COLORADO COURT OF APPEALS 2 East 14th Avenue, Suite 300 Denver, Colorado 80203	
On Appeal from the Boulder County District Court The Honorable James C. Klein Case No. 06CV982	
Appellees: RICHARD McLEAN and EDITH STEVENS v. **Appellants:** DK TRUST and DON KIRLIN	▲ **COURT USE ONLY** ▲ No.
Andrew M. Low, No. 11,393 DAVIS GRAHAM & STUBBS LLP 1550 Seventeenth Street, Suite 500 Denver, CO 80202 Tel: (303) 892-9400 Fax: (303) 893-1379 E-mail: andrew.low@dgslaw.com	
NOTICE OF APPEAL	

I. NATURE OF THE CASE

A. Nature of the controversy. Appellants, DK Trust and Don Kirlin (together, "the Kirlins"), own a vacant lot in Boulder adjoining plaintiffs' residence. Plaintiffs claim that they trespassed on the Kirlins' lot as an easy way to reach their own back yard. Plaintiffs say they performed minor maintenance on a portion of the Kirlins' lot, such as cutting weeds and pruning branches from two small volunteer pine trees, and that guests at plaintiffs' occasional social events

sometimes trespassed on the Kirlins' lot. Plaintiffs also claim that their back yard garden encroached approximately five feet onto the Kirlins' lot. Based on these claimed facts, plaintiffs sought title by adverse possession to a portion of the Kirlins' lot.

Plaintiffs bore the burden of proving that they had used the Kirlins' property for more than 18 years and that their use was actual, adverse, hostile, under claim of right, exclusive, and uninterrupted. The trial judge visited the property twice and found that there was a clear path through the Kirlins' lot, worn down to bare dirt. The path, as defined by the court and shown on plaintiffs' Exhibit 1, began at the street, three feet from the line separating the two lots (the "lot line"), curved out toward the center of the Kirlins' lot, and then led to Boulder open space bordering the back edge of the lot. While that path certainly existed at the time of trial, the Kirlins presented testimony and photographs showing that the path suddenly appeared after plaintiffs filed the lawsuit and thus had existed for less than one year.

Without making any finding of fact as to when the dirt path came into existence, the district court found that plaintiffs had met their burden of proof and awarded to plaintiffs all the land between the lot line and the path—amounting to

34 percent of the Kirlins' lot. This transfer makes the remainder of the lot too small to build a house and reduces the value of the lot by as much as $800,000.

B. Judgment or order being appealed. The Kirlins appeal from the district court's order awarding a portion of their property to plaintiffs by adverse possession. In an order denying plaintiffs' motion to amend the judgment, the district court corrected certain errors in the description of the path in the original order. The court also made extensive comments—not relevant to plaintiffs' motion—in which the court apparently attempted to bolster its findings and conclusions. To the extent that the court's comments are considered in connection with its earlier order, the Kirlins appeal from that order as well.

C. Whether the judgment or order resolved all issues pending before the trial court. Yes.

D. Whether the judgment was made final for purposes of appeal pursuant to C.R.C.P. 54(b). No.

E. The date the judgment or order was entered. October 17, 2007.

F. Whether any extensions of time were granted to file motions for post-trial relief. No.

G. The date any motion for post-trial relief was filed. October 29, 2007.

H. The date the motion for post-trial relief was denied. November 27, 2007.

I. Whether any extensions of time were granted to file the notice of appeal. No.

II. ADVISORY LISTING OF ISSUES TO BE RAISED ON APPEAL

1. Did the district court err in concluding that the facts as it found them were sufficient to prove adverse possession of all the land between the lot line and the path?

2. Where the district court relied heavily on the existence of the path, as personally viewed by the court at the time of trial, and used the path as the boundary of the land awarded to plaintiffs, did the court err in finding for the plaintiffs without finding that the path had been in existence for 18 years?

3. Was the district court's finding that plaintiffs had walked back and forth along the route of the path for at least 18 years, without finding that a clear path existed on the ground for that entire time, insufficient to support a claim of adverse judgment because:

(a) without a clear path, there was no sign that plaintiffs were walking on the Kirlins' property, and plaintiffs therefore failed to prove that their claimed use of the property was open and obvious; and

(b) simply walking across a property, even on the same route day after day, is insufficient as a matter of law to prove adverse possession?

4. Even if the clear path had been in existence for 18 years, was it nonetheless insufficient to prove adverse possession because it led to Boulder open space, not to plaintiffs' back yard, and thus did not reflect open and obvious use of the property *by the plaintiffs*?

5. Did the district court err in concluding that plaintiffs had proved their claim of adverse possession, where:

(a) plaintiffs failed to prove the element of exclusivity because they presented no evidence that they effectively excluded either the Kirlins or anyone else from the disputed property; and

(b) plaintiffs failed to prove the element of use under a claim of right because they admitted they were merely using land that they knew was owned by others, and they did not intend to treat the land as their own until a few years before they filed suit?

6. Did the district court err in awarding more than 1,500 square feet of land to the plaintiffs by adverse possession, where virtually all the tangible evidence of plaintiffs' use pertained to a tiny encroachment by plaintiffs' back yard garden, amounting to less than 100 square feet?

7. Other than the visible path, which was not found to have existed for 18 years, is the plaintiffs' other evidence insufficient as a matter of law to support adverse possession of the entire 1,500 square feet of disputed property, where:

(a) the encroachment by plaintiffs' garden supports, at most, adverse possession of less than 100 square feet of land; and

(b) plaintiffs' remaining evidence, consisting mainly of sporadic weeding and pruning, suggests merely that plaintiffs desired to improve the view from their property or to protect their property from fire, and does not show that their use was adverse, hostile, exclusive, or under claim of right?

Note: This list of issues is advisory only. The Kirlins do not waive, and specifically preserve, their right to raise other issues or to reframe any of the issues stated above.

III. TRANSCRIPT

A transcript of the trial will be necessary. The transcript, which is 679 pages, has already been prepared. The court reporter was M. Theresa Binns.

IV. PREARGUMENT CONFERENCE

No preargument conference is requested.

