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4 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLALLAM

5 JO VONNE NotDisclosed,

6 Plaintiff,

7 vs.

NO. 97-X-XXXXX-X

8 ROBERT NotDisclosed and SHIRLEY  
NotDisclosed, husband and wife,

**DEFENDANTS' TRIAL BRIEF**

9 Defendants and  
10 Third-Party Plaintiffs,

11 vs.

12 DOUGLAS A. NotDisclosed and CINDY  
SUE NotDisclosed, husband and wife,

13 Third-Party Defendants.  
14

15 COMES NOW the Defendants and Third-Party Plaintiffs, ROBERT NotDisclosed and  
16 SHIRLEY NotDisclosed, by and through their Attorney of record, Chuck E. Marunde, and  
17 respectfully submit the following trial brief in support of their claims against the Plaintiff, JO  
18 VONNE NotDisclosed, and against the Third-Party Defendants, DOUGLAS A. NotDisclosed  
19 and CINDY SUE NotDisclosed.

20 **I. HISTORICAL BACKGROUND**

21 1.1 Robert and Shirley NotDisclosed purchased a parcel of real estate on West  
22 Sequim Bay Road from the NotDisclosed family. Jo Vonne and Nils NotDisclosed built a house  
23 in 1989 on the adjacent parcel. This action for adverse possession was commenced by Jo Vonne  
24 NotDisclosed without her husband in an effort to take a portion of the NotDisclosed' property.

25 1.2 Third party defendants Douglas A. NotDisclosed and Cindy Sue NotDisclosed,  
26 husband and wife, purchased or were given property from the plaintiff, which property was part  
27 of plaintiff's parcel and is involved in this dispute. The NotDiscloseds built a house on this  
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2 parcel within the last three years. The subject driveway provides secondary access to the  
3 NotDisclosed residence, and as Mr. NotDisclosed testified in his deposition, is often used by  
4 him.

5 1.3 The property now owned by all the parties was at one time owned entirely by the  
6 NotDisclosed family (Carl NotDisclosed and Grace NotDisclosed) as one parcel of real estate.  
7 The parcels owned by NotDisclosed and NotDisclosed were not platted and separated until the  
8 Estate of Grace NotDisclosed was settled in late 1980. At that time the heirs, Alvin  
9 NotDisclosed and Bobby NotDisclosed, each inherited a parcel. Bobby NotDisclosed inherited  
10 what is now the NotDisclosed' property, and Alvin NotDisclosed (the deceased husband of Jo  
11 Vonne NotDisclosed) inherited the property now owned by the NotDisclosed and  
12 NotDisclosed.<sup>1</sup>

13 1.4 Facts that are not in dispute:

14 1.4.1 There is no dispute between the parties that the property plaintiff is  
15 attempting to adversely claim is vested in defendants in the legal  
16 description of their statutory warranty deed and in all public records of the  
17 Auditor's office in Clallam County.

18 1.4.2 There is no dispute between the parties as to the correct survey and the  
19 correct boundary lines of the subject properties according to their legal  
20 descriptions.

21 1.4.3 There is no dispute between the parties as to the location of the driveway  
22 used by the plaintiffs across a portion of defendants' property.

23 1.4.4 There is no dispute as to when the parties came into title on their  
24 respective properties.

25 1.4.5 There is no dispute that plaintiff built her house on her property adjacent  
26 to defendants' property in 1989.

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27 <sup>1</sup>See the Affidavit of Jo Vonne NotDisclosed in Support of Motion for Summary  
28 Judgment filed June 18, 1997.

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1.4.6 There is no dispute that plaintiff and her husband attended a meeting at the Sequim office of Coldwell Banker with Jeff NotDisclosed, Lorene NotDisclosed, Robin Lambert, and others on November 7, 1994.

1.4.7 There is no dispute that plaintiff never told anyone in the NotDisclosed family or anyone else that she intended to claim any of defendants' property by adverse possession.

1.4.8 The parties agree that the NotDisclosed family used the subject driveway to access their own barn during the years plaintiff owned and used her property and the driveway.

1.4.9 The parties agree that Melvin Baker brought his cattle across plaintiff's property and onto defendants' property, although plaintiff denies Mr. Baker's cattle walked on the driveway.

1.4.10 The parties agree that Douglas NotDisclosed periodically uses the driveway across defendants' property.

1.5 The deposition of Jo Vonne NotDisclosed taken August 21, 1997 by defendants' attorney, Chuck E. Marunde, includes the following relevant interchange:

Q: Do you remember, Mrs. NotDisclosed, a meeting on November 7, 1994, at Coldwell Banker in Sequim?

A: Yes, I do.

Q: Do you remember those in attendance, I believe, were you, Mr. NotDisclosed, Cindy and Doug NotDisclosed, Randy NotDisclosed, Jeff NotDisclosed, William NotDisclosed, Robert NotDisclosed, . . . and Lorene NotDisclosed?

A: That's right.

Q: Do you remember discussing the easement or the driveway with Jeff NotDisclosed at that meeting?

A: The meeting was pertaining to the survey, and the only mention of the driveway was when they wanted me to come to some kind of decision, and Jeff turned to me and said, "You don't have to worry about me taking the driveway away from you."

Q: When did you first tell the NotDisclosed family that you intended to adversely possess the property?

A: I don't believe I ever told them.

Q: Did you ever tell the NotDisclosed family that you felt you had already possessed it?

