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THE SUPREME COURT OF WASHINGTON
Court of Appeals Division III No. 38906-5-III
Spokane Superior Court. No. 21-2-03396-32

HAROLD T. MESSERSMITH and LISA R. BRYANT,

Husband and wife,

Petitioner,

TOWN OF ROCKFORD,

Respondent,

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Town of Rockford, Defendant in the Superior Court, Appellant in the Court of Appeals, and Respondent before this Court, respectfully asks this Court to deny review of the Court of Appeals decision. That decision adhered to statutory language, and existing precedent to hold that a nineteenth-century statute about county roads ceased to apply within territory annexed to a town. This fact-bound dispute presents no issue of substantial public concern that this Court should determine, and this Court should reject Petitioners' attempt to inject a detailed and meritless claim —first raised in their motion for reconsideration before the Court of Appeals— about the validity of a nineteenth- century annexation.

II. STATEMENT OF THE CASE

Rockford is a municipal corporation. CP 4, 26. Harold T. Messersmith and Lisa R. Bryant (“Messersmiths”) are a married couple who own property located in Waltman’s

Addition to the Town of Rockford. CP3, 24. The plat of Waltman's Addition was filed June 5, 1889 with Spokane County, and recorded on June 12, 1889 with the Spokane County Auditor. CP 4, 19-20. One year later on June 18, 1890, Rockford annexed Waltman's Addition from the unincorporated area of Spokane County to the Town of Rockford. CP 5, 28.

Included in Waltman's Addition and dedicated to Rockford are platted streets (Center Avenue and Emma Street) that abut the Messersmiths' property, and an alley that runs through it. CP 49-50. The portions of the abutting streets to their respective centerlines and the portion of the alley overlapping the Messersmiths' property constitutes the "Subject Properties" disputed in this case.

In 2021, the Messersmiths initiated this action against Rockford seeking to quiet title and vest ownership of the Subject Properties to themselves. CP 3-25. The Messersmiths contend that because the Subject Properties were not developed,

as streets or an alley for five years from when Waltman's Addition was filed, they were automatically vacated pursuant to the Nonuser Statute. Laws Of 1889-90, Ch19, §32, *codified as* RCW 36.87.090. CP 5-7.

The parties filed cross motions for Summary Judgement. CP 67-79, 80-87. Rockford argued that the Subject Properties were not vacated pursuant to the Nonuser Statute because it applies only to counties and Rockford annexed the Subject Properties from Spokane County before the five year period had expired. CP 82-86. It is undisputed that the Town of Rockford annexed the Subject Properties one year after Waltman's Addition was filed in Spokane County four years before the expiration of the Nonuser Statute's five year period. CP 5, 28, 82.

The trial court entered judgment for the Messersmiths CP 147-157, but the Court of Appeals reversed and remanded with instructions to enter Judgment in favor of Rockford. The Court of Appeals found dispositive the legal argument that the

Nonuser Statute which applies only to counties was inapplicable to a town. The Court of Appeals subsequently denied the Messersmiths' motion for reconsideration.

III. ARGUMENT

The Messersmiths argue that this Court should accept review because the Court of Appeals decision conflicts with precedent and raises an issue of substantial public interest that this Court should determine. *See* Petition at 6-14; RAP 13.4 (b). Those arguments lack merit.

A. The Court of Appeals decision does not conflict with existing precedent

To support their claim that the Court of Appeals decision conflicts with precedent, the Messersmith point to no decision addressing the Nonuser Statute. Petition at 7-8. They just cite case law reciting the “no genuine issue as to any material fact” summary judgment standard, and claim that the Court of Appeals erred by finding no such issue. *Id.* This court should reject their attempt to pass off a factual dispute as a conflict of legal precedent.

The Court of Appeals decision followed the statute and precedent. The opening words of the Nonuser Statute limit it to counties: “any *county* road of part thereof, which has remained unopen for public use for a period of five years after the order is made or authority granted for opening it, shall be thereby vacated and the authority for building it barred by lapse of time.” RCW 36.87.090 (emphasis added.) If a county road

passes out of county control and is annexed into a city or town before the five-year period runs, the Nonuser Statute does not vacate the road. *Brokaw v. Town of Stanwood*, 79 Wn. 332, 326, 140, P. 358 (1914).

“A material fact is one that affects the outcome of the litigation.” *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn. 2d 780, 789, 108 P. 3d 1220 (2005). The fact that there are competing declarations as to whether the Subject Properties were ever developed is of no consequence. *Cf.* Petition at 7. The Court of Appeals held, based on *Brokaw* and *Northwest Industries, Inc. v. City of Seattle*, 33 Wn. App 757, 759-60, 658 P.2d 24(1983) that the Nonuser Statute ceased to apply to the Subject Properties once Rockford annexed Waltman’s addition. Opinion at 8. The Court of Appeals conflicts with no precedent.

B. This matter presents no issue of substantial public concern that this Court should determine.

The Messersmiths also fail to show how this matter presents an issue of substantial public concern that this court should determine. Their unsubstantiated assertion that this case “will impact rural property owners across the state,” Petition at 8, does nothing to expand the reach of this fact-bound dispute about matters that transpired in the nineteenth century. The Messersmiths do not stand to lose their property. The Subject Properties have always been Town rights of way. The fact that their deed did not accurately reflect that does not make this matter an issue of public concern. The Court of Appeals, following the plain wording of the Nonuser Statute, and well established case law, correctly held that distinguishing between towns and cities in applying the Nonuser Statute is irrelevant. All that matters is that they are not counties. The Messersmiths fail to explain how that is an issue of substantial public concern.

Likewise, the Messersmiths' novel argument, —raised for the first time in their motion for reconsideration— that the annexation of Waltman's Addition was invalid, fails to raise an issue of substantial public concern. As even the Messersmiths point out, the Legislature eliminated future challenges to annexations in 1961. Petition at 11. Not only would such a challenge violate that statute, but a ruling that Waltman's Addition, which has been a part of Rockford for over a century, is no longer considered within the corporate limits of the Town would also have disastrous consequences threatening to upset long-settled jurisdictional boundaries across Washington. And because the Messersmiths raised this argument for the first time on a motion for reconsideration, this Court should decline to consider it because it consists of "facts recited in the briefs but not supported by the record." *Sherry v. Financial Indem Co.* 160 Wn. 2d 611, 615 n.1, 1600 P.3d 31(2007).

V. CONCLUSION

The Court of Appeals got it right; it followed clear statutory language and existing precedent to hold that Rockford's annexation stopped the five-year Nonuser Statute clock from running. The Messersmiths cannot convert this fact-bound dispute into an issue of substantial public concern that this Court should determine, and this Court should reject their attempt to inject a detailed and meritless claim — first raised in their motion for reconsideration before the Court of Appeals— about the validity of Rockford's 1890 annexation. Because this case fails to meet the standards of RAP 13 (b), the Town of Rockford asks this Court to deny the Messersmiths' petition for review.

DATED this 24th Day of August 2023

The undersigned certifies that the word count of this
brief, as specified in RAP 18.17, is. 1,471.

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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the foregoing electronically through the Washington Supreme Court's online Portal to the following:

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

DATED this day 24th of August, 2023, at Garfield, Washington.



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