V. COUNSEL

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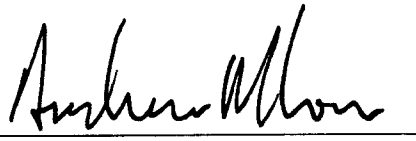
VI. APPENDIX

Copies of the two orders referred to in I(B) above are attached.

Dated: January 10, 2008

DAVIS GRAHAM & STUBBS LLP



Andrew M. Low, No. 11,393
Jonathan W. Rauchway, No. 34,786

CERTIFICATE OF SERVICE

The undersigned certifies that on January 10, 2008, the foregoing **NOTICE OF APPEAL** was served by first class mail on:

Kimberly M. Hult, Esq.
HUTCHINSON BLACK AND COOK, LLC
921 Walnut Street, Suite 200
Boulder, CO 80202

and by LexisNexis File and Serve on:

Boulder County District Court
Boulder Justice Center
1777 6th St.
Boulder, CO 80302

District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-1776	EFILED Document CO Boulder County District Court 20th JD Filing Date: Oct 17 2007 6:04PM MDT Filing ID: 16718877 Review Clerk: N/A
Plaintiffs: RICHARD MCLEAN and EDITH STEVENS v. Defendant: DK TRUST and DON KIRLIN	▲ COURT USE ONLY ▲
Attorney for Plaintiff: Kimberly Hult, Esq. *Attorney for Defendant:* William J. Kowalski, Esq.	Case Number: 06 CV 982 Division 12 Courtroom Q

ORDER

This matter was tried before the Court on June 6-7, 2007, and July 26, 2007. Plaintiffs appeared and were represented by Kimberly Hult, Esq. Defendants appeared and were represented by William J. Kowalski, Esq. Based upon the testimony and evidence presented at the time of trial, as well as two visits by the Court to the disputed property at issue, the Court now issues the following Findings of Fact, Conclusions of Law, and Order regarding Plaintiff's Claim for adverse possession:

FINDINGS OF FACT

1. The disputed property in this matter is delineated on Plaintiff's Exhibit 1 as a footpath beginning from a point on Hardscrabble Drive approximately three feet south of the northeastern most corner of lot 50 in the Shanahan Ridge Six Subdivision, Boulder, Colorado, and continuing in a north westerly semi-circle direction to a point approximately twelve and one tenths (12.1) feet to the south of the northwestern corner of lot 50. This footpath was commonly referred to throughout these proceedings as "Edie's Path."

2. Plaintiffs, purchased lot 51, the lot immediately adjacent to the disputed property in 1981, and following the construction of their home thereon, moved into their home on lot 51 in 1982. Plaintiffs planted extensively the areas surrounding the northeast and east sides of their home such that no access to the back of their home was available except either through their home or on footpaths extending onto lot 50.

3. Edith Stevens testified that Plaintiffs used the disputed property continuously for twenty-five (25) years without the permission of Defendants. Ms. Stevens stated that Plaintiffs' use of the disputed property included: footpaths to Plaintiffs' west garden and deck that were used "virtually every day;" gardening; entertainment; deliveries; a wood pile; the remodeling of Plaintiffs' kitchen; and, the re-staining of Plaintiffs' home.

4. In terms of maintenance on the disputed property, Ms. Stevens testified that she and Mr. McLean regularly cut weeds on the property, trimmed the volunteer trees on the property, raked thatch on the property, and performed fire abatement on the property.

5. Ms Stevens testified that she never saw Defendants on the disputed property until the fall of 2006. Although she knew the lot was owned by someone, it was vacant. When asked by others about the disputed porperty, Ms. Stevens would reply that it was part of the adjacent lot that Plaintiffs used. Ms Stevens testified that the disputed property has "been an integral part of the use of our property."

6. Mr. McLean testified that: no-one interfered with Plaintiffs' use of the disputed property until the fall of 2006; he never met Defendants until the fall of 2006; neither he nor Ms. Stevens asked for permission from Defendants to use the disputed property; Plaintiffs knew the disputed property was someone else's land; and Plaintiffs used the disputed property openly, continuously, and notoriously for twenty-five (25) years.

7. Mr. McLean testified that he used the path, including the steps going up the rock retaining wall almost every day. Mr. McLean testified that he used the path designated as "Dick's Path" to bring the Plaintiff's lawnmower up from the garage to the west deck and yard, and to perform other maintenance on the west side of Plaintiffs' home as well as on the disputed property. Moreover, Mr. McLean also testified that guests and acquaintances used both his and "Edie's Path" to access the west side of Plaintiffs' home.

8. Mr. McLean trimmed the volunteer trees on the disputed property. Mr. Mclean moved what is now designated as the "wood pile" to its present location on lot 50 in 1984 or 1985.

9. Mr. Mclean testified that he and Ms. Stevens had a couple of "events" each summer wherein the disputed property was utilized.

10. Steve Brett, a neighbor of Plaintiffs who resided on the lot immediately adjacent to Lot 51 testified that Plaintiff's representations of their use of the disputed property was in fact accurate.

11. Tad Kline testified that he recalled using what he described as a "clear path" off of Hardscrabble Drive to access Plaintiffs' garden area in the back around the left side of their house on the forty (40) to fifty (50) times that he had visited Plaintiffs' home.

12. William Wright, the land surveyor responsible for the creation of Plaintiffs' Exhibit 1, opined that the "rock wall" and "landscaping," including the gardens below and above the "rock wall," were indicative of "use," and that they were in fact part of the 2059 Hardscrabble Drive property.

13. Janet Mitchell, another neighbor of Plaintiffs, testified that she had worked for the developer (McStain) around the time that Plaintiffs purchased lot 51 and moved in. Ms. Mitchell testified that she worked for McStain in sales for four years and in marketing for five to six years after that. Ms. Mitchell testified that she regularly saw Plaintiffs on the disputed property. Ms. Mitchell testified that Plaintiffs utilized the disputed property for gardening, Mr. McLean's telescope (and screens), and entertainment. Ms. Mitchell stated that she always beleived that Plaintiff's were on their own property, and that all the neighbors thought the disputed property was in fact Plaintiffs' property.