A: I felt there was no problem, because it had always been a driveway and it was grandfathered in. We had used it that many years.

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Q: So, was . . . are you saying that there wasn't a specific time when you told anybody from the NotDisclosed family that you felt you had adversely possessed it?

A: It was never discussed, because it was never a problem. We just used it.

...

Q: Isn't it true that even while you used the driveway periodically, that the NotDisclosed, members of the NotDisclosed family, would use that driveway to access the barn?

A: Rarely.

Q: I'm sorry?

A: Rarely. Whenever they came over, which was rarely.

Q: Okay, but they did?

A: On occasion.

Q: Do you recall Melvin Baker using the driveway?

A: When Melvin Baker brought over cattle, we opened the electric fences and they came over across the field from his side to our side, and they never came down the driveway.

...

Q: Do you remember meeting with Bob and Shirley NotDisclosed on April 1<sup>st</sup> of '97 at a restaurant?

A: I did.

Q: Do you remember discussing this issue with them, the property that is in dispute here?

A: Yes

...

Q: Did you discuss the . . . do you remember talking about your use of the driveway being permissive? That it had never been a problem? That you had always been using it by permission?

A: I'm not sure if that came out or not.

...

Q: Did you ever pay property taxes on any of this, on the NotDisclosed property that you are now claiming by adverse possession?

A: No.<sup>2</sup>

1.6. The deposition of Nils NotDisclosed, husband of the plaintiff, taken August 21, 1997 by defendants' attorney, Chuck E. Marunde, includes the following relevant interchange:

Q: Okay, were you . . . do you recall the meeting on November 7<sup>th</sup> of '94 at Coldwell Banker?

A: Yes.

Q: Do you recall any discussions about permissive use of the driveway on the property?

A: No, the only thing that was said that I can recall is that Jeff mentioned that we could use the driveway, but we have never asked for permission and permission was never even mentioned.

Q: That was at that meeting?

A: That was at that meeting, yes.

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<sup>2</sup>See Deposition of Jo Vonne NotDisclosed at pages 3-11

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Q: In response to that remark or comment or statement by him, what did you say?

A: Nothing. I didn't even respond to it.

...

Q: Had you ever discussed with anybody in the NotDisclosed family your tenant's use of the driveway?

A: No.

...

Q: Uh huh. Did you have a spoken or unspoken agreement with the NotDisclosed family, going back in time here over the years to use, whereby they would allow you to use that driveway over a portion of their property, and then in exchange they would have access to the shoreline across a path down by the shoreline?

A: That was never mentioned at any time. As a matter of fact, I never asked to use the driveway. It was just used, and I thought it was an agreement from way back, that it could be used. It was used by the renters. It was used by Jo. It was used by anybody.<sup>3</sup>

1.7 The deposition of Douglas A. NotDisclosed taken August 21, 1997 by defendants' attorney, Chuck E. Marunde, (a copy of which is attached to the Declaration of Chuck E. Marunde) includes the following relevant interchange:

Q: Are you currently using the driveway that is in dispute?

A: If I have to go from West Sequim Bay Road down to Jo Vonne's house for some reason, from that angle, yes.

Q: How often is that?

A: Not very.

Q: When you say not very, once a month?

A: If that.

...

Q: Okay, are you making any claims to this property that is in dispute right now?

A: No.

Q: Making any claim by adverse or by prescriptive easement or prescriptive use of the driveway?

A: No.

Q: Are you making any claims to any of the other property that is involved in this, that is not part of the driveway?

A: Any other property being . . .?

Q: The property that is being adversely claimed by the NotDisclosed?

A: No.

...

Q: What was your understanding of that driveway, of who has the right to use it?

A: It's always been my understanding that Jo Vonne has had use of that, ever since Alvin died, and prior to that. They had a rental house down there. That was the driveway to that rental house. It was also the access to the beach, and to the orchard, which we all used.

<sup>3</sup>See Deposition of Nils NotDisclosed at pages 3-6

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... Q: Is your wife making any claim for this property? The driveway?  
A: Not that I'm aware of.

... Q: Has any of this . . . any of the boundary line problems that you have had or that had occurred with the NotDisclosed family, Jeff NotDisclosed and others, has that created any problem for you and your family?  
A: I guess the only . . . As far as that use of the driveway, that doesn't present a problem to me, because I have my own, if that is what you mean.<sup>4</sup>

1.8 Prior to late 1980 the parcels owned by NotDisclosedes and NotDisclosedes were owned by the NotDisclosed family. The driveway, which is the subject of this litigation, was built by the NotDisclosedes. Bobby NotDisclosed allowed Alvin NotDisclosed's family to continue to use the driveway after Alvin NotDisclosed's death. It was in 1989 that Alvin NotDisclosed's widow, Jo Vonne NotDisclosed, short platted her property. NotDisclosed retained a 30-foot easement on her own property along the southerly border for ingress and egress from her house to West Sequim Bay Road. That 30-foot easement is shown on the survey already part of the court file as Exhibit "B" to the Lambert declaration.

