

69174-1

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No. 69174-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ANNE WHYTE, a married person on behalf of her marital community
Appellant,

vs.

CHRISTOPHER JACK and PETRA JENNINGS, and their respective
marital community,

Respondents.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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ORIGINAL

TABLE OF CONTENTS

I.	Introduction.....	1
II.	Issues Pertaining to Assignments of Error.....	1
III.	Statement of the Case.....	2
	A. Terms of the Joint Use Maintenance Agreement and Easement.....	5
	B. Use of the adverse possession area by the parties.....	6
	C. Use of the adverse possession area by previous property owners.....	11
	D. Use of the driveway.....	12
IV.	Argument.....	16
	A. Standard of review.....	16
	B. The trial court properly dismissed Ms. Whyte’s adverse possession claim on summary judgment because there is no evidence of hostile possession.....	13
	1. The record does not establish hostile possession during the requisite ten-year time frame.....	13
	2. Ms. Whyte cannot establish hostile use because the JUMAE permits her and her predecessors to use the adverse possession area and requires them to participate in its maintenance.....	14
	3. Planting does not establish adverse possession because there is evidence of ongoing maintenance.....	19
	C. Ms. Whyte’s prescriptive easement claim was properly dismissed on summary judgment because all of the	

	evidence indicates that the use of the corner of the driveway was permissive.....	21
D.	Dr. Jack and Ms. Jennings are entitled to an award of attorney fees and costs.....	31
V.	Conclusion.....	31

TABLE OF AUTHORITIES

TABLE OF CASES

Washington State Cases:

810 Properties v. Jump, 141 Wn. App. 688, 700, 170 P.3d 1209 (2007).....22

Anderson v. Hudak, 80 Wn. App. 398, 403, 907 P.2d 305 (1995).....16, 19, 20

Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984).....15, 16

Cole v. Laverty, 112 Wn. App. 180, 184, 49 P.3d 924 (2002).....17

Drake v. Smersh, 122 Wn. App. 147, 152, 89 P.3d 726 (2004).....22, 27, 29, 30

Granston v. Callahan, 52 Wn. App. 288, 294, 759 P.2d 462 (1988).....23

Gray v. McDonald, 46 Wn.2d 574, 578, 283 P.2d 135, 138 (1955).....23

Hunt v. Matthews, 8 Wn. App. 233, 236-37, 505 P.2d 819 (1973)....16, 17

Imrie v. Kelly, 160 Wn. App. 1, 250 P.3d 1045 (2010).....28

ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 757, 774 P.2d 6 (1989).....13, 15

Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993).....12, 13

Kunkel v. Fisher, 106 Wn. App. 599, 603, 23 P.3d 1128 (2001).....23, 27

Lee v. Lozier, 88 Wn. App. 176, 182, 945 P.2d 214 (1997).....23

Lingvall v. Bartmess, 97 Wn. App. 245, 250, 982 P.2d 690 (1999).....24

Maier v. Giske, 154 Wn. App. 6, 223 P.3d 1265 (2010).....20

Miller v. Jarman, 2 Wn. App. 994, 997, 471 P.2d 704 (1970)...25, 28, 29

<i>Mood v. Banchemo</i> , 67 Wn.2d 835, 841, 410 P.2d 776 (1966).....	23
<i>Northwest Cities Gas Co. v. Western Fuel Co.</i> , 13 Wn.2d 75, 83-84, 123 P.2d 771, 776 (1942).....	22, 24
<i>Peeples v. Port of Bellingham</i> , 93 Wn.2d 766, 771, 613 P.2d 1128 (1980).....	14
<i>Petersen v. Port of Seattle</i> , 94 n.2d 479, 486, 618 P.2d 67 (1980).....	23
<i>Roediger v. Cullen</i> , 26 Wn.2d 690, 706, 175 P.2d 669 (1946).....	23
<i>Shelton v. Strickland</i> , 106 Wn. App. 45, 50, 21 P.3d 1179 (2001).....	15
<i>Smith v. Breen</i> , 26 Wn. App. 802, 614 P.2d 671 (1980).....	30
<i>Washburn v. Esser</i> , 9 Wn. App. 169, 511 P.2d 1387 (1973).....	30
<i>Wilson v. Steinbach</i> , 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).....	13

STATUTES

RCW 4.16.020.....	13
-------------------	----

REGULATIONS AND RULES

CR 56(c).....	13
RAP 14.2.....	31

OTHER AUTHORITIES

17 W. Stoebuck & J. Weaver, Wash. Prac., <i>Real Estate: Property Law</i> §8.1 at n.1 (2d ed. 2012).....	16
17 W. Stoebuck & J. Weaver, Wash. Prac., <i>Real Estate: Property Law</i> §8.6 (2d ed. 2012).....	18

I. INTRODUCTION

Anne Whyte brought suit against her neighbors, Dr. Christopher Jack and Petra Jennings, over a dispute regarding the ownership of a few square feet of land. CP 5. Ms. Whyte claims to have adversely possessed a sliver of land bordering a shared driveway that services both 6730 West Mercer Way (the Whyte property) and 6740 West Mercer Way (the Jack/Jennings property). CP 2-3. She also claims to have acquired a prescriptive easement to a corner of the driveway. *Id.*