14. Joan McLean Braun, Mr. McLean's daughter, testified that she did not know the property was in dispute, and that she had always thought that Plaintiffs owned it. Ms. Braun testified that she assisted with the gardening, walkways (paths), and landscaping on the disputed

property. Ms. Braun testified that the path ("Edie's Path") is where it has always been, and that she has never seen a stranger using it. Ms. Braun testified that she had always felt the larger tree on the end of the rock wall was part of her father's property.

15. The Court finds that the testimony of Edith Stevens, Richard McLean, Steve Brett, Tad Kline, William Wright, Janet Mitchell, and Joan McLean Braun is credible and persuasive.

16. Rick Burman, a property manager who managed Shanahan Ridge between February of 2002 until March of 2007, testified that when property management inspections were conducted by himself and the homeowners association, they were only allowed to conduct such inspections from the street, the firelane or open space. Mr. Burman freely admitted that he did not know where the lot line between lots 51 and 50 was, nor did he know where the disputed property on lot 50 was.

17. Alan Lemke, the Crew Chief for Flagstaff Surveying, testified that although he did not recall seeing the footpaths on lot 50, he did recall landscaping in the northwest corner of lot 50 as well as the rock wall extending into lot 50.

18. Rob Caldwell, the fence contractor hired by Defendants initially testified that he did not observe any footpaths in the area that he was building. When directed to Exhibit 25, which shows "Dick's Path" off the Plaintiffs' driveway, Mr. Cladwell testified that: "I did not cause that in two days." And, when directed to Exhibit 26, which again shows "Dick's Path" off Plaintiffs' driveway, Mr. Caldwell testified that it "looks like a path down to the dirt."

19. Lee Stadelle, the land surveyor hired by Defendants proffered testimony that was completely contrary to that proffered by every other witness in this case that had actually spent time on the disputed property, including the Court. Mr. Stadelle testified: That the landscaping in the northwest corner of lot 50, along the rock wall, and that near the large spruce tree near the front of the property was "difficult for me to find;" that the "garden was more like wood chipping that had spilled out and/or some non-native grasses;" that the landscaping is more properly characterized as "minor landscaping that wandered over the line;" that he "saw no evidence of paths other than people walking the line;" and when directed to Plaintiffs' Exhibit 26, stated that he did not "see a discernable path to the drive."

20. Moreover, upon further questioning by the Court with respect to whether he had a legal obligation to note anything on his survey that calls into question the legal boundary between lots, Mr. Stadelle stated subjectively: "Yes, if it's major." Mr. Stadelle's testimony and observations regarding the disputed property are simply not credible.

21. Ben Hunsinger, a retired builder who currently resides in the Shanahan Ridge subdivision, testified that he participates in bi-annual homeowners association walkthroughs. Mr. Hunsinger testified that these walkthroughs are conducted from the street. Mr. Hunsinger testified that he has not seen any paths or stepping stones on lot 50, and that he had no evidence that Plaintiffs were using lot 50. Mr. Hunsinger, however, has never actually inspected the property, and agreed that there may be some things that can not be seen from the street. Finally, Mr. Hunsinger testified that ordinarily what is being looked for in these walkthroughs is whether there has been some deterioration of any improvements, i.e., the fences in or around the subdivision.

22. Kent Hogan, a Management/Operations Consultant and former home builder, testified that it was he who notified Ms. Kirlin in September of 2006, that Plaintiffs might assert a claim for adverse possession. Mr. Hogan testified that he last walked the property, lots 49 and 50,

when the Defendants purchased the property in 1984. At that time, Mr. Hogan was discussing potential building sites with Defendants on Lot 49, and did not recall seeing steps, paths or anything else on the disputed property. Mr. Hogan also testified that he had no reason to inspect the disputed property over the many years that have transpired since that time. Finally, Mr. Hogan had also discussed the possibility of Defendants listing lot 50 for sale with a realtor friend with whom he lives in order to pay for the construction of Defendants home on lot 49.

23. Susie Kirlin, Defendant Don Kirlin's wife, testified that she and her husband bought lots 49 and 50 in 1984. Ms. Kirlin and her husband walked on and by the property many times but never specifically went to lot 50 to observe anything, "because we were always drawn to lot 49 where we would build." The Kirlins had discussed selling lot 50 to finance the building on lot 49. Ms. Kirlin stated that she had inspected the property after her discussion with Mr. Hogan in September of 2006, but that she had not looked at the property until then and therefore had not seen the garden, wood pile, stone wall steps and pruned trees. When asked specifically whether she had done anything prior to October 2006 to stop Plaintiffs from possessing the property, Ms. Kirlin replied, "no I did not."

24. Defendant Don Kirlin went by the lots at least once per week. Mr. Kirlin did not recall walking the lot line between lots 50 and 51, and he never inspected the disputed portion of property because he "relied on the plat." Prior to the survey commissioned with Mr. Stadelle, no marker existed delineating the property line between the lots. Mr. Kirlin never noticed any of the alleged improvements. Mr. Kirlin conceded that prior to the lawsuit he had never had any contact with the Plaintiffs, he never gave Plaintiffs permission to use his land, he never told Plaintiffs to stop using his land, and the Plaintiffs' use of his land was in bad faith.

