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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Washington Supreme Court No. 91535-1
Court of Appeals No. 70815-5-I

CITY OF REDMOND, a Washington municipal corporation,

Petitioner,

v.

BRIAN and MARILYN HOWE, husband and wife,

Respondents.

CITY OF REDMOND'S PETITION FOR REVIEW

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 APR -1 PM 12: 18

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ORIGINAL

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A. Identity of Petitioner

The City of Redmond ("Redmond").

B. Court of Appeals Decision

Petitioner seeks review of the unpublished opinion issued by the Court of Appeals for Division I in the case of *City of Redmond v. Howe*, No. 70815-5-I, 2015 Wash. App. LEXIS 175 (Feb. 2, 2015) (copy attached as Appendix A; "Opinion" cites are to slip opinion). Petitioner filed a motion for reconsideration and a motion to publish, which were denied on March 2, 2015.

C. Issue Presented for Review

If an adverse possessor negotiates to purchase a superior title, she negates the element of hostility. If the adverse possessor negotiates to purchase some other title, claim or interest, she does not negate the element of hostility. Both rules are followed in Washington depending upon the title involved. As a matter of Washington law, did the Court of Appeals err by lumping the two rules together without regard to the type of title that was at issue and announcing a single "general" rule that "an adverse possession claimant's offer to purchase disputed land does not defeat the hostile nature of the claimant's occupation"?

D. Statement of the Case

1. Redmond Acquires Title to the Parcel at Issue to Use for Public Park and Trail Purposes

Petitioner is the present owner of the former Burlington Northern and Santa Fe Railroad ("BNR") property in Redmond. Redmond plans to utilize the property for park and trail purposes for the benefit and enjoyment of the Redmond public. Clerk's Papers ("CP") 66-69. The BNR property is part of a much larger piece of former railroad property, generally referred to as the Redmond Spur, that was formerly owned by BNR and its predecessor, Northern Pacific Railroad. *Id.* The Redmond Spur runs north to south from a junction with the Woodinville Subdivision in Woodinville, Washington to downtown Redmond, Washington. *Id.* Redmond acquired title to approximately 3.9 miles of the Redmond Spur in June of 2010. *Id.*[1]

In 1990, Kelley Properties sold 16725 Cleveland Street in Redmond (hereinafter, the "Kelley Property"), a commercial property adjacent to the BNR property, to the Howes. CP 53; Brian Howe Deposition ("Howe Dep.") 9:12-20. The Howes used the Kelley Property to operate Sportee's, a sporting goods store. CP 53; Howe Dep. 8. After

[1] BNR transferred the Redmond Spur to the Port of Seattle in 2009, as part of a transaction in which the Port acquired 33 miles of the Woodinville Subdivision, as well as the Redmond Spur, for $81.4 million. CP 66-69.

the purchase, the Howes began using a part of the BNR property to augment their existing parking lot (hereinafter, the "parking parcel"). CP 1, 65. Twenty-two years later, in April 2012, the Howes first notified Redmond, by letter, that they claimed title to the parking parcel by adverse possession. *Id.*

The Court of Appeals determined that the Howes had entered the parking parcel by permission, but that their use became adverse in about 1993. *See* Opinion at 6-7.

2. The Howes Negotiated to Purchase the Parking Parcel from BNR

Mr. Howe never communicated to BNR that he was claiming to adversely possess the parking parcel. CP 57; Howe Dep. 30:11-21. The Howes' only communication with BNR was to talk about purchasing the parking parcel. *Id.* In or about 1998, the Howes had lunch with Larry Seyda, a representative of BNR, to discuss a possible purchase. CP 55; Howe Dep. 21-25. Bank documents from the Howes showed that they applied, and were approved, for a loan of $111,600 to finance the purchase of the parking parcel. CP 60-63, 189-192; Howe Dep. Ex. 2.[2] The bank

[2] The bank documents state in the first box at the very top of the page that the "purpose" of the loan is for "$111,600 to acquire additional land for a parking lot." SCP 189; Howe Dep. Ex. 2. At the bottom of the same page, the bank document states that "[i]ncluded in the total amount request is financing to secure additional land the Howe's [sic] will use as a parking lot." *Id.* At the top (continued . . .)

documents show that the Howes and BNR negotiated the purchase of the parking parcel and agreed on the price, and that the agreement was firm enough for the Howes to seek financing. The purchase apparently fell through because the parties could not obtain an acceptable title report for the property. Howe Dep. 25.

The Howes continued using the parking parcel to augment the parking at Sportee's. CP 56; Howe Dep. 28:5-21. In 2006 they sold their property to Cleveland Holdings LLC. CP 30. In 2010, the Howes took the property back in a non-judicial foreclosure sale. *Id.*

E. Argument Why Review Should Be Accepted

1. Summary of the Argument

When the Howes negotiated with BNR, the then-owner in 1998, to purchase the parking parcel, they negated any claim of hostility. Because the Howes never gave any subsequent notice of hostile possession to BNR or Redmond after 1998, their possession remained non-hostile regardless how long they used the parking lot. Non-hostile possession of property is not adverse and never ripens into title.

(. . . continued)
of page 4, the bank document states that "[t]he land contiguous, not the Sportee's location, is being sold by Burlington Northern/Santa Fe Railroad as part of a new company policy to sell excess holdings." SCP 192.

