70815-5

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Court of Appeals No. 70815-5-I

COURT OF APPEALS

THE STATE OF WASHINGTON

DIVISION I

CITY OF REDMOND, a Washington municipal Corporation,

Appellant,

v.

BRIAN and MARILYN HOWE, husband and wife,

Respondents.

RESPONDENTS' OPENING BRIEF

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I. STATEMENT OF FACTS

A. Respondents' Use of the Disputed Strip.

Respondents' are the owners of improved real property located in the City of Redmond whose street address is 16725 Cleveland Street (hereinafter "the property").CP 27. The property includes an improved commercial structure that was built in approximately 1978 as well as a large parking area south of the building located on the property.

The underlying action involves a strip of land currently held in the record title by Appellant, City of Redmond, adjoining the south boundary of the property (the "disputed strip"). The disputed strip runs the entire length of the south boundary of the property and includes a depth of 50 feet into the property immediately adjacent to our southern boundary. CP 27-28. The disputed strip is part of a former railroad right-of-way which was at some point improved to become a parking lot. CP 28.

Respondents' purchased the property in June/July of 1990 from a third party (hereinafter "Kelleys"). CP 28. Kelleys' were [and had been for some time] leasing out the building located on the property. The only tenant at the time Respondents' purchased the property was an insurance agent. After Respondents' purchased the property, they remodeled the premises and opened a new location for their business known as Sportee's

in October of 1990. CP 28. Sportee's was a recreational sports equipment retailer. CP 28.

At the time Respondents' acquired the property, the disputed strip was a paved area, with striped parking stalls located immediately south of and adjacent to the paved parking lot of the property Respondents' purchased. CP 28. At the time they purchased the property, Respondents' were advised that Burlington Northern Railroad owned the disputed strip and had in the past leased out the disputed strip to Respondents' predecessors in title. CP 28. However, to Respondents' knowledge, there was no existing lease between Kelleys and the then owner of record of the disputed parcel, Burlington Northern Railroad. CP 28. Perhaps more importantly, at the time Respondents' acquired the property they did not assume any lease obligation nor did they enter into any lease with Burlington Northern railroad with respect to the disputed parcel or otherwise. CP 28.

Shortly after acquiring the property in June/July of 1990, Plaintiffs opened a new location for their business known as Sportee's. CP 28-29. Thereafter, Respondents' operated Sportee's at this location as a retail outlet for recreational sports equipment through mid-January of 2006. CP 29. In January of 2006 Sportee's was closed and Respondents' sold the property to a third party, Cleveland Holdings, LLC. CP 29. As part of this sale,

Respondents' financed a portion of the purchase price. Thereafter, the third party defaulted on its payment obligations and Respondents' re-acquired title to our property in June of 2010. CP 29.

Throughout the entire time period that Respondents' operated as Sportee's [from October of 1990 through mid-January of 2006 hereinafter the "period of operation"] Respondents', their employees and their customers used the disputed strip on a daily basis for storage, unloading freight trucks and parking. CP 29. In addition, throughout the period of operation Respondents' maintained the disputed strip's parking lot and landscape by repairing worn asphalt, resurfacing, restriping and addressing drainage and landscape issues. CP 29.

Throughout Respondents' period of operation, Burlington Northern Railroad's only attempt to limit or prohibit Respondents' access to the disputed strip occurred at or prior to 1993. On a Friday night after Sportee's had closed, Burlington Northern Railroad representatives brought in approximately 16 concrete blocks ("ecology blocks") and placed them roughly along the southern boundary line of Respondents' property. CP 29. The ecology blocks obstructed Respondents' access to the disputed strip for less than 24 hours. The following morning, Respondent Brian Howe used his 4WD Chevrolet pick-up truck to push several of the blocks out of the way so that Respondents' and their customers could access and use the

disputed strip. CP 29. Pictures taken at various times during this period reflect the ecology blocks and the fact that the blocks that were moved to allow Respondents' to have continued access to the disputed strip. CP30,36,37.

