FILED

OCT 16 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

No. 306631-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

JAMES P. THOMAS and DELORES I. THOMAS,

husband and wife,

Respondents

v.

ANGELO BRUNETTO and LINA BRUNETTO,

husband and wife,

Appellants.

BRIEF OF RESPONDENTS'

Chris A. Montgomery
Attorney for Respondents
James P. and Delores I. Thomas
Montgomery Law Firm
344 East Birch Avenue
PO Box 269
Colville, Washington 99114
(509) 684-2519
FAX (509) 684-2188
WSBA No. 12377

FILED

OCT 16 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

No. 306631-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

JAMES P. THOMAS and DELORES I. THOMAS,

husband and wife,

Respondents

v.

ANGELO BRUNETTO and LINA BRUNETTO,

husband and wife,

Appellants.

BRIEF OF RESPONDENTS'

Chris A. Montgomery
Attorney for Respondents
James P. and Delores I. Thomas
Montgomery Law Firm
344 East Birch Avenue
PO Box 269
Colville, Washington 99114
(509) 684-2519
FAX (509) 684-2188
WSBA No. 12377

TABLE OF CONTENTS

A. **Table of Authorities** ii

B. **Assignments of Error** v

Respondents Do Not Assign Error To The Trial Court Decision

C. **Issues Pertaining to Assignments of Error** v

D. **Statement of Case** 1

E. **Argument** 5

I. Standard of Review 5

II. Substantial Evidence Supports The Trial Court's Amended Findings of Fact, Conclusions of Law and Judgment Quieting Title That Thomas Proved By Clear, Cogent and Convincing Evidence That A Common Boundary Had Been Established By Mutual Recognition And Acquiescence For A Period Of Ten Years 7

III. Substantial Evidence Supports The Trial Court's Conclusion That Thomases Had Acquired Title To The Disputed Property By Adverse Possession 16

F. **Respondents Are Entitled To An Award Of Attorney's Fees and Costs** 19

G. **Conclusion** 20

TABLE OF AUTHORITIES

Table of Cases

Washington Cases

Anderson v. Hudak,
80 Wn.App. 398, 405, 907 P.2d 305 (1995).....16

Anderson v. Secret Harbor Farms,
47 Wn.2d 490, 288 P.2d 252 (1955).....18

Bering v. Share,
106 Wn.2d 212, 220, 721 P.2d 918 (1986).....6

Bryant v. Palmer Coking Coal Co.,
86 Wn.App. 204, 936 P.2d 1163, 1172 (1997).....18

Chaplin v. Sanders,
100 Wn.2d 853, 860-61, 676 P.2d 431 (1984).....16, 17

Gray v. McDonald,
46 Wn.2d 574, 293 P.2d 135 (1955).....18

Green v. Hooper,
149 Wn.App. 627, 205 P.3d 134 (2010).....14

In re Marriage of Greene,
97 Wn.App. 708, 714, 986 P.2d 144 (1999).....6

In re Marriage of Schweitzer,
132 Wn.2d 318, 329, 937 P.2d 1062 (1997).....6

Lamm v. McTighe,
72 Wn.2d 587, 590-593, 434 P.2d 565 (1967).....6, 7, 8, 9, 15

Lilly v. Lynch,
88 Wn.App. 306, 316, 945 P.2d 727 (1997).....7

Lindley v. Johnston,
42 Wash. 257, 84 P. 822 (1906).....10

Lloyd v. Montecucco,
83 Wn.App. 846, 855, 924 P.2d 927 (1996).....7

Merriman v. Cokeley,
168 Wn.2d 627, 630-631, 230 P.3d 162 (2010).....5, 6, 8, 9, 14, 15

Morse v. Antonellis,
149 Wn.2d 572, 574, 70 P.3d 125 (2003).....6

Mullally v. Parks,
29 Wn.2d 899, 902-03, 908, 190 P.2d 107 (1948).....9

Northwest Cities Gas Co. v. Western Fuel Co.,
13 Wn.2d 75, 123 P.2d 771 (1942).....18

Pedersen v. Washington State Department of Transportation,
43 Wash. App. 413, 717 P.2d 773 (1986).....18

Peeples v. Port of Bellingham,
93 Wn.2d 766, 771, 613 P.2d 1128 (1980).....16

Rose v. Fletcher,
83 Wash. 623, 628, 145 P. 989 (1915).....10

Waldorf v. Cole,
61 Wn.2d 251, 377 P.2d 862 (1963).....10

Washington Beef, Inc. v. Yakima County,
143 Wn.App. 165, 177 P.3d 162 (2008).....6

