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69565-7

NO. 69565-7-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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LEIGH M. KELLOGG and RUTH E. PELAN, Appellants,

vs.

GARY D. CORPRON and SUSAN M. CORPRON, Respondents.

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BRIEF OF RESPONDENTS

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION I  
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COGDILL NICHOLS REIN  
WARTELLE ANDREWS VAIL  
By: Patrick Vail, WSB# 34513  
3232 Rockefeller Avenue  
Everett, Washington 98201  
(425) 259-6111  
Attorney for Respondents

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## **A. INTRODUCTION**

Respondents Gary and Susan Corpron (the “Corprons”) submit this Brief in opposition to the Brief of Appellants.

This matter arises from a boundary dispute between neighbors involving a claim of adverse possession made by Appellants. At trial, the Court correctly held the Appellants failed to meet their burden to prove all the elements of adverse possession existed for any consecutive 10 year period.

Appellants primarily based their claim at trial on the existence of fencing in the Disputed Area. However, the evidence at trial clearly showed the installation, purpose and use of that fencing was as a privacy barrier and to contain animals. Nothing in the record supports the notion that fencing was installed or used as a “line” fence to establish the boundary between the properties. Indeed, that fencing, which runs north-south, only extends about a third of the length of the properties, does not touch either the northern or southern boundaries of either property and runs diagonally.

Furthermore, the testimony at trial showed no actual, continuous or exclusive use of the Disputed Area by either Appellants or their predecessors up to the fence line. The only use and maintenance (periodic containing of animals, weeding and mowing) was extremely sporadic and

lasted far less than the 10 year consecutive period required for adverse possession. Furthermore, that testimony showed the Corprons regularly used and occupied the Disputed Area from the time they purchased their home, destroying exclusivity.

Finally, and most significantly, the uncontroverted evidence at trial showed the Corprons removed the enclosed portion of the fencing at issue less than 10 years after its installation, breaking any prescriptive period.

Because they could not show fencing or any other sufficient actual use existed in the Disputed Area for any consecutive 10 year period, Appellants now argue that period began running when one of their predecessors allegedly started grading and performing other related activities on their property. However, grading and clearing is insufficient actual use under Washington law to support a claim for adverse possession. Additionally, there is no evidence in the record showing any of the following claimed activities occurred in the Disputed Area: (a) logging; (b) clearing; (c) installation or maintenance of a mobile home, septic system, well, or barn; and/or (d) “rough” grading. That predecessor’s testimony also does not show either the “rough” or “final” grading actually occurred more than 10 years before the Corprons removed the fencing upon which Appellants base their claim.

The Trial Court correctly held Appellants failed to meet their burden to prove adverse possession. This Court should affirm that decision on appeal.

**B. STATEMENT OF THE CASE**

1. Corpron Real Property. The Corprons own a parcel of real property located at 10811 132<sup>nd</sup> Street NE, Arlington, Snohomish County, Washington. (CP 31; Ex 2; RP 11, 26).

The Corprons purchased that Property from Evelyn Dorsett (“Dorsett”) on or about September 11, 2003. (Ex 2; RP 25-26). They have occupied that Property continuously from the time of purchase to date. (Id.).

Prior to the Corprons’ purchase of the Property, Dorsett owned and occupied that Property from approximately March 4, 1987 to September 11, 2003. (Ex 2). During that period, Dorsett’s son, Darold Anderson (“Anderson”) periodically lived with and visited Dorsett on that Property. (RP 142).

2. Kellogg Real Property. Appellants Leigh Kellogg (“Kellogg”) and Ruth Pelan own a parcel of real property that sits immediately to the west of the Corpron Real Property. (Ex 3). They purchased their Property on or about October 26, 2004 from Mark Selvig (“Selvig”) and Jennifer Selvig. (Ex 1).

Kellogg lived on that Property from the time of purchase until 2012, when she began renting it to a third party. (RP 213). Prior to Kellogg purchasing her Property, Selvig lived on that Property from approximately 1999 to 2004. (Ex 1).

Prior to Selvig purchasing the Kellogg Real Property, Michael Van Putten (“Van Putten”) owned and lived on that Property from approximately 1995 to 2000. (Ex 1; RP 58). During that period, Van Putten’s ex-wife, Lori Takaki (“Takaki”) also lived on the Kellogg Real Property with Van Putten. (RP 95-96).

3. Disputed Area. This case involved a portion of property that can be generally described as a triangle shaped strip of land located on the Corpron Real Property near its western boundary (the “Disputed Area”). (Ex 3; RP 16). That area sits between the existing fence line, which runs northerly-southerly to the east of that western boundary, and that surveyed western boundary line. (Id.).

The survey prepared by licensed surveyor Bob Huey, recorded under Snohomish County Recording No. 201008115010 and admitted into evidence at trial as Exhibits 3 and 16 (which contain more detailed measurements), more particularly depicts the location and dimensions of the Disputed Area (the “Survey”). (RP 13-14).

4. Fencing. The fence line at issue in this matter for purposes of the adverse possession claim generally consists of the following:

a. Wood/Lattice Fence. Prior to 1995, Dorsett constructed a wood post and lattice fence in the Disputed Area. (RP 73). That fence runs northerly-southerly in the location shown in Exhibit 16.

Thereafter, Dorsett added cedar slats to that wood post and lattice fence. (RP 41). Dorsett's son, Anderson, extended the cedar fence southward an additional length. (RP 145).

The Wood/Lattice Fence<sup>1</sup> is a "hanging" fence. Its most northerly point remains a substantial distance from and does not touch or meet the Northern Boundaries of either the Corpron or Kellogg Real Properties. (Ex 3; Ex 16; RP 16). Its most southerly point remains a substantial distance from and does not touch or meet the Southern Boundaries of either the Corpron or Kellogg Real Properties. (Id.). Thus, that Fence allows easy access from one side of the Fence to the other and between the Corpron and Kellogg Real Properties. (Id.).

The Wood/Lattice Fence only runs approximately one third of the total length of the Western Boundary of the Corpron Real Property. (RP

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<sup>1</sup> For ease of reference, the wood post, lattice, and cedar fence will be referred to as the "Wood/Lattice Fence".

16). That Fence also does not run directly parallel with that Boundary, but rather angles in an easterly direction as it extends northerly. (RP 16; 21).

The Wood/Lattice Fence was installed, maintained and used solely as a privacy barrier, including as a screen for visibility, odor and dust, between the Corpron and Kellogg Real Properties. (RP 35, 38, 145, 147). Anderson specifically testified that the purpose and use of the fence was "... to block the oncoming foul air and flies that were coming across the property line." (RP 145).