The Court of Appeals' erroneous contrary conclusion stems from conflating two well-established rules of adverse possession that apply to two different fact scenarios. The two different rules – which result in opposite outcomes, depending on the title involved – apply when an adverse possession claimant negotiates to purchase a title associated with the property the claimant is attempting to adversely possess. The difference turns on what title the claimant attempts to purchase. As summarized by one court:

> "An offer to purchase the legal title, or an acceptance of a conveyance of title, as distinguished from a mere outstanding claim or interest, is a recognition of that title. Although efforts to obtain deeds from other claimants to the property do not disprove the hostile character of a possession, efforts to buy the property from the record owner constitute an acknowledgment of the record owner's superior title, and thus disprove the adverse holding, because there has been no claim of right."

Allen v. Johnson, 831 A.2d 282, 287 (Conn. App. Ct. 2003) (brackets and citation omitted). This key factual difference is dispositive to the outcome of a particular case. In one case the claimant's action acknowledges the superior title; in the other case the claimant's action does not. In the first case, adverse possession is defeated. In the second case, it is not.

Despite the clear factual demarcation between the two rules, the Court of Appeals, *sua sponte,*[3] relying largely on 125 A.L.R. 825 (1940), lumped all attempts to purchase together, regardless of the nature of the title being sought, and erroneously announced a single rule for ***all*** cases: "[i]n general, an adverse possession claimant's offer to purchase disputed land does not defeat the hostile nature of the claimant's occupation." Opinion at 8.

This statement of a single "general" rule is plainly an erroneous statement of the law of adverse possession in Washington (and elsewhere). Redmond cited Washington authority and numerous other cases to the contrary to the trial court and Court of Appeals (*see infra*). The A.L.R. article relied on by the Court of Appeals deals with purchases or attempts to purchase title, interests or claims from third parties, not the superior title holder. The article was not intended to, and fails to, support a single "general" rule as announced by the Court of Appeals.

There is not a single general rule as the Court of Appeals concluded. This Court's precedent, following well-established adverse

[3] The Court of Appeals' resort to the A.L.R. article was not the result of the parties' briefing. *See* Respondent's Opening Brief; City of Redmond's Opening Appellate Brief. This deprived the parties of an opportunity to address the article in briefing or at oral argument. Redmond sought to address the issue in a motion for reconsideration, which the Court of Appeals denied.

possession principles, recognizes two different rules: negotiating to purchase the superior title negates the element of hostility, but negotiating to purchase some other title does not. *See Peeples v. Port of Bellingham,* 93 Wn.2d 766, 775, 613 P.2d 1128 (1980); *Jackson v. Pennington*, 11 Wn. App. 638, 649, 525 P.2d 822 (1974). The Court of Appeals should have followed *Peeples* and denied the Howes' adverse possession claim.

2. The Court Should Clarify That Washington Follows Long-Established and Fundamental Adverse Possession Rules

"Courts will not permit 'theft' of property by adverse possession unless the owner had notice and an opportunity to assert his or her right" *Miller v. Anderson*, 91 Wn. App. 822, 827, 964 P.2d 365 (1998).[4] The Court of Appeals' ruling violates this most basic principle of adverse possession jurisprudence. "[A]dverse possession is an offense against possession, against the legal right of the person entitled to possession." 17 William B. Stoebuck & John H. Weaver, Washington Practice: Real Estate: Property Law § 8.6, at 512 (2004).

The Court of Appeals' ruling deprived BNR and Redmond of the legal right to notice that the Howes' claim to the parking parcel was

[4] "[N]o presumption exists in favor of the adverse holder because 'possession will be presumed to be in subordination to the title of the true owner.'" *Id.*(citation omitted).

hostile and adverse. They were deprived of an opportunity to protect their rights. The Court of Appeals' error warrants review to restore Redmond's rights as the owner and assure all property owners in Washington that their possession is secure from adverse claims that lack hostility.

The new general rule announced by the Court of Appeals flies in the face of adverse possession's fundamental rule of notice, throws into doubt this Court's existing precedent, creates unnecessary uncertainty for property owners who may have to deal with an adverse possession claim, almost certainly will lead to more confusion in future cases, and places Washington adverse possession law outside the national mainstream. It warrants review and correction.

Undoubtedly, the factual circumstances underlying the two rules are closely related. Without a clear demarcation of the rules from this Court, the Court of Appeals' conflation of the two rules will sow further confusion on these important adverse possession issues. This unnecessary confusion should, and can, be prevented by a clear statement of the rules by this Court.

This case presents an opportunity to reaffirm and clarify this Court's existing precedent on the existence and the proper application of two different rules, and to bring Washington back into the mainstream of the case-law on this issue. The Court would correct an obvious error on a

fundamental principle of adverse possession, and clarify the rules to the benefit of all property owners in Washington who may have to deal with an adverse possession issue with a neighboring property owner. This Court has not hesitated in the past to provide such guidance on other major issues of adverse possession jurisprudence. *See, e.g., Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984); *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 774 P.2d 6 (1989); *Gorman v. City of Woodinville,* 175 Wn.2d 68, 283 P.3d 1082 (2012). This case presents a fundamental issue of the law of adverse possession of significant public interest that warrants review and correction by this Court.