Statutes & Rules

RAP 14.2.....19

RAP 14.3.....19

RAP 18.1 20

RCW 4.16.020 17

RCW 4.84.080(2) 20

ASSIGNMENTS OF ERROR

Respondents do not assign error to the Trial Court's Decision.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the evidence of numerous witnesses and photographs showed that Respondents Thomas and their predecessors had erected monuments such a privacy wall, stone barbeque and patio area, retaining and concrete slab in the early 1970's, which demarked a straight line from the shore to the road, and where they also cleared brush, created, maintained and used a lawn between those, and replacement improvements, to the time of this suit, and where Appellants Brunetto, after purchasing their property in 1990, did not use or maintain the lawn or erect improvements on the Thomas side of the line, did substantial evidence support the Trial Court's conclusion that the parties had, by clear, cogent and convincing evidence, established a boundary between their properties by mutual recognition for a period of more than 10 years?

2. Where the evidence of numerous witnesses and photographs showed that Respondents Thomas and their predecessors had erected a privacy wall, stone barbeque and wooden rounds covering the patio area, and concrete slab in the early 1970's, which demarked a straight line from the shore to the

road dividing the properties, and where they also cleared brush, created, maintained and used a lawn between those, and replacement improvements such as a retaining wall (later rebuilt as a key wall) and raised bed garden area, for forty-one years, neither asking or receiving permission from anyone, and where Appellants Brunetto, after purchasing their property in 1990, did not use or maintain the lawn or erect improvements on the Thomas side of the line, nor attempt to oust Thomas, did substantial evidence support the Trial Court's conclusion that Thomas has established, by a preponderance of the evidence, adverse possession of the land to the East of the monumented line?

STATEMENT OF THE CASE

John P. Thomas, Sr. and Marion J. Thomas (Nelson) (parents of Respondent James P. Thomas), originally acquired the Thomas property by a Real Estate Contract on June 18, 1969. A Statutory Warranty Deed (Fulfillment) was recorded July 14,1981. Ex. 001. At the time of purchase, a small cabin existed on the property, and there was a cabin of nearly identical dimensions and appearance approximately 25 feet to the East. RP p. 29, ln. 16; and Exs. 14-7, 14-19 & 14-20. The area between the two (2) cabins was overgrown with underbrush and they assumed the boundary between the properties was halfway between the cabins. RP p. 34, ll. 9-11 & ll. 17-18. There was no survey evidence marking the boundary between the two (2) cabins. RP p. 9, lns. 14-21. They purchased additional land to the West in 1972. Ex. 002. They cleaned up the beach and cut down brush. RP p. 34, lns. 22-25; p. 38 ln.23; and p. 39, ln. 8. For much of the Summer of 1969 and the immediate years thereafter, the elder Thomases and their sons, John P. Thomas, Jr. and James P. Thomas (Respondent herein) traveled from their home in Spokane to work on the property. RP 161, lns. 6-7. They

* converted cobblestone steps to cement ones RP 35, lns. 9-21; and Exs. 14-10, 14-11 and 14-12;
* poured a concrete footing and concrete slab at the bottom of the steps that extends 12.5 feet East from the Southeast corner of the house RP 36, ln. 6-9; p 37, lns. 5- 10; RP p. 160, lns. 14-21; RP p. 161, ln. 17 to p. 162, ln. 9; Exs. 14-7, 14-8, 14-9 and Ex.15;
* constructed concrete steps from the back door to the road and a rock garden RP p. 42, ln. 24 to p. 43, ln. 3; and Ex. 14-10;
* built a wood retaining wall, patio and privacy fence RP p. 44; RP p. 46, lns. 9-21; RP p. 177, ln 22-25; RP pp. 180-181; Exs. 14-10, 14-11 and 14-12;
* over time, planted, watered, fertilized, and mowed the grass to the halfway point between their cabin and their neighbors' and the neighbors never maintained any portion of that land RP p. 56, lns. 10-15; RP p. 57, lns 1 – 15; and RP p. 69, lns.3-12;
* constructed a stone barbeque RP p. 47, lns 8-11; RP p. 181; Ex. 14-16 and 14-17;

* installed wooden rounds as flooring in patio area around 1974 RP p. 47, lns. 19-25; p. 48, lns. 20-25; RP p. 181, lns 13-17; and Ex. 14-16;
* began construction of a new addition to the cabin in 1975 RP p.45, lns 23-24; RP p. 180, lns.3-4; and Ex. 14-13;
* built a new deck in the late 1970's RP p. 50, lns. 17-25; Ex. 14-18; and RP p. 182, ln 11-17;
* every Winter they stored their boats on the concrete slab and perpendicular to the concrete slap on the grass above RP p. 52, lns. 15-18; and Exs. 14-10 through 14-18.