There was no evidence introduced at trial that supported an inference that the Wood/Lattice Fence was installed, maintained or used as a line fence or demarcation of the boundary between those Properties. The Wood/Lattice Fence sits entirely on the Corpron Real Property. (Ex 3; Ex 16).

b. Van Putten Fence. In May of 1995, Van Putten installed a wire gauge and post fence in the Disputed Area (the "Van Putten Fence"). (Ex 3; Ex 16; RP 109, 119, 161). That fence generally ran northerly-southerly and was immediately adjacent to the western side of the Wood/Lattice Fence. (RP 119).

Van Putten admitted his Fence was installed, maintained and used to contain animals on the Kellogg Real Property and keep those animals off the Wood/Lattice Fence. (RP 99, 163). The Van Putten Fence was not

installed, maintained or used as a line fence. When Van Putten was asked “(a)nd you installed and used that fence to keep horses on the property and to keep the animals in and out, ” he answered “(c)orrect”. (RP 163).

Similarly, when asked what the purpose and use of the Van Putten Fence was Lori Takaki stated, “(j)ust to contain the horses into the property.” (RP 99).

c. Kellogg Fence.

In 2007, Kellogg installed a wood post and electric fence in the Disputed Area (the “Kellogg Fence”). (Ex 13; Ex 13(a); RP 207, 208). That fence generally runs in a northerly-southerly direction to the north of the most northerly post of the Wood/Lattice Fence. (Id.). That fence remained in place through trial.

5. Historic Use and Maintenance of Disputed Area. Neither Kellogg nor her predecessors used, maintained or kept a line fence in the Disputed Area for any consecutive ten-year period. Specifically, the use up to the fence line was as follows:

a. General Use by Van Putten/Takaki. From approximately 1995 to 2000, Van Putten and Takaki kept horses on the Kellogg Real Property and in the Disputed Area. (RP 99-100). After approximately 2000, no one kept animals in the Disputed Area.

From approximately 1999-2000, Van Putten mowed a small patch of grass near the Southeastern corner of the Kellogg Real Property. (RP 100, 105). A portion of that grass was located in the Disputed Area. (Id.).

As discussed above, in May of 1995, the Van Putten Fence was installed, but the portion extending northerly of the Wood Lattice Fence and enclosing the property was removed in February 2005. (RP 195, 203, 242, 280).

Neither Van Putten nor Takaki otherwise regularly used or maintained the Disputed Area during Van Putten's ownership of the Kellogg Real Property. Lori Takaki testified that other than the Van Putten Fence no other improvements were made on the disputed area. (RP 99). She testified that no structures were built in the disputed area. (Id.). She testified that Van Putten did not mow the disputed area. (RP 100). She testified that neither of them did anything to maintain or cultivate the disputed area. (RP 100).

b. Alleged Logging, Clearing and Grading Activities by Van Putten and Father.

Appellants rely heavily in their brief on the notion that the grading activities from Van Putten started the running of the 10-year period for adverse possession. However, the record at trial does not support that position:

i. No Evidence of Logging in Disputed Area.

After completing a survey, Van Putten's father had portions of his property logged. (RP 64-66) However, **nothing in the record indicates any logging in the disputed Area.** (Id.).

ii. No Evidence of Clearing in Disputed Area.

After completing the logging, Van Putten and his father allegedly spent "years" clearing on their Property. (RP 66-67). However, as with the logging, **nothing in the record indicates any clearing in the Disputed Area.** (Id.).

iii. No Evidence of Installation or Use of Mobile Home, Septic System or Well in Disputed Area.

In approximately 1993, Van Putten placed a mobile home on his Property. (Ex 6; RP 68, 73). Thereafter, Van Putten moved into that mobile home and installed a well and septic system. (Id.). However, **nothing in the record indicates any installation or use of the mobile home, septic system or well in the Disputed Area.** (Id.).

iv. No Evidence "Rough" Grading Occurred in Disputed Area.

At trial, Van Putten testified he completed a "rough grading" of the "property" before installing his Fence. (RP 75). However, **nothing in the**

record supports the notion that rough grading occurred in the Disputed Area. (Id.).

- v. No Evidence “Rough” Grading Occurred More Than 10 Years Before Removal of Van Putten Fence.

Van Putten allegedly completed a “rough grading” of his Property “months before” he completed his Fence. (Appellants’ Brief at 16; RP 75). Van Putten did not provide a specific month in 1995 when he allegedly starting the “rough grading.” (Id.). On cross examination, Van Putten admitted he did not construct that Fence until May of 1995. (RP 161). The uncontroverted evidence shows the Corprons removed the portion of that Fence enclosing the Kellogg Property in February of 2005. (RP 195, 203, 242, 280). Accordingly, by Van Putten’s own testimony, such “rough grading” may have started at some (undefined) time in February, March or April of 1995, or less than 10 years before the removal of his Fence in 2005. **Appellants did not and cannot meet their burden of showing the “rough” grading actually occurred more than 10 years before the removal of the Van Putten Fence.** (Id.).

- vi. No Evidence “Finish” Grading Occurred More Than 10 Years Before Removal of Van Putten Fence.

Van Putten testified he completed the “finish grading,” including in a portion of the Disputed Area in “February 1995”. (RP 75). Van

Putten does not provide a specific day in February of 1995 when he supposedly completed that grading. (Id.). Again, the uncontested evidence shows the Corprons removed the enclosing section of the Van Putten Fence in February of 2005. (RP 195, 203, 242, 280). Accordingly, **nothing in the record shows Van Putten started the “finish” grading more than 10 years before the removal of that Fence.** By Van Putten’s own testimony, he could have begun that grading on February 28, 1995 and the Fence could have been removed on February 1, 2005, nearly a month shy of the 10-year statutory period.

vii. Barn Not in Disputed Area.

Appellants’ Brief references the construction of a barn by Van Putten. Appellants’ Brief at 16. However, **that barn is not located in the Disputed Area.** (Ex 3; Ex 16).

viii. Portion of Fence Removed Before 10-Year Period Expired.

As discussed above, at trial, Van Putten admitted on cross examination he constructed his Fence in May of 1995. (RP 161). The uncontested testimony shows the Corprons removed the enclosing section of that Fence in February of 2005, **less than 10 years after its installation.** (RP 195, 203, 242, 280).

c. Van Putten's Testimony is Neither Credible Nor

Reliable. Van Putten's trial testimony is neither credible nor reliable.

First, Van Putten is in a romantic relationship with Appellant Leigh Kellogg. (RP 170-71). That relationship began after Van Putten testified at his deposition but before trial in this matter. (Id.). That romantic relationship indicates a bias and raises issues of credibility regarding Van Putten's testimony.