3. Efforts to Negotiate a Purchase of a Superior Title Negate the Element of Hostility and Defeat an Adverse Possession Claim

Washington unequivocally follows an established rule that an adverse possession claimant who negotiates or attempts to purchase the superior title negates the element of hostility. "Where a claimant recognizes a superior title in the true owner during the statutory period, we have held the element of hostility or adversity is not established." *Peeples,* 93 Wn.2d at 775. The rule is firmly established in other jurisdictions and recognized by commentators. *See, e.g., Bowen v.*

Serksnas, 997 A.2d 573, 579 (Conn. App. Ct. 2010); *Cahill v. Morrow,* 11 A.3d 82, 90-91 (R.I. 2011).[5]

Many other courts state the rule in even stronger terms. "Nothing can more effectually interrupt the running of the statute than an express acknowledgment of the true owner's title." *Dill v. Westbrook*, 75 A. 252, 256 (Pa. 1910); *see also Smith v. Vt. Marble,* 133 A. 355, 358 (Vt. 1926) ("It is well known . . . that a single lisp of acknowledgment by the defendant, that he claims no title fastens a character upon his possession which makes it unavailable for ages" (internal quotation marks and citation omitted)); *Birtrong v. Coronado Bldg. Corp.,* 568 P.2d 196 (N.M. 1977) (where the occupant of the land acknowledges or recognizes the

[5] *See* 3 Am. Jur. 2d *Adverse Possession* § 96 (2015); 4 Herbert Thorndike Tiffany, *The Law of Real Property* § 1164, at 869 (3d ed. 1975); *see also Tidwell v. Strickler*, 457 So. 2d 365, 368 (Ala. 1984); *Kerlin v. Tensaw Land & Timber Co.*, 390 So. 2d 616, 619 (Ala. 1980); *Manhattan Sch. of Music v. Solow*, 571 N.Y.S.2d 958, 960 (App. Div. 1991) ("offer made by one in possession without title to purchase from the record owner during the statutory period is a recognition of the record owner's title and prevents adverse possession from accruing"); *Albright v. Beesimer*, 733 N.Y.S.2d 251 (App. Div. 2001) (same); *Palumbo v. Heumann*, 743 N.Y.S.2d 640 (App. Div. 2002) (same); *Shanks v. Collins*, 782 P.2d 1352, 1355 (Okla. 1989) (recognition by adverse possessor that title was in another as evidenced by adverse possessor's offer to purchase property negated requisite hostility); *Eddy v. Clayton*, 44 So. 2d 395, 397 (Miss. 1950) (same); *Chi. Mill & Lumber Co. v. Matthews*, 260 S.W. 963, 964 (Ark. 1924) (same); *Myers v. Beam*, 713 A.2d 61, 62-63 (Pa. 1998).

title of the real owner and does it before the statutory period has run, he thereby shows that his possession is not adverse).[6]

Because the Howes attempted to buy BNR's superior title, the rule announced in *Peeples* should have applied to defeat the Howes' claim of hostile possession below. The Court of Appeals clearly erred by failing to follow the settled rule adopted in *Peeples and Jackson.*[7]

4. Efforts to Purchase Some Other "Outstanding Title, Interest, or Claim" Do Not Negate the Element of Hostility

A claimant sometimes – desirous to remove a subordinate claim[8] – offers to purchase, or does purchase, some *other* "outstanding title, interest, or claim" from "other claimants" – *not* the superior title – that may relate to the property the claimant seeks to adversely possess. *See*

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[6] *See also Ingersoll v. Lewis*, 11 Pa. 212 (1849); *Paton v. Robinson*, 71 A. 730 (Conn. 1909); *Lewis v. Watson*, 13 So. 570 (Ala. 1893); *Lamb v. Foss*, 21 Me. 240 (1842); *Howard v. Twibell*, 100 N.E. 372 (Ind. 1913); *Risher v. Madsen*, 142 N.W. 700 (Neb. 1913); *Horton v. Davidson*, 19 A. 934 (Pa. 1890); *Hindley v. Metro. Elevated Ry. Co.*, 85 N.Y.S. 561 (Sup. Ct. Spec. Term 1903); *Hatton v. Burgess*, 167 S.W.2d 260 (Tex. Civ. App. 1942).

[7] Redmond has maintained throughout this case that *Peeples* controls. *See* Redmond's Opening Appellate Brief at 1 (Issue No. 1 relating to Assignments of Error), 8, 19-20. The trial court acknowledged the rule as stated in *Peeples*, and would have applied it but for its misreading of *Chaplin*, 100 Wn.2d at 857, as imposing a non-existent restriction that adverse possession conduct was limited to conduct on the property itself. CP 121. The Court of Appeals corrected the trial court's error, but made an error of its own by announcing a single "general" rule that "an adverse possession claimant's offer to purchase disputed land does not defeat the hostile nature of the claimant's occupation." Opinion at 8.

[8] *Jackson*, 11 Wn. App. 638.

Purchase of, or Offer to Purchase or to Settle, Outstanding Title, Interest, or Claim as Interrupting Continuity of Adverse Possession as Regards Another Title, Interest, or Claim, 125 A.L.R. 825 (1940).[9] These other "titles, interests, or claims" may include claims of heirs, remaindermen, or a variety of other interests in the property.[10] The Court of Appeals cited 125 A.L.R. 825 as the basis for a "general" rule it announced, but as the A.L.R. title shows, the rule discussed there is not a "general" rule as the Court of Appeals proclaimed.