In 1996, Respondents' re-surfaced the entire parking lot and the disputed strip and moved all of the remaining ecology blocks and had them placed in the adjacent right-of-way. CP 29-30. Again pictures taken subsequent thereto reflect the removal and placement of the blocks after re-surfacing. CP 37. Other than the ecology block incident that took place in 1993 or prior thereto, there was and is no evidence, claim or contention that the Appellant, or its predecessor in title Burlington Northern Railroad, have obstructed or in any way interfered with Respondents' use of the disputed strip.

As mentioned above, in January of 2006 Respondents' property was sold to Cleveland Holdings, LLC. Thereafter, Cleveland Holdings' LLC operated a business known as Norsk Remodeling. CP 30. From January of 2006 to June of 2010 Norsk occupied the property and operated its business. As Respondents' financed a portion of the purchase price of the property for Norsk, Respondents' regularly checked-up on the building and its operations. CP 30. Throughout the time period that Cleveland Holdings,

LLC operated its business the south parking lot and disputed strip were used for parking by its employees and customers. CP 30.

In June of 2010, after a default by Cleveland Holdings, LLC. Respondents' re-acquired ownership of record of the property. CP 30. Shortly thereafter, Respondents' leased the premises to Hope-Link a local charitable organization. Hope-Link has been operating on the property since fall 2011. Hope-Links employees, volunteers and customers have used the south parking lot and the disputed strip for parking since that time on a daily basis. CP 30.

Since Respondents' acquired the property in June/July of 1990, the disputed strip has been used and maintained solely by Respondents', their employees and their customers, Norsk's employees and customers; and Hope-Links, employees, volunteers and customers. CP 30. Since Respondents' 1990 acquisition of the property neither Burlington North Railroad nor Appellant have ever used or maintained the disputed strip. CP 30-31. Finally, Respondents' have never paid Burlington Northern Railroad or the City of Redmond any money or other consideration for the use of the disputed parcel. CP 31.

B. Respondents' did not assume any lease with Burlington Northern Railroad when they purchased their property.

Appellant contends in its opening brief that a lease existed between Respondents' predecessor in title and Burlington Northern Railroad with respect to the disputed strip.(See Appellant's Brief at. 4) Appellant refers to a real estate agent's letter advising Respondents that if they did not agree to further lease the property they would have to downsize the parking lot. Appellant then contends therefore that Respondents' initial use of the disputed strip was permissive. However, the facts with respect to any lease and/or use of the disputed strip are not and were not in dispute in the underlying proceedings.

First, at the time that the Respondents' acquired their property the building had one tenant, an insurance agent, and for the most part was not being used. CP 28. The majority of the building located on the property had burned down in part several years earlier and no one had needed or used the disputed strip for parking or otherwise for several years. CP 97.

Second, Respondents did not assume any purported existing lease between their predecessors in title and Burlington Northern nor did they enter into any new lease with Burlington Northern for the disputed strip or otherwise. CP 28. The Appellant offered no evidence to the contrary for consideration by the Trial Court. Third, Respondents never paid or

otherwise compensated Burlington Northern Railroad for use of the disputed strip at any time. CP 31.

Finally, there is no evidence that the parking area located on the disputed strip was downsized or eliminated at any time. To the contrary, the undisputed factual evidence that was before the Trial Court was that Respondents' and their successors all used and maintained the entire property, including the disputed strip, from inception through the present. CP 30.

Perhaps the single event that best defines the nature of Respondents' use of the disputed strip is the ecology block incident. Sometime in 1993, on a Friday night after Respondents' business had closed, Burlington Northern Railroad brought in approximately 16 concrete blocks ("ecology blocks") and placed them roughly along the southern boundary line of Respondents' property. CP 96,97, 99-101. The ecology blocks obstructed Respondents' access to the disputed parcel for less than 24 hours. The following morning, Respondent Brian Howe used his 4WD Chevrolet pick-up truck to push several of the blocks out of the way so that Respondents' and their customers could access the disputed parcel. CP 96-97.