Second, at trial, after beginning that romantic relationship, Van Putten attempted to change the testimony he gave at his deposition. (RP 176-77). For example, in his deposition, Van Putten testified: (a) before he ended up with his Property, it just "sat for some time," which he did not "remember,"; and (b) before bringing horses to his Property, the only work he did in the Disputed Area was "dug stumps out and cleaned it up." (RP 159-60; 176-77). However, at trial, Van Putten attempted to change his testimony to say he and his father logged, cleared and graded his Property for many years, including before he received that Property in 1995. (RP 64-67, 75, 177).

Third, Van Putten admitted in his deposition and at trial: (a) he was "confused about the timeline" of events because they occurred 17 years ago; (b) he got that timeline "all mixed up"; and (c) he could not remember whether he installed his Fence before or after the Wood/Lattice

Fence. (RP 168-70). He stated in his deposition that the fence was built in May 1995, then changed it to March 1995 when testifying on direct examination, then he changed it again to May 1995 on cross examination. (RP 160-163). He simply could not keep his story straight.

Van Putten's testimony is clearly not credible and admittedly unreliable.

d. Use by Selvig. From approximately 2003 to 2004, Selvig mowed the small patch of grass near the Southeastern corner of the Kellogg Real Property, a portion of which was located in the Disputed Area. (RP 122, 131). Selvig also, on a single occasion in approximately 2003 or 2004, removed saplings from the Kellogg Real Property, some of which were in the Disputed Area. (RP 115, 127, 129-130).

Except as stated above, between 1999 and 2004, no one otherwise used or maintained the Disputed Area.

Selvig specifically testified that during his ownership he did not: (1) keep horses or other animals; (2) add to or maintain any fencing; (3) install any improvements; and or (4) perform work to remove weeds or brush, in the Disputed Area. (RP 114-115).

There was no continuous use of the Disputed Area from the time Van Putten and Takaki occupied the Kellogg Property to the time Selvig occupied that Property. During Selvig's ownership of the Kellogg

Property, apart from the maintenance in 2003 and/or 2004 described above, the Disputed Area became and remained overgrown with weeds and brush.

e. Use by the Corprons. The Corprons regularly used and maintained the Disputed Area from 2003 to 2010. During that period, the Corprons mowed, weeded, removed debris (including tree branches), raked and removed rocks. (RP 251, 254-255, 259, 299-300, 315-316). Between 2003 and 2010, Kellogg did not exclusively use the Disputed Area. (Id.).

f. Use by Kellogg. When Kellogg purchased her Real Property in 2004, the Disputed Area was unmaintained and overgrown with weeds and brush. (Exs 25-32, RP 230-231). Kellogg did nothing to maintain the Disputed Area until approximately six months after she purchased that Property. (Exs 25-32, RP 211, RP 234).

6. Neighborly and Accommodating Relationship.

Numerous witnesses, including Van Putten, Anderson, Selvig, and Corpron, testified about the neighborly and accommodating relationship between the owners of the Corpron and Kellogg Real Properties. (RP 97, 113, 146). Specifically, Van Putten shared such a relationship with Dorsett (RP 164) and Selvig shared such a relationship with both Dorsett and the Corprons. (RP 291, 317).

7. Removal of Portion of Van Putten Fence by Corprons. As discussed supra, in February 2005, the Corprons removed the enclosing section of the Van Putten Fence. (RP 195, 203, 242, 280). Once that fencing was removed, nothing prevented access between the Kellogg property and the Corpron Property.

8. Trial. The Corprons commenced this action to eject Appellants and quiet title to the disputed area. Kellogg counterclaimed for quiet title based on adverse possession. After trial, the Court held in favor of the Corprons, quieted title to the disputed area in them and ejected Appellants from that area. More particularly, the Trial Court held Appellants had not met their burden to show all the elements of adverse possession, including 1) exclusivity, 2) actual and uninterrupted use, 3) open and notorious use, and 4) hostile use under a claim of right, had existed for any consecutive 10-year period. The Court also awarded damages of \$400 for labor and fencing improperly removed by Kellogg and statutory costs and fees of \$834.26 to the Corprons. (CP 31).

### **C. ARGUMENTS/AUTHORITY**

#### 1. Standard of Review

The Appellate Court must uphold the Trial Court's factual findings if they are supported by substantial evidence. DeBenedictis v. Hagen, 77 Wn. App. 284, 291, 890 P.2d 529 (1995) (citing Johnny's Sea Food Co. v.

Tacoma, 73 Wn. App. 415, 418, 869 P.2d 1097 (1994) and Thompson v. Grays Harbor Comm'ty. Hosp., 36 Wn. App. 300, 302, 675 P.2d 239 (1983)). In deciding whether there is substantial evidence, the Court must take the record in the light most favorable to the respondent. Id.

Substantial evidence is defined as a quantum of evidence sufficient to persuade a fair-minded person that the premise is true. Rainier View Court Homeowners Ass'n, Inc. v. Zenker, 157 Wn. App. 710, 719, 238 P.3d 1217 (2010) (citing Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)).

Credibility of parties and witnesses, and the weight to be given to evidence, is for the Trial Court. Brauhn v. Brauhn, 10 Wn. App. 592, 593, 518 P.2d 1089 (1974) (citing Rognrust v. Seto, 2 Wn. App. 215, 467 P.2d 204 (1970) and Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 343 P.2d 183 (1959)). If the Trial Court's findings are supported by substantial evidence, the Appellate Court may not substitute its findings for the Trial Court's findings even if the non-prevailing party's version of the evidence would support a different decree. Id.

The Appellate Court reviews questions of law and conclusions of law de novo. Veach v. Culp, 92 Wn.2d 570, 573, 599 P.2d 526 (1979).

Finally, the Trial Court may be affirmed “on any basis the record supports.” Graff v. Allstate Ins. Co., 113 Wash.App. 799, 802; 54 P.3d 1266 (2002).

2. The Trial Court Correctly Found That the Appellants Did Not Meet Their Burden to Prove Adverse Possession.

a. Elements of Adverse Possession.

In order to establish a claim of adverse possession, a claimant must show his or her possession of another’s land to be: 1) exclusive, 2) actual and uninterrupted, 3) open and notorious, and 4) hostile and under a claim of right made in good faith.” Chaplin v. Sanders, 100 Wn.2d 853, 857-58, 676 P.2d 431 (1984). Such claimants must prove each of those elements “concurrently exist[ed]” over a 10 year period. Id. at 858; RCW 4.16.020. Here, in order to prevail on their claim of adverse possession, Appellants must show every referenced element existed over the entire Disputed Area for the full period of at least 10 years.

b. Appellants Bear the Burden of Proof.

