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COURT OF APPEALS

No. 66195-7-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

JAMES R. HERRIN, a single man,
and REBECCA HERRIN, as her separate property, Appellants,

v.

ELLEN O'HERN, a single woman, Respondent,
and all other persons or parties unknown claiming
any right, title, estate, lien, or interest in the real
estate described in the complaint herein, Defendants.

RESPONSE BRIEF OF RESPONDENT

Robert M. Tull, WSBA #05845
Attorney for Respondent

Langabeer & Tull, P.S.
PO Box 1678/709 Dupont Street
Bellingham, WA 98227

Tel. 360-671-6460
Fax 360-647-7874
info@langabeertull.com

ORIGINAL

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I. INTRODUCTION

The trial court granted summary judgment because the hostility element of an adverse possession claim cannot be established when the use is permissive.

There is no dispute that Appellants, James R. Herrin and Rebecca Herrin's (Herrins) original use of the property of Respondent, Ellen O'Hern (O'Hern) was initially by permission of O'Hern's predecessor in interest, her father, Howard Rothenbuhler. That permission defeats Herrins' adverse possession claim.

Herrins' argument is that the Court of Appeals should reject the historic public policies of the state of Washington that place great importance on encouraging and recognizing the continuance of a permissive use. Herrins ask the Court to ignore the presumption that a familiar use is permissive. Herrins ask the Court to disregard the presumption that a permissive use remains permissive until revoked. Herrins ask the Court to change the law and place the burden of proof upon the servient estate owner to prove that a permissive use has not been terminated.

The trial court properly granted summary judgment when it ruled that the permissive nature of Herrins' ongoing use of Rothenbuhlers' adjacent property continued until the death of Howard Rothenbuhler,

pursuant to the holding in *Miller v. Anderson*, 91 Wn. App. 822, 964 P.2d 365 (1998). [CP 5] Because the use was permissive, Herrins could not establish the hostility element of adverse possession.

II. STATEMENT OF THE CASE

A. Procedure.

O'Hern agrees with the recitation of the trial court procedure as described in the Brief of the Appellants.

B. Statement of Facts.

1. History of the Properties and the Parties.

This case deals with two parcels of land located off of Rothenbuhler Road at Acme, Washington.

At one time, O'Hern's grandparents owned a farm that included all of the property relevant to this case. Many years ago, O'Hern's grandparents split the farm into two parcels, conveying the property which is now Herrins', that is, .44 acres containing an old farmhouse, to O'Hern's aunt Myrtle Johnson (Johnson). Later, what was the remainder of the grandparents' farm, that is, the farmland, barn and outbuildings, was conveyed to O'Hern's parents, Howard and Janet Rothenbuhler (Rothenbuhlers), who also owned and lived on additional adjacent land.

The same legal description of the parcel in question containing the old farmhouse on .44 acres has been used since the parcel was first divided from O'Hern's grandparents' farm.

Johnson later sold the old farmhouse and yard property to an unrelated third party named Cassals (Cassals). Subsequently, Rothenbuhlers purchased the farmhouse and yard property from Cassals. [CP 48] Thus, for a time, prior to gifting the house to Herrins, Rothenbuhlers owned both parcels and thus all the property pertinent to the matter before the Court.

Herrins are father and daughter. James Herrin lives on the Herrins' property. Rebecca Herrin is a partial owner with her father, and resides in Florida where she has lived since before Rothenbuhlers gave the property to Herrins in 1993. James Herrin was married to Rothenbuhlers' daughter Julia Reed (the mother of Rebecca Herrin), but they divorced in 1983. James Herrin is O'Hern's former brother-in-law. Rebecca Herrin is O'Hern's niece.

James Herrin moved into the house on what is now Herrins' parcel in 1988. By that time, Rothenbuhlers had acquired the property from Cassals and had James Herrin move into the house as Rothenbuhlers' caretaker. As such, James Herrin had the use of the house, the outbuildings, barn and free range of Rothenbuhlers' adjacent farm land

and buildings. After 5 years of James Herrin's use of the premises, as a caretaker, with Rothenbuhlers' permission, in 1993 Rothenbuhlers made a gift of the farmhouse and lot to Herrins. [CP 50-51] Originally, the gift was to James Herrin, his son Sheldon Herrin and daughter Rebecca Herrin. Sheldon Herrin deeded his interest to his father and sister in August, 2004. [CP 58-59] The only term or condition of Rothenbuhlers' gift of the property to Herrins was that Herrins would provide a first right of refusal to any of Rothenbuhlers' relatives that might own the adjacent property. The document stating the first right of refusal has apparently been lost by Herrins.

