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DIVISION III
STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

NO. 32908-9-III

JOHN W. LEBLEU and ROLA M. LEBLEU, husband and wife;

Respondent/Plaintiff,

v.

DAVID W. AALGAARD and LOUELLA A. AALGAARD, husband and
wife,

Appellant/Defendant.

**APPELLANTS/DEFENDANTS DAVID AND LOUELLA
AALGAARD'S
OPENING BRIEF**

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I. INTRODUCTION

A. **The Aalgaards' Occupation Of Their Self-Built Home For Over 20 Years Satisfies The Elements of Adverse Possession.**

The Appellants/Defendants, David and Louella Aalgaard, own a 10 acre parcel of real property locate in a rural area of Spokane County, Washington. They have owned this property since 1993 and built their current family home on it in 1994.

Plaintiff/Appellees, John and Rola LeBleu, own a twenty acre parcel on the southern border of the Aalgaards property purchased November 2012 was purchased from Fannie Mae. The LeBleu's did not have a survey completed prior to their purchase but completed one in November 2013. At that time, it was discovered that the Aalgaard's residence encroached onto the LeBleu property approximately 50 feet, or approximately .61 acres.

Shortly after the survey was completed, in November 2013, LeBleus brought suit in Spokane County Superior Court to quiet title and eject Aalgaards from the small northern section of their property. Aalgaards filed a counter claim seeking adverse possession and to quiet title, among other cause of action. (CP 12-28)

On October 20, 2014, the trial court granted LeBleus' summary judgment motion in full and denied the Aalgaards' summary judgment

motion and claim to the property based on adverse possession in full. The trial court also ordered that Aalgaards remove all structures which encroach onto the .61 acres of property owned by LeBleus.

After paying the required bond into the registry of the court, Aalgaards filed this Appeal seeking reversal of the Trial Court's Order granting summary judgment to LeBleus and granting their Motion.

It must be made expressly clear from the outset: this case is entirely about two neighbors who attempted, without a survey, to locate the boundary line described by their deeds and the resulting construction of a now 21 year old home that minimally encroaches on to LeBleus' rural and undeveloped land. This is *not* a case of permissive use or an attempted transfer of land. The combined result of the mistaken boundary and construction of the Aalgaards' home is that they have lived on the property in a manner that is actual and uninterrupted; open and notorious; hostile and exclusive more than double the 10 year requirement for adverse possession.

Unknown to anyone, until the LeBleu's purchased the property, they were wrong. There are no facts that establish Mr. Deno gifted Aalgaards two acres of land to build their home. Nor are there any facts showing Mr. Deno gave Aalgaards permission to build a family home on his land rather than the Aalgaards' 10 acre lot.

As a matter of law, the trial court erred in granting Summary Judgment to the LeBleus.

In the alternative, the Trial Court's Order of ejectment is inequitable and should be reversed.

B. Remedy Of Ejecting The Aalgaard Home For A Slight Encroachment To Make Room For A Few Extra Square Feet Of Grazing Land Is Improper Under *Arnold*.

Due to the mistake by the Aalgaard's and Mr. Deno, the Aalgaards' home and other improvements were built so they encroached .61 acres on the neighbors' property. This Order of ejectment requiring removal of Aalgaard's residence and outbuildings is unjust, inequitable, and improper. There is an enormous disparity in the resulting hardships of removing the Aalgaard home when compared to a loss of .61 acres on a twenty acre lot and not warranted under Washington law or under the facts of this case.

In the event this Court upholds the Trial Court's denial of the Aalgaards' adverse possession claim, this Court should find ejectment of the Aalgaard home and improvements oppressive and unjust such that an award of money damages is more appropriate. In the alternative, this case should be remanded back to the Trial Court for the proper analysis as set forth in *Arnold v. Melani*, 75 Wn.2d 143 (1968).

II. ASSIGNMENTS OF ERROR

A. The Trial Court erred in finding no dispute of material facts and awarding summary judgment to LeBleus when there is, at minimum, a dispute of fact regarding the hostility and adversity elements.

B. Alternatively, the Trial Court erred by denying the Aalgaards' summary judgment motion when it held the Aalgaards permissively, rather than adversely, occupied the land where they built their family home.

C. The Trial Court erred by awarding a permanent injunction requiring the Aalgaards to remove their slightly encroaching home because to do so would be oppressive and unjust and an *Arnold* analysis reveals an award of money damages is more appropriate.

III. STATEMENT OF THE CASE

A. Facts

The Aalgaards purchased the land in dispute on June 9, 1993 from Dennis Trainor. (CP 216, 226-27) The Aalgaard property is parcel number 48352.9056. (CP 214) The Aalgaards purchased the land in order to build a home and raise their three children. (CP 287) The Aalgaard property is north of the land belonging to their former neighbors, the Deno family, and now owned by the LeBleus. The Aalgaards' southern property line is the northern property line of the Deno (now LeBleu) property. (CP 85) The Aalgaards never sought, and therefore did not obtain, permission from

their neighbors, the Deno family, to build where the home and structures are located. (CP 309) Mr. Deno never attempted to transfer, gift, convey, adjust a boundary line or otherwise give his land to the Aalgaards.

Soon after purchasing the property in 1993, Mr. Aalgaard and Mr. Deno walked their properties and “located...the boundary line separating [the] two parcels of land.” (CP 341; 307) In locating what they believed to be the true property line as described in their deeds received from a common grantor, Mr. Deno testified he relied upon “my understanding of my property boundaries [and] my measurements...” (CP 341) Mr. Deno also had an understanding of the property lines because he had previously walked the same land with the common grantor of the Deno and Aalgaard properties, Dennis Trainor, and was shown where the boundary lines of his property were located. (CP 340)

In working with Mr. Deno to locate the true boundary, Mr. Aalgaard testified that he and Mr. Deno “walked and measured our respective properties...” (CP 307) Based on walking the land and using their deeds to make measurements on the land, Aalgaards and Mr. Deno believed they located the true boundary line as established and described in their deeds received from their common grantor and recorded with Spokane County. (CP 307; 309; 341) They did not have the land professionally surveyed.

After establishing the property line, the Aalgaards prepared the land for construction of the family home, which began in 1993, by clearing the land of timber and brush. (CP 307) The foundation of the home was placed “at least 50 feet, if not more from the common boundary line” they believed they had accurately located (CP 341) Mr. Deno and the Aalgaards believed the foundation was “clearly placed on the Aalgaards’ property” as described in the Aalgaard deed. (CP 341)

The Aalgaards lived in their camper and camped on the property while building their home. (CP 287) The Aalgaards built their family home with the help of “friends, neighbors, and family members,” including their neighbor (and true land owner) Mr. Deno, in 1994. (CP 307; 308) Once construction was completed, the Aalgaards built and planted flower beds around the family home, maintained the yard, and the three Aalgaard children played and rode bikes in the yard and driveway. (CP 288) The Aalgaards also “installed a water line...a propane tank... a barn, a woodshed, and a shop.” (CP 308) All of these improvements were made on what was believed to be the Aalgaard side of the true property line as described in the Aalgaard deed. (CP 309; 341-42) Mr. Deno, the true land owner, assisted the Aalgaards in their improvements. (CP 308)

The Aalgaards completed construction of their home and have occupied it continuously for the past 20 years. (CP 308) At all times prior

to this dispute raised by the LeBleus, the Aalgaards believed that their home occupied their deeded property. (CP 309; 287, 288)

The LeBleus bought the property formerly owned by Mr. Deno from Fannie Mae in November 2012 through a Bargain and Sale Deed and subject to a deed of trust. (CP 60; 65) The land purchased by the LeBleus has Spokane County Assessor Tax Parcel No. 48352.9051. (CP 60)

Prior to purchasing the property, Mr. LeBleu walked the property relying upon the legal description in the deed. (CP 61) The LeBleu home is located on the opposite side of the property from their common property line with the Aalgaards. (CP 61; 85) Over 20 acres separate the two residences.