The Southeast end of the concrete slab ran in nearly a straight line Northwest through the Southeast corner of the patio retaining wall (later rebuilt as a key wire) to the East corner of the privacy fence, matching the Thomases presumed border. RP. p. 170, lns. 1-12; and Exs. 9, 10, 11, & 12. Marion J. Thomas (Nelson) testified that there was never any complaint about their improvements, nor did their neighbors (except children who might have used their dock) ever use any of the improvements constructed by her and her husband. RP p. 58, ln. 14 & lns. 19-24. The Brunettos did not cross over

onto their side of the border when they (Brunettos) cleaned up their property, RP p. 59 lns. 2- 19, they did not use the concrete pad or grassy area between the pad and the retaining wall (later rebuilt as a key wall), nor did they water or mow or maintain it. RP p. 60.

The elder Thomases were divorced in 1987 and John P. Thomas, Sr., the husband, acquired the cabin property as a result. RP p. 53, lns 9-21. The property then passed to his second wife, M. Sue Thomas in the form of a life estate when he died two years later. RP p. 53, lns 23-25.

James P. Thomas and Delores I. Thomas (Thomas), have been married since 1997, and are the Respondents in this suit. James P. Thomas acquired full title to the property when he bought out his step-mother, M. Sue Thomas' life-estate in 1993. Ex. 004. He used the concrete slab as a patio overlooking the lake and stored boats on or above it during the Winter. RP p. 55, lns. 2–13; RP pp. 183 & 185; Exs. 14-19 and 14-20. He dismantled the stone barbeque and wooden rounds covering the patio area and converted it to a raised bed garden area in the same footprint. RP p. 48, lns. 1-13; p. 70, lns. 19-23; p. 180 ln. 18 to p.181 ln. 1. He constructed a deck. RP p. 186, lns. 8-10; Ex. 14-21. About the time James P. Thomas was replacing the retaining wall with the key wall in 2008, he discovered that there might be a

discrepancy in the boundary. RP p. 204, ln. 24 –p. 205, ln 1. James P. Thomas informed Angelo Brunetto who did not want to share the cost of the survey nor did he object to the work on the retaining wall. RP. P. 205 lns 1-12. About five months later James P. Thomas hired Van E. Jacobson, PLS to conduct a survey to establish the deeded East-West boundary between his property and that of Brunetto. This survey confirmed his fears and showed that Thomas's improvements, including portions of his home, encroached on the Brunetto land. RP p.205, lns. 17 – 21.

Thomases filed suit for Declaratory Relief and to Quiet Title on June 10, 2010. CP 001-043. A two (2) day trial was held on December 22, 2011 and December 23, 2011 and the Court entered Amended Findings of Fact, Conclusions of Law and Judgment Quieting Title (CP 091-107) to the disputed property on the theories of Adverse Possession and Mutual Recognition of the Boundary Line on February 7, 2012. Notice of Appeal (CP 111-132) was filed by Appellants on February 29, 2012.

ARGUMENT

I. Standard of Review

An appellate court reviews a trial court's findings of fact for substantial evidence in support of the findings. *Merriman v. Cokeley*, 168 Wn.2d 627,

631, 230 P.3d 162 (2010) (citing *In re Marriage of Schweitzer,* 132 Wn.2d 318, 329, 937 P.2d 1062 (1997)). Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the declared premise. *Merriman* at 631 *(citing Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986)). A reviewing court may not disturb findings of fact supported by substantial evidence even if there is conflicting evidence. *Merriman* at 631; *Lamm v. McTighe*, 72 Wn.2d 587, 593, 434 P.2d 565 (1967).

Credibility determinations are solely for the trier of fact and cannot be reviewed on appeal. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). An appellate court should not weigh the evidence, judge the credibility of the witnesses, or substitute its judgment for that of the trial court. *Washington Beef, Inc. v. Yakima County,* 143 Wn. App. 165, 177 P.3d 162 (2008) (citing *In re Marriage of Greene,* 97 Wn. App. 708, 714, 986 P.2d 144 (1999)). The Trial Court found the Appellants Brunetto not to be credible. CP 091-107.