Janet Rothenbuhler died in 1997 and Howard Rothenbuhler died June 2, 2001. When Howard Rothenbuhler's estate was settled, O'Hern received a portion of her father's farm as part of her share of his estate. O'Hern acquired her property from her father's estate by deed dated December 30, 2003. O'Hern took possession in 2004. O'Hern's property is adjacent to Herrins' parcel on two sides. O'Hern's property includes a garage and barn.

The disputed property is a strip of land with a garage that was not included within the legal description in the deed used to convey the .44 acres to Herrins in 1993. The disputed property is east of the easterly and

north of the northerly boundary lines of Herrins' parcel. The garage is on O'Hern's property, north of Herrins' parcel.

With Rothenbuhlers' permission James Herrin used the now disputed property starting in 1988 when he lived on Rothenbuhlers' land as caretaker. That permission was never revoked until 2009, by O'Hern, when Herrins commenced this litigation. James Herrin's use of the disputed property continued exactly as in the beginning in 1988 and remained permissive after the farmhouse parcel was gifted to him and his children in 1993. It was with permission that James Herrin roamed freely on Rothenbuhlers' adjoining acreage. And it was with permission that he continued to use the barn and the now disputed garage located on the adjoining acreage.

2. Discussion of Facts.

James Herrin states, "In fact, I did use the property with permission when I lived there as a caretaker. At that time both parcels of property were owned by Howard and Janet Rothenbuhler." [CP 44]

Nothing changed in the nature of Herrins' permissive free use of Rothenbuhlers' property from the time Herrins use began in 1988 as a caretaker until Howard Rothenbulher's death June 2, 2001.

At the time Herrins filed their Complaint, less than 10 years had passed since Howard Rothenbuhler's death. [CP 177-183]

Herrins alleged no evidence in their Complaint [CP 177-183, Declarations [CP 40-46, 92-93, 94-95] or in their Responses to Defendant's Interrogatories and Requests for Production [CP 112-127] that suggests that the permission to use the disputed property, which is now owned by O'Hern, was ever withdrawn by Rothenbuhlers.

Prior to Herrins' Answers to Defendant's Interrogatories in March, 2010, James Herrin never suggested that either of the fences were boundary line fences. James Herrin acknowledged that the fence was not on the boundary. [CP 162-166] The legal description of Herrins' property describes a straight northern property line running west to east without any deviation which would be necessary for the legal description in the deed to include the garage which is on O'Hern's property. The fences that are located near Herrins' eastern and northern property boundary lines are not boundary line fences. The fences do not run from corner to corner. The fences were intended as barrier or enclosure fences to keep animals in or out.

James Herrin indicated in an email to O'Hern that he had no issues with her parents, stating, "The exact property line was never an issue because people on both sides were always amicable--and still will be if we can get this straightened out. The few feet involved in the placement of the fence are not significant." [CP 166]

In light of the positive family and neighborly relationship between Rothenbuhlers and Herrins, it is inconceivable that Herrins would have attempted to assert an adverse claim to the sliver of land and the garage while Howard Rothenbuhler lived. In fact, Herrins never asserted an adverse claim to the disputed land or the garage during Rothenbuhlers' lives. And Herrins did not assert such adverse use until more than eight years after Howard Rothenbuhler's death.

Herrins make no claim that their use or any terms of use of Rothenbuhlers' property ever changed from the time James Herrin moved in as caretaker. The only thing that changed was that in 1993 Rothenbuhlers gave Herrins what is now Herrins' property.