Hostile use is an element of both the claim for adverse possession and the claim for prescriptive easement. Because there was no evidence to indicate hostile use by either Ms. Whyte or her predecessors in interest, Dr. Jack and Ms. Jennings moved for summary judgment. The trial court granted summary judgment and dismissed both claims, holding that Ms. Whyte failed to produce any evidence of hostile use. Ms. Whyte now appeals.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court correctly grant summary judgment against Ms. Whyte on her adverse possession claim because the act of maintaining of an easement that is subject to a joint use and maintenance agreement insufficient to establish the hostile use element of adverse

possession, when the joint use and maintenance agreement requires maintenance of the easement?

2. Did the trial court correctly grant summary judgment against Ms. Whyte on her prescriptive easement claim because there all of the evidence indicates that the use of the corner of the driveway was permissive, and there is no evidence to suggest that the use was hostile?

III. STATEMENT OF THE CASE

Dr. Jack and Ms. Jennings purchased a home at 6740 West Mercer Way from Michael and Mehri Moore on June 15, 2010. CP 150. Prior to their purchase of the property, there was a long running dispute between the Moores and their neighbor, Anne Whyte, regarding use of their respective properties. CP 46. Relations deteriorated to the point that the Moores were forced to retain an attorney to deal with Ms. Whyte. CP 92-94. Unfortunately, Ms. Whyte's behavior only escalated over time, CP 46, 48, 57-58, CP 63-64. The relationship between Ms. Whyte and the Moores became so strained that the Moores obtained an anti-harassment order against Ms. Whyte and painted a white line along the property boundary. CP 46; CP 63-64; CP 92-93, CP 182-83. Eventually, the Moores sold their property and moved on. CP 150.

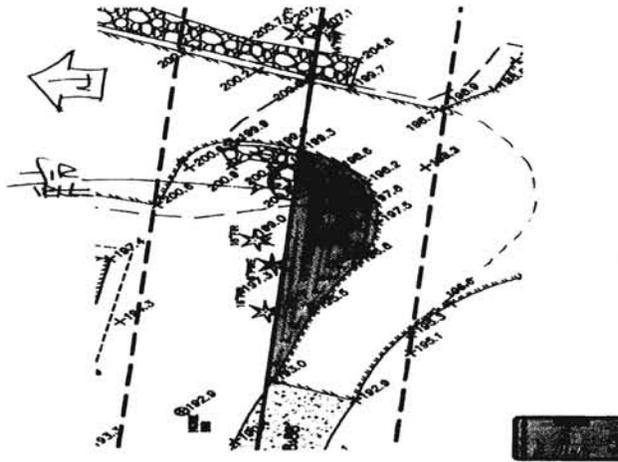
Neighborly relations did not improve when Dr. Jack and Ms. Jennings moved in. Since moving into the home, Dr. Jack and Ms.

Jennings have been subject to a number of complaints and accusations by Ms. Whyte. The harassment by Ms. Whyte was so strident and unremitting that Dr. Jack and Ms. Jennings also sought and obtained an anti-harassment orders against her.¹ CP 47.

The current dispute stems from the use of the shared driveway that serves the two properties. CP 1-8. The driveway runs near the property line. CP 34. The land extending 15 feet on either side of the property line is subject to an easement. CP 35. The easement is governed by an agreement entitled “Joint Use Maintenance Agreement and Easement.” *Id.* This agreement requires both property owners to maintain the property within the easement. *Id.*

The diagram below depicts the area of property at issue in this case:

¹ For a complete picture of Ms. Whyte’s demeanor and behavior toward her neighbors, please see CP 38-67, CP 88-94, and CP 165-170.



CP 246. The property boundary is indicated by a solid line, with the Whyte property on the left (north) side of the solid line and the Jack/Jennings property on the right (south). CP 34; 35. The easement is bordered with a dashed line. CP 34; 35. The area of land that Ms. Whyte claims to have adversely possessed is represented in the green-shaded area. CP 3, ¶3.10; 246. The area shaded in yellow represents the corner of the driveway for which Ms. Whyte claims a prescriptive easement. CP 3, ¶3.11; CP 246.

Until Ms. Whyte moved in, the neighboring homeowners had cooperatively used the shared driveway without incident. CP 144. Since she purchased the property in 2003, Ms. Whyte has initiated vitriolic disputes with her neighbors regarding the use and location of the driveway. CP 46; CP 63-64; CP 92-93, CP 182-83.

Historically, Ms. Whyte has disclaimed any interest in the adverse possession area. In 2007, Ms. Whyte complained to the City of Mercer Island that the trees growing in the adverse possession area were endangering her home and demanded that the City prevail upon the Moores to remove them. CP 46, CP 48, CP 57-58. Ms. Whyte and her husband flagged the trees on that area of land with orange tape, to indicate that they were on the Moore's property. CP 53-54.