Under the proper facts, Washington, like other courts, has recognized and applied the A.L.R. rule. *E.g., State v. Stockdale,* 34 Wn.2d 857, 210 P.2d 686 (1949), *overruled on other grounds by Chaplin*, 100 Wn.2d 853; *Silverstone v. Hanley,* 55 Wash. 458, 460, 104 P. 767 (1909).

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[9] See, for example, *Jackson*, 11 Wn. App. 638, wherein the court recognized the difference between the two rules and fact scenarios and distinguished several of the Washington cases the Court of Appeals relied on here. "These cases recognize the adverse possessor may acquire the claims of third persons as a matter of convenience to eliminate what the adverse possessor considers to be a subordinate interest." *Id.* at 651.

[10] The article outline to 125 A.L.R. 825 breaks down these types of "other claimants" into several general categories: "Particular title, interest, or claim (a) [o]f third person generally; (b) [u]ndivided interest [mostly heirs, remainder-men, tenants in common]; (c) [t]ax title."

5. The Rules Are Different Because Objective Notice Is Given to the Superior Title Holder Under One Set of Facts and Not the Other; The Court of Appeals Lumps the Two Rules Together and Creates Unnecessary Confusion

The outcomes under the two rules are different – indeed, opposite – because of the express notice actually given, or not given, to the holder of the superior title. Such objective notice lies at the heart of adverse possession principles. *Miller* 91 Wn. App. at 827. A holder of a superior title who is notified by a potential claimant that the claimant acknowledges the superior title has no reason to act to protect her title within the 10-year adverse possession time period, because whatever possession the claimant may have, it is not *hostile* possession, and non-hostile possession cannot ripen into title.[11]

In contrast, attempts to purchase, or the actual purchase of, a *third party's* title, claim or interest do not give any notice to the holder of the superior title the claimant seeks to adversely possess. Purchasing or offering to purchase a *third party's* claim, interest or title does not give the superior title holder notice that the claimant's possession is not hostile as to the superior title holder.

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[11] To hold otherwise would allow the claimant to lull the true owner into inaction by making such an express acknowledgment of non-hostility, while in the meanwhile the clock would be running on the claimant's adverse possession claim. Adverse possession principles squarely reject such scenarios.

Given that there are two well-established rules, the Court of Appeals' conclusion that there is just one general rule that applies in all attempts to purchase was error. This conclusion is squarely at odds with the facts of this case and *Peeples*: "negotiations to purchase the property are evidence that a claimant views his own title as subordinate." 93 Wn.2d at 776.

The three Washington cases discussed by the Court of Appeals do, indeed, fall under the rule stated in the A.L.R. article.[12] But such cases have no precedential application to this case, where the purchaser attempted to buy superior title. This Court in *Peeples* recognized the difference and stated the rule applicable here: "the proper analysis of the element of hostility must be whether the claimant recognizes that another party has superior title." 93 Wn.2d at 776.

Peeples (1980) and *Jackson* (1974) were decided after the three cases discussed by the Court of Appeals, and therefore state the current state of Washington law on the facts of this case. The Court of Appeals erred by failing to follow *Peeples*. The record is undisputed that the Howes did not attempt to eliminate a competing third-party title or interest

[12] *See El Cerrito, Inc. v. Ryndak,* 60 Wn.2d 847, 854, 376 P.2d 528 (1962); *Stockdale,* 34 Wn.2d 857; *Silverstone,* 55 Wash. at 460.

for convenience, but negotiated to purchase the superior title to property they were attempting to adversely possess.

6. The Court of Appeals Misapplied the Rule in *Peeples*

The Court of Appeals reasoned that "the Howes at most only made an offer to purchase the property," and that "[s]tanding alone, this is insufficient to constitute the kind of objective conduct necessary to acknowledge superior title in another." Opinion at 12. But *Peeples*, and numerous other courts, hold to the contrary. An offer to purchase the property made to the superior title holder – even standing alone – defeats the hostility element of an adverse possession claim because "negotiations to purchase the property are evidence that a claimant views his own title as subordinate." *Peeples,* 93 Wn.2d at 776; *see also Jackson*, 11 Wn. App. at 648-49; *Kerlin v. Tensaw Land & Timber Co.,* 390 So. 2d 616, 619 (Ala. 1980) (efforts to buy the property from the record owner constitute acknowledgment of his superior title and thus disprove the adverse nature since there is then no claim of right).[13]

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[13] *See also Manhattan Sch. of Music*, 571 N.Y.S.2d at 960 ("offer made by one in possession without title to purchase from the record owner during the statutory period is a recognition of the record owner's title and prevents adverse possession from accruing"); *Albright*, 733 N.Y.S.2d at 253 (same); *Palumbo*, 743 N.Y.S.2d at 642 (same); *Shanks*, 782 P.2d at 1355 (recognition by adverse possessor that title was in another as evidenced by adverse possessor's offer to (continued . . .)