A year after the LeBleus purchased their land, Bruce Larsen of Landtek, LLC completed a survey of the boundary line between the Aalgaard and the LeBleu properties in November 2013. (CP 210) The survey determined the true property line goes through the Aalgaard home. (CP 213-14) The survey also established that the majority of the other improvements made by the Aalgaards were also on the LeBleu property. (CP 213-14) This was the first notice to the Aalgaards that they were mistaken in their property boundary. (CP 309)

Mr. and Mr. LeBleu own eight cattle and one horse. (CP 62) They purchased the property for the purpose of grazing and watering their

animals. (CP 62) The disputed strip of property is largely comprised of a “shallow, wooded ravine” until “the land rises toward the Aalgaard structures, where it flattens out again.” (CP 61)

B. Procedural History

The LeBleus brought suit against the Aalgaards on December 19, 2013. (CP 3-6) They sought an injunction to eject the Aalgaards and all their improvements, including the Aalgaard family home, from the disputed property. (CP 3-6) The Aalgaards counter-claimed, and asked the court to quiet title in themselves based on adverse possession and related doctrines. (CP 16-24) The parties filed summary judgment motions which rely on declarations, various exhibits, and interrogatories. (CP 248; 263; 794) No depositions have been completed. (CP 794)

The Trial Court heard summary judgment oral arguments on October 7, 2014. (CP 447) On October 20, 2014, the Trial Court granted LeBleus’ motion in full and denied Aalgaards’ motion in full. (CP 448-453) The Trial Court found the Aalgaards used the disputed strip permissively and without adversity, and entered an Order quieting in LeBleus’ favor and ejecting the Aalgaards and their improvements from the land. (CP 451-52) The parties obtained mutual restraining orders shortly thereafter. (CP 796) The Trial Court stayed its order of ejectment pending an appeal. (CP 672-73) The Aalgaards filed a notice of appeal on

October 29, 2014. (CP 490)

IV. STANDARD OF REVIEW

Appellate courts “review a summary judgment order de novo, engaging in the same inquiry as the trial court.” *Keck v. Collins*, 181 Wn. App. 67, 78, 325 P.3d 306 (Div. 3 2014); *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976). “Summary judgment is proper if the records on file with the trial court show ‘there is no genuine issue as to any material fact’ and ‘the moving party is entitled to a judgment as a matter of law.’” *Keck*, 181 Wn. App. at 78; CR 56(c). An appellate court construes “all evidence and reasonable inferences in the light most favorable to the nonmoving party.” *Keck*, 181 Wn. App. at 78. “An appellate court cannot properly review a summary judgment order de novo without independently examining all the evidence presented to the trial court.” *Id.* at 81 (quoting *Folson v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (En Banc)). A motion for summary judgment should only be granted when “a reasonable person could reach only one conclusion.” *Folson*, 135 Wn.2d at 663.

On review “adverse possession is a mixed question of law and fact. Whether essential facts exist is for the trier of fact to determine; whether the facts, as found, constitute adverse possession, if for the court to determine as a matter of law.” *Crites v. Koch*, 49 Wn. App. 171, 174, 741

P.2d 1005 (Div. 3 1987).

The standard of review of equitable remedies and injunctions is abuse of discretion. *Steury v. Johnson*, 90 Wn. App. 401, 405, 957 P.2d 772 (1998)(“ a suit for an injunction is an equitably proceedings addressed to the sound discretion of the trial court, to be exercised according to the circumstances of each case.”); *Friend v. Friend*, 92 Wash.App. 799, 803, 964 P.2d 1219 (1998)(standard of review of a trial court’s partitioning of property is abuse of discretion); *City of Bremerton v. Sesko*, 100 Wn. App 158, 162, 995 P.2d 1257 (2000); *Northwest Properties Brokers Network, Inc. v. Early Dawn Estates*, 173 Wash. App 778, 789, 305 P.3d 240 (2013)(a trial court’s decision to grant an injunction and terms of that injunction are reviewed for an abuse of discretion)

V. ARGUMENT

A. A DISPUTE OF MATERIAL FACT EXISTS REGARDING THE ELEMENT OF ‘HOSTILITY’ AND ADVERSITY AND SUMMARY JUDGEMENT WAS NOT PROPERLY GRANTED TO LEBLEUS.

To successfully establish a claim of adverse possession “the claimant must prove his possession was actual and uninterrupted, open and notorious, hostile and exclusive for more than 10 years.” *Draszt v. Naccarato*, 146 Wn. App. 536, 542, 192 P.3d 921 (Div. 3 2008) (citing *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989)). “The

construction and maintenance of a structure partially on the land of another almost necessarily is exclusive, actual and uninterrupted, open and notorious, hostile and made under a claim of right.” *Draszt v. Naccarato*, 146 Wn. App. 536, 542, 192 P.3d 921, 924 (2008) (citing with approval *Reitz v. Knight*, 62 Wn. App. 575, 582, 814 P.2d 1212 (Div. 1 1991)); see also *Erickson v. Murlin*, 39 Wn. 43, 45, 80 P. 853 (1905). The party claiming to have acquired title to property through adverse possession bears the burden of proving each of the elements. *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989).

The mistake of fact by adjoining landowners regarding the true location of a boundary line “does not prevent such possession and claim of ownership ripening into title by adverse possession.” *Beck v. Loveland*, 37 Wn.2d 249, 257, 222 P.2d 1066 (1950), overturned on other grounds by *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984). In *Beck*, the court held “though the fence may have been established originally by mistake [about where the property line is located], if it were followed by a claim to the land, and such acts as clearly evinced a determination of permanent proprietorship, the [adverse possession] claim is established.” *Beck v. Loveland*, 37 Wn.2d at 256.

Here, the Aalgaards meet the *Beck* Court’s requirements. First, it is undisputed the Aalgaards and Mr. Deno mistakenly agreed upon the

property line. Second, Aalgaards clearly made claim to the property in building their home and various subsequent outbuildings. There can be no question that they would not, and did not, build a family home with a property line thru the middle of it.

i. The Aalgaards' construction of a family home and 20 years occupancy establish the hostility element.

The element of hostility requires a claimant “treat the land as his own as against the world throughout the statutory period.” *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 761, 774 P.2d 6 (1989) (citing *Chaplin v. Sanders*, 100 Wn.2d 853, 860-62, 676 P.2d 431 (1984)). Hostility does not require or imply enmity or ill-will. “[I]t connotes rather that the claimant's use has been hostile to the title owner's, in that the claimant's use has been that of an owner.” *Miller v. Anderson*, 91 Wn. App. 822, 828, 964 P.2d 365, 369 (1998). In adverse possession claims, the term “hostile” and “adverse” are used interchangeably by courts. 17 Wash. Prac., Real Estate § 8.12 (2d ed.)

Permission from the true title owner to occupy the land negates hostility. *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 761, 774 P.2d 6 (1989) (citing *Chaplin v. Sanders*, 100 Wn.2d 853, 860-62, 676 P.2d 431 (1984)). In enclosed or developed land cases, a presumption of permissive use exists only where it is reasonable to infer “neighborly sufferance or

acquiescence.” *Gamboia v. Clark*, No. 90291-7, slip op. at 10 (Wash. April 16, 2015); *Miller v. Anderson*, 91 Wn. App. 822, 828, 964 P.2d 365 (Div. 1 1998) (“Permission can be express or implied; an inference of permissive use arises when it is reasonable to assume ‘that the use was permitted by sufferance and acquiescence.’”); see also, *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 85, 123 P.2d 771 (1942) (In an easement by prescription case the court stated, “proof that the use by one of another’s land has been open, notorious, continuous, uninterrupted, and for the required time creates a *presumption* that the use was *adverse*, unless otherwise explained, and, in that situation, in order to prevent another’s acquisition of an easement by prescription, the burden is upon the owner of the servient estate to rebut the presumption by showing that the use was permissive.”). “Whether use is adverse or permissive is a question of fact.” *Miller v. Anderson*, 91 Wn. App. 822, 828, 964 P.2d 365 (1998).