II. Substantial Evidence Supports The Trial Court's Amended Findings Of Fact, Conclusions of Law and Judgment Quieting Title That Thomas Proved By Clear, Cogent And Convincing Evidence That A Common Boundary Had Been Established By Mutual Recognition And Acquiescence For A Period Of Ten Years.

Generally speaking, mutual acquiescence and recognition is a doctrine of boundary adjustments that supplements adverse possession in the settlement of boundary disputes. *Lilly v. Lynch*, 88 Wn. App. 306, 316, 945 P.2d 727 (1997); *Lloyd v. Montecucco*, 83 Wn. App. 846, 855, 924 P.2d 927 (1996). To establish a boundary by acquiescence, the party claiming title to the land must prove by clear, cogent, and convincing evidence: (1) the line is certain, well defined, and in some fashion physically designated upon the ground; (2) the adjoining property owners, or their predecessors in interest, have manifested a mutual recognition and acceptance of the designated line as the true boundary line by their acts, occupancy, and improvements on their respective properties; and (3) mutual recognition and acquiescence continued for the period of time necessary to establish adverse possession (10 years). *Lamm v. McTighe*, 72 Wn.2d 587, 593, 434 P.2d 565 (1967); *see also*

Merriman v. Cokeley, 168 Wn.2d 627, 630, 230 P.3d 162 (2010). Evidence is "clear, cogent, and convincing" if it shows the ultimate facts are "highly probable." *Merriman*, 168 Wn.2d at 630-31.

The Washington Supreme Court, in *Lamm v. McTighe, supra,* recognized that an express agreement is not required to establish a boundary by acquiescence, and that conduct will suffice.

> The existence of an express agreement between adjoining landowners resolving an uncertainty in or dispute about the location of the true boundary line -- the touchstone in the establishment of boundaries by parol agreement -- while often present in the establishment of boundaries by recognition and acquiescence, is not an indispensible element in the application of that doctrine. It is sufficient to bring the doctrine into play if the adjoining parties in interest have, for the requisite period of time, actually demonstrated, by their possessory actions with regard to their properties and the asserted line of division between them, a genuine and mutual recognition and acquiescence in the given line as the mutually adopted boundary between their properties.

72 Wn. 2d at 593. In this case, there is no evidence of an express agreement between the parties creating the boundary. Nonetheless, the conduct of the various landowners over the years provided substantial evidence to support the Trial Court's conclusion that the parties manifested a mutual recognition and acceptance of the designated line for a period of time exceeding ten (10) years.

In *Merriman, supra,* the Washington Supreme Court ruled that three widely spaced survey markers set in a thicket of blackberry bushes, ivy and weeds did not constitute a clear and well defined boundary. Where the disputed area is overgrown, more than isolated markers are required to prove a clear and well-defined boundary. A fence, a pathway, or some other object or combination of objects clearly dividing the two parcels must exist. 168 Wn. 2d at 631.

Unlike the *Merriman* case, the area between the Thomas' and Brunetto parcels is not overgrown nor are the boundaries marked by survey markers that are hidden. Instead, the case is more akin to *Lamm v. McTighe*, 72 Wn.2d 587, 590, 434 P.2d 565 (1967), in which the Supreme Court held that property owners demonstrated mutual recognition and acquiescence by clearing portions of their property up to the disputed boundary line, erecting a fence, planting berry bushes, mowing the grass, and occasionally using the strip adjacent to the disputed fence line as a roadway for deliveries.

Similarly, in *Mullally v. Parks*, 29 Wn.2d 899, 902-03, 908, 190 P.2d 107 (1948), the Supreme Court held that property owners demonstrated mutual recognition and acquiescence by clearing property up to the disputed boundary line, planting ornamental trees, ferns, and flowers, building a fence,

and using the disputed strip as a play area for their children. And, in *Lindley v. Johnston*, 42 Wash. 257, 84 P. 822 (1906), a boundary by acquiescence was affirmed where adjoining landowners established a line between their properties and erected a division fence, which for twenty-four years served as the boundary line between their farms. Each of these original owners and their successors in interest occupied, cultivated, and exercised exclusive dominion over the land on his side of said fence until shortly before the commencement of the suit. *See also Rose v. Fletcher,* 83 Wash. 623, 628, 145 P. 989 (1915) ("An agreed boundary that has been good for 20 years ought, in the absence of some controlling equity, be good forever.")