The rule upon which *Peeples* relies does not require a written admission of superior title, but only "conduct or words" that in some objective manner acknowledge to the true owner her superior title. Efforts to purchase the superior title constitute "conduct or words" that acknowledge the true owner's superior title. Indeed, any words or conduct that expressly acknowledge the superior title defeats an assertion of *hostile* possession:

> "Nothing can more effectively interrupt the running of the [adverse possession] statute than an express acknowledgment of the true owner's title. *** This recognition of another's title may be by acts, as well as words. . . ." ("[T]he possession of one who recognizes or admits title in another, either by declaration or conduct, is not adverse to the title of such other. *** Such an acknowledgment of the owner's title terminates the running of the statutory period, and any subsequent adverse use starts the clock anew.")

Cahill, 11 A.3d at 90 (citations omitted; emphasis and second ellipsis added; other alterations in original); *see Bowen*, 997 A.2d at 579 ("[A]n adverse possessor may interrupt his or her continuous possession by acting in a way that acknowledges the superiority of the real owner's title. . . ." (internal quotation marks and citation omitted; emphasis added; other alterations in original)); *Allen*, 831 A.2d at 287 ("efforts to buy the

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(. . . continued)
purchase property negated requisite hostility); *Eddy*, 44 So. 2d at 397 (same); *Chi. Mill & Lumber Co.*, 260 S.W. at 964 (same).

property . . . constitute an acknowledgment of . . . superior title" (emphasis added)).

This is the correct outcome: whatever possession a claimant may have, it is not *hostile* possession if the claimant negotiates to purchase the superior title. The holder of the superior title who is so notified has no need to take any action to protect her rights against a party whose possession is not hostile. No adverse possession claim can commence or accrue where the possession is objectively demonstrated not to be hostile, no matter how long the claimant remains in non-hostile possession. The Howes' negotiations to purchase the record title from BNR acknowledged the superiority of BNR's title. Therefore, the Howes' possession was not hostile. Because the Howes admit they never had any other contact with BNR after the 1998 negotiations, they never established hostile possession for any 10 year period.

F. Conclusion

The erroneous "general" rule announced by the Court of Appeals violates adverse possession's most fundamental rule of notice and an opportunity to protect one's rights. It is contrary to settled Washington law and casts doubt on the key legal principles of adverse possession. The error has broad implications to the requirement of notice in adverse possession law and to all offers to purchase title by adverse possessors.

Washington should not stray so far from mainstream adverse possession rules simply because the Court of Appeals misapplied an A.L.R. article. It would serve the broad public interest to set the law straight and confirm that an offer to purchase a superior title negates the element of hostility.

DATED: April 1, 2015.

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G. Appendix

Appendix A	Feb. 2, 2015 Unpublished Opinion by the Court of Appeals for the State of Washington, Division One, in re *City of Redmond v. Brian and Marilyn Howe*, No. 70815-5-I

CERTIFICATE OF SERVICE

I certify that the foregoing pleading is being filed with the Court of Appeals with the filing fee, and being served on the party as set forth below via Hand-Delivery/Legal Messenger and via pdf/email:

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Appendix A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

CITY OF REDMOND, a Washington municipal corporation, Appellant, v. BRIAN and MARILYN HOWE, husband and wife, Respondents.	)	No. 70815-5-I DIVISION ONE UNPUBLISHED OPINION FILED: February 2, 2015

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 FEB -2 AM 10: 02

SPEARMAN, C.J. — This appeal arises from a dispute over the ownership of a parking lot located adjacent to commercial property in Redmond, Washington. The Howes sought to quiet title in the lot, which is owned in record title by the City of Redmond (City). The Howes claim that they have acquired ownership of the parking lot by adverse possession or, in the alternative, that they have a prescriptive easement. At trial, the trial court entered partial summary judgment for the Howes. The parties stipulated to a ruling against the City on the remaining fact issue for trial and entered a stipulated judgment. The City appeals, arguing that the undisputed facts fail to establish the Howes' hostile possession of the disputed parcel. We affirm.

FACTS

The parties dispute ownership of a parking lot that comprises a small portion of a much larger tract of former railroad property, previously owned by Burlington Northern/Santa Fe Railroad (BNSF) and its predecessor, Northern Pacific Railroad. This larger tract was transferred by BNSF to the Port of Seattle in 2009. In June 2010, the City acquired title to approximately 3.9 miles of the tract, including the parking lot at issue here. The parking lot lies adjacent to commercial property owned by the Howes, who, along with their predecessors in interest, have used and maintained the parking lot for over two decades.

The Howes contend that they have acquired ownership of the parking lot by adverse possession or, in the alternative, claim to have a prescriptive easement. In cross motions for summary judgment below, the Howes maintained that they were entitled to judgment because the undisputed facts established each element of their adverse possession claim: possession of the parcel for ten years that was exclusive, actual and uninterrupted, open and notorious, and hostile.[1] The City argued that as a matter of law the Howes could not establish the hostility element and moved the court for judgment in its favor. The trial court denied the City's motion and granted the Howes' motion in part. The City's motion for reconsideration, was denied. The City appeals, renewing its argument that the Howes cannot establish the hostility element based on the undisputed

[1] Chaplin v. Sanders, 100 Wn.2d 853, 858, 860-62, 676 P.2d 431 (1984).

facts and the City is entitled to judgment. The relevant facts before the trial court and on appeal are set out below.