At trial, the Appellants bore the burden of overcoming the Corprons’ title ownership and proving adverse possession. “The burden of proving each element of adverse possession is on the claimant... The presumption of possession is in the holder of legal title; [h]e need not maintain a constant patrol to protect his ownership.” Peeples v. Port of

Bellingham, 93 Wn.2d 766, 773, 613 P.2d 1128 (1980) (overruled on other grounds by Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431) (quoting Hunt v. Matthews, 8 Wn. App. 223, 238, 505 P.2d 819 (1973)). Here, the Trial Court correctly found that Appellants did not meet their burden to prove adverse possession

c. The Trial Court Correctly Determined That The Chaplin Decision Does Not Mean the Court May Not Consider the Purpose and Manner in Which the Parties Used the Fence.

Appellant's rely on Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984) to support their position that the Court erred in considering the purpose and manner in which the parties used the fence. Their reliance is misplaced, as Chaplin does not prevent a Court from considering the purpose and use and remains readily distinguishable on its facts from this case.

As a preliminary matter, Chaplin is distinguishable because it did not involve a fence line. Id. It only addressed the hostility requirement for adverse possession and does not address what Washington Courts require claimants in adverse possession cases to show in terms of "actual" or "open" use and possession up to such a line.

The portion of Chaplin upon which Appellants rely relates solely to the "hostility" requirement for adverse possession claims. Id. at 860-61.

It does not involve the requirement under Washington law that claimants in adverse possession cases prove “actual” and “open and notorious” use of a disputed area.<sup>2</sup> Id.

In fact, the portion of Chaplin at issue merely holds a party need not show she subjectively intended to adversely possess in order to meet that specific “hostility” requirement:

For these reasons, we are convinced that the dual requirement that the claimant take possession in “good faith” and not recognize another’s superior interest does not serve the purpose of the adverse possession doctrine...The “**hostility/claim of right**” **element** of adverse possession requires only that the claimant treat the land as his own as against the world throughout the statutory period. The nature of his possession will be determined solely on the basis of the manner in which he treats the property. **His subjective belief regarding his true interest in the land and his intent to dispossess or not dispossess another is irrelevant to this determination** [emphases added; internal citations omitted].

Id.

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<sup>2</sup> Significantly, after ruling on the primary issue of “hostility,” the Court in Chaplin does separately address the elements of “open and notorious” possession. Id. The Court found such “open and notorious” use existed in the area in dispute based on the adverse possessors mowing, planting flowers, installing underground wiring and surface power poles, parking, using it for storage, removing garbage, and parking in that area. Id. at 856, 863-64. Such use remains entirely inconsistent with that of Appellants’ predecessors here, who failed to maintain or adequately use the Disputed Area, by mowing, clearing, weeding, keeping animals, and/or adding improvements, for any consecutive period of ten years or more.

The Chaplin Court therefore only “overrule[d]” prior cases “to the extent that they are inconsistent” with that limited determination regarding “hostility.” Id. at 862.

Because the portion of Chaplin at issue does not address what types of use meet the requirement of “actual,” “open” or “notorious” possession, it did not “overrule” cases holding the failure to maintain up to a fence line or the maintenance of a fence for a purpose other than defining a boundary do not meet those requirements. See, e.g., Lappenbusch v. Florkow, 175 Wn. 23, 26 P.2d 388 (1933) and Hawk v. Walthew, 184 Wn. 673, 675, 52 P.2d 1258 (1935).

Plainly stated, nothing in the Chaplin decision says the Court cannot consider evidence of either the purpose of a fence or how parties actually used that fence, particularly with respect to questions of “actual” or “open and notorious” possession.

In the most recent edition of Washington Practice, Professor William Stoebuck (a leading Washington expert in the area of real property law) specifically states:

**The following activities have been held not to amount to actual possession of rural or semi-rural land: having an old, dilapidated fence in an unused strip overgrown with trees and brush; maintaining an irregular “fence” of poles**

and brush, taking timber, and once planting cabbages; [and] **maintaining a fence intended to be a cattle fence and not a line fence**...[emphases added].

17 William B. Stoebuck and John Weaver, Washington Practice: Real Estate: Property Law § 8.10, at 521 (2011).

Consistently, in Lappenbusch, cited supra, the Court held a “fence [which] was built and maintained to turn cattle” did not meet the requirements for “open and notorious” use. 175 Wn. at 27-28. In so holding, the Court specifically reasoned, “**the north quarter corner [of the involved property] was a mile distant from the point at which the fence started**” and no “evidence in the case [suggested] that the builders of the fence ever undertook to locate the north quarter corner or in any way made any attempt to determine the line or to build the fence upon the line [emphasis added].” Id. at 27. Thus, the Court held, “[e]ach part of the fence was a portion of the whole, and the **purpose of the whole was, apparently, born of the necessity of controlling the ranging of cattle**...[t]he fence taken as a whole lacks every element of a deliberate attempt to define a boundary or locate the dividing line between adjoining holdings [emphasis added].” Id. at 28. The Court based that determination, in part, on the fact the “purpose and use” of the fence did not rise to the level of being “open” or “notorious.” Id. at 27-28.

Likewise, in Hawk, cited supra, the Court held the involved fence “was not erected nor intended by the parties thereto to be a line fence nor as determining the boundary between said contiguous tracts, but was erected as a matter of convenience for the purpose of regulating the pasturage of livestock.” 184 Wn. at 675. Accordingly, the Court held the “use” of such fence did not rise to the requisite level of “open” or “notorious” possession. Id. Significantly, in reaching that determination, the Court considered the “direct testimony of the witness who helped erect the fence as to what the purpose of it was...” Id. at 676. Furthermore, the Court looked to the fact the surrounding land had been historically used for logging timber and “pasturage.” Id. at 675.

Finally, the Court in Wood v. Nelson, 57 Wn. 2d 439 (1961) specifically considered the “purpose” of the involved fence to determine whether the claimant has met the elements required to show adverse possession. 57 Wn.2d 539, 540, 358 P.2d 312 (1961).<sup>3</sup>

Here, as in Lappenbusch and Hawk, the uncontroverted testimony at trial showed the Parties’ predecessors “purpose” and “use” of the fencing at issue consisted of a privacy barrier and for containing animals. Anderson expressly testified the purpose and use of the fencing was as a privacy screen. Van Putten and Takaki specifically testified the purpose

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<sup>3</sup> Significantly, Chaplin, 100 Wn.2d 853 did not specifically reverse the Wood, 57 Wn.2d 439, Lappenbusch, 175 Wn.23 or Hawk, 184 Wn. 673 decisions discussed herein.

and use of the fencing consisted of containing their horses. None of that testimony suggested that such “purpose” and “use” consisted of establishing a boundary between the Properties. In fact, like the fence in Lappenbusch, and unlike the fence in Wood, the fencing in this matter failed to run more than about a third of the boundary between the Properties, did not touch either the northerly or southerly boundaries of the Corpron Property and did not run directly parallel to that boundary. Nothing in Chaplin bars a Trial Court from considering such evidence, particularly that of specific use on the ground (e.g., failure of a fence line to run the full length or parallel to a given boundary).

