

FILED

MAY 24 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Court of Appeals No.294480

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

MICHAEL AND LYNNE WHELAN

Respondents,

v.

ALLEN AND MICHELLE LOUN

Appellants,

APPEAL FROM THE SUPERIOR COURT OF KITTITAS COUNTY
KITTITAS COUNTY CAUSE NO. 08-2-00410-7

RESPONDENTS' REPLY BRIEF

Richard T. Cole, WSBA #5072
Law Offices of Richard T. Cole
Attorney for Respondents
Michael and Lynne Whelan
P.O. Box 638
1206 North Dolarway Road, Suite 108
Ellensburg, WA 98926
(509) 925-1900

FILED

MAY 24 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Court of Appeals No.294480

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

MICHAEL AND LYNNE WHELAN

Respondents,

v.

ALLEN AND MICHELLE LOUN

Appellants,

APPEAL FROM THE SUPERIOR COURT OF KITTITAS COUNTY
KITTITAS COUNTY CAUSE NO. 08-2-00410-7

RESPONDENTS' REPLY BRIEF

Richard T. Cole, WSBA #5072
Law Offices of Richard T. Cole
Attorney for Respondents
Michael and Lynne Whelan
P.O. Box 638
1206 North Dolarway Road, Suite 108
Ellensburg, WA 98926
(509) 925-1900

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
I. ASSIGNMENT OF ERROR.....	1
II. STATEMENT OF THE CASE.....	1
III. SUMMARY OF ARGUMENT.....	1,2,3
IV. CONCLUSION.....	3

TABLE OF AUTHORITIES

Table of Cases

Jacobson v. State, 89 Wn. 2nd 104 (1977).....2

I. ASSIGNMENTS OF ERROR

Respondents agree that the issue before the court is whether or not the Plaintiff had established adverse possession of the property on the Respondents' side of the fence.

II. STATEMENT OF THE CASE

The only objection to Appellant's statement of the case which Respondent would correct is that the consequences of the Court's action in regards to impacting the Appellants' property and its ability to be rezoned or divided was not relevant to the Court's decision and should not be part of any consideration of this appeal. The main thrust of the case was the occupancy and adverse possession of that portion of the Appellants' property on the Respondents' side of the fence by Respondents.

III. SUMMARY OF ARGUMENT

No genuine issue of material fact existed after the close of argument to the Court on the Respondents' Motion for Summary Judgment as to the issue of adverse possession of Appellants' property south of the fence line.

Mr. Vasquez did not acknowledge the Louns' ownership of the property on his side of the fence line, he simply indicated he didn't think the fence was his. The facts were that all previous owners, Haberman, Vasquez, and Whelan all treated their side of the fence and the property south of it as their own without license or permission from the Appellants'

predecessors. The evidence also indicated they all repaired the fence over the years and Habermans indicated they built part of it. See Declarations of Haberman, Vasquez and Whelan, CP 45-47, CP 37-40, CP 30-36. There was no evidence before the Court to support paragraph II of Appellants' Summary of Argument that there had been permission granted by Loun for Vasquez to use the disputed property. The Declaration only established that the fence may not have been Mr. Vasquez' and/or was on the property line. See Declaration of Michelle Loun, CP 54 – 83.

Facts before the Court established by the Declarations of Bob Haberman, CP 45 – 47 James Vasquez, CP 37 – 40, and Respondent Michael Whelan, CP 30 – 36 was that the fenceline existed from 1986 until it was removed by Mrs. Loun in 2008 shortly before this action was filed. The Declaration clearly showed the south side of the fence and all the land south of it was occupied by the Respondents and their predecessors, and treated as their own without objection or claim by Appellants' predecessors. The assertion by Appellant of some type of permissive use had existed, is not supported by the record. Even if Appellants had tried to make the use permissive beginning with their purchase in 2006, that was over twenty years after the initial establishment of the adverse use and the Statute of Limitations on defending Appellants' title ran out ten years before Appellants' ownership.

Even taking all the facts most favorable to the Appellants does not change or alter the Court's decision which was appropriate and proper

under the facts and circumstances of the case. The Court fully complied with the case law regarding the purpose of the summary judgment in regards to avoiding a useless trial and in determining whether or not there were any general issues of material fact. CR 56(c), *Jacobson v. State*, 89 Wn.2d 104 (1977).

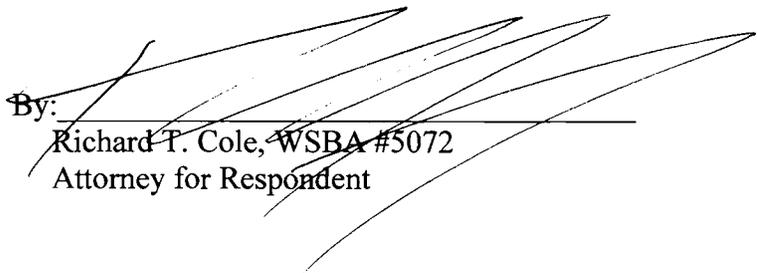
The Appellants provided no information to create any material issue of fact regarding the use and occupancy of the property on the south side of the existing fence. The existing facts before the Court were consistent with the Court's ruling Quieting Title to the property south of the midline of the fence to Respondents. The Respondents acquired said property by adverse possession, the Appellants failed to raise or bring to the Court's attention any material issue of fact in regards to that issue and the issuance of the summary judgment was appropriate and supported by the undisputed facts.

V. CONCLUSION

The Court's issuance of a Partial Summary Judgment Order should be upheld and the Appellants' request for relief denied.

Respectfully submitted this 23rd day of May, 2011.

THE LAW OFFICES OF RICHARD T. COLE

By: 

Richard T. Cole, WSBA #5072
Attorney for Respondent

Court of Appeals No.294480

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ALLEN AND MICHELLE LOUN

Appellants,

v.

MICHAEL AND LYNNE WHELAN

Respondents,

CERTIFICATE OF SERVICE

Richard T. Cole, WSBA #5072
Law Offices of Richard T. Cole
Attorney for Respondents
Michael and Lynne Whelan
P.O. Box 638
1206 North Dolarway Road, Suite 108
Ellensburg, WA 98926
(509) 925-1900

Holly Gremel hereby certifies that on the 23 day of May, 2011, she mailed a copy of the Motion on the Merits and Certificate of Service to the following:

Court of Appeals, Division III
500 North Cedar Street
Spokane, WA 99210

and mailed a copy *via* 1st class mail to the following on May 23, 2011:

Mr. Matthew King
Attorney for Appellant
1420 5th Ave, Suite 220
Seattle, WA 98101

Michael and Lynne Whelan
P.O. Box 1552
Ellensburg, WA 98926

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. RCW 9A 72.085.

SIGNED in Ellensburg, Washington on this 23 day of May, 2011.



Holly Gremel

Holly Gremel, Legal Assistant to Richard T. Cole