The Howes purchased the commercial property located at 16725 N.E. Cleveland Street in Redmond, Washington in July 1990 from Kelley Properties (Kelley). At the time of the sale, Kelley leased approximately 12,425 square feet of right of way from BNSF, which it had paved, landscaped, and used as a parking lot for its commercial tenants and their customers. Kelley paid BNSF approximately $476 per month in rent for the parking lot. The BNSF/Kelley lease was still in effect at the time the Howes purchased the Kelley property.[2]

The parties disagree whether the Howes were aware of the BNSF/Kelley lease when they purchased the Kelley property in 1990. But it is undisputed that the Howes neither paid rent to, executed a new lease with, nor sought permission from BNSF, to use the parking lot. It is also undisputed that after the Howes took possession of the Kelley property, they continued to use the parking lot for business purposes.[3]

In 1993, BNSF attempted to prohibit the Howes' access to the parking lot by placing approximately 16 large concrete ecology blocks in a line along the

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[2] In January 1990, on the eve of sale to the Howes, Kelley's representative sought to reform the BNSF/Kelley lease, requesting a lower rental price in order to facilitate a sale of the Kelley property. The record does not indicate whether Kelley and BNSF reached an agreement on this matter.

[3] In January 2006, the Howes sold their property to Cleveland Holdings, LLC, which operated a business known as Norsk Remodeling on the premises from January 2006 to June 2010. Cleveland Holdings continued to use the parking parcel in the same manner as the Howes. In June 2010, the Howes reacquired the property via foreclosure sale. Shortly thereafter, the Howes leased the premises to Hope-Link, a local charitable organization. Hope-Link has been operating on the property since fall 2011. Hope-Link, its employees, volunteers, and customers have used the parking parcel in the same manner as the Howes during their occupancy. For purposes of this memorandum, the use and possession of these parties is referred to collectively as that of "the Howes."

southern boundary with the Howes' property, blocking the Howes' access to the parking lot. The next morning the Howes used a truck to push several of the blocks out of the way and immediately resumed use of the parking lot. In 1996, the Howes moved the remaining ecology blocks and had the parking lot resurfaced. Around 1995, the Howes resurfaced and restriped the parking lot and removed some trees. Aside from the action in 1993, neither BNSF nor its successors ever obstructed or interfered with the Howes' possession and use of the parking lot until this dispute arose.

In 1998 or 1999, a BNSF representative approached the Howes to inquire whether they were interested in purchasing the parking lot. The Howes had lunch with the BNSF representative to discuss terms of a potential sale. The parties dispute the nature of this discussion and whether it involved the property at issue in this case and whether it resulted in the Howes making an offer to purchase the property. It appears undisputed, however, that negotiations regarding BNSF's offer to sell the property occurred and that at about the time of the discussions, the Howes applied for a loan in the amount of $111,600, the amount BNSF asserts was the agreed upon purchase price.[4] There is no evidence that during the discussions the Howes expressed a claim of ownership or prescriptive rights over the parking lot or that BNSF acknowledged such a claim. Nor is it asserted

[4] The bank records produced by the Howes on summary judgment show that they applied for a loan in the amount of $111,600 to "acquire additional land for use as a parking lot. Land to be acquired totals approximately 12,400 square feet." Clerk's Papers (CP) at 189. "The land contiguous... is being sold by Burlington Northern/Santa Fe Railroad as part of new company policy to sell excess holdings." CP at 192. The description of the land in the loan documents is consistent with the description of the parking lot at issue in this case. The Howes claim, and BNSF does not dispute, that they did not proceed with seeking funding because BNSF could not provide sufficient proof of ownership.

that the Howes expressly acknowledged BNSF's ownership of the property. During and after the discussions, the Howes continued to use the parking lot as they had since 1990.

The Howes initiated this action on December 23, 2011 and in April 2012, sent a letter to the City claiming ownership of the parking lot.

DISCUSSION

We review the trial court's entry of summary judgment de novo. Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). Summary judgment is proper if, viewing the facts and inferences in favor of the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id.; CR 56(c).

A party claiming title to land by adverse possession bears the burden of establishing actual possession of the parcel for ten years that was (1) exclusive; (2) continuous and uninterrupted; (3) open and notorious; and (4) hostile. See Chaplin v. Sanders, 100 Wn.2d 853, 858, 860-62, 676 P.2d 431 (1984). Because the holder of legal title is presumed to possess the property, the party claiming adverse possession bears the burden of proof on each element. Id.; see also Miller v. Anderson, 91 Wn. App. 822, 828, 964 P.2d 365 (1998). In this case, the parties only dispute the element of hostility. We consider first whether the Howes' initial entry onto the parking lot was hostile or permissive.

Possession is not hostile, and so not adverse, if it is with the owner's permission. Chaplin, 100 Wn.2d at 861-62. A leasehold tenant holds a subordinate title to the lessor and necessarily possesses land with permission

from the landowner; thus, a lessee is not an adverse possessor of leased property. See Bowden-Gazzam Co. v. Kent, 22 Wn.2d 41, 154 P.2d 292 (1944); Northern Pac. Ry. Co. v. George, 51 Wash. 303, 98 P. 1126 (1908).

Permission is personal to the grantor and cannot extend beyond that person's ownership. Miller, 91 Wn. App. at 829. The party granting permission determines when permissive use terminates for purposes of adverse possession. Id. Consequently, once an adverse possession claimant has been granted permission to use or occupy another's land, conveyance of the claimant's property will not revoke that permission. Id. at 831-32. Permission to use or occupy land given to a claimant's predecessor in interest is imputed to the claimant. Id.; Chaplin, 100 Wn.2d at 862.