25. On June 7, and July 26, 2007, the Court, at the request of the parties, conducted a site review of the disputed property in the absence of the parties. The following are the Court's observations and findings from the first site review on June 7, 2007:

a. There is non-native vegetation along the front drip-line of the large pine trees near the front of the lot. This non-native vegetation extends approximately three and one-half (3.5) feet into the adjacent lot (lot 50), and includes Iris plants and non-native ground cover plants.

b. "Edie's Path" is very distinctive along the rock retaining wall that extends at least four (4) feet to the southwest of the larger ponderosa pine on Lot 50. Edie's path is actually southwest of the furthest end of the retaining wall by at least two feet.

c. The woodpile in the northwest corner of lot 50 is very distinctive and is very visible from Hardscrabble drive, as is the retaining wall that extends to and beyond the left-most ponderosa pine on lot 50.

d. Most distinctive is the relatively flat nature of lot 50 with the exception of the "cut out" or "hollowed out" almost half moon portion of land bordered by Edie's path on the left and held back by the retaining wall. This observation is clearly visible from the street.

e. It is clear that significant pruning has been done on the "volunteer" ponderosa pines within this moon-shaped portion of land.

f. Edie's path leads directly to an opening onto Plaintiffs' flagstone deck, ending between a large pinon pine on top of the rock wall containing the largest boulders and a smaller pinon pine at the east end of the 1996 garden upgrades. Plaintiff's maple tree and other gardening is to the northwest of the smaller pinon pine.

g. It is difficult to tell exactly how old the upper garden is, but it is reasonable to believe that it has been there for a long time in light of the well worn paths, the degree to which the retaining wall extends into the adjacent lot (lot 50), the degree to which the adjacent lot has been "carved" out to accommodate the rock wall, and the improvements on and around it.

h. As viewed from the street, and in the absence of the short incomplete fence, it would be easy to conclude that the disputed portion of property is actually part of lot 51. It is clear that this disputed portion of property has been used by Plaintiffs for many years.

The following are the Court's observations and findings from the second site review conducted on July 26, 2007:

a. Edie's path remains very distinctive, and is consistent with the Court's observations on June 7, 2007.

b. Absent the fence dividing Lots 49 and 50, Defendants' lot would appear as one large lot with the exception of this half moon shaped portion (disputed property bordered by Edie's path) on the east side.

c. Considering that the disputed property has been sitting fallow since October of 2006, Edie's path is still quite distinctive.

d. The remainder of the Court's observations are consistent with those made on June 7, 2007.

26. The testimony of Rick Burman, Alan Lemke, Rob Caldwell, Lee Stadelle, Ben Hunsinger, Kent Hogan, Susie Kirlin, and Don Kirlin does not dissuade the Court from finding that Plaintiff's use of Defendants' property was actual, adverse, hostile, under a claim of right, exclusive and uninterrupted for the statutory period of time. In fact, the testimony of these witnesses lends further support to the Court's finding that Plaintiff's use of Defendants' property was actual, adverse, hostile, under a claim of right, exclusive and uninterrupted for the statutory period of time.

CONCLSUSIONS OF LAW

I. BACKGROUND ON THE DOCTRINE OF ADVERSE POSSESSION

A. HISTORICAL UNDERPINNINGS

Adverse possession is a method of acquiring title to an interest in land without the consent, and typically over the objection, of the true owner. *See* 3 AM. JUR. 2D ADVERSE POSSESSION § 1 (2007). The adverse possession doctrine has existed since, at least, the sixteenth century. Alexandra B. Klass, *Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession*, 77 U. COLO. L. REV. 283, 286 (2006) (citing 16 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 91.01 (Michael Allan Wolf ed., Matthew Bender 2005) (1949)).

Moreover, the concept has been incorporated into American law since the country's inception. *Id.*

B. POLICY JUSTIFICATIONS

Traditionally, the doctrine of adverse possession has been justified on various public policy grounds. However, times change, and, today, the most relevant policy justification for adverse possession is the personhood model developed by Oliver Wendell Holmes. *See* Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L. J. 2419, 2473 (2001); *see also* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 128-29 (5th ed. 2002). The personhood model justifies adverse possession by explaining that, after a significant amount of time, the claimant in possession of land forms a personal attachment that is stronger than the true owner's attachment to the land. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476-77 (1897). Justice Holmes posited that adverse possession becomes appropriate as a matter of law to transfer title to the person with the strongest attachment to the land. *See id.*

II. COLORADO'S ADVERSE POSSESSION LAW

A. ELEMENTS OF ADVERSE POSSESSION

In Colorado, the doctrine of adverse possession is governed by statute and the common law. "[A]ctual possession of the property in a manner hostile to the record owner's right to possession . . . leads to title by adverse possession. The doctrine of adverse possession recognizes the record owner's right to exercise dominion over the property, but holds that the right is lost if a claimant adversely possesses the property for the required time." *Ocmulgee Props., Inc. v. Jeffery*, 53 P.3d 665, 667 (Colo. App. 2001) (citing C.R.S. § 38-41-101 (2001)).

To obtain title to an interest in land through adverse possession, a claimant must establish by a preponderance of the evidence that his or her possession was "actual, adverse, hostile, under a claim of right, exclusive and uninterrupted for the statutory period." *Smith v. Hayden*, 772 P.2d 47, 52 (Colo. 1989); *see also Schuler v. Oldervik*, 143 P.3d 1197, 1202 (Colo. App. 2006). The statutory period for adverse possession in Colorado is eighteen years. *See* C.R.S. § 38-41-101(1) (2006). "A determination of whether possession is hostile, actual, exclusive, and adverse is a question of fact to be determined by the trier of fact." *Schuler*, 143 P.3d at 1202.

1. ACTUAL POSSESSION OR OCCUPANCY

To establish actual possession, the claimant's use must be sufficiently open and obvious to apprise the owner, through reasonable diligence, that another is making use of the land, allowing the owner to object. *Trask v. Nozisko*, 134 P.3d 544, 549 (Colo. App. 2006). The claimant must act as the average landowner would in utilizing the land for the ordinary uses of which the land is capable. *Schuler*, 143 P.3d at 1203. "Thus, the nature of the property is critical in determining what acts by the claimant are required for actual possession." *Palmer Ranch, Ltd. v. Suwansawasdi*, 920 P.2d 870, 873 (Colo. App. 1996). "The adverse possessor may use any actual visible means that puts the true owner and the public on notice of his dominion over the parcel." *Schuler*, 143 P.3d at 1203; *see also Anderson v. Cold Spring Tungsten, Inc.*, 458 P.2d 756, 759 (Colo. 1969).