It is clear from Herrins' answers to O'Hern's interrogatories that the relationship between Herrins and Rothenbuhlers was familiar and that of good neighbors. No signals of hostility were displayed by Herrins toward Rothenbuhlers. There was no reason to make claims for more than what was given or permitted. Herrins had the use of much more than what they were given. According to the Herrins' interrogatory answers, Herrins did not know or indicate that there was a dispute as to ownership of any of Rothenbuhlers', now O'Hern's, property until discussions with O'Hern in 2009. [CP 120] A mere mistake as to what the Herrins thought they owned is not the same as the hostile nature of ownership required to

support an adverse possession claim. James Herrin, in an email dated January 12, 2009, acknowledged that he wanted to buy 25 feet of O'Hern's property, saying, "my garage encroaches on your property." This was the first indication that James Herrin made that he owned the garage. [CP 164]

"Prior to surveying, I had not thought much about the boundary line and garage as my ownership had never been challenged." [CP 41] This is essentially the argument that goes against Herrins. Just as Herrins state that no one had challenged their ownership, Herrins provide no evidence that Herrins challenged Rothenbuhlers' ownership. There was no known dispute. There was no way for the flag of hostility to have been raised by Herrins because they did not have a hostile interest to that of Howard Rothenbuhler, the grandfather, former father-in-law, friend and neighbor. If Herrins did not know what they owned until 2008-09, then Herrins never could have put Rothenbuhlers on notice of the adverse interest. Why did Herrins never straighten out the obvious differences between their fence line, boundary lines and the garage location?

The material and undisputed facts can be distilled down to the following: 1) that Herrins' admit their use of Rothenbuhlers' property (including what is now the disputed O'Hern property) was permissive at commencement and for years thereafter, [CP 40-41 & 44]; 2) that the

nature of Herrins' actual use never changed during the life of Howard Rothenbuhler; 3) that Herrins never put Howard Rothenbuhler on notice that they held portions of Rothenbuhlers' land in a manner hostile (within the meaning relevant to claims of adverse possession) to the title of Rothenbuhlers; and, 4) that less than 10 years elapsed between the time of Howard Rothenbuhler's death in 2001 and the filing of Herrins' claim of adverse possession in 2009. These facts are acknowledged in Herrins' submissions to the trial court and in the Appellant's Brief.

O'Hern reasserts the facts as set forth in the trial court proceedings.

[CP 167]

Clarification of Herrins' Statement of Facts.

O'Hern sets forth the following to clarify the statement of facts in Appellant's Brief.

At page 3 of Appellant's Brief, Herrins state, the parents of O'Hern, Rothenbuhlers, "(...resided elsewhere but nearby.)" Rothenbuhlers were Herrins' neighbor and resided on property adjacent to the property that Rothenbuhlers gifted to Herrins.

At page 3 of Appellant's Brief, Herrins state, "the Rothenbuhlers gifted the property for which he was caring to James Herrin..." It should be noted that Rothenbuhlers only gifted a *portion* of the property which

James Herrin had been using as a caretaker; the .44 acre portion described in the deed.

At page 4 of Appellant's Brief, Herrins state, "She (O'Hern) also owns a barn to the east of the Herrins' property outside of *his fence lines...*" To say *his fence lines* is inaccurate as the fences are on the O'Hern land.

At page 4 of Appellant's Brief, Herrins state, "Herrin's property consisted of .44 acres. It has historically been separated from the adjoining field and barn now owned by O'Hern by a fence. [CP 42-44] The property includes a house, yard and a one car garage constructed as early as 1912, enclosed by fences, a road and the Burlington Northern railroad right-of-way. [CP 42-44, 93, 94] The error in Herrins' statement is that the .44 acres did not include the garage or all the land within the fences, and the fences were not boundary line fences. [CP 90-91, 136-161]

At page 5 of Appellant's Brief, Herrins state, "Prior to obtaining the survey, no one had ever raised the question of ownership to Herrin." More importantly, as to the statement of facts, Herrins never told anyone of their claim to the disputed property until after the survey was conducted.

At page 6 of Appellant's Brief, the photographs of the property which Herrins assert illustrate how the owner of the house would normally assume that they owned and had exclusive use of the garage do not support their assertion. The photos do show: that the garage is on O'Hern's property and not on Herrins' side of the fence; and that the fences are clearly not boundary line fences; and that the fences do not comport with the legal description. At page 6 of Appellant's Brief, the fences are described by Herrins as encroaching onto the O'Hern property. The fences do not encroach onto the O'Hern property; they are on the O'Hern property.

That James Herrin mowed the lawn on his side of the fence is not illustrative of a claim of ownership as he also mowed to the north and east of the fences [CP 139-160] and has never suggested to Howard Rothenbuhler or anyone else that he was claiming any or all of what he was mowing.