In this case, the trial court concluded that the Howes' initial entry was hostile because they never entered a lease with BNSF and did not pay rent. But there is no dispute that the Howes' predecessor in interest, Kelley, possessed the parking lot pursuant to a lease with BNSF. Although Kelley utilized the parking lot infrequently during its final years of possession (due to a fire and subsequent decreased tenancy in its commercial building), there was no evidence that the BNSF/Kelley lease was ever terminated, or that Kelley's permission to use the parking lot was otherwise revoked by BNSF. On the contrary, a letter sent from Kelley's representative to BNSF on the eve of sale to the Howes, which expressed Kelley's desire to renegotiate its lease terms, indicates that the BNSF/Kelley lease was still in effect. And Kelley's conveyance of its property to the Howes did not revoke BNSF's permission to use the parking

lot. Miller, 91 Wn. App. at 829. It is immaterial whether the Howes assumed the BNSF/Kelley lease, entered a new lease, paid rent to BNSF, or affirmatively requested permission from BNSF to use the parking lot. Because their predecessors in interest had permission to possess the parking lot, the Howes' initial possession of the parking lot was also permissive.

Occupation that is permissive in its inception cannot ripen into adverse possession, but only if there has been a "distinct and positive assertion by the dominant owner of a right hostile to the owner. . . ." Northwest Cities Gas Co. v. Western Fuel Co., 13 Wn.2d 75, 84, 123 P.2d 771 (1942). However, "courts will not permit the 'theft' of property by adverse possession unless the owner had notice and an opportunity to assert his or her right." Herrin v. O'Hern, 168 Wn. App. 305, 310, 275 P.3d 1231 (2012) Thus, where a claimant's use of land is less than pervasive, courts are reluctant to acknowledge that the use is hostile to the owner. In this case, it is undisputed that the Howes and their predecessors were the sole occupiers and users of the property for more than twenty years. And most significantly, in 1993, the Howes rebuffed BNSF's only attempt to exclude them from the parking lot by removing the barricade BNSF had placed there. This was a distinct and positive assertion of a right hostile to the owner that put BNSF on notice of the hostile nature of the Howes' claim. The trial court properly concluded that this act triggered the adverse possession period.

Next, we consider whether the Howes' hostile possession terminated prior to the running of the ten-year adverse possession period. It is well established that a claimant who recognizes superior title in the true owner during the

statutory period cannot establish the element of hostility, so long as that recognition is established by the claimant's objective conduct. Chaplin, 100 Wn.2d 853. The City argues that the Howes' offer to purchase the property from BNSF constituted such objective conduct and defeated their claim of hostility.[5] We disagree.

In general, an adverse possession claimant's offer to purchase disputed land does not defeat the hostile nature of the claimant's occupation. As explained in American Law Reports:

> the rule seems well settled that such purchase will not in and of itself interrupt the adverse possession. This is true for the evident and practical reason that one claiming adversely may, and usually does, desire, in making the purchase, merely to protect his possession and to avoid possible litigation, and he should not be deemed to have intended to abandon a title by conduct the purpose of which was to strengthen it. As has been said: "He joins the two together, and possesses whatever title both may give him." See Omaha & F. Land & T. Co. v. Hansen (1891) 32 Neb 449, 49 NW 456, infra.
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> The purchase "does not prove, and alone it does not even tend to prove, a change in the character of the possession or a recognition of a title paramount." Oldig v. Fisk (1897) 53 Neb 156, 73 NW 661, infra.

125 A.L.R. 825 (Originally published in 1940).

Washington cases addressing the issue are consistent with this position. In El Cerrito, Inc. v. Ryndak, 60 Wn.2d 847, 854, 376 P.2d 528 (1962), a property

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[5] Although BNSF asserts that the Howes made an offer to purchase the property, they offer no evidence in support of this claim. At most, the evidence shows that the Howes met with a BNSF representative to discuss BNSF's offer to sell the property and "[t]he negotiations proceeded to the point that the Howes applied to their bank for a loan to finance the purchase of the parking parcel from [BNSF]." Brief of Appellant at 6. The Howes deny they made such an offer. They assert that the BNSF representative offered to sell the property for a specific price and that they applied for a loan in that amount. But even if we assume, for purposes of summary judgment, that the Howes offered to purchase the property, it does not affect our analysis.

owner's eaves overhung the property line with a neighboring parcel by several feet. During negotiations to sell the property, the owner commissioned a survey and discovered the encroachment. In an effort to perfect title and expedite the sale of his parcel, the property owner made an offer to purchase the disputed strip of land, even though he believed he owned it. The trial court held that this offer was insufficient to defeat the element of hostility and the Supreme Court affirmed.

In State v. Stockdale, 34 Wn.2d 857, 210 P.2d 686 (1949), overruled on other grounds, Chaplin, the State of Washington occupied and developed approximately ten acres of land under the erroneous belief that it held title. Three years into its occupation, and after significant development, the State opened the land to the public as a state park. About two years after the park opened, a State employee discovered that many of the State's improvements encroached on the neighboring owner's property. No action was taken by the state with regard to ownership of the land at that time. Rather, the State continued to develop and use the land as a state park, open to the public. Two years later, the neighboring tract was acquired by John Rumsey, at which time "[t]here were some negotiations had between Mr. Rumsey and [the State] with reference to making some adjustment of title." Id. at 860. Apparently, these negotiations did not result in an agreement, as the State continued to use the land as a state park and brought a condemnation suit to quiet title. In response to the State's action, the plaintiff argued that the negotiations to purchase the disputed land constituted an acknowledgment of superior title by the State, which defeated its claim of hostile

possession. The Court disagreed, concluding that "[t]he negotiations had with a view of perfection of title rather than indulging in litigation did not operate as an interruption of the adverse possession." Id. at 862.