To hold otherwise would lead to the absurd result where a Trial Court is required to disregard the clear purpose and nature of the use of a fence as something other than a “line” fence for delineating boundaries between properties.

For these reasons, Appellants’ arguments fail, and the Trial Court’s ruling should be affirmed.

d. The Trial Court Correctly Determined That the Appellants Did Not Show “Actual” Possession of Disputed Area Over the Statutory Period Based Solely on the Existence of the Fence.

At trial the Court properly held Appellants could not and did not show “actual” possession of the Disputed Area over the 10-year statutory

period. Accordingly, the Trial Court correctly dismissed their adverse possession claim.

As a preliminary matter, under Washington law, “use alone does not necessarily constitute [the] possession” required for acquiring title by prescription. ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 759, 774 P.2d 6 (1989). Rather, “[t]he ultimate test is the exercise of dominion over the land in a manner consistent with the actions a true owner would take.” Id.

i. The Court Did Not Err In Finding That the Fence Was Insufficient to Support Adverse Possession

Appellants mistakenly primarily base their claim on the existence of the “hanging” wood and lattice fence, along with their predecessors’ establishment of a barbless wire fence immediately adjacent to that fence, near the Western boundary of Plaintiffs’ Real Property. However, under well-established Washington law, the mere existence of a fence, without more, will not support a claim of adverse possession:

The following activities have been held *not* to amount to actual possession of rural or semi-rural land: having an old, dilapidated fence in an unused strip overgrown with trees and brush; maintaining an irregular “fence” of poles and brush, taking timber, and once planting cabbages; [and] maintaining a fence intended to be a cattle fence and not a line fence...

17 William B. Stoebuck and John Weaver, Washington Practice: Real Estate: Property Law, § 8.10, at 521 (2011)(citing Muench v. Oxley, 90

Wn.2d 637, 584 P.2d 939 (1978); White v. Branchick, 160 Wn. 697, 295 P.929 (1931); Roy v. Goerz, 26 Wn. App. 807, 614 P.2d 1308 (1980)).

a. Maintenance and Use is Required

The Muench and White decisions illustrate the necessity of not only the presence of a fence, but of some regular maintenance and use up to that line, as a prerequisite of a claim of prescription. Where the land abutting the fence remains “overgrown with trees and brush” (as in Muench) or where the claimant only intermittently uses it for “taking timber” or “planting cabbages” (as in White), a claim of adverse possession cannot stand.

Here, like their counterparts in Muench and White, neither the Appellants nor their predecessors used or maintained the Disputed Area up to the fence line in a sufficient manner to show “actual” possession. They did not mow, maintain, cultivate, plant, or improve up to the wood and lattice fence for a consecutive period of ten or more years. Rather, Van Putten merely: (a) constructed a barbless wire fence to contain his horses in the Disputed Area; (b) kept those horses in the Disputed Area for about five years (from 1995 to 2000); and (c) mowed a small section of grass near the Southeastern corner of his property for about two years (from 1998 to 2000) in the Disputed Area. Neither Van Putten’s predecessor nor

Selvig took any meaningful steps to maintain or use the Disputed Area. In fact, Selvig allowed the Disputed Area, including the portion immediately adjacent to the wood and lattice fence, to become overgrown with Alder saplings and brush. Appellants cannot show or point to any “actual” use of the Disputed Area over the course of a ten-year period.

Moreover, as illustrated by the Roy case cited above, where the purpose and use of a fence consist of something other than establishing a boundary line, no “actual” use supporting adverse possession occurs. “A fence erected to control pasturage or cattle and not as a boundary does not establish adverse possession.” Roy v. Goerz, 26 Wn. App. 807, 813-814, 614 P.2d 1308 (1980) (citing Taylor v. Talmadge, 45 Wn.2d 144, 273 P.2d 506 (1954) (overruled on other grounds by Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431); Hawk v. Walthew, 184 Wn. 673, 52 P.2d 1258 (1935); and Lappenbusch v. Florkow, 175 Wn. 23, 26 P.2d 388 (1933)). In Roy, the Court rejected an adverse possession claim where the evidence showed the party who erected the fence did so not to establish a boundary, but “simply [as] a cattle fence.” Roy, 26 Wn. App. at 813.

Similarly, in Lappenbusch v. Florkow, 175 Wn. 23, 28, 26 P.2d 388 (1933), the Washington Supreme Court rejected a claim of adverse possession based on the existence of a fence “built and maintained to turn cattle.” Significantly, in reaching that determination, the Court

specifically reasoned “it must be remembered that the north quarter corner was a mile distant from the point at which the fence started, and it is not suggested by any evidence in the case that the builders of the fence ever undertook to locate the north quarter corner or in any way made any attempt to determine the line or to build the fence upon the line.” Id. at 27. Because the Court found “the purpose of the whole [fence] was, apparently, born of the necessity of controlling the ranging of cattle,” it held the fence “lacks every element of a deliberate attempt to define a boundary or locate the dividing line between adjoining holdings.” Id. at 28.

The Court reached a consistent ruling in Hawk v. Walthew, 184 Wn. 673, 675, 52 P.2d 1258 (1935), rejecting a claim of adverse possession based on a fence. Relying on Lappenbusch, the Court in Hawk reasoned, “said fence was not erected nor intended by the parties thereto to be a line fence nor as determining the boundary between said contiguous tracts, but was erected as a matter of convenience for the purpose of regulating the pasturage of livestock.” Id.

Here, as in Roy, Lappenbusch, and Hawk, the Dorsetts did not erect or use the wood and lattice fence to determine the boundaries between the Parties’ respective Properties. Rather, the Dorsetts built and used the fence solely as a privacy barrier to block the sight, smell and flies

associated with the neighboring lot to the West. Like the fence in Lappenbusch, the wood and lattice fence does not extend anywhere close to either the Northern or Southern boundaries of the Corpron's Property. In fact, it only spans a little over a third of the length of that boundary line. It does not run parallel to the true boundary, but rather sits at an angle which moves away from that boundary as the fence extends Northerly.