In contrast, in *Waldorf v. Cole,* 61 Wn.2d 251, 377 P.2d 862 (1963), the court held that there was "a complete lack of proof" of mutual recognition and acquiescence where the disputed area *"was apparently not used and was essentially in its original condition*," and the only improvement in the disputed area was a "rockery" built by one of the adjoining property owners against a dirt bank. 61 Wn.2d at 255-56 (italics added).

In the present case, more than hidden survey markers defined the line. A concrete slab poured up to the equal distance point between the Southeast corner of the original Thomas cabin and the Southwest corner of the original

Brunetto cabin, the retaining wall (later rebuilt as a key wall), patio and stone barbeque area (later converted to a wood storage area and most recently used for a raised bed garden area), concrete and rock wall with wood fence on top and a piece of angle iron in concrete, all at a 90 degree angle from the concrete slab collectively monument the length of the boundary. The total distance between the concrete and rock wall and the beginning of the concrete slab is 40.82 feet. Ex. 12. The distance between the concrete and rock wall and the key wall is 6.67 feet and the distance between the key wall and the beginning of the concrete slab is 34.15 feet. Ex. 12. Van E. Jacobson, PLS, a licensed land surveyor in the State of Washington for 34 years, testified that the concrete slab, key wall, raised bed garden area, concrete wall, and privacy fence would all be considered monuments. RP p. 22, ln. 24 to p.23 ln. 7. The line was clear and he was able to survey and create a legal description for the boundary established by mutual acquiescence. See Ex. 9.

Lawn was planted and maintained in the area in between the monuments, and used by the Thomases, their children and grandchildren throughout the years. RP p. 152, ln. 21 to p. 153, ln. 25; p. 192, lns.21-25.

Testimony of numerous witnesses, including Marion J. Thomas (Nelson), neighbor Linda Howe, neighbor Wade Carpenter, and both James

P. and Delores I. Thomas, as well as extensive photographic evidence, Exs. 14-1 through to 14-35, clearly show that these monuments were readily visible, formed a straight line, and remained in the same location for forty-one (41) years, up to the institution of this suit. CP 001-043.

Linda Howe, was a regular resident at the lake in the Summers between 1977 and 1987, and primarily a weekend Summer resident between 1987 and 2011 when she sold her land which overlooked the Thomas and Brunetto properties, RP p. 73, Ln 11; p. 77, ln. 17. Linda Howe confirmed the Thomases' improvements in 1972, including the brush clearing, beach cleanup, and the installation of the fence, lawn area and stone barbeque. RP. p. 80, lns.9 – 10; 19-20; p. 81, lns.10-16; p. 85, lns.5-6. Linda Howe never saw the Brunettos mow or water the lawn area, nor did she observe them using the concrete pad, the patio or the grassy area in between. RP p. 90, ln. 24 to p. 91, ln 22; p. 93, lns. 3-24; p. 98, lns 10-24. Linda Howe saw the Brunettos clean up and improve their property to the East of the assumed boundary line which began at a fence corner and went to the concrete slab where the red wagon stood, and that James P. Thomas mowed to the same line. RP p.98, lns.10-24.

Neighbor, Wade Carpenter, moved to his property, East of Linda Howe and overlooking the Thomas and Brunetto land, in 1982. Prior to that time Wade Carpenter went there several times a week while his parents owned it. RP p. 102, ln.24 – p. 103, ln. 3. Wade Carpenter's home is higher than Linda Howe's and has a fuller view. RP p. 107, lns 1-6. Between 1974 and 1981, he observe John P. Thomas, Sr. constantly improving the area East of the assumed boundary line, a line clearly established by the Thomas improvements: the fence, patio and stone barbeque, and concrete pad. RP p. 108, lns. 5-8; p. 109, lns. 4-25; p. 111, ln 13 to p. 112 ln.23. Wade Carpenter stated the "footprint" of the Thomases' use of the property has not changed over the years. RP p. 119, lns 3-12. Wade Carpenter also testified that prior to 2009, he never observed the Brunettos use the concrete slab nor maintain the grass. After that date, Brunetto watered and mowed East of the assumed boundary line. RP p. 118, lns. 12-15; p. 124, lns 22-25. Before 2009, Wade Carpenter testified the Brunettos never complained about the Thomases' use. RP p. 125, lns. 9-14.

