IN THE SUPREME COURT OF THE STATE OF OREGON

SEA RIVER PROPERTIES, LLC, an Oregon limited liability company,

Petitioner on Review,

v.

LOREN E. PARKS, an individual,

Respondent on Review.

Tillamook County Circuit Court Case No. 062011

CA No. A145896

SC No. S061094

61094

LOREN E. PARKS, an individual,

Third-Party Plaintiff,

v.

H. ROBERT RILEY and GENEVA RUTH RILEY, both individually and as Trustees of the H. Robert Riley Trust and Geneva Ruth Riley Trust; DONALD LEE RILEY and LEE ANN RILEY, husband and wife; DAVID ROBERT RILEY and CATHERINE LOU RILEY, husband and wife,

Third-Party Defendants.

PETITIONER'S REPLY BRIEF ON THE MERITS FOR REVIEW AND SUPPLEMENTAL EXCERPT OF RECORD

Petition for review of the decision of the Court of Appeals
on appeal from a judgment of the Circuit Court for Tillamook County,
Honorable Rick W. Roll, Judge

Opinion Filed: December 5, 2012
Author of Opinion: Brewer, J.

September 2013

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In his merits brief, Parks argues the merits of his adverse possession claim, an issue the Court of Appeals did not reach. Sea River is pleased for the court to consider the adverse possession issue in addition to the parties' accretion claims, but requested a reply brief if the court intends to do so as Sea River was not permitted to address adverse possession in its opening brief. *See* ORAP 9.17(2)(b)(i). The court allowed the request. Sea River therefore submits this reply brief on adverse possession.

I. THE ISSUE IS BEFORE THE COURT

The court may consider any issue that was before the Court of Appeals. ORAP 9.20(2). The trial court's decision on Parks's adverse possession claim was fully briefed and before the Court of Appeals. The court simply did not reach it because of its accretion ruling.

This case has been pending since 2006. Both parties desire the court to address the adverse possession issue in addition to the accretion issues. This will expedite final resolution of the case, avoid the need for an additional proceeding, and serve judicial efficiency. It is also appropriate because Parks's claim raises important issues of Oregon law regarding adverse possession of vacant land, which this court is ultimately the proper body to decide.

II. THIS REPLY IS A SUPPLEMENTAL BRIEF

Sea River fully briefed the trial court's decision on Parks's adverse possession claim in the Court of Appeals. It was the sole subject of Sea River's

appeal and the sole subject of its opening brief ("COA Opening Brief") and reply ("COA Reply") in the Court of Appeals. By contrast, in this court, Sea River could not address Parks's adverse possession claim in its opening brief, *see* ORAP 9.17(2)(b)(i), and this reply is limited to 4,000 words, *see* ORAP 5.05(2)(b)(i). Sea River therefore necessarily relies on its Court of Appeals briefs as the main briefs on adverse possession and offers this reply only as a supplement to highlight some key issues. *See* ORAP 9.20(4). Sea River's Court of Appeals briefs contain substantially more detail.

III. STANDARD OF REVIEW

The facts relevant to adverse possession are largely uncontested. Sea River has requested *de novo* review only in one narrow circumstance, related to three erroneous factual findings not actually relevant to Parks's claim but which the trial court apparently considered. (COA Opening Brief at 5-8; COA Reply at 2-3.) *See In re Marriage of Frost*, 244 Or App 16, 21-22, 260 P3d 570 (2011) (granting *de novo* review in similar circumstances). Parks does not cite those findings so they are not discussed herein, but Sea River maintains its limited request as relevant.

IV. KEY FACTS RELEVANT TO ADVERSE POSSESSION

The facts relevant to Parks's adverse possession claim are described in Sea River's COA Opening Brief at 8-18 and COA Reply at 4-7, 11-13.