Like the fences in Lappenbusch, Hawk and Roy, the uncontroverted testimony at trial revealed Van Putten installed and used that fencing solely to keep his horses off the wood and lattice fence.

b. Reliance On The Wood Decision Is Misplaced

Appellants also mistakenly rely on Wood v. Nelson, 57 Wn.2d 539 (1961). However, that case is largely inapplicable and does not support Appellant's position.

First, in Wood, the Court determined the involved "fence was built as a line fence" because that fence "follow[ed] along the **entire length of the property** and on a **line parallel with the true line** [emphases added]." Id. at 540. The Court thus consistently found "[e]xclusive dominion" based on the fence used to "exclude strangers." Id.

Here, unlike in Wood, the uncontroverted evidence shows the fence did not run the "entire length of the property." To the contrary, it

only ran approximately one third of that distance and did not connect with either the northerly or southerly boundaries of the Corpron Real Property. Nothing in the record at trial shows the fencing at issue here acted to “exclude strangers” from the Kellogg Property for a period of ten years or more.

Furthermore, unlike in Wood, the clear evidence at trial showed the fence angled severely away, and did not run “parallel” to the true boundary between the Corpron and Kellogg Real Properties.

Finally, it bears noting, in finding a “line fence,” the Court in Wood, specifically rejected the notion that the “wire fence was merely for the purpose of confining stock and fowl.” Id. In reaching that decision, the Court expressly reasoned, “there was nothing at either end of the fence to confine the chickens or other fowl.” Id.

In the present case, unlike in Wood, the uncontested testimony at trial indicated additional fencing running to the west of the wooden fence existed for the particular “purpose” of “confining” the horses owned by Mike Van Putten and Lori Takaki. Unlike its counterpart in Wood something clearly existed “at either end of the fence to confine” those animals.

Wood does not support Appellants’ claims.

The Trial Court correctly found that the Appellants failed to meet their burden to show “actual” possession and dismissed their claims.

ii. The Trial Court Did Not Err In Finding That The Grading Activities Were Insufficient to Support Adverse Possession

Appellants argue that the Trial Court erred in finding that the grading activities of Van Putten were insufficient to support adverse possession. The Trial Court did not err for at least two reasons. First, as a matter of law, Washington Courts have rejected the argument that clearing or grading alone is sufficient to support adverse possession. Second, even if grading were sufficient under Washington Law, the record does not support Appellants’ position.

a. Washington Courts Have Specifically Rejected the Argument that Clearing or Grading Alone is Sufficient to Support Adverse Possession.

Washington Courts reject the argument made by Appellants here, *i.e.*, that “clearing” or “grading” is sufficient “actual possession” to start the running of the statute. More particularly, Washington Courts specifically refuse to find adverse possession based on “keeping a lot cleared for ten years and maintaining a fence for less than ten years.” 17 William B. Stoebuck and John W. Weaver, Washington Practice: Real Estate: Property Law § 8.10 (2013).

For example, in Loomis v. Stromburg, 166 Wn. 567, 569-70, 7 P.2d 973 (1932), a neighbor “cleared” land “up to [a] line, upon which a fence was later constructed.” The “clearing” occurred more than ten years before the adjoining owner filed suit to quiet title. Id. However, the referenced “fence” was built “less than ten years prior to the action.” Id. at 570. The Washington Supreme Court rejected the neighbor’s claim, holding she “did not, for ten years next prior to the action, have such possession of the area in dispute as would result in the acquisition of title thereto by [that neighbor] by reason of adverse possession.” Id. The Court further reasoned the neighbor’s use “was not sufficiently clear, definite, and satisfactory to warrant this Court in holding...[she] has established her title thereto by adverse possession .” Id. at 571. Significantly, the Court reached that decision even though the neighbor offered evidence she “cultivated” the previously “wild...rough...[and] overgrown” property up to the line where the “fence was later constructed,” in addition to the referenced “clearing.” Id. at 569-70.

Consistently, in People’s Savings Bank v. Bufford, 90 Wn. 204, 205-6, 155 P. 1068 (1916), the Washington Supreme Court held “clearing” and “grading” of an “ungraded, unimproved” parcel of land insufficient “possession” to “start the running of the statute” and support an adverse possession claim. Significantly, the Court reached that

conclusion even though the referenced “clearing” and “grading” was coupled with certain fencing and planting activities. Id. See also, Wood v. Nelson, 57 Wn.2d 539, 540, 358 P.2d 312 (1961)(a “few instances” of “cut[ting] wild grass” is a “limited use that would not of itself conclusively establish adverse possession of wild, unimproved, or unfenced land”); Spinning v. Pugh, 65 Wn. 490, 494-95, 118 P. 635 (1911)(“irregular cultivation” insufficient to support adverse possession claim, even coupled with planting and fencing).

Here, like the claimant in Loomis, Appellants base their adverse possession claim on “keeping a lot cleared for ten years and maintaining a fence for less than ten years.” However, as recognized by the Washington Supreme Court in both Loomis and People’s Savings, such “clearing” and “grading” is insufficient “actual possession” to support that prescriptive claim.

Appellants spend a significant portion of their argument asserting that Frolund v. Frankland, 431 Wn.2d 812, 431 P.2d 188 (1967), supports their position that the Trial Court erred. The decision in that case, however, is readily distinguishable from this case and does not support Appellants' position.

In Frolund, the Court clearly based its finding of adverse possession on the involved neighbors: (a) "destroying a significant

portion" of a preexisting "fence" during clearing of the "disputed wedge" of land; and (b) "thereafter maintaining" that "wedge" to a "clear and discernible line at odds with a boundary line which would otherwise be defined by any extension of the destroyed fence or its remnants." Id. at 817-18. Regarding such maintenance, the Court found the adverse claimants "regularly mowed the grass growing thereon up to their survey line and annually utilized the north-west corner of the property for winter storage of their swimming float." Id. at 816. Finding sufficient "possession" of the "disputed wedge," the Court expressly reasoned the removal of fencing and maintenance described above "were sufficient to place [the other neighbor] upon notice and inquiry that [the neighbors] from the outset did not recognize or accept the old fence line as the boundary between their properties." Id. at 818.

It is clear from reading Frolund as a whole that it does not stand for the proposition that clearing or grading alone will support an adverse possession claim. Rather, in that case, the Court looked primarily to the destruction of the existing fence and continual maintenance of the "disputed wedge" to support that prescriptive claim.