Nonetheless, Ms. Whyte now claims to possess the sliver of land bordering the driveway by virtue of adverse possession. CP 1-8. She also claims that she has acquired a prescriptive easement to the corner of the driveway. *Id.* The trial court granted summary judgment in favor of Dr. Jack and Ms. Jennings, holding that Ms. Whyte had failed to put forth any evidence that the use of either of the disputed areas was hostile. CP 240-241. Hostility is an element of both the adverse possession and prescriptive easement claims, and without any evidence to establish it, Ms. Whyte's claims could not survive.

Ms. Whyte now appeals.

A. Terms of the Joint Use Maintenance Agreement and Easement.

The shared driveway and some of the property bordering the driveway is subject to a Joint Use Maintenance Agreement and Easement

(“JUMAE”), which benefits and burdens both properties. CP 35.

The adverse possession area is on the Jack/Jennings property but within the easement, and thus falls within the scope of the JUMAE. CP 3, ¶3.8-3.10. Neither party disputes the validity or applicability of the JUMAE. The JUMAE was created when the properties were originally developed back in 1972. CP 35. The original owners of the respective properties created the JUMAE “for themselves, their successors and/or assigns...for the construction, improvement, repair and maintenance for roadway and utilities over across and upon” the two properties. *Id.* The JUMAE also contains a provision by which the original owners and “their successors and/or assigns do hereby enter into a *mutual* maintenance agreement and shall now and forever be required to maintain the road and utilities on said easement in a reasonable state of repair at all times, and any expense or cost thereof shall be borne equally by the beneficial owners of said lots 8 and 9.” *Id.* (emphasis added).

B. Use of the adverse possession area by the parties.

Although Ms. Whyte now claims that the adverse possession area belongs to her, she has not always maintained such a claim. In 2007, while the Moores occupied the property now owned by Dr. Jack and Ms. Jennings, Ms. Whyte complained vociferously to the Mercer Island Police Chief that the trees in the adverse possession area were “planted too close

together to be healthy and dangerously too close to our home.” CP 46, 48, 57-58. She asked the police chief to tell her exactly where the property line was so she would know whether she was permitted to remove the trees. CP 48. Ms Whyte did not remove the trees herself, nor did she insist that she had the right to do so. In fact, she and her husband tagged the trees in the adverse possession area with orange tape to indicate that they belonged on the Moores’ side of the property line. CP 49-56.

Ms. Whyte continued to insist that the trees were a danger. In 2008 she sent another email to the Mercer Island Police Chief complaining that the trees were “sick, dying, unhealthy, and/or dangerous” and posed “an imminent hazard” to her “health, welfare, and safety.” CP 57. She voiced a concern that the trees would fall and cause damage to her home as well as “bodily harm.” *Id.* Still, she did nothing to address this allegedly dangerous condition.

After Dr. Jack and Ms. Jennings moved into the property, they cut down the offending trees. CP 59-60. Even though Ms. Whyte had repeatedly demanded the removal of the trees, she now claims damages against Dr. Jack and Ms. Jennings for cutting down the very same trees she demanded be removed. *Id.* When asked about this inconsistency at her deposition, Ms. Whyte testified as follows:

Q. ...And you've just drawn a circle and a line that's going to depict the fir tree you're referencing in your Complaint.

A. And I'm writing "fir tree."

Q. And isn't it true that that's also one of the dangerous, sick, dying trees you were referencing in Exhibit No. 8?

A. And 50 percent of it is mine.

CP 61.

In addition to the trees, a rockery also exists within the adverse possession area. CP 82. Ms. Whyte repeatedly insisted to employees of the City of Mercer Island in 2009 that the Moores built and maintained the rockery in the adverse possession area. CP 63. Ms. Whyte admitted, in fact, that the rockery that the Moores built and maintained was on the Moores' property. *Id.* She did not assert any ownership interest in the rockery or the adjacent land. *Id.* Even though the rockery was apparently a source of great distress to her because it allegedly limited the ability of delivery trucks to access her home, Ms. Whyte never attempted to remove, alter, or modify the rockery to increase her driveway space.

Ms. Whyte instead insisted that the City of Mercer Island take action to force the Moores to remove the rockery and accused the Moores of being "mentally unstable," "irrational," "self-aggrandizing," "vile,

abusive, violent,” and “dangerous.” CP 64. Ms. Whyte claimed that the Moores perpetrated a number of crimes against her, including assault with their vehicles, battery, burglary, trespass, attempted robbery, harassment, and sending “nasty minions” onto her property.² CP 46; CP 48; CP 67. She labeled the Moores’ attorney as “vile and abusive” as well, alleged that he had “violated the ethical standards of the Washington State Bar,” and also accused him of criminal behavior. CP 46; CP 48.

By seeking the assistance of the City and failing to address the issues with the rockery herself when she was allegedly under such extreme duress, Ms. Whyte acknowledged by her actions that she had no claim of right to the rockery itself or the adverse possession area.