III. ARGUMENT

1. Summary judgment.

Summary judgment is appropriate when no material or factual dispute exists and the court may rule as a matter of law to grant summary judgment, *CR 56*. For the purposes of summary judgment, the issue is whether Herrins have presented evidence to establish the hostility element

of their adverse possession claim. The trial court ruled Herrins did not do so.

There needs to be more than bare assertion of a dispute to defeat a motion for summary judgment. Once such a motion is submitted to the court, the party opposing the motion must identify evidence to support the allegation or assertions to defeat a motion for summary judgment. The party opposing summary judgment must set forth specific facts showing a genuine issue for trial. *Young v. Key Pharmaceuticals Inc.*, 112 Wn. 2d 216, 770 P.2d 182 (1989). Unsupported conclusional statements and legal opinions cannot be considered in summary judgment motions. *Marks v. Bensen*, 62 Wn. App. 178, 813 P.2d 180 (1991).

Mere speculation and argumentative assertions are insufficient to prevent summary judgment. *Adams v. King County*, 164 Wn.2d. 640, 192 P.3d. 8912 (2008). *Strong v. Terrell*, 147 Wn.App. 376, 195 P3d. 977 (2008). *Segaline v. Labor & Industries*, 144 Wn.App. 312, 192 P.3d. 480 (2008). *Allen v. Asbestos Corp.*, 138 Wn.App. 564, 157 P.3d. 406 (2007).

Factually, all that was conveyed to Plaintiffs by Howard Rothenbuhler was explicitly stated in the gift deed. Everything else which Plaintiffs seek to have construed from outside the four corners of the deed is mere speculation or unsupported assertions which are insufficient to

prevent summary judgment. See *Molsness v. Walla Walla*, 84 Wn.App. 393, 928 P.2d 1108 (1996).

In the instant case, the undisputed material facts establish that Herrins cannot prove that the hostility element of their claim for adverse possession existed for the requisite 10 years before Herrins filed their claim against O'Hern. Herrins have acknowledged that their initial use of the dominant estate was permissive when James Herrin originally moved onto Rothenbuhlers' property as a caretaker with permission to use Rothenbuhlers' land which included the now disputed property. Herrins acknowledge that they never changed their use of the property from the use James Herrin enjoyed while a caretaker until after the 2001 death of Howard Rothenbuhler. Herrins presented no evidence of a hostile claim of ownership to the disputed property. These undisputed facts are all that is necessary for the trial court, and now this court, to determine that Herrins' claim for ownership of the disputed property based upon the claim of ownership by adverse possession cannot succeed because the hostility element cannot be proven. Thus, the summary judgment prayed for by O'Hern was properly granted.

2. Adverse possession.

To defeat the summary judgment motion, Herrins must establish a dispute as to a material fact that would prove the hostility element of their

adverse possession claim. Whether Herrins use of the disputed property was hostile is the main issue herein.

In *Kunkel v. Fisher*, 106 Wn. App. 599, 602, 23 P.3d 1128 (2001), the court states:

The requirements to establish a prescriptive easement are the same as those to establish adverse possession. The claimant must prove use of the servient land that is: (1) open and notorious; (2) over a uniform route; (3) continuous and uninterrupted for 10 years; (4) adverse to the owner of the land sought to be subjected; and (5) with the knowledge of such owner at a time when he was able in law to assert and enforce his rights. Washington employs an objective test for adversity. When the claimant uses the property as the true owner would, under a claim of right, disregarding the claims of others, and asking no permission for such use, the use is adverse. Adversity may be inferred from the actions of the claimant and the owner.

Under the doctrines of both prescriptive easement and adverse possession, a use is not adverse if it is permissive. Permission can be express or implied. A permissive use may be implied in “any situation where it is reasonable to infer that the use was permitted by neighborly sufferance or acquiescence[.]” (Footnotes omitted).

Herrins cite *King v. Bassindale*, 127 Wash.App. 189, 220 P. 177 (1923) and *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984) for the proposition that, “Hostility, as defined by the court, ‘does not import enmity or ill-will, but rather imports that the claimant is in possession as owner, in contradistinction to holding in recognition of or subordination to the true owner.’” In essence, Herrins assert that the hostility element is

somehow met by Herrins merely using the disputed land in a manner consistent with ownership for more than 10 years.