Briefly, this dispute involves approximately 40 acres of wild undeveloped land on the coast, consisting mostly of sand and trees. (Tr 1297-98.) There are no fences or enclosures. (*Id.*) The general public freely uses the area for recreation, including walking the trails throughout the property, as it has done since 1944 when Riley bought the land and started developing the town of Nedonna. (2SER-1-2; 2SER-16; Tr 765, 841, 947, 956-59.) From approximately 1944 to 1996, Riley posted signs expressly giving the public permission to use the land for recreation, and it has continued to do so as a matter of course since he retired and stopping posting them. (Exs 227*33; Tr 233, 241-44, 255-57, 298-99, 302-03, 311-12.)[1] Some Nedonna residents walk through the disputed area every day, clearing brush as needed to keep the trails clear. (Tr 872, 874-75.)

Parks claims he adversely possessed the entire disputed area during some unspecified 10-year period beginning sometime after August 29, 1989.[2] Parks's claim is based almost entirely on the fact that he is erroneously listed as the land's owner on the Tillamook County tax records—due to an assessment error the county refuses to correct—as a result of which Parks has paid the

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[1] Exhibit 227 is a perpetuation deposition transcript with exhibits. "Ex 227*1" means Exhibit 227, deposition exhibit 1.

[2] August 29, 1989 is the first date Parks "honestly believed" he owned the disputed land. (Ex 71.) Tacking does not apply, so events prior to August 29, 1989 are irrelevant. (COA Opening Brief at 37-38; COA Reply at 3.)

property taxes (currently $605/year) and sporadically authorized some public utility access. (Exs 227*23, 630; Tr 194-99, 759.) Parks has an equitable lien claim to recoup the tax payments if he does not own the land. (TCF 6 at 4.) *See Thomas v. Spencer*, 66 Or 359, 368, 133 P 822 (1913) (requiring true owner to reimburse would-be adverse possessor for property taxes paid).

Parks's conduct regarding taxes and public utility access demonstrates hostility and honest belief of ownership, but it does not satisfy the other requirements for adverse possession. Parks has never actually, exclusively, and continuously used the disputed property for any 10-year period. The record is:

- There is only the vaguest evidence of Parks even setting foot on the disputed land after August 1989, when he purported to purchase it in a phone-and-mail transaction. (2SER-12-15.) If he has, it is less than he did as a member of the general public in the early 1980s. (2SER-9-11.)

- On a single occasion, year unknown, Parks "cut some branches" on an existing dirt road. (2SER-15.) The general public also cuts branches, as Parks admits. (2SER-4-5; 2SER-19.)

- Beginning in 1981, Parks's son and granddaughter walked and recreated in the disputed area when visiting Nedonna, like everyone else residing in or visiting Nedonna does. Parks was rarely present. The son and granddaughter did "the same thing" as the general public and "frequently encountered other residents." (Tr 973, 990-91.) There is no evidence of any difference in their behavior after August 1989.

- The City of Rockaway has two wells in the disputed area. Parks offered no evidence when or how many times, if any, the City has entered the disputed area to check its wells since August 1989. In any event, Riley gave the City permission to drill the wells and lay the

pipes to them in the first place. (Ex 227, Perp Dep Tr at 294-96.) The City's single payment to Parks in January 1990, subsequent refusal to pay him, and eventual willingness to pay $1,000 to settle the dispute (given that Parks is listed on the tax records) is irrelevant to actual use. (Exs 611, 617, 621; Tr 1520.)

- In June 1998, Parks entered a "temporary agreement" with the Port of Nehalem, authorizing Port employees to cut some brush once a year to maintain a sight line for a navigational range marker. It is unknown how long the agreement lasted, it is unclear whether the Port employees even went in the disputed area, and Parks received no payment. (Ex 622; 2SER-3 lines 9-16; Tr 836-37, 1516.)

- In 2000, Parks granted the Tillamook People's Utility District an 8-foot easement at the very edge of the disputed area to install underground utility lines for a nearby development. Parks received no payment and does not even recall granting the permission. (Exs 623-24, 628; Tr 1516-17.)

- Parks falsely states that Riley, 3&3 LLC, and Sea River have "offered to purchase" the disputed land from Parks "at various times." This is neither relevant nor true, and Parks knows it, having been called on this unsupported misstatement before. (COA Reply at 13 n 6.)