From the undisputed testimony and the pictures before the Trial Court, the Trial Court could draw only one reasonable inference: Respondents' were possessing the dispute strip in a hostile and under a

claim of right. Moreover, in subsequent years the remaining ecology blocks were completely removed by Respondents from the area and they continued their use for in excess of 17 more years.

C. Respondents' Did not make any offer to purchase the disputed strip. Appellant identifies an exchange in 1998 between Respondents and Burlington Northern Railroad. A Burlington Northern Railroad representative approached Respondent Brian Howe about whether or not they [Respondents'] were interested in purchasing railroad property. CP 184. There was a subsequent lunch discussion over the issue. CP 184-185. Respondent did not recall whether the discussion involved the much larger parcel involved in the earlier lease with Kelleys or just the disputed strip. CP 185.

Respondents' did explore potential financing of a purchase but it never went any further because there was not sufficient proof that Burling Northern even owned the property. CP 185. There was and is no evidence of any offer to purchase nor any evidence of any negotiations. Moreover, it is not even clear the scope of property that was being discussed for purchase. SP 185. Most importantly, before during and after this interaction Respondents' use of the disputed strip, was continuous and remain unchanged.

D. The City of Redmond acquired title to the disputed strip in June of 2010. Record title to the disputed parcel is not factually in dispute. The Appellant City of Redmond acquired the adjacent real property, including the disputed parcel, from the Port of Seattle in June of 2010. CP 7. The Port of Seattle acquired the property in question, including the disputed parcel, from the Burlington Northern Santa Fe (BNSF) Railroad in December of 2009. CP 67. The BNSF Railroad was the successor record owner to the property in question to the Northern Pacific Railroad which had opened a private railroad line for logging and freight and passenger purposes beginning in the late 1800s. Until acquisition of the property in question of record by the Port of Seattle, the property had always been privately owned.

For over 100 years the 50 feet of ground adjacent to and immediately south of the Respondents' property in Redmond was owned by a private railroad company and operated for railroad purposes. The 50-foot area is not occupied by railroad tracks, rather it was and remains an area adjacent to the actual tracks. The Port of Seattle made no use of the property. The City of Redmond is currently making no use of the property but intends to use the property south of the Respondents' property for public purposes. CP 66-67.

E. Procedural history. In December of 2011 Respondents' filed the underlying action to quiet title to the disputed parcel either through adverse possession or the right to continue to use the disputed strip via a prescriptive easement.CP 1-5. The case was set for trial in September of 2013. In June of 2013, the Trial Court heard and considered Respondents motion for Summary Judgment and Appellant cross-motioned for judgment in its favor. The trial Court granted Respondents' motion in part and denied Appellants Motion. CP 146-152. Appellant moved for reconsideration and its motion was denied. CP 137-139. The Order left a relatively minor issue remaining so Appellants Stipulated to the issue, pursuant to a Stipulated Final Judgment on August 29th 2013. CP ___. This appeal ensued.

II. ISSUES ON APPEAL

Appellants raise three primary issues on appeal.

1. Whether there was any genuine issue of material fact that Respondents' use of the disputed strip for the requisite prescriptive period was hostile and under a claim of right.

2. Whether there was any genuine issue of material fact that Respondents' use of the disputed strip was permissive from inception.

3. Whether there was any genuine issue of material fact before the Trial Court that Respondents' use, if permissive at inception, ever put Appellant on notice of the use changing to a hostile nature.

III. ARGUMENT

A. Applicable Standard of Review. The underlying decision at issue arises out of the Trial Court's decisions determined on summary judgment. Consequently, the applicable standard of review is de novo. *Highline School District No. 401 v. Port of Seattle*, 87 Wn.2d 6, 548 P.2d 1085 (1976) Summary Judgment is appropriate when there are no genuine issues of material fact and when the moving party is entitled to judgment as a matter of law. CR 56; *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030(1982). A material fact is a fact upon which the outcome of litigation depends. *Hill v. Cox*, 110 Wn.App. 394, 402, 41 P.3d 495 (2002). In a summary judgment motion, all evidence and the reasonable inferences to be drawn therefrom are viewed in a light most favorable to the non-moving party. Wilson at p.437.