Delores I. Thomas also testified that she never saw the Brunettos work on the lawn nor make any use of property lying West of the assumed boundary line. RP p. 134, lns. 16-20; p. 135, ln. 19 to p. 136, ln.7. In fact, the only

improvement erected by the Brunettos to the West of their cabin is a small storage shed which is, nonetheless, East of the Thomases' patio area. Exs. 9 & 11.

In fact, the only time Brunetto obstructed the concrete slab was when they placed bricks and debris on the concrete slab after the boundary dispute began in 2009. RP p. 194, 11- 19; Ex. 14-32.

The fact remains no matter what the mowing pattern, the concrete slab, retaining wall (later rebuilt as a key wall), patio, raised bed garden area, concrete and rock wall and fence stood as a visible, consistent line for the length of the boundary for more than forty-one (41) years, and for that reason, *Green v. Hooper,* 149 Wn. App. 627, 205 P.3d 134 (2010) cited by Brunetto and in fact discussed in the Thomases' pretrial brief, is readily distinguishable. In *Green,* the purported boundary was a short retaining wall that did not extend the full length of the property. In *Merriman*, the purported boundary consisted of three survey stakes overgrown by berry bushes, ivy and weeds. Here, the well-defined line extended the full length of the boundary, it was readily visible, and the Thomases have used the property up to that well-defined boundary, and Brunettos have recognized it as well.

The Trial Court recognized that the testimony of the Brunettos was conflicting – both as to other witnesses as well as to each other. CP 091-107. An appellate court cannot revisit a trial court's findings because there is conflicting evidence. *Merriman, 168 Wn.2d at 631.* The matter went to trial because there was conflicting evidence.

The foregoing evidence is precisely the kind of conduct envisioned by the Supreme Court *in Lamm v. McTighe*: the adjoining parties in interest have, for the requisite period of time, actually demonstrated, by their possessory actions with regard to their properties and the asserted line of division between them, a genuine and mutual recognition and acquiescence in the given line as the mutually adopted boundary between their properties. In this case, the time frame occurred from 1969 to 2008 when James P. Thomas discovered the boundary discrepancy. Substantial evidence supports the Trial Court's Amended Findings of Fact, Conclusions of Law, and Judgment Quieting Title that the parties, in good faith manifested by their acts, occupancy and improvements with respect to their respective properties, a mutual recognition and acceptance of the true boundary line, and this occurred for a period of more than ten (10) years. The Appeal should be dismissed and the Trial Court Amended Decree Quieting Title affirmed.

III. Substantial Evidence Supports The Trial Court's Conclusion That The Thomases Had Acquired Title To The Disputed Property By Adverse Possession

To establish an adverse possession claim, a claimant's possession must be: (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile. Possession of the property with each of the necessary concurrent elements must exist for the statutorily prescribed period of 10 years and be established by a preponderance of the evidence. *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984), (citing and overruling in part *Peeples v. Port of Bellingham,* 93 Wn.2d 766, 771, 613 P.2d 1128 (1980)); and RCW 4.16.020.

In establishing adverse possession, open and notorious use need only be the character that a true owner would assert in view of the property's nature and location. *Chaplin, supra*, 100 Wn. 2d at 863. This requirement relates to the necessity and basic fairness of providing the record owners with actual notice of adverse use throughout the statutory period, such that the land is used in such a way that any reasonable person would assume the claimants are the true owners. Id.; see *Anderson v. Hudak, 80 Wn. App. 398, 405, 907 P.2d 305 (1995).* As discussed *supra,* many reasonable people over the years assumed that Thomas and their predecessors in interest were the owners of the disputed

property, including the neighboring property owners of both Thomas and Brunetto. This was based on the location of the improvements such as the concrete slab, retaining wall (later rebuilt as a key wall), patio area which later became the raised bed garden area, the privacy fence, creating and maintaining the lawn, and actual use of the property East of the assumed boundary. All this activity was that of true owners, and open and easily observed.

Moreover, Van E. Jacobson, PLS, a licensed land surveyor in the State of Washington for 34 years, testified that the concrete slab, key wall, raised bed garden area, concrete wall, and privacy fence would all be considered monuments. RP p. 22, ln. 24 to p.23 ln. 7. The line was clear. He was able to survey the line and create a legal description for the land adversely possessed. See Ex. 11.