V. PARKS BEARS A HEAVY BURDEN OF PROOF

A person claiming adverse possession "bears a 'heavy burden'" to take title to someone else's land. *Hoffman v. Freeman Land & Timber, LLC*, 329 Or 554, 560, 994 P2d 106 (1999). The adverse claimant must establish, by clear and convincing evidence, "that [his] use of the property was actual, open, notorious, exclusive, continuous, and hostile for a 10-year period," as well as that he had an "honest belief" of ownership for claims vested after 1990. *Id.* at 559; ORS 105.620(1).

"Evidence of adverse possession is always to be construed strictly, and every presumption is to be made in favor of the true owner." *Harris v. Se. Portland Lumber Co.*, 123 Or 549, 557, 262 P 243 (1927). "The burden of establishing [adverse possession] is upon him who asserts it, and it is not to be made out by inference or presumption, but by clear and positive proof." *Id.* This means proof "that is free from confusion, fully intelligible, distinct" and "that establishes that the truth of the asserted fact is 'highly probable.'" *Stonier v. Kronenberger*, 230 Or App 11, 18, 214 P3d 41 (2009).

VI. PARKS DID NOT PROVE ADVERSE POSSESSION

The trial court erroneously applied the law of adverse possession. The trial court began its analysis of Parks's claim by concluding that *Riley* did not prove *Riley* maintained "open, notorious, and hostile" possession of the disputed land after 1989. (ER-82.) That has nothing to do with Parks's claim. *Harris*, 123 Or at 557; *Barley v. Fisher*, 267 Mich 450, 453, 255 NW 223, 224 (1934) (stating that lawful owner "need not, of course, taken any affirmative possession of his property"). When the court did discuss Parks, it focused almost entirely on his state of mind. (ER-82-83.)

An alleged adverse possessor must prove *every* element of adverse possession to take title from the lawful owner. When the law is properly applied, Parks's adverse possession claim must fail. Most notably, Parks has

not proven actual, exclusive, or continuous use of the disputed land for any 10-year period.[3]

A. Payment of Taxes

Payment of taxes is evidence of hostility, and Sea River does not contest hostility, but hostility is only one element of adverse possession. *See Knecht v. Spake*, 218 Or 601, 607-08, 612, 346 P2d 98 (1959) (paying taxes evidences "a claim of ownership" only); *Phipps v. Stancliff*, 118 Or 32, 35-36, 245 P 508 (1926) (similar), *overruled in part on other grounds by Godell v. Johnson*, 244 Or 587 (1966). Paying taxes is not "use," as courts have long recognized. "Payment of taxes, prohibition of trespasses, surveys of the land, sales and conveyances of it; though they may serve to show a claim of title, are not evidence of actual possession." *Taylor v. Burnsides*, 42 Va 165, 206 (1844).

This and other courts routinely reject claims by parties who have paid taxes but not satisfied the other requirements for adverse possession. *E.g., Fry v. Woodward*, 221 Or 39, 42, 350 P2d 183 (1960); *Willamette Real Estate v. Hendrix*, 28 Or 485, 497, 42 P 514 (1895); *Pleasants v. Henry*, 36 Idaho 728, 213 P 565 (1923) (denying claim based on tax payments and fence repair);

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[3] Sea River focuses on these three elements herein. *Every* element of adverse possession is discussed in detail in Sea River's COA Opening Brief, and *all* of Parks's arguments are addressed in Sea River's COA Reply. This includes the reasonableness of Parks's belief of ownership given that he knew by late 1989 that Riley claimed ownership. (Ex 708.)

Dickinson v. Bales, 59 Kan 224, 52 P 447 (1898) (denying claim based on tax payments and occasional entry on land and cutting hay); *Griffith Lumber Co. v. Kirk*, 228 Ky 310, 14 SW2d 1075, 1076 (1929) ("The surveying and marking of a boundary, the payment of taxes, and occasional entries for the purpose of cutting timber are not sufficient to constitute adverse possession."); *Barley*, 267 Mich at 450 (stating that paying taxes, asserting title, surveying, and an occasional rent is insufficient for adverse possession).