B. Respondents' Claims. To establish their claim for adverse possession, Respondents were required to establish that their possession of the property in question was (1) exclusive, (2) actual and uninterrupted, (3) open and notorious (4) hostile and under claim of right for a period of ten years or more. *Chaplin v. Sanders*, 100 Wn.2d 853,857,676 P.2d 431 (1984). Generally, adverse possession is a mixed question of law and fact: whether the necessary facts exist is for the trier of fact, but whether those

facts constitute adverse possession is an issue of law for the Court to decide. *Miller v. Anderson*, 91 Wn.App. 822,828, 964 P.2d 365(1998).

In this case the following facts were not in dispute that were before the Trial Court:

(1) Respondents', their employees, their customers and their successors' employees and customers, traveled upon and parked on the disputed strip daily from 1990 through 2013.

(2) Respondents', their agents and contractors (and/or successors agents and contractors) maintained the disputed strip by amongst other things patching the asphalt, resurfacing the asphalt, striping the asphalt and addressing draining issues from 1990-2013.

(3) The disputed strip was acquired by the City of Redmond/Appellant in June of 2010.

(4) Respondents', their employees, their customers and their successors' employees and customers use of the disputed strip was clearly open and obvious.

(5) Respondents', their employees, their customers and their successors' employees and customers' use of the disputed strip was uninterrupted and continuous for over twenty years.

(6) Respondents', their employees, their customers and their successors' employees and customers' use of the disputed strip was exclusive throughout the period of time at issue.

In the alternative, Respondents' advanced a cause of action for a prescriptive easement over the dispute strip. The burden of proving a party has acquired prescriptive rights over property is on the party seeking those rights. *Anderson v. Secret Harbor Farms, Inc.,* 47 Wash.2d 490, 288 P.2d 252 (1955) To acquire prescriptive rights, a claimant must prove the following elements: (1) a use by a claimant adverse to the right of the servient owner; (2) open, notorious, continuous, and uninterrupted use by the claimant for the entire prescriptive period [10 years]; and (3) knowledge of such use by the owner at a time when he was able to assert and enforce his rights. *Mood v. Banchero*,67 Wn.2d 835, 841, 410 P.2d 776 (1966) Adverse use is:

> [S]uch use of property as the owner himself would exercise, entirely disregarding the claims of others, asking for permission from no one and using the property under a claim of right. *Dunbar v. Heinrich* 95 Wn.2d 20, 23,622 P.2d 812 (1980) citing *Malnati v. Ramstead*, 50 Wn.2d 105,108,309 P.2d 754 (1957).

In this case, the above facts identified equally support Respondents' cause of action for prescriptive rights as well.

C. Respondents' use of the disputed strip was hostile.

Appellant has raised three basic arguments as to why the Trial Court erred.

First Appellant contends that the Trial Court applied the wrong standard for hostility under *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984). Appellant contends that a claimant's objective conduct acknowledging a true owner's superior title defeats a subsequent claim of hostility. The second and third claim of error relate to permissiveness, Appellant claims that the Respondents' initial use of the property was permissive and that there was no subsequent act that put the true owner on notice that their use was hostile. Unfortunately for Appellant, all three of its arguments fail, and the Trial Court's decision should be upheld.

1. **The Respondents' hostility was not negated by their consideration of the Railroad's offer to sell the disputed strip.**

The underlying facts are not in dispute. Respondents' acquired the property at issue in 1990. At the time, there was one tenant in the building and presumptively little use of any portion of the parking lot. Respondents' remodeled the building and opened for business. Thereafter, they and their subsequent successors in titled used the existing parking lot and the disputed strip on a daily basis for over 20 years. The evidence before the Trial Court was that the Respondents' were aware that the disputed strip within which they were parking was not owned by them.

Nonetheless, they and their successors in title used the area on a daily basis for parking, loading and unloading.