"When the boundaries of the land claimed by adverse possession are not established by fences or other barriers, and when there is no deed describing the extent of the land claimed, the

adverse claimant may not claim any property not actually occupied for the statutory period." *Hayden*, 772 P.2d at 52 (citing *Anderson*, 458 P.2d at 759). "The extent of actual occupancy is a question of fact for the trial court to determine. In arriving at this determination, the court should consider that adverse possession by actual occupancy without a fence or other barrier does not require constant, visible occupancy or physical improvements on every square foot of the parcel claimed." *Id.*

2. HOSTILITY

"For use to be 'hostile,' the adverse possessor must demonstrate an intention to claim exclusive ownership of the property occupied." *Trask*, 134 P.3d at 549. "The possessor need not have the specific intent to take property from the owner for the hostility requirement to be satisfied." *Sleeping Indian Ranch, Inc. v. West Ridge Group, LLC*, 107 P.3d 1028, 1031 (Colo. App. 2004), *rev'd on other grounds*, 119 P.3d 1062 (Colo. 2005); *see also Anderson*, 458 P.2d at 758. "All that is required to establish hostility is that the person claiming adverse possession occupy the property adversely to the rights of the record holder" and all others. *Palmer Ranch, Ltd.*, 920 P.2d at 872; *see also Lovejoy v. Sch. Dist. No. 46*, 269 P.2d 1067, 1069 (Colo. 1954). The trier of fact determines whether possession is hostile through reasonable deductions from the acts and declarations of the parties. *Vade v. Sickler*, 195 P.2d 390, 392 (Colo. 1948); *see also Moss v. O'Brien*, 437 P.2d 348, 349 (Colo. 1968).

B. SHIFTING PRESUMPTIONS

In an adverse possession case, the initial presumption is in favor of the record title holder. *Whinnery v. Thompson*, 868 P.2d 1095, 1099 (Colo. App. 2003), *rev'd on other grounds*, 895 P.2d 537 (Colo. 1995). "Every reasonable presumption is made in favor of the true owner as against adverse possession." *Lovejoy*, 269 P.2d at 1070. However, "[a] presumption that the possession is adverse arises after the claimant has demonstrated that he has been in actual and exclusive possession of the property for the statutory period." *Hayden*, 772 P.2d at 52 (citing *Raftopoulos v. Monger*, 656 P.2d 1308, 1312 (Colo. 1983), *overruled on other grounds by Gerner v. Sullivan*, 768 P.2d 701 (Colo. 1989)).

"In order to merit this presumption, the claimant's use must be 'sufficiently open and obvious to apprise the true owner, in the exercise of reasonable diligence, of an intention to claim adversely.'" *Hayden*, 772 P.2d at 52 (quoting *Hodge v. Terrill*, 228 P.2d 984, 988 (Colo. 1951)). "Further, a claimant's possession need not be absolutely exclusive in order to attain the degree of exclusivity required for adverse possession." *Palmer Ranch, Ltd.*, 920 P.2d at 872. "[A] mere casual entry for a limited purpose by the record owner is not necessarily sufficient to prove that the use of the property was joint." *Hayden*, 772 P.2d at 52 (quoting *Hodge*, 228 P.2d at 988). "[A]ssuming that a presumption of adversity arises, the burden then falls upon the challenging party to overcome the presumption." *Welsch v. Smith*, 113 P.3d 1284, 1288 (Colo. App. 2005) (citing *Niles v. Churchill*, 482 P.2d 994 (Colo. 1971)).

C. INTERRUPTION OF THE STATUTORY PERIOD

"[W]here the claimant has been in possession for the required period, the record owner must show an interruption of some aspect of the possession to defeat the claim; mere assertion of a claim of record ownership is not sufficient. Indeed, the claimant's recognition of the owner's record title while claimant remains in possession strengthens the adverse possession claim."

Ocmulgee Props., Inc., 53 P.3d at 667 (citing *Schoenherr v. Campbell*, 472 P.2d 139 (Colo. 1970)).

"To disrupt the adverse possession claim, the record owner must assert a claim to the land or perform an act that would reinstate him in possession." *Id.* (quoting *Bushey v. Seven Lakes Reservoir Co.*, 545 P.2d 158, 161 (Colo. 1975)). "A recognition of record title does not demonstrate an intent not to possess adversely." *Ocmulgee Props., Inc.*, 53 P.3d at 667 (quoting *Schoenherr*, 472 P.2d at 141).

ORDER

WHEREFORE, based upon the Court's Findings of Fact, and Conclusions of Law, the Court enters the following Order.

The Court finds by a preponderance of the evidence that Plaintiffs' use of the disputed land was actual, exclusive, hostile, adverse, under a claim of right, and uninterrupted for at least 18 years. *Smith v. Hayden*, 772 P.2d 47, 52 (Colo. 1989), C.R.S. § 38-41-101(1) (2006).

The Court finds that, because Plaintiffs' use was sufficiently obvious to permit a reasonably diligent owner to notice and object, Plaintiffs' possession was actual. Although the boundaries of the disputed property were not delineated by fences, Plaintiffs did put the land to the ordinary use of which it was capable, and thus actually occupied it. *Palmer Ranch, Ltd. v. Suwansawasdi*, 920 P.2d 870, 873 (Colo. App. 1996), *Hayden*, 772 P.2d at 52. Neither constant, visible occupancy nor physical improvements on every square inch are required to prove that property is occupied; rather, occupancy is proven by "any actual visible means ... which gives notice of exclusion from the property to the true owner or to the public and of the defendant's dominion over it." *Hayden*, 772 P.2d at 52. All plats of land at issue in this case were residential properties, and the use to which Plaintiffs put the disputed land was consistent with residential use. Ms. Stevens testified that since at least 1985, Plaintiffs used the property on a daily basis as a footpath to their garden and deck, gardened and entertained on it, kept their wood pile on it, and used its path to have deliveries made. Ms. Stevens also testified that Plaintiffs regularly cut weeds, trimmed trees, raked leaves, and performed fire abatement there. Mr. McLean testified that he used the disputed property to access Plaintiffs' home and to hold his wood pile, and that he trimmed the trees on it. Five witnesses corroborate Plaintiffs' description of their use of the disputed property, and the Court has found all of their testimony to be credible and persuasive. Steve Brett and Janet Mitchell, who had been Plaintiffs' neighbors for approximately 20 years at the time of the litigation, testifies that they regularly saw Plaintiffs using the disputed property. Moreover, having personally visited the disputed property on two occasions, the Court is satisfied that Plaintiffs did, in fact, actually occupy the disputed property by putting it to their asserted uses and that Defendants had notice of the use.

