incurred by the other parties, and for the value of the easement granted.

**Summary:**

A party who prevails against the holder of recorded title at the time an adverse possession action is filed, or against a later purchaser of the title, may be required to reimburse that holder or purchaser for part or all of any taxes and assessments on the property that the losing party paid during the period of adverse possession. The court also may require the prevailing party to pay to the county treasurer part or all of any taxes and assessments levied on the property after the filing of the claim that are due and remain unpaid at the time of judgment. If the court orders payment or reimbursement of taxes and assessments, the court must decide how to allocate the taxes and assessment based on all the facts and in a way that appears equitable and just.

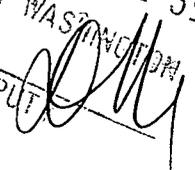
The court may award costs and reasonable attorneys' fees to the prevailing party in an action asserting title to real property by adverse possession if the court determines that an award is equitable and just.

This act applies to adverse possession actions filed on or after July 1, 2012.

**Votes on Final Passage:**

House	95	1	
Senate	48	0	(Senate amended)
House			(House refused to concur)
Senate	47	0	(Senate amended)
House	96	1	(House concurred)

**Effective:** July 22, 2011

FILED  
COURT OF APPEALS  
DIVISION II  
2013 DEC 13 PM 12:59  
STATE OF WASHINGTON  
BY  DEPUTY

COURT OF APPEALS, DIVISION II  
OF STATE OF WASHINGTON

MARK L. BUBENIK and MARGARET  
M. BUBENIK, husband and wife  
and the marital community  
comprised thereof,

NO. 44689-8

CERTIFICATE OF SERVICE

Appellants,

vs.

THOMAS J. MAUSS and KAROL K.  
MAUSS, husband and wife and the  
marital community comprised  
thereof,

Respondents.

THIS IS TO CERTIFY that on this 11<sup>th</sup> day of December, 2013, I  
did serve via US Postal Service, true and correct copies of Appellants  
Bubeniks' Reply Brief by addressing for delivery to the following:

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