In fact, it was Dr. Jack and Ms. Jennings who moved the rockery and increased the driveway space. CP 4. Even though Ms. Whyte had demanded for years that the rockery be moved to increase the driveway space, she now claims damages for trespass related to the removal and reinstallation of the rockery. *Id.*

C. Use of the adverse possession area by previous property owners.

Ms. Whyte purchased the Whyte property from June Skidmore in

² The Moores were never prosecuted for any of these alleged crimes. CP 67. Ms. Whyte contends that this is because, “Mercer Island doesn’t seem to take those [crimes] very seriously.” *Id.*

July 2003. CP 116. Ms. Skidmore had lived there since 1975. CP 122. While living there, Ms. Skidmore planted some ground cover in the adverse possession area. She believed that she may also have planted a rhododendron and possibly an azalea in the adverse possession area. CP 145. She testified with regard to her use of the adverse possession as follows:

Q. Did you have to water that area?

A. Infrequently.

Q. Did you ever do any weeding in that area?

A. No.

Q. So as you sit here today, is it your testimony that you did not maintain that area called the bulb?

...

A. I don't think that applies.

Q. What do you mean?

A. If it's ground cover it doesn't take any looking after.

CP 239. There is no evidence in the record as to when the planting took place. At some undetermined time after 1991, Ms. Skidmore installed an

irrigation system.³ Ms. Skidmore also testified that she installed two “good sized” rocks shortly after moving in, CP 125-126, but there is no evidence in the record as to whether these rocks were located in the adverse possession area.

D. Use of the driveway.

Until Ms. Whyte moved in, the owners of the neighboring properties had no disputes regarding use of the driveway. CP 143-144. According to June Skidmore, the use of the driveway “never came up” in conversations with her neighbors. CP 144. Each property owner used the driveway as needed without conflict. CP 143-144.

Ms. Skidmore testified that, at times, she would drive all the way up to the neighboring house in order to turn around:

Or sometimes we'd drive into the other, you know, straight back. So we were going into the other house and then turning around. It's a space, nobody is using it, just go down.

CP 143. Things changed when Ms. Whyte arrived in July of 2003. CP 116.

Due to the acrimony created by Ms. Whyte over the driveway, in 2010 Dr. Jack constructed a 12 inch high concrete barrier that ran along

³ Ms. Skidmore testified that the irrigation system was installed after her husband died. CP 127. She had testified earlier in the deposition that her husband passed away in 1991. CP 122.

the outer boundary of the easement. CP 194. Upon learning of the barrier, Ms. Whyte immediately complained to the City of Mercer Island. CP 194. A code compliance officer visited the property and dismissed her complaint as unfounded, concluding that the barrier did not impede the fire department's access to her property.⁴ *Id.* Ms. Whyte did not appeal this decision or seek any other redress of the City's dismissal of her complaint. The City's decision is thus not before the court.

Ms. Whyte "fled" the property after Dr. Jack and Ms. Jennings moved in. CP 88. She moved back to her home in California,⁵ where she has since remained. CP 89.

IV. ARGUMENT

A. Standard of review.

In reviewing a summary judgment order, the Court of Appeals engages in the same inquiry as the trial court, evaluating the matter *de novo*. *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). The appellate court considers the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party.

⁴ Ms. Whyte contends in her opening brief that the barrier narrows the driveway to a width of six feet. *Appellant's Opening Brief*, p.1. In her complaint to the City, she acknowledges that the width is actually 9.88 feet. CP 194.

⁵ Historically, Ms. Whyte has had numerous disputes with her neighbors in California as well. These disputes include her accusation that the business students renting the home next door were involved in prostitution, an unnamed dispute with another tenant of a neighboring property, and a conflict with a neighbor whose dog barked. CP 42; CP 90.

Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is proper if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. CR 56(c); *Kruse*, 121 Wn.2d at 722.

B. The trial court properly dismissed Ms. Whyte's adverse possession claim on summary judgment because there is no evidence of hostile possession.

1. The record does not establish hostile possession during the requisite ten-year time frame.

Preliminarily, the court should note that the record on appeal does not support Ms. Whyte's claim of adverse possession over the requisite time frame. Each of the four elements of adverse possession must have existed for at least 10 years before title through adverse possession can be had. *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989) (citing RCW 4.16.020). The record is devoid of any reference to when the landscaping activities by Ms. Skidmore, upon which Ms. Whyte so heavily relies, took place. Ms. Whyte does not define the time period during which she claims the adverse possession occurred. Dr. Jack and Ms. Jennings installed new landscaping in the adverse possession area in 2010, CP 4, giving rise to this lawsuit, which was filed in 2011. CP 1. Ms. Skidmore was in possession of the property until 2003. If Ms. Skidmore did not conduct her landscaping activities until sometime after

2000, then Ms. Whyte cannot establish the ten year period required to assert adverse possession. There is no evidence from which we can infer that the landscaping activities by Ms. Skidmore took place prior to 2000. Ms. Whyte's claim for adverse possession thus fails. The court does not need to reach the law on adverse possession because Ms. Whyte's claim is unsupported by the facts in the record.