Furthermore, the Court finds that Plaintiffs' possession was exclusive. Given that they were unaware of any development on the property until 2006, Defendants cannot now claim that their familiarity with the property was sufficient to constitute joint use. Ms. Kirlin testified that, from the time Defendants purchased the property in 1984 until September 2006, she had not inspected the disputed property and did not know that Plaintiffs had developed it. Mr. Kirlin testified that he had neither inspected the disputed portion of property nor noticed any of the improvements on it. Both Plaintiffs testified that they had used the property continuously for 25

years without the permission of Defendants. This evidence forms a sufficient basis on which to conclude that Plaintiffs had exclusive and uninterrupted use of the property for at least 21 years.[1]

Hence, because Plaintiffs' possession was actual and exclusive, a presumption of adversity arises. *Hayden*, 772 P.2d at 52. The Court finds that Defendants have not rebutted this presumption. Defendants have failed to prove that the possession was not hostile, not adverse, not made under a claim of right,[2] or interrupted. To prove hostility, the adverse possessor must merely intend to occupy the property adversely to the rights of the record holder, *Palmer Ranch v. Suwansawasdi*, 920 P.2d 870 (Colo. App. 1996), and, here, Plaintiffs have proven their hostile use by "demonstrat[ing] an intention to claim exclusive ownership of the property occupied." *Trask v. Nozisko*, 134 P.3d 544, 549 (Colo. App. 2006). Plaintiffs knew that the disputed property was owned by someone else, and Mr. McLean testified that neither he nor Ms. Stevens asked for permission from Defendants to use the disputed property.

Defendants argue that the "claim of right" and hostility elements have not been satisfied because Plaintiffs knew at the time they began to use the property that it was owned by someone else, and because prior to 2000 Plaintiffs did not intend to assert a "claim of right" but rather used the property as a matter of convenience. The Court disagrees. As Plaintiffs point out, not only does a recognition of record title not demonstrate an intent not to possess adversely, it actually strengthens an adverse possession claim. *Schoenherr v. Campbell*, 472 P.2d 139, 141 (Colo. 1970). All that is required to meet the hostility requirement is that the adverse possessor intend to occupy the property adversely to the ownership rights of the record holder, and Plaintiffs' occupation of the disputed property in this case was inconsistent with Defendants' ownership of it.

Finally, the Court finds and concludes that the policy considerations underlying the doctrine of adverse possession justify transfer of title to Plaintiffs. In this case, Plaintiffs' attachment to the land is stronger than the true owners' attachment. Whereas Defendants were unaware of Plaintiffs' use of the disputed land during virtually their entire 22 year period of ownership, Plaintiffs have efficiently used the land on a daily basis. Given this history of use, the equities favor transfer of title to Plaintiffs.

Thus, the Court finds that Plaintiffs have adversely possessed the disputed land as described in Plaintiff's Exhibit 1. The Court Orders that title to this land be transferred to Plaintiffs.

BY THE COURT

October 17, 2007
Date

James C. Klein,
District Court Judge

[1] Defendants both testified that they "went by" lot 50 many times, but that they never specifically observed the development on the disputed land. Defendants also paid taxes and dues on the land. "[M]ere casual entry by the record owner is not necessarily sufficient to prove that the use of the property was joint," *Hayden*, 772 P.2d at 52, and the Court finds this limited "use" of the land does not defeat the exclusivity of Plaintiffs' possession.

[2] Under Colorado law, proof of use that is "adverse," "hostile," and "under a claim of right" is generally subsumed within the "hostility" analysis.

District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-1776	
Plaintiffs: RICHARD MCLEAN and EDITH STEVENS v. Defendant: DK TRUST and DON KIRLIN	▲ COURT USE ONLY ▲
Attorney for Plaintiff: Kimberly Hult, Esq. *Attorney for Defendant:* William J. Kowalski, Esq. Andrew M. Low, Esq.	Case Number: 06 CV 982 Division 6 Courtroom Q
CORRECTED ORDER	

This matter is before the Court on Plaintiffs' Motion for Amendment of Judgment Pursuant to Rule 59(a)(4). The Court, having reviewed the Motion, Defendants' Response, and Plaintiffs' Reply, hereby issues the following Order.

This matter involves a claim for adverse possession of a strip of land that lies between lot 51, which is owned by Plaintiffs, and lot 50, which is owned by Defendant Kirlin and the DK Trust. A three day trial to the Court was held, and judgment was entered in favor of the Plaintiffs based upon the description of the boundary of the disputed land which was described in Exhibit 1.

In their Motion Plaintiffs now assert that they are entitled to more property than that which was awarded by the Court. Plaintiffs now claim that the specific description of land that they requested in Plaintiffs' Exhibit 1 does not include all of the property to which they are entitled. Plaintiffs now argue, contrary to the representations made at trial, that Exhibit 1 represents the "midline" rather than the outside line of the path referenced by the parties as "Edie's path." Plaintiffs request that the Court speculate that the boundary description that they provided throughout this case omitted 9 inches of property, and they request the Court to award them additional property.

The Court has thoroughly reviewed the briefs and, once again, the evidence admitted by both parties at trial. The Court makes the following findings of fact and law and denies Plaintiffs motion.

The law of adverse possession in Colorado was enacted into law by the Colorado legislature and set forth in Colorado statute at 38-41-101, et seq., C.R.S. (2006). This body of the law acts to preclude a record title holder to real property who has failed to use reasonable diligence for eighteen (18) years to make future claims to the property where the property has been used by another in an open and notorious fashion and in a manner contrary to the record title holder's interest. It has been extensively interpreted by our appellate courts. Colorado trial Courts are bound by the laws enacted by the legislature and the decisions of the higher Courts.

To prevail on a claim for adverse possession, the Plaintiffs must prove five elements:

(1) actual and exclusive use or possession of the real property;

(2) in an open and notorious manner;

(3) adverse and hostile to the record title holder's interest;

(4) under a claim of right; and

(5) continuously for eighteen years

See, *Smith v. Hayden*, 772 P.2d 47, 52 (Colo. 1989).