The hostile use requirement does not require ill will toward others, but rather a showing that the claimant treated the land as his own throughout the entire statutory period. *Chaplin v. Saunders, supra,* 100 Wn. 2d at 860-61. Claimants must take affirmative steps to show that they intend to use the land as their own. In *Anderson, supra,* the plaintiff's singular act of planting trees was not enough to establish that the plaintiff had claimed the land as her own, since the trees were never maintained or cultivated in any way. In contrast, the

Thomases provided clear indications that they intended to use the property in dispute as their own by constructing and using the house, deck, concrete slab, raised bed garden area, lawn, stone barbeque, patio, stairs, fence on concrete and rock wall, all located within the disputed area.

Exclusive possession need not be absolutely exclusive of all others to prove adverse possession. Rather, Thomas only needed to show that the possession was of the type expected of an owner. *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 936 P.2d 1163, 1172 (1997). Again, the foregoing conduct and indicia of ownership meet this requirement.

Once a claimant establishes open, notorious, and uninterrupted use for the prescriptive period, adverse use is presumed and the burden of proof then shifts to the servient owner to show that the use was permissive. *Gray v. McDonald*, 46 Wn. 2d 574, 293 P.2d 135 (1955); *Anderson v. Secret Harbor Farms*, 47 Wn.2d 490, 288 P.2d 252 (1955); *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn. 2d 75, 123 P.2d 771 (1942); *Pedersen v. Washington State Department of Transportation,* 43 Wash. App. 413, 717 P.2d 773 (1986).

The Trial Court found the Brunettos less than credible. CP 091-107. The Trial Court found that the use of the disputed property by John P.

Thomas, Sr. and Marion J. Thomas (Nelson), and by the Respondents Thomas, was not permissive, but rather a positively asserted ownership of the property from the outset of their ownership. CP 091-107. This fact and legal conclusion, coupled with the foregoing elements, clearly established by a preponderance of the evidence that the Thomas families had acquired title by adverse possession. The Appellants' appeal should be dismissed and the Amended Decree Quieting Title unto the Respondents be affirmed.

RESPONDENTS ARE ENTITLED TO AN AWARD OF ATTORNEY'S FEES AND COSTS

Pursuant to RAP 18.1, Respondents James P. Thomas, and Delores I. Thomas, husband and wife, request attorney fees and costs pursuant to RCW 4.84.080(2). The Respondents have endured countless hours and great expense pursuing their legal remedies at trial against the claims of the Appellants. Respondents are entitled to recover attorney's fees from Appellants Angelo Brunetto and Lina Brunetto, husband and wife, pursuant to RCW 4.84.080(2). In addition, Respondents request that they be awarded their costs on Appeal pursuant to RAP 14.2 and RAP 14.3.

CONCLUSION

In view of the foregoing arguments and authorities, Respondents respectfully request the decision of the Trial Court Quieting Title unto them be affirmed and the Brunettos' Appeal be dismissed.

DATED this 15th day of October, 2012.

Respectfully submitted,

Chris A. Montgomery
WSBA #12377
Attorney for Respondents
James P. and Delores I. Thomas

FILED

OCT 16 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

JAMES P. THOMAS and DELORES I. THOMAS, husband and wife, Respondents, vs. ANGELO BRUNETTO and LINA BRUNETTO, husband and wife, Respondents.	CASE NO. 306631-III AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) ss.
COUNTY OF STEVENS)

TISHA D. CLEGG, being first duly sworn, upon oath, deposes and states as follows:

On October 15, 2012, I caused a true and correct copy of Respondents' Brief to be placed in the United States Mail, first class, postage pre-paid, pursuant to CR 4(d)(4), to the person addressed as follows:

MONTGOMERY LAW FIRM
344 East Birch Avenue
P.O. Box 269
Colville, Washington 99114-0269
(509) 684-2519

John F. Bury, Esq.
Attorney at Law
818 West Riverside Avenue, #631
Spokane, Washington 99201

DATED this 15th day of October, 2012.

Tisha D. Clegg

SUBSCRIBED AND SWORN to before me this 15th day of October, 2012.

NOTARY PUBLIC in and for the State of Washington, residing at Colville
My Appointment Expires: 8-9-15

MONTGOMERY LAW FIRM
344 East Birch Avenue
P.O. Box 269
Colville, Washington 99114-0269
(509) 684-2519