The *Draszt* Court, affirmed the presumption in *Northwest Cities Gas. Draszt v. Naccarato*, 146 Wn. App. at 542, 192 P.3d at 924 (citing with approval *Reitz v. Knight*, 62 Wn. App. 575, 582, 814 P.2d 1212 (Div. 1 1991)); see also *Erickson v. Murlin*, 39 Wn. 43, 45, 80 P. 853 (1905). In *Draszt*, the plaintiff, owner of a café, and defendant, owner of a market, shared a lot that had been divided in two with the intention that the market

building would form the boundary line. *Draszt* 146 Wn. App. at 539, 192 P.3d 921. The parties' predecessors in interest divided the lot in 1986 by quitclaim deeds with the intention that the market building would form the boundary line. *Id.* Unbeknownst to anyone, when the market building and its fence was built it encroached onto the café's half of the property by 12 feet. *Id.* The parties made a mistake of fact regarding the actual boundary line. The encroaching building existed prior to 1947 and the fence prior to 1986. *Id.* at 542. The defendant (market owner) possessed the disputed strip of land for almost 20 years. *Id.* The appellate court affirmed the lower court's ruling that the defendant (market owner) had acquired the land by adverse possession because "the construction and maintenance of a structure partially on the land of another almost necessarily is exclusive, actual and uninterrupted, open and notorious, hostile and made under a claim of right." *Draszt*, 146 Wn. App. at 542 (citing *Reitz v. Knight*, 62 Wn. App. 575, 582, 814 P.2d 1212 (1991)).

Here, Aalgaards' possession and use of the land is similar to the facts of *Draszt*. The Aalgaards believed they had located and identified the true property line as described in their deed similar to the parties who split the lot in *Draszt*. Neither Aalgaards nor the parties in *Draszt* used a surveyor when they sought to identify the property line. Both Aalgaards and the market owner in *Draszt* occupied encroaching buildings for nearly

20 years. Just as the LeBleu's acquired a deed describing property that has been adversely possessed for nearly 20 years, the plaintiff in *Draszt* acquired a deed describing property that had been adversely possessed for the requisite period of time. The Aalgaards built and maintained a family home just as the market owner in *Draszt* maintained a structure and business.

A mistake in determining the true property line by the Aalgaards and Mr. Deno will not defeat Aalgaards claim of adverse possession. *See, e.g., Beck*, 37 Wn.2d at 257 (a mistake of the true location of the boundary line "does not prevent such possession and claim of ownership ripening into title by adverse possession.); *Wissinger v. Reed*, 69 Wn. 684, 125 P. 1030, 1031 (1912)(adverse possession is not defeated by mistake of fact as to actual boundary line when claimant adversely possessed land up to fence line with claim of ownership.)

Thus, just as the market owner in *Draszt* satisfied the hostile element by occupying and maintaining a structure, the Aalgaards have also satisfied the element of hostility, or at minimum, created a material issue of fact because they occupied the land under a claim of right.

ii. The Aalgaards' Use Of The Property Is Exclusive Because They Possessed The Land As A True Owner And To The Exclusion Of The World.

The Aalgaards' occupancy of their home and other improvements

satisfies the requirement that an adverse possessors' use be exclusive because the Aalgaards possessed the land as a true owner. In order to prevail on an adverse possession claim "the claimant's possession need not be absolutely exclusive. Rather, the possession must be of a type that would be expected of an owner under the circumstances." *Crites v. Koch*, 49 Wn. App. 171, 174, 741 P.2d 1005 (Div. 3 1987). The "nature and location of the land" are important in determining how a true owner would use the land. *Id.* at 174. "Trifling encroachments by an owner on land held adversely does not render the claimant's use nonexclusive." *Id.* at 175. (emphasis added)

In *Crites*, it was undisputed that the plaintiff had continuously "planted, harvested, rotated, and sold crops in the same manner" as his adjoining land for at least 15 years. *Id.* at 174. The defendant's use of the same property "never interfered with the appellants' use" of the farm and was "very, very slight." *Id.* at 175. The *Crites* court therefore concluded that plaintiff's use of the land satisfied the exclusive element. *Id.*

In *Draszt*, *supra*, the appellate court affirmed a lower court finding of exclusive use and adverse possession and explained "the construction and maintenance of a structure partially on the land of another almost necessarily is *exclusive*, actual and uninterrupted, open and notorious, hostile and made under a claim of right." *Id.* at 542.

The present case is analogous. The Aalgaard property is located on the southwest side of Mt. Spokane; is rural in nature; and the building sites cleared of timber and brush. (CP 307; 226) There is no evidence in the record that the Aalgaards shared this property with anyone, including the true land owner, for 20 years. The true land owner, Mr. Deno, visited the Aalgaard home from time to time as neighbors do. (CP 341) Mr. Deno never asserted the property on which the Aalgaards built their home was his or that he shared occupancy of the property with the Aalgaards. (CP 342; 343) Further, the Aalgaards possessed the land as a true owner by building and maintaining a home, driveway, shop, barn, drainage field, installing a water line and well, bringing electricity to the property, and installing a propane tank. (CP 308) All in open view of the world.

This use by the Aalgaards unequivocally satisfies the exclusive element of adverse possession as they occupied the land as a true owner for all the world to see.

iii. The Aalgaards Maintained Uninterrupted Possession For 20Years Of The Disputed Land.

A claimant must show possession and use was actual and uninterrupted. *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984). A claimant's possession and use must only be "like that of a true land owner, considering the land's nature and location." *Acord v. Pettit*,

174 Wn. App. 95, 104, 302 P.3d 1265 (Div. 3 2013) (citing *Chaplin*, 100 Wn.2d at 861). Said another way, “What constitutes possession or occupancy of property for purposes of adverse possession, necessarily depends to a great extent upon the nature, character, and locality of the property involved and the uses to which it is ordinarily adapted or applied.” *Frolund v. Frankland*, 71 Wn.2d 812, 817, 431 P.2d 188 (1967), *overruled on other grounds by Chaplin*, 100 Wn.2d 853 (1984). “Exclusive dominion over land is the essence of possession, and it can exist in unused land if others have been excluded therefrom.” *Wood v. Nelson*, 57 Wn.2d 539, 540, 358 P.2d 312 (1961). The purpose of requiring use and possession is “to convey to the absent owner reasonable notice that a claim is made in hostility to his title.” *Malnati v. Ramstead*, 50 Wn.2d 105, 109, 309 P.2d 754 (1957). “Evidence of *use* is admissible because it is ordinarily an indication of *possession*. It is *possession* that is the ultimate fact to be ascertained.” *Wood*, 57 Wn.2d at 540 (emphasis added). Still, “neither actual occupation, cultivation or residence are [sic] necessary to constitute actual possession.” *Campbell v. Reed*, 134 Wn. App. 349, 362-63, 139 P.3d 419 (2006) (citing *Bellingham Bay Land Co. v. Dibble*, 4 Wn. 764, 770, 31 P. 30 (1892)). “If a line of use is obvious upon the ground to prudent observation,” adverse possession may exist up to a reasonable projection of that line.” *Campbell*, 134 Wn. App. at 363

(citing *Frolund*, 71 Wn.2d at 820).

In *Campbell v. Reed*, plaintiff brought an action to quiet title based on adverse possession, among other legal theories. 134 Wn. App. at 354. The land which plaintiff claimed was not permanently occupied and there was evidence the land was without boundary markers except for a “dilapidated barb wire fence.” *Id.* at 355-56. Other evidence showed plaintiff “constructed a road, cleared brush, cut firewood, all of which left a mark on the property.” *Id.* at 361. There was also evidence that the clearing of brush made the property “distinctly different than the adjoining property.” *Id.* at 362.

The court in *Campbell* found the presence of a fence and other activity was “sufficient evidence to create material issues of fact” about whether the land was actually possessed. *Id.* at 363. The court therefore found summary judgment in favor of defendant was not proper and remanded the case to the trial court. *Id.* at 364.