2. Ms. Whyte cannot establish hostile use because the JUMAE permits her and her predecessors to use the adverse possession area and requires them to participate in its maintenance.

Even if we disregard the lack of factual support for Ms. Whyte's claim, her adverse possession claim still fails as a matter of law. The landscaping activities performed by Ms. Skidmore were permitted, and even required, by the JUMAE. Summary judgment was, therefore, properly granted by the trial court.

Although adverse possession is typically a mixed question of law and fact, there is no dispute in this case as to the relevant facts related to the use of the property by the parties and by previous landowners. Summary judgment was appropriate here, because the issue of whether the facts constitute adverse possession is for the court to determine as a matter of law. *Peeples v. Port of Bellingham*, 93 Wn.2d 766, 771, 613 P.2d 1128

(1980), *overruled on other grounds by Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984).

The elements of adverse possession are well-settled. “To establish ownership of a piece of property through adverse possession, a claimant must prove that his or her possession of the property was: (1) open and notorious, (2) actual and uninterrupted, (3) exclusive; (4) hostile and under a claim of right, (5) for a period of 10 years.” *Shelton v. Strickland*, 106 Wn. App. 45, 50, 21 P.3d 1179 (2001). “As the presumption of possession is in the holder of legal title, the party claiming to have adversely possessed the property has the burden of establishing the existence of each element.” *ITT Rayonier, Inc.*, 112 Wn.2d at 757 (citations omitted).

Ms. Whyte cannot establish the fourth element of adverse possession: that possession of the property was hostile and under a claim of right. The adverse possession area falls within the driveway easement and was therefore governed by the JUMAE. The JUMAE required Ms. Whyte and her predecessors to bear half of the burden of maintaining the driveway. Despite the fact that the JUMAE sets forth, Ms. Whyte nonetheless claims that maintenance of the property bordering the driveway amounts to hostile possession. As a matter of law, these acts are insufficient to establish hostile possession.

The element of hostility is “the very marrow of adverse possession.” 17 W. Stoebeck & J. Weaver, Wash. Prac., *Real Estate: Property Law* §8.1, at 73 n.1 (2d ed. 2012). Hostile possession must be unequivocal. As explained in *Hunt v. Matthews*, 8 Wn. App. 233, 236-37, 505 P.2d 819 (1973), *overruled on other grounds by Chaplin*, 100 Wn.2d 853, 676 P.2d 431:

The acts constituting the warning which establishes notice must be made with sufficient obtrusiveness to be unmistakable to an adversary, not carried out with such silent civility that no one will pay attention.... Real property will be taken away from an original owner by adverse possession only when he was or should have been aware and informed that his interest was challenged.

What constitutes possession or occupancy of property for purposes of adverse possession necessarily depends upon the nature, character, and locality of the property involved and the uses to which it is ordinarily adapted or applied. *Anderson v. Hudak*, 80 Wn. App. 398, 403, 907 P.2d 305 (1995).

An owner cannot be “aware and informed” if the use of the land is consistent with an existing easement. In this case, Whyte and her predecessors did nothing more than was what expected of them pursuant to the JUMAE: they maintained the driveway and its border. They did nothing to indicate that they were asserting a right of exclusive ownership

over the property. Their use was entirely consistent with the JUMAE. The owners of both properties were entitled to use the easement, and they did. Both were required to maintain the easement, and they did. Ms. Whyte can show no actions on her part or on the part of her predecessors to demonstrate that Dr. Jack and Ms. Jennings or their predecessors were or should have been “aware and informed” that their interest in the easement was challenged.

Because use of an easement is expected, hostile possession is difficult to establish when an easement exists. Typically, it is the owner of the servient estate who claims adverse possession in order to terminate an easement. In such a case a high bar exists to establish hostile possession:

Hostile use is difficult to prove. The servient estate owner has the right to use his or her land for any purpose that does not interfere with the enjoyment of the easement.

Cole v. Laverty, 112 Wn. App. 180, 184, 49 P.3d 924 (2002). The roles are reversed in our case, because the adverse possession claim here is being made by the owner of the dominant estate, rather than the owner of the servient estate. However, the principles remain the same, because the pivotal issue in both situations is whether the owner was “aware and informed” that his interest in the property was being challenged. See *Hunt*, 8 Wn. App. at 236-37. Where an easement exists and a property

owner is entitled to use the easement, most uses will not be perceived hostile.

In order to be hostile, and thus put a landowner on notice, the use must be inconsistent with the easement:

It is possible, however, for an easement, though a nonpossessory interest, to be extinguished by a form of adverse possession. **This will not occur simply by someone's adversely possessing the land that is subject to the easement, for that is not in itself inconsistent with the existence of the easement.** In fact, the person who extinguishes the easement need not be an adverse possessor of the burdened land; he may be, but he may as well be, and probably usually is, the owner of the land. The easement can be extinguished by acts on the ground that are inimical to *it*, essentially acts that prevent enjoyment of the easement. For instance, an easement of passage may be extinguished if the owner of the burdened land or an adverse possessor of that land maintains a substantial object, such as a wall or building, that blocks the easement sufficiently to prevent its use.