B. No Actual Use By Parks

Actual use is required for every adverse possession claim. *Goorman v. Estate of Heniken*, 244 Or 200, 205, 416 P2d 662 (1966) (denying claim for adverse possession of vacant, unenclosed, unimproved land based on lack of actual use; "It appears that any occupancy that the land has enjoyed has been limited to the fauna native to the area."). No Oregon court has ever given title by adverse possession to someone who did not "actually use" the land continuously for 10 years. Why would an absentee "adverse possessor" be favored over the true owner of vacant land?

Parks has testified only in the vaguest terms that he has even gone into the disputed area since August 1989, the earliest possible start date for an adverse possession period. According to Parks, he visited Nedonna mostly in the "first few years" after 1981 when he bought a vacation house there (which is

not located on the disputed land). (2SER-9-11.) Parks has never lived in Nedonna, and he moved to Nevada in or before 2001. (2SER-9; Tr 1577.)

After August 1989, the *only* evidence of use by Parks is (1) some "recreational use," such as walking and gathering firewood, of unspecified duration, in unspecified years, with unspecified frequency, which he also did before August 1989; and (2) one occasion, in an unspecified year, when he "cut some branches" on an existing road. (2SER-15.) Moreover, Parks refers to the whole vacant area north of Section Line Road, not distinguishing between the portion he actually owns and the disputed portion. (*Id.*) Parks's testimony is hardly "clear and convincing" evidence of actual use after August 1989.

As for public utilities occasionally asking Parks for permission to access the disputed area, because he is erroneously listed as the owner on the tax records, Parks has not cited any case anywhere in which actions of government employees were imputed to a would-be adverse possessor because the government had incorrectly assessed the taxes on the property and thereafter approached the wrong person for utility access. *See* COA Reply at 4-5. In any event, there is almost no evidence of government employees actually entering the disputed area after August 1989, as detailed *supra* pp. 4-5.

In *Talbot v. Cook*, 57 Or 535, 539-40, 112 P 709 (1911), this court stated that a claimant's "casual cutting" of firewood on wild, unenclosed land (several cords for personal use) and "passing over [the land] back and forth"

was insufficient to constitute "actual" possession. In *Knecht*, 218 Or at 609, 611-12, this court stated that even use of wild land "many times a year" for picnics and recreation, regular inspection, cutting firewood, and clearing brush, "standing alone, would not have been sufficient to fulfill the requirement of actual possession as an ingredient of adverse possession." The court allowed Knecht's adverse possession claim only because the undisputed true owner had actually *conveyed* the land to Knecht's father but forgotten to execute the deed. *Id.* at 612 (relying on "oral conveyance" to make up shortcomings in evidence of "actual possession").

Parks has not actually used the disputed land. As this court explained over 100 years ago, claiming title and paying taxes is not enough:

> "It must be admitted that the plaintiff claimed title to the locus in quo; but, never having occupied any portion of the premises, its claim of ownership, in the absence of occupancy, can never become the foundation of an adverse right."

Willamette Real Estate, 28 Or at 497; *see also, e.g., Taylor*, 42 Va at 206 ("[A]n adversary claim merely, however open and notorious, and whether on or off the premises, does not give an actual possession. It does not show an occupation, use or enjoyment of the premises. In truth, an adverse claim seems here to have been confounded with an adverse possession.")

C. No Exclusive Use By Parks

Even if nominal actual use proven by vague evidence were enough to satisfy the "actual use" requirement for adverse possession, Parks's claim would still fail for lack of exclusivity. *See Werner v. Brown*, 44 Or App 319, 324, 605 P2d 1352, *rev den*, 289 Or 71 (1980) (holding that lack of exclusivity defeated claim, even assuming all other elements were satisfied).[4]

Even if Parks has occasionally gone into the disputed area since August 1989, he did so more as a member of the general public in the early 1980s when he first purchased a vacation house in Nedonna. (2SER-9-10.) He also has done so the same or less than the general public has done since 1944. The widespread public use of the disputed area is discussed in Sea River's COA Opening Brief at 27-29 and COA Reply at 10-11. Parks and his son both admit that the general public uses the disputed land "all the time," doing "the same thing" as Parks. (2SER-15-16.)