In *Stokes v. Kummer*, plaintiffs sued to quiet title and eject defendants from land defendants farmed. *Stokes v. Kummer*, 85 Wn. App. 682, 684, 936 P.2d 4 (1997). The defendants, three brothers, were dry-land wheat farmers. The land at issue was in a rural and desolate part of Kittitas County which was “rocky and arid, covered mostly with sagebrush and tumbleweeds.” *Id.* at 684. The brothers harvested wheat every other year

with the land being left fallow in the middle years. *Id.* at 693. During the fallow years the brothers would “plow, cultivate, fertilize and seed the fields.” *Id.* at 686.

Plaintiffs argued that harvesting wheat by dry-land farming every two years was insufficient to show the brothers actually possessed the land. *Id.* at 693. The Division Three Court of Appeals rejected this argument as “completely without merit” by restating the rule that “use and occupancy of the property need only be of the character that a true owner would assert in view of its nature and location.” *Id.* at 693 (citing *Chaplin*, 100 Wn.2d at 863). The court cited the high visibility of the brothers’ use of the land and the visible contrast between the farmed fields and surrounding wild land overgrown with sage brush as evidence that the land was actually possessed. *Id.* at 693.

Here, the trial court’s written findings do not comment on this element of adverse possession. (CP 451) However, the trial court did discuss this element in its oral ruling. (RP 24-25) The *Campbell* and *Stokes* cases are analogous to the facts at hand. In fact, the evidence here goes beyond what the court found sufficed in *Campbell* and *Stokes*.

The Aalgaards actually possessed the land known as the clearing. They built a home, numerous outer buildings, and installed numerous utilities to support their family at the site of their homestead. (CP 308) In

preparation for the construction of the home and other improvements the Aalgaards cleared brush. (CP 307) The Aalgaards have occupied their home and utilized their improvements as a primary residence since 1994. (CP 308) There is no evidence that the Aalgaards' use of the land was anything but continuous since 1994. Plaintiff's surveyor, Bruce Larsen, even stated in his Declaration and survey regarding the area known as the clearing limits, "That is the area that is out of the woods and appeared to be used by Aalgaards. It contains approximately 0.61 acres." (CP 211)

Wood v. Nelson requires a claimant to show "exclusive dominion over the land" which "can exist in unused land if others have been excluded therefrom." *Wood v. Nelson*, 57 Wn.2d 539, 540, 358 P.2d 312 (1961). The Aalgaards clearly meet this standard because they exercised exclusive dominion over the site of their improvements and the area of land identified as the clearing which surrounds the home. Further, the Aalgaards have exercised exclusive dominion over the timbered land beyond the clearing by excluding others from using the same. *Wood*, 57 Wn.2d at 540 (actual possession element can be satisfied even if land is unused so long as claimant excludes others from using the same). In addition, the Aalgaard children and their friends hiked, played, sledged and explored the property over the course of 15 years. (CP 267; 342) Considering the rural and heavily timbered nature of portions of the

Aalgaard property, such use is consistent with how the true land owner would use the land. *See, e.g., Frolund*, 71 Wn.2d at 817 (the possession element “necessarily depends to a great extent upon the nature, character and locality of the property involved and the uses to which it is ordinarily adapted or applied.”).

All the Aalgaards’ activities, from the construction of their home and other improvements to their recreational activities constitute use which demonstrates possession such that “prudent observation” would put the land owner on notice. *Campbell*, 134 Wn. App. at 363 (citing *Frolund*, 71 Wn.2d at 820). In fact, the true land owner had actual notice of the Aalgaards’ actual and continuous use of the disputed property. (CP 341-42) The Aalgaards actually and continuously possessed the disputed land as the true property owner. At a minimum, there may be a question of fact regarding what portion of the timbered land the Aalgaards possessed. There can be no question that they possessed the cleared land.

iv. The Aalgaards’ Use Was Open And Notorious Because They Built, Maintained, Used And Lived In Their Home As A True Land Owner.

A claimant must show possession of the disputed land was open and notorious. *Chaplin*, 100 Wn.2d at, 857, 676 P.2d 431. The element is satisfied if the owner has “actual knowledge of the possession.” *Id.* at 862. Like other elements, the character of the land must be considered when

determining if the facts of use and possession are sufficiently open to give the land owner notice of a claim to the land. *Id.* at 863. “If the owner knew of the adverse user, no further proof as to notice is required.” *Hovil v. Bartek*, 48 Wn.2d 238, 242, 292 P.2d 877 (1956).

Here, the true land owner, Mr. Deno, had actual knowledge of Aalgaards’ use of the land by virtue of his status as their neighbor and by rendering assistance in building the Aalgaards’ home and improvements. (CP 341-42) The Aalgaards’ construction and occupation of the property for 20 years was open, just as a the true land owner would have done, such that even a less than vigilant land owner would have had notice of the adverse use. (*supra*)

Therefore, there is no question that the Aalgaards’ use and occupancy of their family home and improvements for 20 years satisfies the open and notorious element.

v. All elements of Adverse Possession Are Satisfied.

The Aalgaards’ use and possession of their home and improvements, if it does not satisfy adverse possession outright, at a minimum creates a material question of fact such that the Trial Court erred in granting LeBleus’ Summary Judgment Motion.

There is no evidence in the record that Mr. Aalgaard or Mr. Deno arbitrarily pronounced the location of the boundary line. Rather, they each

took care to “measure[] [their] respective parcels from each side to establish where the boundary line was located.” (CP 341) Mr. Deno and the Aalgaards were not trying to establish a new boundary line but rather were attempting to locate the established boundary line as described in their deed. It is further nonsensical to simply assume Mr. Deno knowingly walked away from property he rightfully owned with no compensation for the same. Mr. Aalgaard clearly stated he never sought or received permission from Mr. Deno to build the Aalgaard home at its current location. He believed his family rightfully owned the land pursuant to the deed he received from the seller Dennis Trainor. (CP 309)

Thus, summary judgment in favor of plaintiffs was not proper and Aalgaards respectfully request that their Summary Judgment be granted and/or that this matter be remanded to the trial court level for trial.

B. THE 1993 CONVERSATION BETWEEN THE AALGAARDS AND MR. DENO DID NOT PROVIDE PERMISSIVE USE OF THE PROPERTY.

The LeBleu’s argue that the 1993 conversation between the Aalgaards and Mr. Deno resulted in either (1) Mr. Deno granting permission to the Aalgaards to use the land, or (2) a gift of the land to the Aalgaards through a boundary line adjustment. (CP 228) Whether the 1993 conversation is as the Aalgaards remember or the LeBleus claim is a disputed material fact and is the crux of the ‘hostile’ element.

Here, the interpretation of the 1993 conversation is a disputed material fact. The Aalgaards categorically deny that the 1993 conversation with Mr. Deno was a conversation regarding permissive use. The intent was to preserve each parties property lines and rights. (CP 341) Not to “allow” Aalgaards to build on the “best” land or for any other potential reason. Only the Aalgaards and Mr. Deno were present at this conversation. (CP 341; 307) The 1993 conversation was to identify the true boundary line as described in their respective deeds. (CP 307; 341) As Mr. Aalgaard states;

At no time did Mr. Deno give us permission to use the property, as established by the boundary line agreement. My wife and I never attempted to obtain permission from Mr. Deno because we believed that no permission was required, as we have always understood that we are the true owners of the property that our home and outbuildings sit on.

(CP 309)¹

The Aalgaards never sought to obtain permission to build where they did because they believed the disputed land was theirs as described in their deed. Mr. Deno also clearly believed the improvements were on the land of the Aalgaards as described in the deed and not on his land. (CP 341) (“The home was...clearly placed on the Aalgaards’ property.”)