Washington courts have determined that a different rule, not the “objective standard,” applies to the element of hostility in adverse possession cases where the initial use was permissive. *Granston v. Callahan*, 52 Wn. App. 288, 759 P.2d 462 (1988).

The relevant law applicable to the instant case is discussed in detail in *Granston v. Callahan* at 293-295 as follows:

In *Chaplin v. Sanders, supra*, the Washington Supreme Court further defined the meaning of hostility in the adverse possession context 100 Wash.2d at pages 860-61, 676 P.2d 431 as follows:

The “hostility/claim of right” element of adverse possession requires only that the claimant treat the land as his own as against the world throughout the statutory period. The nature of his possession will be determined solely on the basis of the manner in which he treats the property. His subjective belief regarding his true interest in the land and his intent to dispossess or not dispossess another is irrelevant to this determination.

(Footnote omitted.)

While this definition may work well in cases where the only issue is whether the use was adverse, it would appear to have very little practical application in cases such as the one before us today, where the commencement of the use was clearly permissive. Where the use is permissive, the user will normally occupy and use the land in the manner of a true owner. Thus, evidence of such manner of use is not helpful in resolving permissive use cases.

In the *Chaplin* opinion, the court states at pages 861-62:

[P]ermission to occupy the land, given by the true title owner to the claimant or his predecessors in interest, will still operate to negate the element of hostility. The traditional presumptions still apply to the extent that they are not inconsistent with this ruling. (Emphasis added).

In so stating, the *Chaplin* court made it clear that a different set of rules applies when the initial use is permissive.

PERMISSIVE USE

Those rules are well stated in *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 84, 123 P.2d 771 (1942) as follows:

When one enters into the possession of another's property there is a presumption that he does so with the true owner's permission and in subordination to the latter's title.

A user [sic] which is permissive in its inception cannot ripen into a prescriptive right, no matter how long it may continue, unless there has been a distinct positive assertion by the dominant owner of a right hostile to the owner of the servient estate.

(Citations omitted.)

...

Permission can be express or implied, and a use which is initially permissive cannot ripen into a prescriptive right unless the claimant makes a distinct and positive assertion of a right hostile to the owner. *Roediger v. Cullen*, 25 Wn.2d 690, 175 P.2d 669 (1946); *Crites v. Kock*, 49 Wn. App. 171, 177, 741 P.2d 1005 (1987). (Emphasis added).

The inference of permissive use is applicable to any situation in which it is reasonable to infer that the use was permitted by sufferance and acquiescence. It is not necessary that permission be requested. *Cuillier v. Coffin*, 57 Wn.2d 624, 626, 358 P.2d 958 (1961); *Roediger v. Cullen*, *supra* at 707; *Cites v Koch*, *supra* at 177. A finding of permissive use is supported by evidence of a close,

friendly relationship or family relationship between the claimant and the property owner. Stoebuck, *The Law of Adverse Possession in Washington*, 35 Wash. L. Rev. 53, 75 (1960).

A friendly relationship between parties is a circumstance more suggestive of permissive use than adverse use and the trial court was free to find use was permitted as neighborly courtesy.

Miller v. Jarman, 2 Wn. App. 994, 997, 471 P.2d 704 (1970).

In *Pickar v. Erickson*, 382 N.W.2d 536, 538 (Minn. Ct. App. 1986), the court declined to find adverse use, stating as follows:

There is at least an inference, if not a presumption, that a use is permissive where the owners of the two estates have a close family relationship.

The court in *Miller v. Anderson*, 91 Wn. App. 822, 964 P.2d 365 (1998) reviewed the issue of permissive use and how the initial permission to occupy land will operate to negate the element of hostility, stating:

When the use is initially permissive, the burden is on the party claiming adverse possession to show that the permission terminated and that the owner had notice of the adverse use. (*Miller*, at page 832. Citing *Granston*, *supra*, at 294-95.)

In James Herrin's Declaration, Plaintiffs' Memorandum in Response to Defendant's Motion for Summary Judgment and in the Appellant's Brief, Herrins acknowledge the original permissive use of the disputed Rothenbuhlers' property. Herrins' use of the disputed land began

upon the commencement of the caretaker's (permissive) use and did not end or change form when the house and its parcel were gifted to Herrins.