1.9 A portion of the property claimed now by plaintiff had a partial broken down wire fence, which was not built by plaintiffs, and which was not a boundary line of any kind, but was used to keep cattle within the field when cattle were grazed on the NotDisclosed property in years past. The location of that small section of the fence was a matter of convenient location and practicality. To place this portion of the fence on the opposite side of the driveway would have created a great inconvenience, since there would have to have been a permanent gate across the driveway to keep the cattle in and at the same time to allow the NotDisclosedes, Melvin Baker, and the NotDisclosedes or their tenants to use the driveway. That fence was removed prior to March 5<sup>th</sup>, 1996, as can be seen by a letter dated March 5, 1996, from William McDowell to Chuck E. Marunde. A copy of that letter is attached to the Declaration of Chuck E. Marunde in the court file. It is important to know that this fence was built before the properties were subdivided, which means it was not built as an intended boundary line between parcels, and

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<sup>4</sup>See Deposition of Douglas NotDisclosed at pages 3-9

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2 which also means that this fence was not built in its position by mistake. The fence was built exactly where it was intended to contain cattle.

3 1.10 There was also another fence along the approximate boundary line between the  
4 two parcels up to the highway, so that the driveway which is the disputed area had a fence on  
5 both sides of it for many years. This small portion of fence (shown on the NotDisclosed' survey)  
6 was in place after the NotDisclosedes purchased their property, but at some point it disappeared.

## 7 II. LEGAL ISSUES

8 2.1 Can the plaintiff prove her prima facie case of adverse possession?

9 2.2 Can plaintiff prove the "open and notorious" element of her claim?

10 2.3 Can plaintiff prove the "actual and uninterrupted" element of her claim?

11 2.4 Can the plaintiff meet her burden of proof that use of the claimed property was  
12 exclusive?

13 2.5 Where competent evidence of five witnesses has been admitted before this Court  
14 establishing that plaintiff's use of the property in question was permissive and not hostile, can  
15 this Court decide Plaintiff has not met her burden of proof as to this element? In other words,  
16 can this Court possibly decide that, under these facts, Plaintiff could meet her burden?

## 17 III. ADVERSE POSSESSION

18 3.1 In order to establish her adverse claim, plaintiff must meet the burden of proof (a  
19 preponderance of the evidence) by establishing each and every element of adverse possession  
20 under RCW 4.16.020 and as defined in our state courts. The burden of proving the "existence of  
21 each element of adverse possession is on the claimant." Hunt v. Matthews, 8 Wn. App. 233,  
22 238, 505 P.2d 819 (1973). See also Lloyd v. Montecucco, 83 Wn. App. 846, 924 P.2d 927  
23 (1996); ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 757, 774 P.2d 6 (1989); Anderson v. Hudak  
24 at 404-405 citing Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984); Stokes v. Kummer,  
25 85 Wn. App. 682, - P.2d - (1997); Bryant v. Palmer Coking Coal Co., 86 Wn. App. 204, - P.2d -  
26 (1997).

27 3.2 In order to establish a claim of adverse possession, there must be possession for  
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2 ten years that is: (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4)  
3 hostile. ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 757, 774 P.2d 6 (1989). See also Lloyd v.  
4 Montecucco, 83 Wn.App. 846, 924 P.2d 927 (1996); Anderson v. Hudak at 404-405 citing  
5 Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984); Stokes v. Kummer, 85 Wn. App. 682,  
6 - P.2d - (1997); Bryant v. Palmer Coking Coal Co., 86 Wn. App. 204, - P.2d - (1997).

#### 7 **IV. OPEN AND NOTORIOUS**

8 4.1 “The open and notorious requirement is met if (1) the true owner has actual notice  
9 of the adverse use throughout the statutory period, or (2) the claimant uses the land so that any  
10 reasonable person would assume that the claimant is the owner.” Anderson v. Hudak at 404-405  
11 citing Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984).

12 4.2 The true owner of this property did not have actual notice of the adverse use  
13 throughout the statutory period. It was only in the last two years that plaintiff began to exhibit  
14 conduct adverse to the true owner’s interest.

15 4.3 In the language of Anderson v. Hudak, page 405, “With no evidence of  
16 affirmative acts of ownership, [NotDisclosed] failed to prove that [she] used the land so ‘that any  
17 reasonable person would assume that the claimant is the owner.’” The Anderson court decided  
18 that Anderson’s possession was not open and notorious in a case involving a tree line. However,  
19 in Anderson the claimant had actually planted the trees. In the present case, NotDisclosed did  
20 not plant trees along the property line, nor did NotDisclosed install the fence along the property  
21 line. The wire fence was maintained by the NotDisclosed and by Melvin Baker, who  
22 maintained the fence for the NotDisclosed. The shrubs and flowers that were planted by  
23 NotDisclosed were by permission and even NotDisclosed stated that these shrubs and flowers  
24 would be the property of the NotDisclosed. Although NotDisclosed now denies this,  
25 declarations by Jeff NotDisclosed, who no longer has an interest in the property, by Robin  
26 Lambert, an uninterested third party Realtor, and by Lorene NotDisclosed, also an uninterested  
27 third party Realtor, bolster the NotDisclosed’ own declarations regarding Jo Vonne NotDisclosed  
28 agreement that her use of the driveway was permissive.

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4.4 In the present case, both plaintiff’s and defendants’ lots have been vacant during much of the time relevant to this action, and defendants’ property was vacant at all times. The NotDisclosed lived about 100 miles from the property. “Greater use of a vacant lot would be required to be notorious to an absentee owner than to one occupying the land who would observe an offensive encroachment daily.” Hunt v. Matthews, 8 Wn. App. 233, 237, 505 P.2d 819 (1973). The Hunt court cites Peoples Savings Bank v. Bufford, 90 Wash. 204, 208, 155 P. 1068 (1916), in which it was said, “It is . . . important . . . to consider the character and intended uses of the property . . . the mere fencing and sowing of some turnip seed were insufficient to initiate a title to a town lot. “ In the present case, NotDisclosed neither fenced nor sowed. Hunt, at page 238, required that the “property must be used beyond the use it would receive because it was handy and convenient and, instead, must be utilized and exploited as by an owner answerable to no one.” Citing Fadden v. Purvis, 77 Wn.2d 23, 459 P.2d 385 (1969).