An adverse possession claim must fail when other people use the disputed property as much as the claimant. *See Harrell v. Tilley*, 201 Or App 464, 477, 119 P3d 251 (2005) (holding that use of disputed property "was insufficiently exclusive by any one party to wrest possession and ownership

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[4] In *Zambrotto v. Superior Lumber Co.*, 167 Or App 204, 4 P3d 62 (2000), the court concluded that hiking, rattlesnake hunting, and fence repair on steep rural forested property was "actual use," albeit "not much use, to be sure." The court rejected the claim on other grounds, however, and therefore never reached the exclusivity or continuity elements, where the claim surely would have failed.

from" title owners); *Werner*, 44 Or App at 324 (holding that fact another party also ran livestock in disputed area meant claimant's use was non-exclusive, defeating his adverse possession claim); *Shumate v. Robinson*, 52 Or App 199, 203-04, 627 P2d 1295 (1981) (holding that defendants' use of disputed property was non-exclusive, defeating their adverse possession claim, because other people had also used plaintiff's property for years, including adjacent business owners and their customers).

In *Fry v. Woodward*, 221 Or 39, 42, 350 P2d 183 (1960), this court denied an adjacent property owner's claim that he had adversely possessed vacant land alongside a river, which "area was largely used for picnics, swimming and fishing by all adjacent neighbors and the public generally." The claimant had occasionally cut wood on the property and had paid the taxes on it due to an assessment error. *Id.* The court denied the claim. "The difficulty with defendants' case is that their and their predecessors' use was far from exclusive. Such as it was, it appears to have been in common with everyone else." *Id.* at 44; *see also, e.g., Hamilton v. Weber*, 339 Mich 31, 62 NW2d 646, 650 (1954) (stating that "occupation in common with the public" is "[n]ever exclusive.").

Any actual use by Parks since August 1989 has been far from exclusive. The lack of exclusivity is fatal to Parks's claim.

D. No Continuous Use By Parks

Parks's adverse possession claim also fails for lack of continuity. Continuity is "the very essence of the doctrine and policy" underlying adverse possession. *Harris*, 123 Or at 554. Parks has never even identified in what 10-year period he allegedly adversely possessed the property.

"To be 'continuous,' use of the property in dispute 'must be constant and not intermittent.'" *Gibbons v. Lettow*, 180 Or App 37, 42, 42 P3d 925 (2002), *quoting Hoffman*, 329 Or at 560. "[A]ny break or interruption of the continuity of the possession will be fatal to the claim of the party setting up title by adverse possession; and the length of time a break or interruption in the possession exists is immaterial." *Harris*, 123 Or at 554 (citation omitted). The adverse possessor need not use the property every single day, but he must use it continuously without interruption for 10 years. "There must be such continuity of possession as will furnish a cause of action for every day during the whole period required to perfect title by adverse possession * * * *." *Id.* at 555.

"[O]ccasional trespasses or acts of ownership do not constitute such continuous possession as will ripen into a title by adverse possession, although extending over the statutory period." *Harris*, 123 Or at 555; *see also Reeves v. Porta*, 173 Or 147, 153, 144 P2d 493 (1944) (holding that occasional pasturing of cows on wild land was not proven to be continuous enough for adverse possession); *Gibbons*, 180 Or App at 42 (same, where defendants did

not prove "the duration of the grazing activity or the frequency with which it occurred," let alone that it had occurred every season for 10 years); *Wheeler v. Taylor*, 32 Or 421, 436, 52 P 183 (1898) (recognizing "rule of law" that "occasional cutting and carrying away of rails and firewood from land chiefly valuable for timber" is not continuous occupation).