The *Miller* court went on to state at 831-32,

Prescriptive rights are not favored, and permission once granted is presumed to continue.... We reaffirm the rule set forth in previous Washington cases: absent revocation, only the sale of the servient estate, clear notice, or obvious change in use terminates permission.

Herrins have asserted that the use never changed during the remainder of Howard Rothenbuhler's life and that no one ever talked about the property lines or location of the garage as they did not know of the location of the line or that the fence and garage was on Rothenbuhlers' (now O'Hern's) property until the survey of 2008-9. There was never notice to Rothenbuhlers of an adverse claim because Herrins say they did not know the location of the boundary lines. [CP 105] As stated, James Herrin conceded that, the exact property line was not an issue because his relationship with Rothenbuhlers was amicable.

In *Lingvall v. Bartmess*, 97 Wn. App. 245, 250-252, 982 P.2d 690

(1999) the court states:

The Bartmesses contend that the evidence implies permissive use because there was (1) a family relationship between the parties, (2) mutual use of the driveway by Lingvall and Bobby Blank, and (3) use that occurred on neighboring parcels of land. The Bartmesses are correct that Washington courts have inferred permissive use in each of these circumstances. See, e.g., *Granston v.*

Callahan, 52 Wn. App. 288, 294-95, 759, P.2d 462 (1988) (close family relationship between brothers living on adjacent parcels supports inference of permissive use); *Jarman*, 2 Wn. App. at 997 (mutual use of driveway supports determination of permissive use); *Roediger v. Cullen*, 26 Wn.2d 690, 707, 185 P.2d 669 (1946) (permissive use may be implied in "any situation where it is reasonable to infer that the use was permitted by neighborly sufferance or acquiescence").

The *Lingvall v. Bartmess* decision is applicable to the instant case.

The Rothenbuhler-Herrin relationship was good enough that James Herrin even asserted that he loved Rothenbuhlers more than their own children loved them. [CP 111]

The original permissive use of Rothenbuhlers' property by Herrins continued in the same friendly way during Howard Rothenbuhler's life. Herrins' permissive use of Rothenbuhlers' property continued even after Howard Rothenbuhler died in 2001.

In *Miller v. Anderson, supra* at 828-832, where the original use of the serviant estate was permissive, the death of the owner of the serviant estate was deemed to start the hostile ownership. The court in *Miller v. Anderson, supra* at 828 regarding the impact of permission on the hostility element of adverse possession stated:

This case requires examination of the impact of permission on the hostility element of adverse possession. Generally, the hostility element requires proof that the possessor treated the property as an owner would. *Chaplin*, 100 Wn.2d at 860-61, 676 P.2d 431, (1984). But

"permission to occupy the land, given by the true title owner to the claimant or his predecessors in interest, will still operate to negate the element of hostility." *Chaplin*, 100 Wn2d at 861-62. This qualification means that "a different set of rules applies when the initial use is permissive." *Granston v. Callahan*, 52 Wn. App. 288, 293, 759 P.2d 462 (1988) (applying *Chaplin* analysis to claim of prescriptive easement). Hostility does not mean personal animosity or even adversarial intent. It connotes rather that the claimant's use has been hostile to the title owner's, in that the claimant's use has been that of an owner. See *Chaplin*, 100 Wn.2d at 857-58. Use with the true owner's permission thus cannot be use hostile to the true owner's title.

The *Miller* court, *supra*, at 830 also states,

When use is permissive at the outset, an adverse claim cannot lie unless the true owner has some notice that an adverse claim is being made....This rule both protects the expectations of the property owner who grants permission and encourages cooperation between neighboring landowners.

The *Miller* case is applicable to the instant case. Herrins have failed to demonstrate that a material fact exists that would establish the hostility element in light of the original and unchanged nature of the permissive use of the disputed property.

If there were evidence of revocation of permission by Howard Rothenbuhler, or other notice of change of use, such evidence would and should have been included in Herrins' declarations or other submissions in opposition to the Motion for Summary Judgment.

3. Herrins' attempt to distinguish *Miller* case.

At page 13 of Appellant's Brief, Herrins cites five points attempting to distinguish the instant case from the *Miller* case. However, the arguments are not supported by the facts or law.