4.5 NotDisclosed’s claim that she has used the driveway and that establishes adverse possession falls short of the Bryant requirements. In Bryant v. Palmer Coking Coal Co., 86 Wn.App. 204, 213, 209, - P.2d - (1997), the adverse claimant had constructed a road on the property, which “was for a use establishing adverse possession.” The court found that “Bryant cut a road, cleared openings, built a structure, cut wood, parked 50 to 100 vehicles, kept a horse, and guard dog, and built a 7,000-gallon diesel fuel tank there.” In the present case, NotDisclosed has done none of these things. NotDisclosed did not build the driveway which she has used, and NotDisclosed most certainly did not build the road to establish adverse possession. NotDisclosed has made no significant improvements to the property that would put the NotDisclosed family on notice that there was any kind of adverse claim in the making.

4.6 Bryant v. Palmer Coking Coal Co., 86 Wn.App. 204, 212, 209, - P.2d - (1997) addresses the open and notorious element, “Open and notorious use is such use that would lead a reasonable person to assume that the claimant was the owner,” and then the Bryant court quoted Hunt (at page 212 in Bryant):

\_\_\_\_\_The acts constituting the warning which establishes notice must be made with

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2 sufficient obtrusiveness to be unmistakable to an adversary, not carried out with  
3 such silent civility that no one will pay attention . . . Real property will be taken  
4 away from an original owner by adverse possession only when he was or should  
5 have been aware and informed that his interest was challenged.

6 The NotDisclosed' property should not be taken away from them based on the weakness of  
7 NotDisclosed's claims.

8 4.7 The state's foremost authority on the law of adverse possession, William B.  
9 Stoebeck, stated that "Adverse possession is wrongful possession; possession with the owner's  
10 consent is not wrongful." Washington Practice, Real Estate: Property Law, Chapter 8 at page  
11 479 (1995). NotDisclosed did not wrongfully possess any portion of defendants' property until  
12 approximately the year 1995. Plaintiff's use of the property was by permission and under terms  
13 which the plaintiff and the property owners agreed upon. Those terms included plaintiff's use of  
14 the driveway in exchange for maintaining the driveway, and permission to plant small trees,  
15 shrubs, and flowers, which admittedly by plaintiff with many witnesses present, were to belong  
16 to the true property owners, the NotDisclosed. Plaintiff also admitted in front of at least eight  
17 witnesses on November 7, 1994, that the driveway was on the defendants' property and that she  
18 only requested permissive use of the driveway until she could install her own driveway on her  
19 own property.

20 4.8 Plaintiff's use of defendants' driveway across the corner of defendants' property,  
21 and the small corner parcel adjacent to the driveway also belonging to the defendants, have only  
22 been adverse at most since 1995, and does not satisfy the open and notorious elements of adverse  
23 possession by any stretch of the imagination.

24 4.9 A number of adverse possession cases involve questions of meeting the open and  
25 notorious test. In Murray v. Bousquet, 154 Wash. 42, 280 P. 395 (1929), the adverse possessor  
26 used wild, mountainous land to pasture cattle and horses during the summer. Hunt v. Matthews,  
27 8 Wn. App. 233, 237, 505 P.2d 819 (1973), involved cultivation of a garden in a vacant lot, with  
28 no clear fenced boundary. In Waldrup v. Olympia Oyster Co., 40 Wn.2d 469, 244 P.2d 273  
(1952), the court rejected a claim of adverse possession where the alleged possessor had paid

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2 taxes on the subject property but never made any actual use of it. In Peeples v. Port of  
3 Bellingham, 93 Wn.2d 766, 613 P.2d 1128 (1980), the court stated that mooring a floating  
4 structure on tidelands is not open and notorious use.

5 4.10 Plaintiff in the present case drove down a driveway, part of which crosses  
6 defendants' property, and this use was permissive. There simply was no open and notorious use  
7 that rises to the level of the cases in this state. As the Bryant Court so aptly said, “. . . there was  
8 insufficient evidence of activity . . .” to ripen into an adverse claim. (Page 216) And so it is here.

#### 9 V. ACTUAL AND UNINTERRUPTED

10 5.1 Plaintiff's claim of possession must be actual and uninterrupted for a period of  
11 time in excess of 10 years. Her claim fails this test.

12 5.2 Stoebuck at page 496 summarizes the kinds of adverse possession cases involving  
13 rural land in which the courts have denied a claimant:

14 The following activities have been held not to amount to actual possession of rural or  
15 semi-rural land: having an old, dilapidated fence in an unused strip overgrown with trees  
16 and brush; maintaining an irregular 'fence' of poles and brush, taking timber, and once  
17 planting cabbages; **maintaining a fence intended to be a cattle fence and not a line**  
18 **fence**; erecting one, and part of the time two, signboards and a mailbox, and ploughing up  
19 weeds; irregular use for gardening, piling wood, and mowing hay; on uplands bordering  
20 tidelands, having occasional picnics and posting a sign warning against beach fires; and  
21 exacting rent from the owner's lessee. [boldface added]

22 5.3 Stoebuck at page 498 states, “**But if adverse possession is claimed up to a fence,**  
23 **it must be a line fence and not a fence used only for some other purpose, such as an interior**  
24 **fence to contain animals.**” [boldface added] This is precisely the case at hand. The fence  
25 which Plaintiff now claims is the adversely possessed boundary line was built by predecessors of  
26 the NotDisclosedes and was maintained by predecessors of the NotDisclosedes or their  
27 permissive users, such as Melvin Baker for the purpose of containing cattle on the NotDisclosed  
28 property.