In *Woolfolk v. Isler*, 37 Or App 687, 689, 588 P2d 632 (1978), the plaintiffs honestly believed they owned the disputed property, which had been enclosed within a "substantial, well-maintained fence" for 30 years, and they proved they had actually used the disputed property for 9.5 years. The court would not "infer" the necessary additional half-year of actual use from evidence of use in other periods. *Id.* at 693. "[T]he cases uniformly state that a person claiming title by adverse possession faces a 'heavy burden' and 'will be held to strict proof.'" *Id.* (citations omitted).

Parks, who has residences and vacation houses in multiple states, gave no testimony as to when or how many times he went into the disputed area after August 1989, not even in what years. (2SER-7-18.) "The burden of establishing [adverse possession] is upon him who asserts it, and it is not to be made out by inference or presumption, but by clear and positive proof." *Harris*, 123 Or at 557. Parks's failure to prove that he not only believed he owned the property for 10 years (as the trial court found) but actually *used* it *continuously* for a specific 10-year period necessarily defeats his claim.

E. Parks Could Not Have Adversely Possessed the Whole Area

Finally, even if Parks adversely possessed some portion of the disputed area (which he did not), it was error to grant him title to the entire acreage.

As the trial court recognized, Parks's hostility is based on claim of right, not color of title. (ER-81-82.) Natural accretions to Lot 1 of Section 20 (the disputed land) are not part of Lot 4 of Section 17 (the property identified in Parks's deed). (Ex 71 (deed); Ex 73 (Parks's title insurance policy excepting accretion claims). Parks belief that his deed includes the disputed property was honest but mistaken, making it a claim of right.[5] *Stiles v. Godsey*, 258 Or App 145, -- P3d -- (2013); *see also Faulconer v. Williams*, 327 Or 381, 390, 964 P2d 246 (1998) (discussing "pure mistake" when deed accurately describes conveyed property but grantee mistakenly believes it also includes other property).

As such, any adverse possession claim by Parks is limited to the specific portions of the disputed land that he actually used, not the entire acreage. *Stiles*, 258 Or App at 145; *Joy v. Stump*, 14 Or 361, 364, 12 P 929 (1887) ("[T]he possession cannot be extended by construction beyond the limits

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[5] Given the hostility and honest belief requirements, nearly every would-be adverse possessor either has a deed that he honestly but mistakenly believes includes the disputed land (claim of right), or a deed that actually purports to convey the land (color of title).

of the actual occupation."). Parks offered no proof on that subject. In no event can Parks take title to the whole disputed area and, in this case, he has not proved a right to any part either. *See Harris*, 123 Or at 557 (burden of proof).

VII. CONCLUSION

Upon reversing the Court of Appeals' decision on accretion and reinstating the trial court's decision on accretion, the court should turn to Parks's adverse possession claim. The trial court's ruling on that claim misapplies Oregon law and creates too low a bar for adverse possession. Sea River respectfully asks that the court affirm the trial court's decision on accretion, reverse the trial court's decision on adverse possession, and quiet title in Sea River.

DATED this 9th day of September, 2013.

Respectfully Submitted,

TONKON TORP LLP

By *s/ Robyn Ridler Aoyagi*
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CERTIFICATE OF COMPLIANCE

Pursuant to ORAP 5.05, I certify that Petitioner's Reply Brief on the Merits is proportionately spaced, has a typeface of 14 points or more, and contains 3,949 words.

Dated this 9th day of September, 2013.

s/ Robyn Ridler Aoyagi
Robyn Ridler Aoyagi

CERTIFICATE OF E-FILING AND SERVICE

I hereby certify that on September 9, 2013, I directed the original **PETITIONER'S REPLY BRIEF ON THE MERITS FOR REVIEW AND SUPPLEMENTAL EXCERPT OF RECORD** be electronically filed with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system. Participants in the case who are registered appellate court users will be served by the appellate court's electronic filing service. Those participants are:

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I further certify that on September 9, 2013 some participants in the case are not registered users of the court's electronic filing system. I mailed two copies of the **PETITIONER'S REPLY BRIEF ON THE MERITS FOR REVIEW AND SUPPLEMENTAL EXCERPT OF RECORD** by First Class Mail, postage prepaid, to the following parties who are not registered users:

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Dated this 9th day of September, 2013.

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