Herrins' first claim is that because Howard Rothenbuhler owned both the dominant and servient estates, that the gift of the dominant estate was a change in use providing notice of the same to Howard Rothenbuhler. This circumstance is common to adverse possession cases where one person owns land and sells or transfers a portion of his land. When the boundary line is disputed, adverse possession claims arise. The long established policies then come into play to determine whether the elements of adverse possession can be established. One element, hostility, is negated by permissive use. Herrins cannot not claim adverse use of Rothenbuhlers' property, as Herrins continuing, initial and unchanged use was permissive.

The second argument is that the permissive use of all of Rothenbuhlers' property terminated when Rothenbuhlers gave a portion of the property to Herrins. But there is no evidence that permissive use of Rothenbuhlers' property was terminated. The burden of proof, as stated in the cases cited, is upon Herrins to prove that the permissive use of the disputed land terminated and when.

The third argument states that the nature of the caretaker use was not about lines of occupation. It is unclear what Herrins' point is, but the caretaker use was not about ownership or dominion. The caretaker use of the disputed land and garage was a permissive use that did not end simply because Rothenbuhlers gifted the .44 acres to Herrins.

The fourth argument relates to Rothenbuhlers' grandchildren. The Herrin children never lived upon the property after it was given to them; they live in Florida. They never used the property hostile to their grandfather, Howard Rothenbuhler. No evidence was presented to show that they established any elements of hostile use or adverse possession.

The fifth argument ignores the reasoning of Washington's adverse possession case law applicable to permissive uses and especially with regard to permissive use by family or involving a friendly relationship. The presumption is that the original permissive use continues until revoked or terminated.

Other than stating that the trial court inappropriately applied the *Miller* case, no authority is cited to support Herrins' position as to any of the five points argued. Herrins' arguments are contrary to the decision in the *Miller* case.

4. Re: Deadman's statute.

Herrins dead man statute argument is not relevant to the summary judgment granted by the trial court. Nothing of what O'Hern might think or suggest or argue Howard Rothenbuhler may have said regarding permissive use is at issue regarding the motion for summary judgment. The undisputed facts, acknowledged by Herrins in Appellant's Brief, establish that the initial use of the property was permissive and that the use never changed during Howard Rothenbuhler's life. There is no need for O'Hern to produce evidence of her father's statements about permissive use. It is up to Herrins to prove that permission was revoked. Herrins produced no evidence that the permissive use was revoked. The comments of Julia Reed and Neal Rothenbuhler indicate that they are unaware of any discussions ever, by anyone, regarding the use of the disputed property. In other words, they present no evidence that the permissive use was ever revoked.

The hostility element of adverse possession cannot be proved by anything that has been offered by Herrins in the declarations of Neal Rothenbuhler, Julia Reed, and James Herrin. Herrins makes clear that they never did anything or said anything to put Howard Rothenbuhler on notice of a hostile claim to property greater than they had received by gift. Herrins have presented no evidence the permission was revoked as to the

use of the disputed property or any other parts of Rothenbuhlers' land or buildings. The declarations only confirm that no one talked about the issue of use or boundaries. Julia Reed confirms that no one questioned the land ownership and, that what "the general understanding of everyone, including my father if he ever thought about it, was..." [CP 94-95] The only relevant thought expressed is that her father, Howard Rothenbuhler, said nothing that she can recall concerning the ownership of the property. She makes no suggestion that any hostile claim was ever made by Herrins.

Similarly, Neal Rothenbuhler says, "...with certainty ..." that prior to the 2008-09 survey, "no one knew that the garage and fence...were outside his (Herrins) legal description. I never heard the issue raised by anyone prior to obtaining the survey...neither by James Herrin, my father Howard Rothenbuhler nor my sister Ellen O'Hern." He neglects to acknowledge that even the disputed fence line does not include the garage. He also states that it was a "non issue" to everyone. [CP 92-93] Neal Rothenbuhler makes no statement suggesting that Howard Rothenbuhler was on notice of a hostile claim by Herrins to the disputed property and makes no statement that Howard Rothenbuhler did anything to terminate the permissive use or acknowledge termination.