Further the undisputed evidence before the Trial Court was that Respondents' maintained the disputed area, including resurfacing it on more than one occasion. Respondents' testimony and pictures clearly showed consistent use throughout the entire period at issue. Finally, the undisputed evidence reflected that Respondents' paid nothing to the true owner Burlington Northern Railroad for such use nor did they ever seek or receive permission for such use. The above facts are not in dispute and were the case from inception through the date that the lawsuit was commenced.

Appellant argues that a one-time discussion that took place in 1998 between Respondent Brian Howe and BNR representative Larry Seyda somehow negates the hostility element of their claim. Appellant's argument of course ignores all of the other uncontroverted evidence before the Trial Court, including the fact that both, before, during and after the referenced lunch Respondents used and maintained the disputed property on a daily basis - such that a true owner would use the property.

1. *Harris v. Urell*, 133 Wn.App.130, 135 P.3d 530(2006).

Appellant cites the *Harris* decision in support of its claim that the Trial Court erred. In *Harris*, the claimants had used the driveway at issue for

the requisite period such that they had obtained title to the driveway by adverse possession. Thereafter, the record owner requested and received permission from the claimants to use the driveway and used the driveway for a period in excess of ten years. The record owner counterclaimed alleging effectively they had re-acquired the property based on such subsequent use. The *Harris* Court disagreed and affirmed the trial court's ruling stating that the subsequent usage was permissive – "on the contrary, she [Harris] had notice only that their [Watts/Urell] use was not adverse because they had repeatedly asked for and received her permission to use the driveway." *Harris* at p. 142. The issue in *Harris* was the permissive nature of the usage – through the objective conduct of asking permission. In the case at bar, Respondents' never requested nor did they ever receive permission.

Appellant concludes with the argument that a party cannot claim hostile use if they give actual notice by objective conduct that they are not making a claim,(See Appellant's brief at p.9) However, Appellant would have the Court ignore 8 years of prior use and 12 years of subsequent use and maintenance following the infamous meeting. The Appellant would have the Court ignore the hostile act of removing the ecology blocks in less than 24 hours that the Appellant predecessor in title placed prohibiting

access to the disputed area less than twenty four hours after their placement.

2. *Chaplin v. Sanders*, 100 Wn.2d 853, 861, 675 P.2d. 431(1984). Appellant argues that the Trial Court misapplied the *Chaplin* case. Appellant argues from a policy standpoint – the Court cannot rely on the Trial Court's interpretation of *Chaplin* – "the trial Court's ruling would permit a claimant to mislead the true owner by acknowledging the superior title to his or her face, all the while letting the 10-year clock run". However, Appellant argument would of course require the Court to completely ignore the nature and character of Respondents' use for 20 years. If the Court were to adopt Appellant's rule – all that a record owner would need to do to defeat a claim of adversity would be to approach a hostile user and offer the use the use of the property or offer the property for sale – if the user/claimant even considered such an offer – under Appellant's theory their claim, no matter how ripe, would be terminated. The argument makes no sense – and is not consistent with the law. A record owner confronted with such pervasive usage has multiple options available – all of which pertain to asserting its rights to the property. Here, Burlington Northern Railroad chose not to do so.

Appellant argues that the mere fact that Respondents' even considered purchasing some property[1] from Burlington Northern Railroad should have negated the claim. As the Court in Chaplin expressly stated Respondents' subjective belief of ownership is not relevant to the claim. *Chaplin v. Sanders*, 100 Wn.2d 853, 861, 675 P.2d. 431(1984). Moreover in *Chaplin,* similar to the case at bar, the responding party argued that a contractual agreement recognized by the Claimant acknowledged the superior ownership of the responding party, and negated the hostility element of adverse possession. The *Chaplin* Court held otherwise stating:

> Under our holding today the contractual provision is no longer relevant. What is relevant is the objective character of Hibbard's possession and that of his successors in interest. *Chaplin,* at p. 862.

Nonetheless, Appellant argues somehow that the mere fact that Burlington Northern Railroad approached Respondents to purchase some property – constitutes some objective acknowledgment of superior title. It simply is not the case, there was no purchase and sale, no negotiation, no discussion regarding current or past use, no concessions made by Respondent. The only "objective act" by Respondents was to take the meeting and listen. As pointed out by the *Chaplin* Court, the most important facts pertained to how

[1] The evidence before the trial court was that it was not clear what Burlington Northern was offering Respondents for sale at the time – and whether it included the disputed strip and/or additional property.