Here, unlike in Frolund, no fence was removed from the Disputed Area during Van Puttens' "grading activities." Furthermore, unlike in Frolund, there is no evidence of continual maintenance of the Disputed

Area, such as by "regularly mow[ing] the grass" or using the Disputed Area for "storage" for the statutory period. Frolund does not support Appellants' position. The Court should affirm the Trial Court's decision.

b. Even If The Grading Activities Were Sufficient The Record Does Not Support Appellant's Position

In their argument Appellants rely heavily on the testimony of Van Putten. As discussed above, Van Putten's testimony is neither credible nor reliable because: (a) he is in a romantic relationship with Appellant Leigh Kellogg; (b) he attempted to change his deposition testimony at trial in order to help his girlfriend; and (c) he admittedly cannot accurately recall the timing of critical events relating to the use of his Property. (RP 64-65, 75, 159-60, 168-71, 176-77). Like the Trial Court, this Court should disregard and/or place no weight on that testimony.

Further, as discussed above, no evidence in the record shows any: (a) logging in the Disputed Area; (b) clearing in the Disputed Area; (c) installation or use of a mobile home, septic system or well in the Disputed Area; and/or (d) "rough" grading in the Disputed Area. (Ex 6; RP 64-68, 73, 75). None of the above activities, including the "rough" grading upon which Appellants' rely, can support any adverse claim.

Nothing in the record shows the “rough” grading occurred more than 10 years before the Corprons removed the enclosing portion of the Van Putten Fence. Rather, the best Appellants can say is Van Putten started that grading some undefined number of “months before” completing his Fence in May of 1995. (Appellants’ Brief at 16, RP 75) The uncontroverted evidence at trial shows the Corprons removed that Fence in February of 2005. (RP 195, 203, 242, 280) Accordingly, by Van Putten’s own testimony, his grading work could have started in February, March or April of 1995, **less than 10 years before the removal of that fencing**. This holds true even if the Court chooses to accept Van Putten’s non-credible and unreliable testimony. Appellants cannot meet their burden to show adverse use for the full statutory period.

Finally, no evidence of record supports Appellants’ claim the “finish” grading occurred more than 10 years before the Corprons removed the enclosing section of the Van Putten Fence. Rather, Van Putten’s (non-credible and unreliable) testimony merely contends such work occurred on some undefined day in “February 1995.” (P 75) Again, the uncontested evidence shows the Corprons removed the Van Putten fencing in February of 2005. (RP 195, 203, 242, 280) By Van Putten’s own testimony, he could have started the “finish” grading on February 28, 1995. If the Corprons removed the fencing on February 1, 2005, the 10

year period would not have expired prior to such removal. Appellants bear the burden of proof. They have failed to meet that burden. The Court should affirm the Trial Court's holding.

e. Because the Appellants Could Not Show Exclusive Possession, The Trial Court Correctly Dismissed the Claim for Adverse Possession

The Appellants cannot show exclusive possession over the required 10-year period. Accordingly, the Trial Court did not err in dismissing their claim for adverse possession.

Under a well-settled maxim of Washington law, a claim for adverse possession cannot stand where the true owner also uses the area in dispute. For example, in Thompson v. Schlittenhart, 47 Wn. App. 209, 734 P.2d 48 (1987), the Court rejected an adverse possession action where the claimant could not show exclusive possession of the disputed strips due to the other party's maintenance of that area. Similarly, in Peeples, where the claimant could not show either that they restricted the access of others or maintained exclusive use of the involved tidelands, it could not prevail on its adverse possession claim. 93 Wn.2d at 773.

Here, from approximately 2003 until 2009, Corpron maintained and used the Disputed Area. Such maintenance and use specifically includes the following:

- (1) Regularly mowing in the Disputed Area;

- (2) Regularly spraying and removing weeds in the Disputed Area;
- (3) Regularly removing tree branches and other debris from the Disputed Area;
- (4) Raking and removing rocks from the Disputed Area; and
- (5) Adding and removing fencing from the Disputed Area.

(RP 251, 254-255, 259, 299-300, 315-316)

Additionally, Corpron's children periodically accessed and played in the Disputed Area. (RP 251)

Accordingly, Appellants cannot show exclusive possession over the required 10-year period for purposes of adverse possession. The Trial Court properly dismissed their adverse possession claim.

f. Because the Appellants Could Not Show Continuous and Uninterrupted Use, The Trial Court Correctly Dismissed the Claim for Adverse Possession.

Appellants cannot and did not meet their burden to show continuous and uninterrupted use of the Disputed Area. Therefore, their adverse possession claim lacks merit. Under a well-settled maxim of Washington law, where even a matter of months breaks the continuity of use by an adverse possessor, they will be held to have abandoned their

claim. For example, in Johnson v. Brown, 33 Wn. 588, 590, 74 P. 677 (1903), the Court rejected a claim for adverse possession where the plaintiff moved away from the involved property for a “few months,” then returned and continued with his prescriptive use. The Court reasoned “his occupancy could not have been continuous for more than ten years,” since he “abandoned the land” (despite his return shortly thereafter). Similarly, in State v. Achepohl, 139 Wn. 84, 92-93, 245 P. 758 (1926), the Court rejected an adverse possession claim of water rights based on repeated interruptions to the continuous prescriptive use. In so holding, the Court reiterated the rule under Washington law that “an interruption [of such prescriptive use], however slight...prevents any adverse right.” Id. at 93; See also, Rogers v. Cation, 9 Wn.2d 369, 375, 115 P.2d 702 (1941) (rejecting claim of plaintiffs who could not show an “uninterrupted ten-year period during which an adverse possession and use could ripen into title by prescription” as to waters from a spring located on an adjacent parcel); and Downie v. City of Renton, 167 Wn. 374, 9 P.2d 372 (1932) (rejecting claim of adverse possession based on “intermittent” annual or semiannual discharge of water from reservoir by City into a gulch connected with a landowner’s pond).

The only arguable continuous use of the Disputed Area by Appellants or their predecessors consisted of Van Putten building the

barbless wire fence to contain horses, keeping those horses and mowing a small section of lawn in the Disputed Area. But Van Putten only kept the horses in that Area for a period of about five years (from 1995 to 2000). Furthermore, the Corprons cut down the portion of his wire fence extending North of the wood and lattice fence before the expiration of the ten-year period (in February of 2005).

Van Putten only mowed the strip of grass in the Disputed Area for about two years, from 1998 to 2000. Van Putten's predecessor did nothing to maintain or use the Disputed Area after logging the property in the late 1980s. Van Putten did not start maintaining or using the Disputed Area until 1995. After Selvig purchased the Kellogg Property from Van Putten, he did virtually nothing to maintain or use the Disputed Area. He did not keep animals. He did not cultivate plants. He did not improve that Area. He allowed the Disputed Area to become overgrown with weeds and saplings. Even when Kellogg took possession of her Property, she did nothing to maintain or use the Disputed Area for over six months.