¹ It is possible the LeBleus understand the phrase “boundary line agreement” as an agreement to adjust the boundary line. This is an incorrect reading. A proper reading of this statement, in the context of all other portions of the Dave Aalgaard declaration and declarations from other witnesses, makes it clear that the Aalgaards and Mr. Deno agreed they had located the true boundary line as described in their respective deeds. These other declarations will be discussed further in this brief. At minimum, a dispute of material fact exists regarding this statement.

This understanding is significant and of vital importance; both the Aalgaards and Mr. Deno believed the Aalgaard home and other improvements were on the Aalgaards' property as describe in the original deed received from Dennis Trainor. It was not an attempted transfer of property or permissive use granted by Mr. Deno to the Aalgaards. (CP 341) "Based upon my understanding of my property boundaries, my measurements, and measurements taken by Dave, we established the boundary line separating our parcels." (CP 307) "In 1993, Mr. Deno and I established a boundary line separating our property from the Denos' property."

Black's Law Dictionary, 6th Ed., defines "Establish" as: 1) To settle, make, or fix firmly...2) to make or form...3) To prove; to convince. The Aalgaards submit they used the term "establish" to mean "to settle" under definition No. 1. Definition No. 3 is also appropriate in that the Aalgaards sought to "prove" the location of the boundary line as described in their deed. The Aalgaards did not use the word 'establish' to mean "to make or form" under definition No. 2 because they were not attempting to create or adjust a boundary line. The LeBleus were not present during the conversation and thus their interpretation of the conversation is meritless. Nonetheless, it is the key fact that the LeBleus have misunderstood and/or mischaracterized throughout the proceedings.

The LeBleus' argue, "According to Aalgaards, Eric Deno gave them a two-acre strip along the boundary in 1993," (CP 228), and the "Aalgaards contend that they had an oral agreement with Eric Deno wherein Mr. Deno gave them the strip," (CP 232). This interpretation of the 1993 conversation is not supported by the record. In the LeBleus' reply brief, they argue the Declaration of Dave Aalgaard supports their position that the Aalgaards use was permissive. (CP 356) The LeBleu's then state the "Aalgaards appear to be arguing namely that they took initial possession by agreement (*i.e.* permissively), but that permission then became hostile. This is an odd argument because Aalgaards also argue they become the owners as of the date of the agreement in 1993." (CP 358) The LeBleu's statements is characterization of the 1993 conversation and necessarily the presence of a material dispute of fact. The Aalgaards' Declarations and Pleadings have never supported the LeBleus' above statements. The citations to the record the LeBleus rely on simply do not stand for the position they put forward.

The Aalgaards believe they became owners of the land in 1993 because that is when they purchased the land from Dennis Trainor and because they believed they were building on the land described in their deed. (CP 309) The Aalgaards have never argued they occupied the land where their family home sits with permission of Mr. Deno. *Supra*. Nor

have the Aalgaards ever argued they became the owners of the land where their home sits as a result of a gift from Mr. Deno.

Until this litigation, Aalgaards believed the land where their home sits is on their property as described in their deed from the seller. (CP 309) That the parties clearly disagree on the substance of the 1993 conversation makes clear that a dispute of material fact exists regarding the element of hostility.

Indeed, the LeBleus concede in their Response to Cross-Motion For Summary Judgment that should “the court...not believe the evidence of permissiveness is sufficiently strong to grant LeBleus’ motion, it is certainly strong enough to create issues of fact” regarding hostility. (CP 801)

At a minimum, the Trial Court ruled on a question of fact, when it interpreted the differing understandings of the 1993 conversation. There is a disputed fact regarding whether Aalgaards’ use was permissive or adverse and hostile. For well over a century Washington law has established that the question of permissive or hostile use is a question of fact. *McAuliff v. Parker*, 10 Wn. 141, 143, 38 P. 744 (1894) (“the question of adverse possession is a question of fact.”); *Northwest Cities Gas Co.*, 13 Wn.2d at 84 (“The question of adverse user is a question of fact.”); *Murray v. Bousquet*, 154 Wn. 42, 49, 280 P. 935 (1929) (“All the

authorities hold that the question of adverse possession is a question of fact...”)

Further, common sense mitigates against LeBleus’ theory – and the Court’s finding. It is safe to say that it is not normal practice for neighbors with no close relationship to simply give away land. It is also nonsensical that Mr. Deno, who has no familial connection or close friendship with the Aalgaards, would permissively allow the Aalgaards to permanently build a family home, a barn, a shop, and a drain field, among other improvements, on his land.

An appellate court must construe “all evidence and reasonable inferences in the light most favorable to the nonmoving party,” *Keck*, 181 Wn. App. at 78. As a matter of law, this Court should reverse the grant of summary judgment in favor of LeBleus because the Aalgaards are entitled to have the 1993 conversation construed in their favor and/or found subject to interpretation, thus disputed. Second, the Aalgaards are entitled to, at a minimum, a reasonable inference that the 1993 conversation did not result in a grant of permissive use. To do otherwise does not improperly construes the evidence and makes improper inferences in favor of the moving party contrary to the summary judgment standard.

i. Aalgaards Did Not Have Deno’s Permission

At summary judgment LeBleus argued that Aalgaards used the

land permissively or that there was an attempted boundary adjustment. This conclusion is not supported by direct evidence, is a mischaracterization of fact, and, at best, can only be reached by making an inference in favor of the moving party.

As discussed above, Washington courts have repeatedly held, the building and maintenance of a structure is “almost necessarily...hostile and made under a claim of right.” *Draszt*, 146 Wn. App. at 542 (citing *Reitz*, 62 Wn. App. at 582 (encroachment by eaves of a building “almost necessarily is exclusive, actual and uninterrupted, open and notorious, hostile and made under a claim of right)); *Erickson v. Murlin*, 39 Wn. 43, 44-45, 80 P. 853 (1905) (21 inch encroachment by eaves of home satisfied hostile element of adverse possession).

Grantson v. Callahan, 52 Wn. App. 288, 759 P.2d 462 (Div. 1 1988), provides a framework for distinguishing permissive versus hostile use. In *Granston*, two brothers, William and Edward Granston, acquired adjacent parcels in 1935. *Id.* at 289. The brothers had a very close relationship and, through the course of ownership of their respective properties, they utilized the two parcels as if they were a single parcel, building structures without regard to the property line and sharing complete access to all of the structures including the homes. *Id.* at 290-91. Thus, each had structures or improvements upon each other’s land, *Id.* at

290-91. The appellate court described these facts as a “clear, almost indisputable, case of permissive use.” *Id.* at 295. The trial court found that permissive use was supported not only by the presumption of permissive use “but also by the fact that the improvements were made on both properties for reasons of convenience completely uninfluenced by the location of the property line dividing the properties.” *Id.* at 295.

However, the facts of the present case are easily distinguishable. Here, the Deno and Aalgaard families are not related and did not have a close friendship in 1993 when they originally walked the land. The purpose of the boundary line location was to protect Deno’s property as well as the Aalgaards. While the Granston brothers built their structures for their mutual benefit, the Aalgaards’ built their home for their sole use and possession, with hostility and to the exclusion of the world. (CP 343; 309) There are no facts establishing Mr. Deno ever used Aalgaard’s land where they built their home as if he owned, or had any right to the land; no facts to establish he was merely lending it to Aalgaards; and no facts showing Mr. Deno and the Aalgaards attempted to adjust the boundary line.

In *Granston*, the brothers knew where the boundary line was located yet disregarded it when building their structures. *Granston*, 52 Wn. App. at 290. Conversely, Aalgaards (and the Denos) believed they

had correctly determined the property line as described in their deed and attempted to honor the line, building their home fifty feet off the line. (CP 309) In reality, it was not the actual boundary line.