> [W]here the claimant has been in possession for the required period, the record owner must show an interruption of some aspect of the possession to defeat the claim; mere assertion of a claim of record ownership is not sufficient. Indeed, the claimant's recognition of the owner's record title while the claimant remains in possession strengthens the adverse possession claim. *Schoenherr v. Campbell*, 172 Colo. 306, 472 P.2d 139 (1970).

The clear language of the statute as drafted by the Colorado Legislature and the appellate decisions mandate that even trespassers in bad faith shall be awarded property if the claimant is able to prove the five elements. The law makes no distinction between rural or urban property; the law makes no distinction between good faith and bad faith possession. This Court *cannot* carve out exceptions to the law; that is the duty of the legislature. This Court is bound to apply *all* statutes and cannot choose which, if any, it does not like.

Moreover, the appellate decisions that this Court *must* follow hold that the payment of taxes or home owner association dues is not sufficient to defeat a claim for adverse possession. The appellate courts have been very clear that . . .

> . . . acts of the record owner that did not include re-entry upon the land with intent to possess it and did not constitute legal action to retake possession of it were insufficient to interrupt the period of adverse possession of plaintiff who continued in actual, hostile possession of the property.

Ocmulgee Properties, Inc. v. Jeffrey, 53 P.2d 665, 667-668 (Colo. App. 2002). The legislature has not enacted any statutory exemption that makes payment of taxes and homeowner association dues a defense to an action for adverse possession of real property as has been done in many other states. Indeed, Defendants had the right to request compensation for back taxes and homeowners association dues and other compensation under a claim of *quantum meruit*, but elected not to do so.

The Court has considered all evidence offered and admitted at trial,[1] including its own observations at two site reviews, the first of which was conducted at the request of both parties.[2] The Court can only consider evidence that was presented at trial, and it was the burden of the parties to bring evidence to the Court in accordance with the mandate of the rules of evidence and civil procedure. This Court will not consider evidence that was not presented at the time of trial.

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[1] See, Court's Minute Order Re: Bench Trial dated July 30, 2007, for a complete itemization of all exhibits offered and admitted at the time of trial.

[2] The Court's first site review was conducted on June 7, 2007, at the request of the parties. Because of the extended period of time between the first day of trial and its conclusion, the Court conducted a second site review on July 26, 2007, in order to review and confirm the findings that it had made on June 7, 2007.

With the exception of Lee Stadelle, the land surveyor hired by Defendants whose testimony was inconsistent with every other witness in this case including his own survey crew, this Court found that all of the witnesses presented by both sides at trial were credible.[3] The Court held that

[3] Defendant Mr. Kirlin was asked whether he recalled walking the lot line between the Plaintiff's lot and the property at issue. He responded "not really, we always walked up and around" on the *other side* of the property. Mr. Kirlin testified that he had never had plans drawn to build a home on lot 50. He stated: "We knew our residence would be on lot 49. We considered selling lot 50." When asked whether he inspected the lot line in dispute, he responded that he had not. He stated that "I relied on the plat." Mr. Kirlin testified that he was unaware of any markers delineating the lot line between lots 50 and 51 prior to 2006. He testified that prior to the current litigation, he had never had any contact with Plaintiffs, he never gave Plaintiffs permission to use his property, and, he never told Plaintiffs to stop using his property. Finally, Mr. Kirlin testified that his wife took care of the maintenance of his property over the twenty-three (23) years that he has owned lots 49 and 50. Mr. Kirlin testified that during that period of time, the weeds have been sprayed once and the perimeter fences have been repaired five or six times.

Mrs. Kirlin, who is not an owner of the disputed property or a defendant in this matter, testified that she had never personally worked on the property. Somewhere between six (6) to ten (10) years earlier, she and her husband had a crew spray for weeds, but she did not know if the spraying was done on the property at issue (lot 50) or on the other adjacent lot (lot 49) that is owned by Don Kirlin and the DK Trust. When asked whether she ever specifically went to the lot at issue here (lot 50) to observe anything, she responded "No, we were always drawn to lot 49," a property not at issue in this case, "where we were always going to build." Ms. Kirlin testified that she and her husband had planned to sell lot 50 to finance the construction of their home on lot 49. She testified that fence repairs were 90% related to the fence along the south side of lot 49, adjacent to the fire road, due to the number of people who used the fire road for hiking. When specifically asked whether she "did anything prior to October of 2006 to stop Plaintiffs from possessing the property," she responded, "no I did not."

Rick Burman, a property manager who managed Shanahan Ridge between February of 2002 until March of 2007, testified that when property management inspections were conducted by himself and the homeowners association, they were only allowed to conduct such inspections from the street, the firelane or open space On cross examination, Mr. Burman admitted that he did not know where the lot line between lots 51 and 50 was, nor did he know where the disputed property on lot 50 was. Finally, Mr. Burman testified that the purpose of these inspections was to observe the condition of subdivision fences.

Bob Hunsinger, a retired builder who has resided in the Shanahan Ridge subdivision since 1985, testified that he participates in bi-annual homeowners association walkthroughs. Mr. Hunsinger also testified that these walkthroughs are conducted from the street. Although Mr. Hunsinger testified that he did not "notice" any paths or stepping stones on lot 50, and that he had no evidence that Plaintiffs were using lot 50, on cross examination, Mr. Hunsinger testified that he has never actually inspected the property, and agreed that there may be things that can not be seen from the street. Mr. Hunsinger also testified that he was familiar with lots 49 and 50, but offered no testimony that he was familiar with the lot line between lots 50 and 51. Finally, like Mr. Burman, Mr. Hunsinger testified that what is being looked for in these walkthroughs is whether there has been some deterioration of the perimeter fences in the subdivision. Mr. Hunsinger agreed that prior to 2006, no fences existed that separated lots 49 from 50 and lot 50 from 51.

The Defendants did not offer any exhibits showing that they performed maintenance on the property at issue. They offered no photographic or satellite imaging that "Edie's path" did not exist. Defendant Kirlin offered a photograph showing a small patch of earth. Defendant Kirlin did not offer photographs showing the absence of the two paths asserted by Plaintiffs. The Defendants offered no evidence whatsoever that the Defendants either told the Plaintiffs to stop trespassing or that they gave them permission to use the land.