17 W. Stoebeck & J. Weaver, Wash. Prac., *Real Estate: Property Law* §8.6 (2d ed. 2012). Ms. Skidmore's use was not inconsistent with the easement and did not prevent enjoyment of the easement. It therefore cannot be construed as hostile.

Ms. Whyte relies upon several cases in which adverse possession is gained by landscaping, but these cases are inapplicable. None of the

case law cited by Ms. Whyte pertains to an area of land that is both (1) in an easement; and (2) subject to a joint use and maintenance agreement. The easement gave Ms. Whyte and her predecessors the right to use the delineated property, so their use of the property is not hostile. Further, maintenance of the property is not only expected, it is required by the JUMAE. For these reasons, Ms. Whyte cannot establish hostile possession as a matter of law.

3. Planting does not establish adverse possession because there is evidence of ongoing maintenance.

Regardless of the JUMAE, merely planting ground cover and shrubbery does not amount to adverse possession because there is no evidence of ongoing maintenance of the landscaping. Ms. Skidmore testified that the plants she planted did not “take any looking after.” CP 239. Ms. Skidmore’s minimal landscaping activities therefore are insufficient to establish hostile possession.

In *Anderson v. Hudak*, 80 Wn. App. 398, 907 P.2d 305 (1995), for example, merely planting a row of trees was insufficient as a matter of law to establish adverse possession. Because there was no evidence in *Anderson* that the plaintiff cultivated or cared for the trees, her claim for adverse possession failed. *Id.* at 404. The court held that to succeed on an adverse possession claim, a plaintiff must furnish “some evidence of usage

of the disputed property during the statutory period...such as clearing land, mowing grass, and maintaining shrubs and plants.” *Id.* This makes sense, because one cannot be held to possess land under a claim of right if he or she does nothing more than simply plant trees and watch them grow.

Similarly, in *Maier v. Giske*, 154 Wn. App. 6, 223 P.3d 1265 (2010), Giske claimed to have acquired a corner of Maier’s lot by virtue of the fact that she had planted a tree and other vegetation in the area. The trial court rejected this claim, holding that although the tree was very special to Giske, its planting and the planting of some nearby vegetation did not satisfy the notoriety and hostility elements required for adverse possession. *Id.* at 19. The trial court explained, “It is not clear that she had maintained the plants in the area in a way that would be recognized by others....” *Id.*

The Court of Appeals affirmed, noting that

[W]hen Giske was asked what she had done to take care of the area, she responded, “Well, it’s in an area of wild vegetation.” She gave no indication that she did anything other than plant a tree and some other vegetation in the area.

Id. at 20. Because Giske did not prove that she used the property beyond the initial planting, she could not establish adverse possession.

Our case is like *Anderson* and *Maier*, because June Skidmore explicitly stated that she did not maintain the landscaping she planted:

Q. Did you have to water that area?

A. Infrequently.

Q. Did you ever do any weeding in that area?

A. No.

Q. So as you sit here today, is it your testimony that you did not maintain that area called the bulb?

...

B. I don't think that applies.

Q. What do you mean?

A. If it's ground cover it doesn't take any looking after.

CP 239. An episode of planting, followed by infrequent watering, cannot constitute adverse possession as a matter of law, because it does not show continuous hostile occupation of the land. It provides no notice to the owner or the world at large that she is affirmatively staking a claim to that area of land. It cannot, therefore, support a claim for adverse possession.

C. Ms. Whyte's prescriptive easement claim was properly dismissed on summary judgment because all of the evidence indicates that the use of the corner of the driveway was permissive.

There is no evidence that the use of the corner of the driveway was

hostile. Hostile or adverse use is an essential element of a prescriptive easement claim. *Kunkel v. Fisher*, 106 Wn. App. 599, 602, 23 P.3d 1128 (2001). The trial court therefore properly dismissed Ms. Whyte's prescriptive easement claim on summary judgment.

Although hostile versus permissive use is generally a question of fact, it can be resolved as a matter of law when, as in this case, the essential facts are not in dispute. *Drake v. Smersh*, 122 Wn. App. 147, 152, 89 P.3d 726 (2004).

Ms. Whyte claims a prescriptive easement to a corner of the driveway that extends just beyond the boundaries of the easement. While use of the corner of driveway is not necessary for ingress and egress, the surface of the driveway at the corner was paved and available for vehicle travel, and potentially made access more convenient. Because Ms. Whyte has no evidence to suggest that her predecessors in interest used the corner of the driveway in a hostile or adverse manner, she cannot prevail on her claim for a prescriptive easement. Her claim was thus properly dismissed on summary judgment.