Accordingly, under Johnson and its progeny, the Appellants could not show continuous and uninterrupted use, and thus, the Trial Court correctly found that they could not meet their burden to show adverse possession.

g. Because the Appellants Cannot Show Open and Notorious Use, their Adverse Possession Claim The Trial Court Correctly Dismissed the Claim for Adverse Possession.

In addition to the issues above, the Appellants could and did not meet their burden to show open and notorious use of the Disputed Area and the Trial Court correctly dismissed their claim of adverse possession.

Washington law requires adverse use to be open enough to appear “clearly hostile” to the true owner’s interest and “put the [true] owner on notice” of such adverse use. Cole v. Laverty, 112 Wn. App. 180, 184, 49 P.3d 924 (2002).

For example, in Anderson v. Hudak, 80 Wn. App. 398, 404-405, 907 P.2d 305 (1995), the Court refused to find adverse possession where a claimant claimed the property up to a row of trees she planted by prescription. In rejecting her claim, the Court held she failed to satisfy the “open and notorious” or “hostility” requirements for adverse possession because she “could not show that she or her family ever maintained or cultivated the trees.” Id. at 405.

Similarly, in Cole, the Court held a “fence, locked gates, and bathtub planters [did] not constitute permanent obstructions that would otherwise put [the true owner] on notice that the [claimants] were

asserting hostile, exclusive interest over the easement” at issue. 112 Wn. App. at 186.

Here, for the reasons they could not show “actual” possession, Appellants did not meet their burden to prove “open” or “notorious” use over the statutory period. They have not maintained up to the wood and lattice fence for that period. Rather, Selvig allowed the Disputed Area to become overgrown with weeds and saplings. Van Putten only kept animals in that Area for approximately five years (from 1995 to 2000). Neither Appellants nor their predecessors did anything to exclude Plaintiffs or their predecessors from the Disputed Area. Appellants’ use did not rise to the level of “open” or “notorious” over the 10-year period.

h. Appellants’ Predecessors’ Use of the Disputed Area Remained a Neighborly Accommodation and Did Not Meet Hostility Requirement for Adverse Possession.

Because the Appellants’ predecessors’ use of the Disputed Area remained a “neighborly accommodation,” it does not meet the hostility requirement of adverse possession. Under Washington law, use of another’s land as a “neighborly Courtesy” does not ripen into adverse possession. Crites v. Koch, 49 Wn. App. 171, 176-78, 741 P.2d 1005 (1987) (farmer driving equipment across neighboring pastureland “was recognized as neighborly Courtesy, whether or not permission was expressly granted, and was not perceived as trespass.”).

Here, the Dorsetts and the Corprons shared an accommodating, neighborly relationship with the Van Puttens and the Selvigs. Particularly given the rural location of the involved Properties, any use of the Disputed Area by Appellants' predecessors represented mere "neighborly Courtesy." No hostility arises from such Courtesy. No adverse possession has occurred.

3. The Fencing Does Not Create a Reasonably Definite Boundary Line for Purposes of Adverse Possession.

The Wood and Lattice fence (and/or Van Putten's barbless wire fence) fail to create the reasonably definite boundary line required for adverse possession under Washington law<sup>4</sup>.

For example, in Scott v. Slater, 42 Wn.2d 366, 368-69, 255 P.2d 377 (1953) (overruled on other grounds by Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431, the Court rejected a claimant's action for adverse possession based on the mere presence of a row of pear trees allegedly marking the boundary line without a clear line of use and cultivation (and where the opposing party also maintained around the trees at issue).

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<sup>4</sup> Similarly, the old, dilapidated barbed wire fence running North from the wood and lattice fence, which remained in "sad condition" and remained covered in foliage, cannot form the basis for a claim of adverse possession. The Court has held that an old, dilapidated wire fence present when a party purchases land will not support an adverse possession claim. See e.g. Muench v. Oxley, 90 W.2d 637, 642-43, 584 P.2d 939 (1978) (overruled on other grounds by Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431), ("such a dilapidated fence could not be said to rise to the level of possession as would put a person of ordinary prudence on notice of a hostile claim.")

Similarly, in Merriman v. Cokeley, 168 Wn.2d 627, 632, 230 P.3d 162 (2010), the Court refused to find a boundary by mutual acquiescence because the Plaintiffs failed to prove a clear and well established boundary based on widely spaced markers set in a thicket of brush.”

Here, neither the wood and lattice fence nor Van Putten’s barbless wire fence extend anywhere near to the Northern or Southern boundaries of the Plaintiffs’ Property. Rather, they remain “hanging” in the middle of that Property and run at an angle away from the boundary. They extend only about a third of the distance between the Northern and Southern boundaries. They do not form a reasonably definite boundary line.

#### 4. Appellants Cannot Extend the Fence Line.

Appellants wrongly assert that the Court erred in refusing to extend the line of the wood and lattice fence to the Northern and Southern boundaries of the Corpron Property in order to find adverse possession.

No Washington authority supports that position. Rather, Lloyd v. Montecucco, 83 Wn. App. 846, 924 P.2d 927 (1996), the case relied upon by Appellants, merely allows a Court to “project boundary lines **between objects** when reasonable and logical to do so...[emphasis added]”. Id. at 853-54. In that case, the Court permitted the claimant to extend its line of occupation at the top of a steep slope to a bulkhead he had maintained on the beach below. Here, no such additional “object” or use exists at either

the Northern or Southern boundary of the Corpron or Kellogg Property to which the Appellants could extend the fence line.

Appellants improperly ask this Court to determine that the Trial Court was incorrect in refusing to extend the fence line nearly three times the length of alleged occupation. The Court should reject that meritless position.

**D. CONCLUSION**

For the foregoing reasons Respondents respectfully request this Court to affirm the Trial Court and dismiss the appeal.

DATED this 9th day of September, 2013.

Respectfully submitted,

COGDILL NICHOLS REIN  
WARTELLE ANDREWS VAIL



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PATRICK L. VAIL  
WSBA No. 34513

DECLARATION OF SERVICE

On said day below I caused to be delivered via North Sound Legal Messenger Service a true and accurate copy of the following document: Brief of Respondent in Court of Appeals Cause No. 69565-7-1 to the following:

Mr. Dennis Jordan  
Dennis Jordan and Associates, Inc., P.S.  
Attorney for Appellants  
4218 Rucker Avenue  
Everett, WA 98203

Original and copy filed with:

Court of Appeals, Division 1  
Clerk's Office  
600 University Street  
Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated September 9, 2013 at Everett, Washington.



Taryn Anderson  
Cogdill Nichols Rein Wartelle Andrews Vail