Because of Defendants' lack of knowledge about their own land, the Court was left with the testimony of Plaintiffs and their witnesses who consistently said that Plaintiffs had openly used the property for twenty-four (24) years, and the testimony of Defendant Don Kirlin and his wife who admitted that for twenty-two (22) years: (1) they were not aware of the property line between lots 50 and 51; (2) they had not spent any time on the property; (3) they had not "noticed" Plaintiffs' use of their property including a rock retaining wall (that is very obvious), a wood pile, landscaping including a sprinkler system installed in 1996, and two distinct paths; and, (4) they had not met the Plaintiffs nor had they either given Plaintiffs permission to use their property or instructed Plaintiffs to not use the their property. Finally, the Court was left with the testimony of Defendants' witnesses who testified that they had

the witnesses offered by the defense did not *dissuade* the Court from concluding that Plaintiffs had in fact met their burden of proof on their claim for adverse possession. This does not mean that the Court determined that the Defendants' witnesses (with the exception of Mr. Stadelle) were not credible or that their testimony was disregarded. It simply means that the testimony that the Defense offered tended to prove the Plaintiffs' claims rather than the defense.

In ruling on this Motion, the Court continues to weigh this testimony in the same fashion, and finds that none of it supports Plaintiffs' Motion. At trial Defendants conceded that the rock retaining wall was built in 1982, and the testimony concerning the rock retaining wall was that it openly and obviously encroached on the Defendant's property. However, this testimony does not support a claim for the additional land. With respect to the garden, Ms. Braun testified that she helped plant the garden and it was there in 1982. Ms. Mitchell and Mr. Winchester testified that the garden has existed since 1982. Mr. Brett[4] testified that Plaintiffs' use of the property was consistent with their representation. But not one of these witnesses, Plaintiffs' or Defendants', offered any testimony to support Plaintiffs' motion for an additional award. With respect to "Edie's path," Mr. Brett, Tad Kline, Ms. Braun, Mr. Winchester, and Plaintiffs all testified that they utilized the "Edie's path" to access the rear of Plaintiffs' property. Although each of these witnesses testified that they had used both paths for decades, no witness offered testimony about the width of the path.

Further, the Motion is not supported by the exhibits offered and admitted at trial. Plaintiffs' Exhibit 1, was admitted into evidence at trial for the purpose of showing the boundary of the disputed property. Although this path is referenced on Plaintiff's Exhibit 1 as the "approximate centerline of footpath," Plaintiffs represented to the Court through the entire trial that this was the boundary of the disputed property. No evidence was presented at trial that the line delineated on Exhibit 1 was anything other than the boundary of the disputed property. Further, Plaintiffs failed to provide any evidence about the width of "Edie's path."[5] The Court has no information that nine (9) inches is one-half of the width of the path. Plaintiffs proved the elements of adverse possession to a

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not "noticed" Plaintiffs' use of the property during the prescribed period for many of the same reasons as those testified to by Defendant Don Kirlin and his wife.

[4] Steve Brett was Plaintiffs' neighbor from 1983 until almost 2003. Mr. Brett's home was located on the lot immediately adjacent to Lot 49 across the fire road from lot 49. Mr. Brett's home has a clear view of Plaintiffs' home across both of Defendants' lots.

[5] Notably, this path was the subject of a temporary restraining order issued pursuant to Rule 65 of the Colorado Rules of Procedure on October 5, 2006. The purpose of such protective orders is to preserve the evidence relevant to pending litigation, to prevent hostilities between parties, and to preserve the status quo. Such orders are routinely entered at the request of one party at the outset of litigation. The entry of this order did not adversely impact any substantive defense that could have been raised. The adverse possession against these Defendants began in 1984, and the Defendants had until 2002 to take action. Any action by the Defendants in 2006 was four years beyond the statutory deadline and futile.

Subsequent to entry of the temporary restraining order, the parties agreed that neither party would be allowed to utilize the disputed property, including "Edie's Path," pending a final determination of the merits of the case. By doing this, the parties, including Defendants, agreed that the temporary restraining order was appropriate in this case. Specifically, Plaintiffs "agreed not to alter the condition or appearance of the Disputed Tract, although they reserved the right to continue to utilize the Disputed Tract to water and tidy the garden and to access the Disputed Tract." See, Plaintiffs' Trial Brief, page 4, May 18, 2007.

Therefore, by the time this Court conducted its first site review on June 7, 2007, "Edie's Path" had been sitting fallow to the elements for approximately eight months. Yet, it was very distinctive to the Court at that time, and remained so seven weeks later when the Court did a second site inspection on July 30, 2007. It was the Court's conclusion that if "Edie's Path" was a recent creation as suggested by Defendants, it would have been over grown by that time with native vegetation. That was not the case.

preponderance of the evidence and that Exhibit 1 was the boundary, and the Court will not consider new evidence or argument at this time. This evidence, even if true, was certainly available to be presented to the Court, and it was not.

ORDER

1. Plaintiffs' Motion to Amend Judgment is hereby denied because it is not supported by the testimony of the witnesses or evidence at trial.

2. Because the Court was not asked at the time of trial to address the maintenance easement referenced in Defendants response, for the same reasons set forth above, the Court declines to address that issue at this time.

3. Paragraph 1 of the Court's Order dated October 17, 2007, is amended to read:

> The disputed property in this matter is delineated on Plaintiff's Exhibit 1 as a footpath beginning from a point on Hardscrabble Drive approximately three feet south**west** of the **south**eastern most corner of lot 50 in the Shanahan Ridge Six Subdivision, Boulder, Colorado, and continuing in a north westerly semi-circle direction to a point approximately twelve and one tenths (12.1) feet to the south**west** of the north**eastern** corner of lot 50. This footpath was commonly referred to throughout these proceedings as "Edie's Path."

BY THE COURT

November 28, 2007, *nunc pro tunc*, November 27, 2007

James C. Klein,
District Court Judge