The *Granston* brothers and their families had “free and unencumbered access” to the others property and all improvements, including the homes, *Granston*, 52 Wn. App. at 291. Here, the Aalgaards used their home, barn, shop, drive way, drain field, and the clearing with hostility and to the exclusion of others, including Mr. Deno. (CP 309; 342; 343)

Cullier v. Coffin, 57 Wn.2d 624, 358 P.2d 958 (1961), also dealt with permissive use. In that case, plaintiff sued to enjoin the defendant from trespassing along a road that both parties used. Defendant counter-claimed arguing that he had acquired a prescriptive right to use the roadway. *Id.* at 625. The ultimate issue was “whether the use [of the road] was adverse or permissive.” *Id.* at 626. While evidence in the case established that the defendant never gained express permission to use the road, the court held this was just one “circumstance from which an inference may be drawn that the use was adverse.” *Id.* at 626-27.

In *Cullier*, the court stated the circumstances of each case must be considered when examining permissive use. *Id.* at 627. The *Cullier* court then considered whether: the plaintiff may not have challenged

defendant's use of the road as a neighborly courtesy; whether the use of the disputed land was exclusively used; and considered who maintained the disputed land. *Id.* at 627. The court found an inference of adversity and hostility was likely "[i]f one, for his exclusive use," makes improvements on the land of another "and uses it for the prescriptive period..." *Id.* at 627. Conversely, using improvements which were constructed by the true owner for his own purposes is more indicative of permissive use. *Id.* at 627.

Again the facts of *Cullier* are readily distinguishable from the present case. First, *Cullier* was a prescriptive easement over a road while the present case is about the construction of a homestead. The construction of a permanent family homestead on another's property cannot be reasonably described as a "neighborly courtesy." Second, Aalgaards (unknowingly) constructed their improvements on the land of another for their sole and exclusive use. *See, Cullier*, 57 Wn.2d. at 627 (one making improvements on the land of another for his own exclusive use and for the statutorily period creates an inference of hostility). Indeed, Washington courts have repeatedly held, the building and maintenance of improvements is "almost necessarily...exclusive, actual and uninterrupted, open and notorious, hostile and made under a claim of right." *Draszt*, 146 Wn. App. at 542, citing *Reitz*, 62 Wn. App. at 582; *Erickson v. Murlin*, 39

Wn. 43, 44-45, 80 P. 853 (1905) (21 inch encroachment by eaves of home satisfied adverse possession). Here, none of the evidence supports a permissive use of the .61 acres. (supra)

C. THE TRIAL COURT ERRED BY EJECTING DEFENDANTS' STRUCTURES FROM PROPERTY PROPER ANALYSIS.

Assuming arguendo, this Court finds LeBleus' Motion for Summary Judgment was properly granted, the trial court committed error by summarily ejecting the Aalgaards' encroaching family home and improvements as a matter of course and without engaging in an *Arnold* analysis as required under Washington law. *Arnold v. Melani*, 75 Wn.2d 143, 152, 449 P.2d 800 (1968); *Proctor v. Huntington*, 169 Wn.2d 491, 502-03, 238 P.3d 1117 (2010)) ("A court asked to eject an encroacher must instead reason through the *Arnold* elements as part of its duty to achieve fairness between the parties.") In *Arnold* the Washington Supreme Court held that ejectments may not occur "as a matter of course."

An order of ejectment is an "extraordinary remedy" in equity. *Arnold*, 75 Wn.2d at 152. A court possesses "tremendous discretion" to do justice when asked to impose an equitable remedy. *Young v. Young*, 164 Wn.2d 477, 488, 191 P.3d 1258 (2008). The issuance of a mandatory injunction, an equitable remedy, is not to be issued as a matter of right because "when an equitable power of the court is invoked, to enforce a

right, the court, must grant equity in a meaningful manner, not blindly.” *Arnold*, 75 Wn.2d at 152. The appropriate equitable remedy is “flexible and fact-specific.” *Proctor*, 169 Wn.2d at 503 (citing *Young*, 164 Wn.2d at 495). In *Arnold*, the Washington Supreme Court explained that a mandatory injunction to eject structures “is not to be issued as a matter of course.” *Arnold*, 75 Wn.2d at 152. This is true even though “[o]rdinarily... a mandatory injunction will issue to compel the removal of an encroaching structure.” *Id.* at 152. Rather, “A court asked to eject an encroacher must instead reason through the *Arnold* elements as part of its duty to achieve fairness between the parties.” *Proctor v. Huntington*, 169 Wn.2d 491, 502-03, 238 P.3d 1117 (2010). The *Proctor* court explained “injunctions should not mechanically follow from any encroachment.” 169 Wn.2d at 502. This means that a court may deny equitable relief “whenever such an enforcement would be inequitable.” *Id.* at 152 (citing *Thisius v. Sealander*, 26 Wn.2d 810, 818, 175 P.2d 619, 623 (1946)).

In order to prevent a mandatory injunction from issuing, an encroacher must prove the following elements by clear and convincing evidence:

- 1) the encroacher did not simply take a calculated risk, act in bad faith, or negligently, wilfully or indifferently locate the encroaching structure;
- 2) the damage to the landowner is slight and the benefit of removing the structure equally small;
- 3) there was ample remaining room for a structure suitable for the area and no real limitation on the property’s future use;
- 4) it is impractical to move the structure as built; and
- 5) there is an enormous disparity in resulting hardships.

Proctor, 169 Wn. 2d.at 152.

These elements are a “judicial recognition of a circumstance in which one party uses a legal right” as an “equitable club to be used as a weapon of oppression rather than in defense of a right.” *Id.* at 153. “It is a contradiction of terms to adhere to a rule which requires a court of equity to act oppressively or inequitably and by rote rather than thorough reason.” *Id.* at 153 (citing with approval *Golden Press Inc. v. Rylands*, 124 Colo. 122, 235 P.2d 592, 28 A.L.R. 2d 672 (1951)).

In deciding *Arnold*, the Washington Supreme Court relied on an earlier decision, *Adamec v. McCray*, 63 Wn.2d 217, 219-20, 386 P.2d 427 (1963). There the Supreme Court explained,

The doctrine of balancing the equities provides that where by mistake, a building is erected that slightly encroaches, and the damage to the owner of the building is greatly disproportionate to the injury sustained by the landowner, the court may decline to order its removal and leave the complaining party to his remedy at law.

Adamec, 63 Wn.2d at 219-20.

The Washington Supreme Court revisited the *Arnold* analysis in the *Proctor* case. (*supra*) There, the Court explained that under traditional property law the remedy was usually characterized as “all-or-nothing relief” which often resulted in “frustrating applications of common law property rules” whose results “sometimes seemed grossly inefficient or unfair.” *Id.* at 496. The solution to the “harsh or unjust results” was the

introduction of the “liability rule.” *Id.* at 497.

The difference in the application of an injunction in equity and the liability rule was demonstrated in *Harrington v. McCarthy*, 169 Mass. 492, 48 N.E. 278 (1897) and cited with approval by the *Proctor* court. In that case, the defendant’s cornice and underground foundation both encroached on the plaintiff’s property. *Harrington*, 169 Mass. at 493-94, 48 N.E. 278. The court required McCarthy to trim back his cornice under traditional property rules. *Id.* However, the court found it would be too difficult or impossible to remove the encroaching foundation and that the foundation caused no harm to the adjacent property and so limited plaintiff’s remedy to money damages. *Id.* at 494-95.

The *Proctor* Court upheld the trial court’s order that defendant pay plaintiff the fair market value of an encroachment rather than order an injunction requiring them to tear down their home after completing an *Arnold* analysis. *Proctor*, 169 Wn.2d at 504. There, the plaintiff acquired a 30 acre parcel and defendant acquired a 27 acre parcel from a common grantor approximately one year apart. *Id.* at 494. The parties believed they located the established common boundary line after conferring with a surveyor. *Id.* at 494. Unbeknownst to the parties, the located boundary line was incorrect. *Id.* at 495. Defendant built a home, garage, and well based on what he believed to be the true property line as described in his deed.