5.4 The definition of rural is not clearly defined in the law, but there are some  
concepts which lead one to believe property is rural or semi-rural as opposed to urban property.  
In the present case, there are several facts which lead to the conclusion that this is a rural or semi-

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2 rural area. The property owned by Melvin Baker adjacent to Jo Vonne NotDisclosed was at one  
3 time 72 acres, and although he sold some small portion, he still retains the largest section of that  
4 property, and it is largely fields which he uses to grow hay. The property owned by the  
5 NotDisclosedes is 3.64 acres, and the property owned by the NotDisclosedes prior to short platting  
6 and selling to the NotDisclosedes exceeded five (5) acres on the first Cummins' survey.<sup>5</sup> These  
7 parcels were larger just a few years ago, because they included property across the highway,  
8 which has subsequently been sold. Several Washington cases conclude that the subject property  
9 in those cases is rural, but do not describe the property or the definition of rural. Piotrowski v.  
10 Parks, 39 Wn. App. 37, 691 P.2d 591 (1984), a Clallam County case involving rural land,  
11 addressed a boundary dispute between neighbors. In that case, a fence was erected and the  
12 argument was made that it was erected solely to hold cattle, as in the present case. The Court  
13 found that wasn't true in that case, that the parties had agreed to make their new fence the actual  
14 boundary between their respective properties, but the clear indication from the Court is that the  
15 intention of the party building and using the fence is important, and if that intention is not to  
16 establish a boundary line, then the Plaintiff in the present case is not entitled to rely on the fence  
17 she did not build, the fence that was maintained by the NotDisclosedes and their tenant, Melvin  
18 Baker, for the purpose of retaining cattle and for that purpose only.

19 5.5 A number of factors are used to determine if property is rural or semi-rural. Size  
20 appears to be a factor. Location appears to be a factor. Use appears to be a factor. In Stokes v.  
21 Kummer, 85 Wn. App. 682, - P.2d - (1997), agricultural land of 20 acre parcels were rural for  
22 purposes of determining adverse possession claims, although no mention of minimum acreage is  
23 mentioned. In the present case, the NotDisclosed' property was vacant and used over the last 30  
24 to possibly 50 years as a hay field. This is consistent with agricultural use in the area. During

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26 <sup>5</sup>The minimum lot size for county zoning in this area is 2.4 acres. The first Cummins'  
27 survey was incorrect, because it showed the NotDisclosed property being divided into two lots of  
28 over 2.4 acres each when the actual acreage of both the NotDisclosed and NotDisclosed parcels  
totals only 3.78 acres. The county granted building permits based on the faulty survey, and so the  
NotDisclosed and NotDisclosed parcels are not in compliance with county zoning requirements.

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2 the time period claimed by the Plaintiff, there was no house on the NotDisclosed property, no  
3 house on the NotDisclosed property, and the NotDisclosed's new house was not built, although  
4 there was an old house on the NotDisclosed property that burned down prior to the building of  
5 their new house. In addition, the property across the highway which now has a new house on it  
6 owned by Doug Arrington, did not have a house on it. The NotDisclosed property had the  
7 agricultural feel of rural or semi-rural property. The NotDisclosed who owned the property for  
8 many years prior to selling to the NotDisclosedes lived in Tacoma.

9 5.6 The Clallam County Code includes the subject properties in what is classified as  
10 R2. This zone is a "Rural Moderate" area defined in the code in this way, "The purpose of the  
11 Rural Moderate (R2) zone is to provide areas having a moderate density rural setting free from  
12 commercial, industrial, and high density residential developments." CCC, Section 33.10.030.  
13 Within that zone the Code lists the allowed land uses, which includes:

- 14 Agricultural activities
- 15 Bed and breakfast inns
- 16 Commercial greenhouses (wholesale)
- 17 Duplex
- 18 Home enterprises
- 19 Family child care home
- 20 Single family dwellings
- 21 Timber harvesting

22 These are logically and reasonably the kinds of uses you would expect in a rural area.

23 5.7 The definition of "rural" according to the American Heritage Dictionary of the  
24 English Language, includes this relevant language, "1. of or pertaining to the country as opposed  
25 to the city; rustic. 2. of or pertaining to people who live in the country. 3. of or relating to  
26 farming; agricultural. Compare urban." The history of the properties in the present case would  
27 fit these rural descriptions.

28 5.8 The fence on Defendants' side of the driveway near the highway, which was  
placed there by the NotDisclosed family many years ago was never intended by the  
NotDisclosedes to be a boundary line. The fence was built prior to the one parcel being divided  
into two parcels. In addition, the fence fell into disrepair and was rebuilt and maintained by

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Melvin Baker from 1984 to 1995 for the sole purpose of keeping his cattle inside the NotDisclosed's (now NotDisclosed' property). Plaintiff neither built the fence, nor maintained the fence. Furthermore, the location of the fence on the south side of the driveway was a logical place for the fence. To place the fence on the actual boundary line to keep cattle inside the property would have meant installing a gate across the driveway that the NotDisclosed's were using by permission. Since there had been cooperation between family members during these years, there was no reason to create an undue burden for Plaintiff.