Respondents' had used the disputed strip for the years preceding this meeting and subsequent thereto.

The litany of out of state cases cited by Appellant all have similar fact patterns that distinguish them from the instant action. They involve situations where a true owner has caused a claimant to yield to his superior title. To the extent that Appellant is arguing that a record owner can unilaterally simply (by approaching a claimant) change the nature of claimants use is not supported. Such a rule in this circumstance would directly conflict with *Chaplin*.

Moreover, the evidence before the Trial Court did not support Appellant's contention that Respondents' acknowledged superior title to the disputed strip in Burlington Northern Railroad. Rather, the record simply reflects that Respondents' were approached by and entertained a discussion with Burlington Northern Railroad. Ironically, the record also reflects that nothing was pursued because, based upon limited research, it was not clear even that Burlington Northern Railroad even owned the property. How could Respondents' acknowledge superior title when they were not even sure the railroad owned the property ?

2. The Respondents' use was not permissive.

Appellant also argues that Respondents' use of the disputed strip was permissive from inception and that Respondents' never provided

Burlington Northern notice that the nature of such use changed. Appellant argues that Respondents' initial use was permissive because of a lease that purportedly existed between Respondents' predecessor in title and Burlington Northern Railroad. Appellant's position is simply not supported by the record.

Again, the underlying facts were not and are not in dispute. Respondents' did not assume any lease between their predecessor in title and Burlington Northern Railroad when they acquired the property in 1990.CP 97. Second, the disputed strip had not been used for between 1-2 years prior to the time Respondents' acquired title due to a previous fire. CP 97. Third, Respondents' never entered into any lease with Burlington Northern Railroad at any point in time nor did Respondents' ever seek or receive permission from Burlington Northern to use the disputed strip. CP 96-97. There was no evidence before the Trial Court to support any contention that Respondents' use at the outset was permissive.

Although Respondents' do not believe that there is any basis for a finding or inference that their use at the time of acquisition in 1990 was permissive, even if such an inference could be drawn, the events that predated 1993 clearly put Burlington Northern Railroad on notice of the hostile nature of Respondents' use. If a claimant is using property by permission, in order to make a subsequent claim of hostility, Respondents'

actions must have been such as to put the Railroad on notice that they were occupying/using the area in question in a hostile manner and under a claim of right. *Miller v. Anderson*,91 Wn.App. 822,832, 964 P.2d 365 (1998)

In this case, Burlington Northern Railroad was put on notice of the Respondents' hostile claim because (1) prior to Respondents' acquiring the property, their predecessor had stopped using it; (2) Respondents' refused to pay any rent by never entering into a lease with the railroad; and (3) in 1993 when Burlington Northern Railroad attempted to prevent Respondents' use of the area in dispute by placing ecology blocks, Respondents' immediately took action to remove the impediment and continued to use the area in question.

All of the above actions, and the only reasonable inferences that can be drawn therefrom, are that Respondents' were using the area in question under a claim of right and in a hostile manner. Any conceivable argument to the contrary was undoubtedly erased by the 1993 ecology block incident. The undisputed facts before the Trial Court were and are that subsequent to the 1993 ecology block incident Respondents and their successors have used this property continuously now for over 20 more years.

IV. CONCLUSION

For the foregoing reasons, Respondents' respectfully request the Court affirm the Trial Court's decision in all respects.

Dated this 7th day of February 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the date below she forwarded for filing with the Court of Appeals for the State of Washington, Division I in Seattle, the original foregoing pleading entitled Respondents' Opening Brief. Additionally, a true and correct copy of the aforementioned pleading was emailed pdf and deposited in the U.S. Mail, First Class, postage prepaid, on this date to the following persons:

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Dated this 7th day of February, 2014 at Bellevue, Washington.

Cheryl C. Cook