Id. at 494. Similarly, the plaintiff built his own home based on the understood boundary line. *Id.* at 494. Eight years after defendant began living in the home a second survey showed that defendant's home, garage, and well were all located on plaintiff's property. *Id.* at 495. The plaintiff sued to quiet title and eject the defendant's structures. The defendant counter claimed to quiet title under a theory of adverse possession and estoppel in pais. *Id.* at 495. The trial court found for the plaintiff but refused to eject the defendant and his home, garage, and well from the land. *Id.* at 495. Instead, the trial court ordered the plaintiff to sell the encroached upon land to the defendant for fair market value. *Id.* at 495.

On review, the Supreme Court determined the trial court acted correctly in not ordering ejectment and instead making an award of money damages. *Id.* at 504. In affirming, the Supreme Court explained its position using some of the factors contained in the *Arnold* analysis. First, the Court described the encroachment as relatively small, only 3.3 percent of plaintiff's parcel, even though defendants' encroachments encompassed an entire acre of land. *Id.* at 502. While the encroachment encompassed an acre the Court cited *Bufford* where the court refused to order ejectment even though the encroachment encompassed the entire parcel. *People's Sav. Bank v. Bufford*, 90 Wn. 204, 206, 155 P. 1068 (1916).

Next, the court explained that ejecting the defendant and

encroachments would only minimally benefit plaintiff compared to the substantial loss defendant would suffer. *Id.* at 503. The *Proctor* Court held plaintiff would receive a minimal benefit because 1) he already built a home, 2) the acre would not “appreciably” increase the value of plaintiff’s land, 3) the acre would not “appreciably” increase parcel size of plaintiff who owned 29 other acres, and 4) the acre was valued at \$25,000. *Id.* at 503. Conversely, an ejectment would have cost defendant approximately \$300,000 and imposed a significant emotional and financial hardship to remove and rebuild a home, garage, and well. *Id.* at 495, 503-04.

The facts of the present litigation are remarkably similar to the facts in *Proctor*. Here, the Aalgaards acquired 10 acres of land while their neighbor Mr. Deno acquired 20 acres from a common grantor, Dennis Trainor. (CP 215; 216) The Aalgaards and Mr. Deno then used the description of their property as contained in their deeds, walked the land, and took measurements in a good faith effort to locate their common boundary line. (CP 340-41; 307) Subsequent to this determination of the true boundary line, the Aalgaards built their home and other improvements. (CP 307) At some point, Mr. Deno also built a home. (CP 342) The Aalgaards then raised their children while living in their home and utilizing the land as a true lander owner would do. (CP 288)

For nearly 20 years there was no indication the Aalgaards were not

on their legal property. (CP 306) In 2012, the LeBleus acquired the property formally belonging to Mr. Deno. (CP 61) Mr. LeBleu stated in his declaration that he walked the property prior to purchasing the same. This may be accurate that he walked the line according to Mr. Deno's description. However, the accuracy of this statement must be obviously called in to question. Had Mr. LeBleu actually walked the land and also known the true boundary lines, he would have seen the Aalgaard clearing limit, driveway, home, barn and other improvements encroaching on his land. (emphasis added) Thus, either the LeBleus didn't know the true property line and assumed Mr. Deno's description was correct or they purchased their property knowing the Aalgaard's home and buildings were on their property.

It was not until November 2013, when the LeBleus commissioned a survey of their property that the true property line was located. It split the Aalgaard home in half and placed many of the Aalgaard improvements on the LeBleu property by approximately 50 feet. (CP 214) The survey appears to show the Aalgaards mistook the location of their property line by a little less than 100 feet. (CP 214) The Aalgaards' encroaching structures and use within the clearing equals approximately .61 acres. (CP 211) Under these facts an Arnold analysis is appropriate.

- i. *The Aalgaards Acted In Good Faith Because They Used Reasonable Means And Worked With The Adjoining Land Owner To Locate The True Property Line.*

In *Proctor*, the parties exercised good faith by relying on a surveyor regarding the location of the common boundary line of their rural properties. *Proctor*, 169 Wn.2d at 494. The surveyor committed an error and misplaced the boundary line by 400 feet. *Id.* at 494. In *Mahon v. Haas*, the plaintiff built a commercial greenhouse on defendant's property. *Mahon v. Haas*, 2 Wn. App. 560, 564-65, 468 P.2d 713 (Div. 3 1970). In that case, the court found plaintiff took a calculated risk in building the greenhouse because she had notice of the public's longstanding use of the property and was put on notice by defendant's lawyer that defendant would assert his rights. The trial court ordered the green house removed due to defendant's prescriptive rights to the disputed area. *Id.* at 565. The appellate court affirmed and stated, "the doctrine of balancing the equities, or relative hardship, is reserved for the innocent party who proceeds without knowledge or warning that his structure encroaches upon another's property or property rights." *Id.* at 565 (citing *Bach v. Sarich*, 74 Wn.2d 575, 582, 445 P.2d 648 (1968))

Here, the facts clearly establish, Aalgaards and Denos made reasonable and good faith efforts to locate the established property line as described in their deeds. They used the description of their property as

contained in the deed, walked the land, and took measurements in a good faith effort to locate their common boundary line as described in their respective deeds. (CP 341; 307) The parties also relied on a conversation the year prior between Mr. Deno and their common grantor, Dennis Trainor, about where the boundary lines were located. While the surveyor in *Proctor* was off by 400 feet, the Aalgaards and Mr. Deno appear to have been off by only about 100 feet. (CP 214)

Therefore, as in *Proctor*, the Aalgaards and Mr. Deno clearly acted in good faith when building their home at the chosen site.

ii. *The Damage To The LeBleu's Property Is Slight And The Benefit Of Removal Is Equally Small.*

The Washington Supreme Court holds that the measure of “slight” is relative to the totality of the circumstances. For example, while the facts in *Bufford* are distinguishable, there the court refused to order ejectment even when the encroachment consumed the entire parcel. *Bufford*, 90 Wn. at 208-09. In *Proctor*, the trial court refused to order an ejectment, and instead awarded money damages, even though the encroachment consumed an entire acre. *Proctor*, 169 Wn.2d at 503-04. In affirming the trial court, the Supreme Court noted that the encroached upon acre only comprised 3.3 percent of plaintiff’s property. *Id.* at 502.

In the present case, the area of actual encroachment, described as

“the clearing” in proceedings at the trial court, composes only .61 acres according to the survey giving rise to this litigation. (CP 211) Considering the LeBleus land encompasses approximately 20 acres, the .61 acre encroachment equals 2.9% of the LeBleu property. This is a minimal encroachment and even less than in *Proctor* where the court said an encroachment of 3.3% of the plaintiff’s land was “slight.” *Proctor*, 169 Wn.2d at 502.

There is evidence of the value of the disputed property from two sources. The first source is Bryan Walker, a real estate broker in Spokane for NAI Black with over 25 years of experience in land developments, land acquisitions, and, among other things, land sales. (CP 558) According to Mr. Walker, the average value of unimproved land in the disputed area ranges from \$6,000-\$10,000 per acre and is dependent on factors such as “services and access.” (CP 559) Mr. Walker estimates the value of land on the specific property in dispute to be \$8,000 per acre. (CP 559) Since the area encroached upon equals approximately .61 acres, the approximate value of the encroachment equals \$4,480.

The second source of evidence regarding the clearing’s value comes from the Spokane County Assessor’s Office. (CP 568) The Assessor’s Office states the Aalgaard property is approximately 10 acres and the land value is assessed at \$66,600. (CP 568) Therefore, according

to the Assessor's office, the land in dispute is valued at \$6,660.00 per acre. Since the encroached area equals .61 acres, the approximate value of the encroachment is approximately \$4,026.00.