**VI. EXCLUSIVE USE**

6.1 Even if, arguendo, plaintiff had used the property for a period of time in excess of 10 years, it was not exclusive. The prior owners of defendants' property, the NotDisclosed family, continued to use the property and the driveway to access their barn and the tidelands below. In addition, Melvin Baker grazed his cattle on the subject property from 1984 to 1995 with the permission of the NotDisclosed. His cattle were brought onto the NotDisclosed property and to the NotDisclosed' property across and perhaps down a portion of the driveway. Melvin Baker used the driveway from the highway to bring in his vehicles to feed and water his cattle for this 11-year period of time. In addition, Melvin Baker cut and baled hay on the NotDisclosed property during this same time period, and to access the NotDisclosed property, he brought his heavy equipment down the disputed driveway. He also hauled the hay from the NotDisclosed property out the same disputed driveway during these same years from 1984 to 1995. Plaintiff cannot successfully argue that the driveway was exclusively used by plaintiff or plaintiff's tenants. Hurn v. Matthews, page 238, states, "The fence did not define the boundary of the area claimed by the plaintiff; it did not exclude the defendants from the property; and it did not indicate an affirmative exertion of dominion by the claimant over the property." Defendants were never excluded from using their driveway or their entire property, either by plaintiff or plaintiff's tenants.

6.2 In ITT Rayonier, Inc., v. Bell, 112 Wn.2d 754, 759, 774 P.2d 6 (1989), a Clallam County case, the Supreme Court said:

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2 . . . that the exclusivity element was lacking because the alleged adverse possessor had  
3 shared the use of the disputed area. Nevertheless, by pointing to specific instances of his  
4 own use of the property, Bell attempts to establish his exclusive possession.  
5 Unfortunately, such an approach logically fails to negate instances of use by others. As  
6 this court has held, specific instances of property usage merely provide evidence of  
7 possession.”

8 The ITT Rayonier court went on to say at page 128:

9 Bell did not deny that Olesen and Klock used the same land, although he said they used  
10 the land only one to three times a year. When asked in a deposition whether other people  
11 had the right to use the property, Bell answered: "I suppose they did." When he was asked  
12 if he ever attempted to "throw anyone off the property," he responded that he had not  
13 done so, except for the "lady" who rented this houseboat. He indicated that he evicted her  
14 from the houseboat for nonpayment of rent. Finally, he was asked if "it was your  
15 understanding that other people could use the property if they wanted to?" He answered,  
16 "when I was there they-I didn't think somebody was going to come up and go camping  
17 right there. But I suppose if they tried to, I wouldn't have said anything to them."  
18 [1] Even viewing this evidence in a light most favorable to Bell, it is apparent that the  
19 exclusive possession that is required for adverse possession is lacking. A party seeking to  
20 establish a claim of adverse possession must show that his possession of the claimed  
21 property was exclusive in addition to being actual and uninterrupted, open and notorious,  
22 and hostile and under a claim of right made in good faith. *Chaplin v. Sanders*, 100 Wn.2d  
23 853, 857, 676 P.2d 431 (1984).

24 6.3 In the present case, no one ever excluded the defendants or their predecessors  
25 from full use of all of their property. That plaintiff may have used a portion of the NotDisclosed'  
26 property is only evidence of recent possession, but it falls far short of establishing exclusive use.

27 6.4 In Bryant (at page 217) the claimant built an airstrip and expanded it over the  
28 years. As the court said, "Construction of an airstrip is a much clearer indication of ownership  
than leaving property undeveloped." Bryant built and used an airstrip on property he was  
adversely claiming, but NotDisclosed cannot make such claims of construction of the original  
road, nor to exclusive use of that road.

6.5 Cases where the courts have found a lack of exclusivity involve use by the title  
owner that indicate ownership. In Thompson v. Schlittenhart, 47 Wn.App. 209, 734 P.2d 48  
(1987), parties on both sides of a disputed boundary made similar use of the disputed property.  
In Scott v. Slater, 42 Wn.2d 366, 255 P.2d 377 (1953), the title owner cultivated, sprayed, and  
harvested pears on the subject property. The defendants' predecessors used the driveway and  
their property freely. Jeff NotDisclosed's declaration evidences his families use of the driveway

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across their property and down the NotDisclosed’s property to access the NotDisclosed family’s barn from time to time over the years. The declaration of Melvin Baker also is evidence that with the permission of the NotDisclosed family, he brought cattle down or across the subject driveway from 1984 to 1995 to graze his cattle on the NotDisclosed property, which at that time was an open field. There never was any denial of defendants’ use of the property plaintiff is now claiming. This same time period of the additional use by Melvin Baker from 1984 to 1995, among other uses, denies plaintiff’s claim to exclusive use.

6.6 Plaintiff admits in her own deposition that the defendants’ predecessors used the driveway, so her use is admittedly not exclusive. Plaintiff’s own husband stated in his deposition that the driveway was used by renters and his wife and by “anybody,” which is not exclusive use. Douglas NotDisclosed admits in his deposition that the use of the driveway was not exclusive with plaintiff when he states that, “It was also the access to the beach, and to the orchard, which we all used.” Such incredible statements alone defeat the element of exclusivity.