Prescriptive easements are disfavored in the law. *E.g.*, *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 83-84, 123 P.2d 771, 776 (1942). In a claim for prescriptive easement, the court may imply or presume that use was permissive and not adverse. *E.g.*, *810 Properties v.*

Jump, 141 Wn. App. 688, 700, 170 P.3d 1209 (2007) (“We start with the presumption that the use of another's property is permissive”); *Kunkel*, 106 Wn. App. at 603 (“In a claim for a prescriptive easement there is a presumption that the servient property was used with the permission of, and in subordination to, the title of the true owner”); *Lee v. Lozier*, 88 Wn. App. 176, 182, 945 P.2d 214 (1997) (use of property is rebuttably presumed to be permissive); *Granston v. Callahan*, 52 Wn. App. 288, 294, 759 P.2d 462 (1988) (“The inference of permissive use is applicable to any situation in which it is reasonable to infer that the use was permitted by sufferance and acquiescence”); *Petersen v. Port of Seattle*, 94 n.2d 479, 486, 618 P.2d 67 (1980)(“[W]e also consider that a use of property, at its inception, is presumed to be permissive”); *Mood v. Banchemo*, 67 Wn.2d 835, 841, 410 P.2d 776 (1966) (“The fact of possession or use alone, however, raises a presumption that such use was with the consent of the respondents or the true owners”); *Gray v. McDonald*, 46 Wn.2d 574, 578, 283 P.2d 135, 138 (1955) (“The following general principles have been announced by this court with reference to prescriptive rights...A use, at its inception, is presumed to be permissive”); *Roediger v. Cullen*, 26 Wn.2d 690, 706, 175 P.2d 669 (1946) (“When one enters into the possession of another's property there is a presumption that he does so with the true owner's permission and in subordination to the latter's title”). The party

claiming the prescriptive easement bears the burden of proving adverse use. *Northwest Cities*, 13 Wn.2d at 84.

Adverse use is measured objectively based on the observable acts of the user and the rightful owner. *Lingvall v. Bartmess*, 97 Wn. App. 245, 250, 982 P.2d 690 (1999). Using this objective standard, the linchpin of the prescriptive easement claim is this: When Ms. Skidmore turned the corner of the driveway wide, straying a few feet across the property boundary, were her neighbors objectively put on notice that Ms. Skidmore was staking a claim to their property? Objectively, would a reasonable landowner have defended the boundaries of his properties by forbidding Ms. Skidmore to stray a few feet over the property boundary when traversing the driveway, even though Ms. Skidmore's route adversely affected no one? The only reasonable answer to these questions is no. The law related to prescriptive easements would be Machiavellian indeed if it required a landowner to police his or her property boundary to with such hypervigilance.

Most landowners would not object to Ms. Skidmore's acts. While Ms. Whyte has been historically contentious with her neighbors, Ms. Skidmore and her family had no trouble comporting themselves in an agreeable and neighborly fashion. In fact, Ms. Skidmore testified that she was "very good friends" with her neighbors. CP 144. A friendly

relationship between neighbors is a circumstance more suggestive of permissive use than adverse use, and indicates that use was permitted as a neighborly courtesy. *Miller v. Jarman*, 2 Wn. App. 994, 997, 471 P.2d 704 (1970).

The fact that Ms. Skidmore may have taken the corner of the driveway wide on occasion and crossed the boundary of the easement thus does not amount to hostile possession. Ms. Skidmore testified that her neighbors had no objection to her using the entire driveway, all the way up to the neighbors' home, which was well outside of the boundaries of the easement. Ms. Skidmore would routinely back her car all the way into her neighbors' driveway when leaving the property:

Q. What about the—I know I'm going to get their name wrong—the Skugstads?

A. Skugstads, yes.

Q. Did you have any conversations with them about the driveway?

A. No. We were very good friends. We knew them.

Q. So when, you know, did you ever ask them if you could back directly into their driveway to get out of the driveway?

A. No. I don't think it ever came up.

Q. And did you ever discuss with them your use of what you've described as the turnaround area on Exhibit 32?

A. No. We both used it.

Q. What about the family with the four children, did you ever have discussions about the driveway with them?

A. No.

Q. What about the Moores?

A. No.

CP 144. Each of the prior owners of the Jack/Jennings property permitted Ms. Skidmore to back up all the way into their driveway in order to turn around. They permitted her this neighborly accommodation, so an implication or presumption that they also permitted her to take the corner of the driveway wide necessarily follows as common sense.

Ms. Whyte has no evidence to establish hostility, especially in the face of Ms. Skidmore's affirmative testimony that her neighbors permitted her other accommodations with regard to the use of the driveway. It would be ridiculous to argue that the neighbors permitted Ms. Skidmore to back up into their driveway but did not permit her to swing wide around the corner of the driveway. Ms. Whyte cannot, therefore, establish that use of the corner of the driveway was hostile.