Similarly, in Silverstone v. Hanley, 55 Wash. 458, 460, 104 P. 767 (1909), the Court held that payment of back taxes did not necessarily defeat the element of hostility. In that case, the claimant and his predecessor in interest had exclusively possessed a parcel of land for over ten years. Id. at 458-59. The predecessor had fenced that land and planted an orchard upon it before conveying it to the claimant. Id. at 458. Years into the occupation, the claimant received a tax certificate that had been assessed to an unknown owner. Id. The Court held that the claimant's payment of the tax debt was merely a recognition of the taxing power of the state, not an acknowledgment of superior title in the "unknown owner." Id. at 459. Citing various foreign cases, the Court noted "'a party in possession of premises claiming to own the same may buy his peace by purchasing any outstanding title or claim of title without admitting such title or claim of title to be valid ... He has a right to quiet his possession and protect himself from litigation in any lawful mode that appears to him most advantageous or desirable.'" Id. (quoting Cannon v. Stockmon, 36 Cal. 535, 538-39, 95 Am. Dec. 205 (1869)).

The City relies on Peeples v. Port of Bellingham, 93 Wn.2d 766, 613 P.2d 1128 (1980)[6] to argue that an offer to purchase land is objective conduct

[6] To the extent the holding of Peeples relied on the Port's failure to establish its claim to the property was in "good faith," (see Peeples, 93 Wn.2d at 775) we note that that rationale was explicitly rejected in Chaplin, 100 Wn.2d at 861, n.2.

acknowledging superior title in another which defeats the hostility element of an adverse possession claim. But they misconstrue the holding of that case. Peeples involved an adverse possession claim asserted by the Port of Bellingham (Port) over certain coastal property. Beginning in 1957, the Port had purchased certain tidelands adjacent to the disputed parcel and began to develop them. With respect to the disputed parcel, the evidence showed that the Port obtained the permission of the owner to dredge an 80-foot channel through the property to float in rock barges. Id. at 767-69. It was undisputed that this was a "'one-time'" use with no further intended use of this channel, although it was occasionally used by fisherman as a winter moorage for their boats. Id. at 769. It was also undisputed that, between 1957 and 1970, "'[t]here were many, many years when there was nothing there.'" Id. at 770.

Later, in 1966 the Port learned that it did not own the disputed property. Id. Nevertheless, it began construction of a boat launch and related facilities. In 1972, the Port's attorney wrote a letter to the owners of the disputed parcel, offering to purchase the property. Id. In the letter, the Port specifically referred to the disputed property as "property that is *owned by Yelton and Miller* [the true owners]," expressed a "*desire[ ] to acquire this property*" and asked the true owners to "*establish your asking price* and then submit it to the Port."[7] Id. at 774-75. The parties could not agree on the terms of a sale and each sued to quiet title. Id. The trial court found for the Port and the Court of Appeals affirmed. The Supreme Court reversed.

[7] The subject line of the letter also refers to the property as "Yelton-Miller Property."

The Supreme Court disagreed that the evidence supported a conclusion that the Port's possession of the disputed property was uninterrupted and that its use had been open, notorious, hostile, and exclusive and held under color of title for more than ten years. Id. at 773. The Court noted that the evidence showed that the Port at no time had exclusive possession of the property and that its use of the property was not continuous. Id. Moreover, the Court found that use of the property to moor floating structures from time to time was inadequate to provide notice to an owner that someone was claiming title adversely. Id. As to the element of hostility, the Court observed that the Port dredged the property with the permission of the owners and that in the Port's letter initiating negotiations to purchase the property "it *admitted* ownership in petitioners or their predecessors in interest." Id. at 775. Nor did it assert or even imply a claim to the property. Id.

In this case it is beyond dispute that at least since 1993 when the Howes repelled BNSF's effort to exclude them from the property, the Howes have been in continuous and exclusive possession of the property. And although, the Howes responded to BNSF's offer to sell the property, there is no evidence that they expressly admitted ownership in BNSF. Indeed, during and following the unsuccessful negotiations, BNSF concedes that the Howes continued their exclusive use and possession of the property. Brief of Appellant at 6. Unlike in Peeples, where the claimant by its own admission acknowledged title in the true owner, here, the Howes at most only made an offer to purchase the property. Standing alone, this is insufficient to constitute the kind of objective conduct necessary to acknowledge superior title in another. The mere making of such an

offer, without more, does not negate evidence that otherwise establishes the element of hostility in an adverse possession claim. Accord El Cerrito, 60 Wn.2d at 854; Stockdale; 34 Wn.2d at 862; Silverstone 55 Wash at 460. The trial court did not err in granting partial summary judgment to the Howes on the issue of hostility.

Affirm.

Spearman, C.J.

WE CONCUR:

Trickey, J

Appelwick, J.