6.7 Plaintiff’s own attorney, William McDowell, agreed and represented that his client’s use of the driveway had not been exclusive in his letter dated December 5, 1996, and addressed to the NotDisclosedes. In that letter, Mr. McDowell states, “They [NotDisclosedes] intend to continue their non-exclusive use of the driveway under this claim of right with or without your permission.” Furthermore, Mr. McDowell’s letter gave up any claim his client may have for adverse possession to the portion of property adjacent to the driveway when he stated, “So long as you are aware of their position, they have no objection to your [sic] fencing that small piece of property to the north of the driveway if you take responsibility for the maintenance of that property and do not attempt to prevent their use of the driveway.”

**VII. HOSTILE USE**

7.1 Plaintiff’s claim has never been hostile until recently within the past two years. “Hostility does not import enmity or ill-will; rather, it ‘requires only that the claimant treat the land as his own as against the world throughout the statutory period.’” Anderson v. Hudak, page 402, citing Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984). Anderson went on to say,

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2 “The nature of possession is determined objectively by the manner in which the claimant treated  
3 the land; the claimant’s subjective belief regarding the claimant’s true interest in the land and  
4 intent to dispossess or not dispossess another is irrelevant to determine whether hostility has been  
5 established.”

6 7.2 Plaintiff NotDisclosed cannot silently and subjectively desire to adversely possess  
7 part of the NotDisclosed’ property, and suddenly hope to ripen her claim in this quiet title action.  
8 In a much more obvious case of “hostility”, the Anderson court found the claimant failed to  
9 establish an adverse claim. In Anderson, Mrs. Anderson stands in the shoes of plaintiff in this  
10 case, and the Hudak’s stand in the shoes of the defendants here. Mrs. Anderson attempted to  
11 claim 15 feet of the Hudak’s property including a row of trees which her deceased husband had  
12 planted. That Mrs. Anderson only pruned the trees once and “only watched them grow for the  
13 next thirty years” was insufficient to establish adverse possession. NotDisclosed cannot  
14 overcome insufficient evidence any more than Anderson could.

15 7.3 The very credible declarations of five witnesses have testified that plaintiff agreed  
16 that use of the driveway and a small corner section of the defendants’ property was permissive.  
17 The defendants have declared their testimony that plaintiff agreed that her use of the property  
18 was permissive. In Timberlane v. Brame, 79 Wn. App. 303, 310, 901 P.2d 1074 (1995), the  
19 court cited Crites v. Koch, 49 Wn. App. 171, 177, 741 P. 2d 1005 (1987):

20 . . . [p]ermissive use is not hostile and does not commence the running of the  
21 prescriptive period. Use that is permissive in its inception cannot ripen into a  
22 prescriptive right unless the claimant has made a distinct and positive assertion of  
23 a right hostile to the owner. . . . In addition, use of property, at its inception, is  
24 presumed to be permissive. However, a variety of circumstances are relevant to  
25 the question of whether use was hostile or permissive. . . . [U]nchallenged use for  
26 the prescriptive period is one circumstance from which a finding of adverse use  
27 may be drawn. Other circumstances may suggest that such use was permitted as a  
28 neighborly courtesy. The inference of permissive use is applicable to any  
situation in which it is reasonable to infer that the use was permitted by  
neighborly sufferance and acquiescence. (Citations omitted)

7.4 In the present case, the two families had ties that went back many years, and their  
joint use of the property was part of the family history. Permissive use would not only be a  
reasonable inference under these circumstances, but expected and any other assumption would be

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2 unreasonable. This permissive use is confirmed in the testimony of the parties and the third party  
3 witnesses. Plaintiff admitted in her deposition that Jeff NotDisclosed told her at the November 7,  
4 1994 meeting that, “You don’t have to worry about me taking the driveway away from you.”  
5 What other implication or inference could be made from this kind of statement in such a context  
6 but that permission had been granted and was continued as a neighborly act. Plaintiff’s own  
7 husband testified in his deposition that Jeff NotDisclosed did make that statement, but that he did  
8 not argue with that statement or question the issue of permission, but said, “Nothing. I didn’t  
9 even respond to it.”

10 7.5 Jeff NotDisclosed states in his declaration:

11 On or about November 7, 1994 before eight witnesses at the Sequim office of  
12 Coldwell Banker, Jo Vonne acknowledged that the entrance to the driveway was  
13 on my father’s property. At that meeting, she asked me if she could get a written  
14 easement for continued use of the driveway, and I told her that I would not give  
15 her a written easement, but I again reasserted that she could use the driveway until  
16 we sold the property at which time she would then have to ask the new owners.  
17 Jo Vonne again stated that she would do the maintenance and upkeep on the  
18 driveway, provided she could continue to use it. Jo Vonne also stated that my  
19 family could keep any improvements she made to the property, which she said  
20 might include trees, bushes and flowers.

21 Clearly, plaintiff acknowledged her use of the driveway and property was by permission, and no  
22 reasonable inference of an adverse claim could be made from this.