The declarations submitted by Herrins to the trial court do not present evidence that the permissive use of the disputed property changed

before 2009. All the declarations state is that no communication occurred relative to the ongoing use of Rothenbuhlers' land. Herrins state at page 19 of Appellant's Brief, "uncommunicated intentions and consent are not particularly relevant, whether by Rothenbuhler or O'Hern." What Herrins continue to ignore is that it is their own failure to communicate their hostile intentions to Rothenbuhlers that is relevant.

The idea that Herrins' continued use of the disputed property after the gift of the dominant estate is somehow objectively hostile is unsupported by facts or law and runs contrary to the cases that hold that the burden of proof is on the adverse claimant to prove revocation or termination of consent when the initial use was permissive and presumed to continue until terminated.

The uses itemized at page 18-19 of Appellant's Brief are consistent with permissive use. More importantly, except for the labor and materials put into "rebuilding the garage in a color scheme that matches the house and other buildings," which occurred in 2004, only after the death of Howard Rothenbuhler, none of the itemized uses were any different from the uses before Howard Rothenbuhler's death. More importantly still, not until the 2004 rebuilding to include the garage into the scheme of the rest of his buildings did James Herrin do anything that might put someone on

notice of Herrins' claim to ownership (instead of continued permissive use) of the garage.

5. No Support Exists for Herrins' Argument that the Court Should Shift the Burden of Proof in Permissive Use Cases.

The question in this case is similar to that posed by the *Miller* court, "The question then is whether any subsequent act terminated permission such that a hostile use arose." *Miller v. Anderson*, page 829

Essentially, the *Miller* court in discussing Pennsylvania law decided to not adopt a theory which, although not the same as that offered by Herrins, is similar in that the result would be to shift the burden of proof to require that the servient estate owner prove the permissive use has not been revoked. Herrins' argument is contrary to the specific language of *Miller v. Anderson, supra*, page 832. The *Miller* court seems to have actually considered and rejected the position suggested by Herrins.

When the use is initially permissive, the burden is on the party claiming adverse possession to show that the permission terminated and that the owner had notice of the adverse use. *Granston*, 52 Wn.App. at 294-95.

Herrins' argument would require a revision of Washington law regarding adverse possession with respect to several already clear doctrines regarding burden of proof and the presumptions that uses are

presumed to be permissive and that a permissive use is presumed to continue until revoked.

Herrins are arguing that Howard Rothenbuhler, friend, neighbor, former father-in-law, and grandfather, by giving a house on .44 acres to Herrins, was expected to know that Herrins claimed ownership by adverse possession to a portion of Rothenbuhlers' property that Herrins had been allowed to use for years. The *Miller* and *Granston* cases have already decided otherwise.

IV. CONCLUSION.

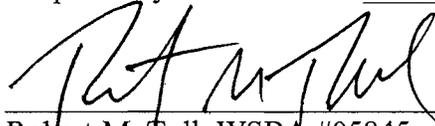
The *Chaplin* and *Miller* cases state that once permission is shown, the permissive use is presumed to continue until revoked or terminated. As stated by Herrins, their use started permissively in 1988 and continued unchanged until 2009. Herrins have presented no evidence to rebut the presumption of permissive use. Herrins cannot prove the hostile element of adverse possession. Herrins' argument that using the property as would an owner constitutes the notice of hostile ownership ignores the holding in *Granston* that different rules apply in permissive use cases and contradicts the clearly established policies of Washington courts that permissive uses are favored, encouraged, and even presumed. Herrins ask the Court to shift the burden of proof in permissive use adverse possession cases to require the true owner prove that permission was not terminated. The

Miller, Chaplin and *Granston* cases control the issues in this case. The trial court's Summary Judgment should be affirmed.

V. REQUEST FOR ATTORNEYS FEES

Pursuant to *RAP 18* and *RCW 4.84.080*, Respondent O'Hern requests that the Court award her attorneys fees and costs herein as allowed by statute, court rule and case law. Therefore, O'Hern moves the court to grant her an order for her attorneys' fees and cost as allowed.

Respectfully submitted this 29th day of April, 2011.



Robert M. Tull, WSBA #05845
Attorney for Respondent
Langabeer & Tull, P.S.
PO Box 1678/709 Dupont Street
Bellingham, WA 98227

Tel. 360-671-6460
Fax 360-647-7874
info@langabeertull.com