

64104-2

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Nº 64104-2

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

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ROGER FLOE & BETTY FLOE, h/w

Appellants

vs.

DAN N. FIORITO & TIMOTHY T. FIORITO, each as their separate property

Respondents

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**REPLY BRIEF OF APPELLANTS**

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FILED  
COURT OF APPEALS DIV. 1  
STATE OF WASHINGTON  
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## **RESPONSIVE ARGUMENT**

### **A. Motion for Reconsideration**

Appellants filed a motion for reconsideration following the Court's verbal decision. Appellants submitted several additional declarations in support of the motion. These were filed due to Judge Needy making several references at the oral argument on the summary judgment motion to the lack of evidence of use by Appellants beyond mowing the lawn, implying that such additional evidence would be relevant to his decision. See RP 3:22-23; RP 18:25; RP 19:1-4. These issues were not raised by Respondents in their responsive materials; the Court raised them *sua sponte*.

Respondents are correct in that motions for reconsideration are left to the sound discretion of the trial court. It is not the case, however, that additional evidence is absolutely prohibited. Here, Judge Needy invited the evidence that was included in the motion for reconsideration. See RP 3:22-23; RP 18:25; RP 19:1-4. In addition, he stated that the additional declarations would not have changed the outcome, thereby essentially accepting them as evidence. CP 163. Under these circumstances, submission of the additional declarations was not inappropriate.

### **B. Summary Judgment of Dismissal was Improper**

It is fundamental to the law of summary judgments that an appellate court reviews an order of summary judgment *de novo*, considering the facts and the inferences from the facts in a light most favorable to the nonmoving party. *Bremerton Public Safety Ass'n v. City of Bremerton*, 104 Wn.App. 226 (2001). It is equally fundamental that summary judgment is only appropriate where reasonable minds could come but to one conclusion in light of the evidence presented. *Cotton v. Kronenberg*, 111 Wn.App. 258 (2002). In this case, it is submitted that reasonable minds could very easily come to different conclusions based on the evidence presented, and that as a consequence the order dismissing Appellant's case was inappropriate.

In an adverse possession case, the nature of the property dictates the amount or type of use necessary to qualify as "open and notorious". *Riley v. Andres*, 107 Wn.App. 391, 396 (2001). *These are factual issues.* The declarations submitted by Appellants in response to the Respondents' motion, show the existence of disputed material facts. These preclude summary judgment.

Contrary to the statements by respondent in their Reply Brief, page

19, this is not “wild, unimproved, or unfenced land”. While it is true that there is no fence, there are natural boundary delineations acting as the functional equivalent; this is not disputed. It also is undisputed that the area in question appears to be a part of the Appellants’ lawn.

“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 v. Nelson*, 57 Wn. 2d 539, 540 (1961). Respondents do not claim that they have used the area in question. They also do not dispute that the area in question would have reverted to its natural state, i.e. covered with blackberries and other native vegetation (similar in general to the remainder of Respondents’ property), had it not been maintained as a lawn by Appellants. *See* CP 111. Respondents’ Reply Brief, at page 21, mis-states Appellants’ argument in this regard; it is not claimed that Appellants repeatedly cleared brush. What is stated by Appellants in their declarations is, that they cleared brush initially and kept it back by mowing and maintaining the lawn. As was argued at the hearing on the motion, this activity is evidence of possession of the property, by putting the Respondents on notice that it was being actively maintained. RP 4:7-25; RP 5:1-5. These factual issues concerning use, and by extension

possession, preclude summary judgment.

Respondents cite, at pages 23-24 of their Reply Brief, to *Mesher v. Connally*, 63 Wn. 2d 552 (1964), also cited by Appellants in their Brief. The *Mesher* court recognized that “the circumstances and manner of the cutting of a lawn may be an ‘unfurling of the flag’ of hostile ownership”. *Mesher*, 63 Wn.2d at 556. These are factual issues. The Court went on to hold that, in that case, the cutting of the grass *was* sufficient to support a finding of adverse possession. *Id.*

*Mesher* also cited to *Skoog v. Seymour*, 29 Wn.2d 355 (1947), which in turn cited from *Whalen v. Smith*, 183 Iowa 949 (1918), as follows:

To constitute adverse possession or to set in operation the statute of limitations does not necessarily require the claimant to live upon the land, or to enclose it with fences, or to stand guard at all times upon its borders to oppose the entry of trespassers or hostile claimants. It is enough if the person pleading the statute takes and maintains such possession and exercises such open dominion as ordinarily marks the conduct of owners in general in holding, managing, and caring for property of like nature and condition.

Respondents go on to argue that the actions of the Appellants were nothing more than a “neighborly accommodation”, supporting their contention by the statement, without citing any authority, that maintaining

a government easement equates to such an accommodation. It is true that adverse possession claims may not be maintained against the sovereign, but that is irrelevant to this action, as Skagit County is not a party hereto. There is no evidence whatsoever that the Appellants maintained and possessed the area in question merely as a favor to the Respondents.

Besides, Respondents mis-characterize the nature of a “neighborly accommodation”. Neighborly accommodation issues are relevant to whether use by an adverse claimant is exclusive. *Harris v. Urell*, 133 Wn.App. 130, 137, (2006), *quoting Lilly v. Lynch*, 88 Wn.App. 306 (1997). *See also Crites v. Koch*, 49 Wn.App. 171, 174 (1987). Here, there is no evidence that the Respondents (or anyone else apart from Appellants) used the area in question, making the exclusivity element a non-issue, so “neighborly accommodation” is completely irrelevant.

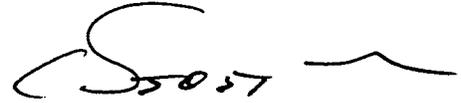
## **CONCLUSION**

Factual issues exist concerning their use and possession of the subject property, requiring a trial. It was improper for the trial court to have deprived them of their day in court.

Based on the foregoing, as well as on the arguments presented by

Appellants' Brief, this Court should reverse the trial court's dismissal of this matter, and remand this matter for trial.

DATED: 2-11-2010

A handwritten signature in black ink, appearing to read 'Sjostrom', with a horizontal line extending to the right.

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