Many cases have addressed the issue of whether shared use of a roadway that serves multiple properties justifies a prescriptive easement. Typically, use of a shared roadway is found to be a permissive use as a neighborly accommodation. For example, in *Kunkel v. Fisher*, 106 Wn. App. 599, the plaintiff claimed a prescriptive easement relating to a gravel road on an adjacent parcel of property. He traversed the road on a daily basis for 20 years to access his property. The adjacent landowners were aware of his use of the road and never objected. When a conflict over the use of the road arose, the plaintiff claimed a prescriptive easement, arguing that his continuous use of the driveway proved the element of hostility. The trial court granted the easement, but the Court of Appeals reversed, holding that the evidence was not sufficient to overcome the presumption⁶ of permissive use. *Id.* at 605.

Ms. Whyte argues that it is error to rely upon *Kunkel v. Fisher*, implying that *Kunkel* was overruled by *Drake v. Smersh* and thus is no longer good law. This is not true. The court in *Drake* did not abrogate *Kunkel*. The court in *Drake* parsed the difference between a presumption as opposed to an inference of permissive use, but explicitly held:

Although we acknowledge that *Kunkel* was not clearly reasoned, we emphasize that had

⁶ As previously stated, under *Drake*, the result would have been the same whether permission was presumed or implied.

we *inferred* neighborly accommodation as the law allows, rather than applying a *presumption*, **the outcome in that case would have been the same.**

Id. at 154 n.18 (emphasis added). As recognized in *Drake*, the court in *Kunkel* uses the “imply” and “presume” interchangeably. In any event, *Drake* clarified that, when the facts in a case support an inference that use was permitted by neighborly accommodation, a court may imply that use was permissive and accordingly conclude that the claimant has not established the element of adverse use.

Moreover, *Imrie v. Kelly*, 160 Wn. App. 1, 250 P.3d 1045 (2010), which was decided after both *Kunkel* and *Drake*, relied upon *Kunkel* in rejecting a claim for prescriptive easement and holding that use of an access road was permissive. In *Imrie*, the plaintiff sought a prescriptive easement to a road that he had used to access his property for ten years. *Id.* at 6. The plaintiff neither asked for nor was granted permission to use the road. *Id.* at 10. Nonetheless, the court in that case implied permissive use, noting that the plaintiff failed to establish that he “acted in a manner demonstrating a right to use the property without regard to the wishes of the owner.” *Id.*

Similarly, in *Miller v. Jarman*, 2 Wn. App. 994, 471 P.2d 704 (1970), the plaintiffs claimed a prescriptive easement to their neighbor’s

driveway. The court rejected the claim, concluding that use of the driveway was permissive. *Id.* at 998. In reaching this conclusion, the court stated:

The use of the Jarmans' driveway by the Millers did not in any way interfere with the use of the driveway by the Jarmans. This circumstance also justifies the inference that such use by the nonowner is with the permission of the owner and signifies the owner is permitting his neighbor to use the driveway in a neighborly way.

Id. Permissive use was therefore implied, even though there was no evidence that permission was explicitly granted.

The undisputed facts in this case support the conclusion that the use of the corner of the driveway by Ms. Skidmore was permissive. There is no evidence offered by Ms. Whyte to suggest that Ms. Skidmore's use was adverse. Although permissive use is typically a question of fact, if the essential facts are not in dispute, it can be resolved as a question of law. *Drake*, 122 Wn. App. at 152. Here, Ms. Skidmore was friendly with her neighbors and that her neighbors allowed her to use the driveway in any manner she pleased, up to and including backing her car all the way up to their house. The only conclusion that can be drawn from this evidence is that Ms. Skidmore's neighbors accommodated her with respect to the driveway. There is no evidence to support the argument that Ms.

Skidmore was asserting a hostile claim of right to a portion of the driveway.

Because the use was permissive, it cannot give rise to a prescriptive easement. “A use that is permissive in its inception cannot ripen into a prescriptive right, no matter how long it may continue, unless there has been a distinct and positive assertion by the dominant owner of a right hostile to the owner of the servient estate.” *Id.* at 603-04.

Ms. Whyte argues that the fact that the driveway was jointly constructed many years ago indicates hostile use, citing *Washburn v. Esser*, 9 Wn. App. 169, 511 P.2d 1387 (1973), and *Smith v. Breen*, 26 Wn. App. 802, 614 P.2d 671 (1980). In those cases, however, there was no easement created in conjunction with the driveway construction. The fact that the parties in those cases worked together to construct a driveway was thus indicative that each party later used the jointly constructed driveway under a claim of right. A prescriptive easement was necessary because an express easement was not created. In our case, however, an easement was expressly created when the driveway was constructed. An easement need not be created by prescription because an easement already exists. *Washburn* and *Smith* are inapposite.

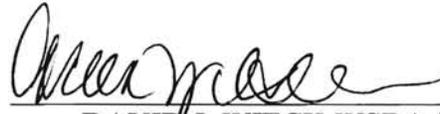
D. Dr. Jack and Ms. Jennings are entitled to an award of attorney fees and costs.

As the prevailing parties on appeal, Dr. Jack and Ms. Jennings are entitled to an award of fees and costs under RAP 14.2.

V. CONCLUSION

Therefore, for the reasons set forth above, this court should affirm the trial court's decision.

RESPECTFULLY SUBMITTED this 2nd day of January, 2013.



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