23 7.6 It was also at the November 7, 1994 meeting that surveyor Bob NotDisclosed  
24 showed the Plaintiff and all present the survey he prepared showing the exact boundaries of the  
25 properties and the location of the driveway over a portion of the NotDisclosed’ property. Mr.  
26 NotDisclosed explained this survey carefully to Plaintiff, and she raised no concerns, no  
27 objections, no negative comments, and no comment of any kind that raised any indication that  
28 she ever claimed the driveway as her own. Jo Vonne NotDisclosed was said to be very pleasant  
throughout the meeting and quite agreeable to all that was said. Furthermore, it was at that  
meeting that Jeff NotDisclosed told Jo Vonne NotDisclosed that she could continue to use the  
driveway but after the property was sold, she would have to talk to the new owners about  
continued permissive use. To this, Jo Vonne NotDisclosed raised no concerns, no objections, no

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2 negative comments, and no comment of any kind that raised any indication that she ever claimed  
3 the driveway as her own. Again, she appeared quite agreeable to all present. At that point, Jo  
4 Vonne NotDisclosed raised her only concern—her fruit trees. Several parties (Jeff NotDisclosed,  
5 Bob NotDisclosed, Lorene NotDisclosed, Robin Lambert, and others) left that meeting believing  
6 that the survey and boundary lines were all clear and acceptable to everyone involved. It was  
7 only later that Jo Vonne NotDisclosed changed her plans and in the past two years has taken the  
8 position she is entitled to the driveway by adverse possession. Her position now is quite contrary  
9 to her position in all previous years.

10 7.7 Plaintiff admits in her deposition that she had a meeting at a restaurant with the  
11 defendants, and when asked whether she remembered discussing “permissive use”, she stated,  
12 “I’m not sure if that came out or not.” This is clearly not a denial, and the NotDisclosed  
13 Declaration should be given great credibility on this issue of Jo Vonne NotDisclosed agreeing  
14 that her use was permissive. Robert NotDisclosed’ declaration states that Jo Vonne  
15 NotDisclosed said at the restaurant that she “has been using the driveway for many years and it  
16 was only after the property was put up for sale that permission to use the driveway was denied.”  
17 Robert NotDisclosed points out that she said that twice in their conversation.

18 7.8 The plaintiff’s own words in her deposition indicate that she never told the  
19 NotDisclosed family or anyone that she was claiming the property by adverse possession. She  
20 admits, “I felt there was no problem,” and “It was never discussed, because it was never a  
21 problem. We just used it.” Hostility was clearly absent, and by plaintiff’s own words, she has  
22 not used the driveway hostilely.

23 7.9 The importance of the family relationship involved in this case cannot be  
24 overlooked. It bears a great deal of importance on this issue of hostility. Stoebuck, at page 502,  
25 appropriately stated, “Permission may be implied in some cases when there is a close  
26 relationship, often a family relationship, between owner and possessor.”

27 7.10 The portion of the fence on the NotDisclosed side of the driveway, and up to  
28 which Plaintiff seems to claim, was built with the intent of the true owners to contain cattle, and

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2 this defeats the hostility claim of Plaintiff. The following pertinent quote from the Washington  
3 Real Property Deskbook, Chapter 64, Adverse Possession, at page 64-15, is helpful:

4 It is very common in such cases for the claimant to be asserting ownership up to a fence  
5 line which the true owner claims is a barrier of some sort (such as to impound cattle) and  
6 not a boundary line fence. Division Three of the Court of Appeals has held that the  
7 subjective intent of the claimant's predecessor to treat such a fence as a barrier rather than  
8 a boundary defeated the adverse possession claim. Roy v. Goerz, 26 Wn.App. 807, 614,  
9 P.2d 1308 (1980), review denied, 94 Wn.2d 1018 (1980), overruled on other grounds,  
10 Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1994). Roy was, of course,  
11 inconsistent with Chaplin and was overruled by it. But Chaplin still leaves open the  
12 possibility of the same sort of claim being defeated if the evidence shows that the fence  
13 was on the true owners' property by his or her permission. In Roy, there was no proof as  
14 to who built the fence. Suppose, hypothetically, that the true owner had built a fence on  
15 his or her own land with the subjective intent to allow a neighbor "permission" to graze  
16 cattle up to it. Or, suppose the true owner and the claimant had had a discussion during  
17 or before the construction of the fence, and the discussion indicates some permission on  
18 the part of the true owner. Chaplin still allows proof of "permissive" use to defeat a  
19 claim. Therefore, evidence of the subjective intent of the true owner could still be  
20 relevant on this type of issue in an adverse possession case.

21 7.11 "Permission can be express or implied, and a use which is initially permissive  
22 cannot ripen into a prescriptive right unless the claimant makes a distinct and positive assertion  
23 of a right hostile to the owner. . ." Washington Real Property Deskbook, Chapter 64, Adverse  
24 Possession, at page 64-16. Plaintiff's long family use of the driveway has been permissive, and  
25 did not begin to ripen into an actual adverse claim until the last couple of years.

26 7.12 Stoebuck, at page 501, uses this test, "Considering the character of possession and  
27 the locale of the land, is the possession of such a nature as would normally be objectionable to  
28 owners of such land?" Plaintiff NotDisclosed's alleged use of the property never did rise to the  
level of concern to the NotDisclosed family, at least not prior to approximately one to two years  
ago, nor would it have to any reasonably minded person. NotDisclosed's use of the driveway  
was not hostile.

## 29 **VIII. ADVERSE POSSESSION UNDER COLOR OF TITLE**

30 8.1 Plaintiff also cannot claim adverse possession through the doctrine of color of title  
31 under the seven year statute (RCW 7.28.070), since she did not pay property taxes on the  
32 NotDisclosed' property, and because she did not plead the special elements required in the  
33 statute.