Also crucial to the analysis is that this "encroachment" is on the far north side of the LeBleus' property while the LeBleu home is located on the far southern portion of the lot. The LeBleu home is separated from the encroachment by a heavily timbered ravine. (CP 61) There is currently no road connecting the LeBleu home and the clearing on which the encroachment sits. (CP 213)

LeBleus' argue the land under the encroachment is needed to care for livestock. Mr. LeBleu states he intended to "build a barn and cattle pens on the disputed property." (CP 662) However, the evidence in the record does not corroborate this statement. First, Mr. LeBleu did not even know his deed encompassed the disputed clearing until a year after he bought the property. (supra) Second, there is a significantly timbered ravine between his home and the disputed clearing with no road access. Third, the LeBleus have twenty other acres on which to build a barn and livestock pens which would appear to be much more convenient in caring for the LeBleu animals. Since the LeBleus clearly did not know their deed included the area encroached upon when they bought the property, these statements ring hollow. (CP 60; 210)

On the other hand, ejecting the Aalgaards, their home, and their improvements would be inequitable and oppressive. First, the cost of removing a permanent two-story structure and foundation, a barn, a shed, a propane tank, a well and associated water line, a driveway and a septic drain field would be substantial. Second, the emotional hardship of being forced off of land on which the Aalgaards raised their family would be significant. The burden is even more significant considering that the Aalgaards would only have to move the structures a short distance to cross the boundary line.

Therefore, the facts of this case clearly show that the damage to the LeBleus' property is minimal and the benefit of removal is small.

iii. The LeBleu's Are Not Limited By The Loss Of .61 Acres

In *Proctor*, the Washington Supreme Court affirmed the trial court's decision that plaintiff faced no real limitation on the use of the property when the encroachment composed only 3.3% of plaintiff's 30 acres of land and when the plaintiff already had built a home on his land. 169 Wn.2d at 502. In addition, while not expressly relied upon by the court on this portion of the analysis, it is worth noting that the parties in *Proctor* used and occupied their properties while observing the mistaken boundary line for at least 8 years. *Id.* at 494-95.

Here, the LeBleus face no real limitation by not utilizing .61 acres

(2.9% of their property) on the far side of their property. The LeBleus have a home and 20 other acres on which to build any structure needed to care for their animals. Further, the LeBleus did not believe they owned the disputed clearing when they bought the land for the purpose of maintaining cattle. The survey revealing the true boundary line was not completed until a year after the property was purchased. (CP 60; 210) Therefore the LeBleus clearly - at least when they purchased the property had some other initial location for building a barn or their animals other than the disputed property. ²

Therefore, the evidence clearly establish the *Arnold* requirement that the injured party, the LeBleus, do not face a real limitation on their property use in the future.

iv. It Is Impractical To Move The Aalgaard Homestead.

In *Proctor*, the Washington Supreme Court affirmed the lower court's finding that it would be impractical to require defendant to remove his house, garage, and well. 169 Wn.2d at 503-04. In *Hansen v. Estell*, the Division Three Court of Appeals described the costs associated with moving of a barn a few feet "likely prohibitive." 100 Wn. App. 281, 288-89, 997 P.2d 426 (Div.3 2000). Because of this, the *Estell* Court affirmed the trial court's decision to not eject the encroaching barn but instead to

² It is also most likely not a typical use of land to build a barn for livestock 20 acres from the residence.

make an award of money damages. *Id.* at 288-89.

There is no doubt, that requiring the Aalgaards to remove their improvements would be a significant financial burden and substantial logistical undertaking considering the encroaching improvements are significant. (CP 214; RP 50) This case is directly on point with *Hansen*, where the court found moving a barn to be likely costs prohibitive. Here it is cost prohibitive to move not just the Aalgaard barn, but home, also their shop and other improvements. The Aalgaards clearly satisfy the *Arnold* requirement that removal of the encroachment is impractical.

v. ***There Is An Enormous Disparity In Hardships Between The Aalgaards In Being Forced To Remove Their Home And Other Improvements As Compared To The Le Bleus.***

In *Proctor*, the Washington Supreme Court found there was an enormous disparity between defendant having to remove a home, garage, and well compared to plaintiff's unknown use of the small portion of land encroached upon. 169 Wn.2d at 503-04.

Here, there is an enormous disparity in hardships if the Aalgaards have to remove their family home and other improvements as compared to the LeBleus inability to use 2.9% of their 20 acre property to build a barn 20 acres from their residence. As noted supra, LeBleus did not purchase their 20 acres believing they owned the area of land under the Aalgaards' home. Thus, their intentions in buying their land is not frustrated. (CP 60;

210) Conversely, the hardships of the Aalgaards include the emotional trauma of losing their self-built family home where their three children were raised. In addition, the sheer financial burden associated with removing their two-story home and numerous improvements, and then rebuilding a home eclipses any “burden” on the LeBleus.

While the actual cost removing all of the Aalgaards’ improvements is unknown, it is at a minimum the cost of a new home. This surely is no doubt substantially more expensive than the \$4,000-\$4,400 the land is worth. The LeBleus have 20 other acres in which to build any improvements they allegedly desire to build on the land of the encroachment. Finally, the LeBleu’s have no emotional connection to the land, unlike Aalgaards who have spent the last 20 years in a family home. Therefore, there is clearly an enormous disparity in the resulting hardships if the Aalgaards are required to eject their home and other improvements.

The Trial Court erred by ordering the ejectment of the Aalgaard home and other improvements as a matter of course instead of conducting the requisite analysis under *Arnold*. In fact, the trial judge even hinted at the inequity of the circumstances of the case. (RP 30) Recognizing this difficulty and the apparent oppressive and unjust result, the trial court should not have blindly imposed the “all-or-nothing relief” of traditional property law where the result is “frustrating” and “grossly inefficient or

unfair.” See, *Proctor*, 169 Wn.2d at 496. The Trial Court failed to complete the *Arnold* analysis and did not consider an award of money damages to the LeBleus under the modern “liability rule”/Arnold rule as adopted in Washington.

Aalgaards respectfully request this Court find that an *Arnold* analysis demonstrates an award of money damages should have been awarded to LeBleus rather than ejecting the Aalgaards. In the alternative, Aalgaards respectfully request that this Court vacate the order of ejectment and remand the case back to the trial court for reconsideration under *Arnold* as set forth supra and to “reason through the *Arnold* elements as part of its duty to achieve fairness between the parties.” *Proctor v. Huntington*, 169 Wn.2d at 502-03.

VI. CONCLUSION

The construction and occupation of the Aalgaards’ family home and multiple improvements for 20 years clearly meet all the elements of adverse possession. The Aalgaards and Mr. Deno, the only witnesses to the 1993 conversation, testified that the conversation was solely to locate the common boundary line as described in their deeds, It was not intended to give permissive use, a conveyance of land, or any other type of boundary adjustment. Any other assertion regarding the 1993 conversation is a misinterpretation or misstatement of the testimony of the Aalgaards

and Mr. Deno. This misinterpretation is unreasonable because it is not supported by the testimony of the only witnesses.

At minimum, the different interpretations of the 1993 conversation are a dispute of material fact. As the non-moving party in LeBleus' summary judgment motion, Aalgaards are entitled to have all evidence and any reasonable inferences construed in their favor. Instead the trial court ruled on an issue of fact and Summary Judgment was improper.

Aalgaards respectfully request this Court reverse the trial courts order of summary judgment in favor of LeBleus by granting their own summary judgment motion or vacating the trial court's Order and remanding the case back to the trial court for trial.

The Trial Court also erred by not conducting an *Arnold* analysis as required by the Washington Supreme Court. The particular facts and circumstances of this case make the Trial Court's Order of ejectment inequitable, unjust and oppressive. Had an *Arnold* analysis been completed, the trial court could have reasonably found an award of money damages more appropriate than the harsh order of ejectment.

Aalgaards respectfully request this Court remand the case to the trial court for a proper *Arnold* analysis.

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DATED THIS 4th day of May, 2015.

EVANS, CRAVEN & LACKIE, P.S.

A large, bold, handwritten signature in black ink, appearing to be 'H. C. YAKELY', written over a horizontal line.

By: HEATHER C. YAKELY #28848
Attorney for Appellants/Defendants

DECLARATION OF SERVICE:

On the 4th day of May, 2015, I caused the foregoing document described as Appellants Opening Brief to be served via Hand Delivery at the address listed below on all interested parties to this action as follows:

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