

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.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The narrow issue in this case is whether the Appellant Herrin's use of the garage and strip of land inside the fences of his yard ceased to be permissive "as a matter of law" when the owner, Rothenbuhler, deeded the house and yard to Herrin, or whether Herrin's use ceased to be permissive at a later date when Rothenbuhler died. If the presumption of permissive use ceased when Rothenbuhler quit-claimed the property to Herrin, then more than 10 years of "hostile" use elapsed for purposes of this summary judgment motion. Only if a presumption of permissive use continued as a matter of law until Rothenbuhler died, did less than 10 years of "hostile" use elapsed for purposes of adverse possession.

The legal argument on which this issue turns is whether the principle of *Miller v. Anderson*, 91 Wn. App. 822, 964 P.2d 365 (1998) requires the court to conclude that the legal presumption of permissive use of the garage and yard ceased only when Rothenbuhler died, or whether the court can conclude, if all facts are resolved in Herrin's favor for purposes of O'Hern's summary judgment motion, that permissive use ceased earlier when Rothenbuhler conveyed the dominant estate by deed to Herrin and Herrin stopped being a caretaker or permissive occupant of Rothenbuhler's property.

II. STATEMENT OF THE CASE.

Disagreement over Facts. While it may be a difference in nuances, Respondent O'Hern implies that there is a factual basis for assuming that Herrin's caretaker role, the basis for a finding of permissive use, continued after Herrin was deeded the property by Rothenbuhler. O'Hern suggests that Herrin was caretaker or permissive user with "free range" of substantial other property in addition to the property conveyed to him by Rothenbuhler. (*Response Brief of Respondent*, page 3.)

First, the implication of O'Hern's statement of the facts is that Herrin was using other property with permission as a caretaker in addition to the disputed property, and therefore a basis remained for finding a continuing presumption of permissive use of the garage and strip of yard with other property after Herrin was deeded the house. In fact, nothing in the record states that Herrin was caretaker of the field or barn to which the disputed garage and strip of land inside the fence are adjacent. His caretaker role completely ceased when he was given the deed to the house in 1993 (CP113-14, *Memorandum in Support of Defendant's Motion for Summary Judgment, Exhibit B (Answers to Interrogatories)*).

If Herrin had been a permissive user of the larger field adjacent to the disputed property after he was deeded the house, then O'Hern's argument would make more sense, as Rothenbuhler could reasonably rely

on the continuing permission given to Herrin. But it is only the strip of land and garage that is at issue. At what point would a presumption of continued permissive use of only this narrow strip be illogical: if it is one foot in width? Two feet? Three feet? At some point the presumption of permissive use is overcome by the weight of the paper and ink on the deed signed by Rothenbuhler.

Second, Herrin's declaration states that he did not have blanket permission to use all of Howard Rothenbuhler's property as either a caretaker or a cherished former son-in-law (CP 44-45), and that his use of the yard and garage was predicated on ownership after Rothenbuhler's conveyance. Therefore Rothenbuhler would not rely on continued permissive use. Herrin states in part:

“While Howard Rothenbuhler would permit me to use his tools, or store property in his barn, or fish in his pond, I could not presume permission, but I always asked. While permission was usually granted, it was occasionally denied. However, I always had a clear understanding of what belonged to Howard Rothenbuhler and what belonged to me, even if that understanding was incorrect, as revealed by the survey....

“When Howard Rothenbuhler conveyed the property to me, the fence was already in existence, and the garage was accessible only by my driveway. After the property was conveyed to me, I continued to use it to the exclusion of all others without asking anyone's permission, and in the sincere belief of myself and others that it was my property. This is different from my use of the barn, which was clearly on Howard's property and later owned by Ellen O'Hern. In that case I had express permission to use the barn at the inception of my use, and would not have presumed to use it without permission. In the summer of 2004 Ellen asked me to

remove my property from the barn after she had inherited it, and I did so.” (CP 45)

Herrin’s position is supported by the Declaration of Julia Reed, in which she stated:

“The property owned by my ex-husband, James Herrin, was previously owned by my grandparents, my aunt, the Cassals, my parents, and James Herrin and my two children. At no time prior to a 2008-09 survey, to my knowledge did anyone question that the land inside the fence lines around the house, and the garage, belonged to the owner of the house. I have never heard this issue raised until Ellen O’Hern, my sister, raised it as part of this case. The general understanding of everyone, including my father if he ever thought about it, was that the land inside the fence, and particularly the garage, belonged to the owner of the house, who is now James Herrin. It was not an issue – it was just commonly understood.” (CP 94-95)

Likewise, the Declaration of Neal Rothenbuhler, O’Hern’s bother, states:

“It was generally accepted by all parties that the garage was owned by whomever owned the house, and that the fences were the property boundaries for the James Herrin property” (CP93).

It is important to Appellant Herrin’s case that the court understand that the only property in dispute is that within the fenced yard and garage. The survey (CP 74) and photographs (157) show this land forms a relatively narrow band around the property described in Herrin’s quit-claim deed, and it is not logical to assume that permissive use of this land, as a caretaker or otherwise, continued in isolation after the rest of the property was conveyed to Herrin.

III. ARGUMENT

Contrary to Respondent's brief, the Appellant and Respondent do not disagree about the fundamentals of the law of adverse possession, and I will not recite them here. The parties do disagree about whether *Miller v. Anderson* is an appropriate precedent to determine the outcome of this case on a summary judgment motion. O'Hern asks the court to mechanically apply the language in *Miller* regardless of a distinction in facts and applicability of purpose. Herrin asks the court to consider the fundamental issue, whether the underlying basis for assuming permissive occupancy of the property ceased to exist through the very actions of the owner, Rothenbuhler, when he gave the dominant estate to Herrin.

A. *MILLER V. ANDERSON* IS DISTINGUISHABLE FROM THIS CASE ON ITS FACTS.

Respondent O'Hern argues that Herrin is asking the Court of Appeals to ignore established law of adverse possession set forth in *Miller v. Anderson*, 91 Wn. App. 822, 964 P.2d 365 (1998). But *Miller v. Anderson* is distinguishable from this case in two important ways, which the O'Hern fails to adequately address. First, *Miller* is distinguishable on its facts. In *Miller* the owner of the dominant estate acquired title from a third party, its predecessor who had agreed to permissive use, and not

from the owner of the burdened or servient estate. This fact underlies the rule in *Miller v. Anderson* that once given, permissive use is presumed to continue until the party given permission has reason to know that the permissive use has terminated.

Herrin's situation is different from *Miller v. Anderson*, in that Herrin acquired his property directly from Rothenbyhler, the owner of the burdened estate, who had previously made Herrin a permissive tenant, and who by his own actions (a deed of conveyance) terminated Herrin's role as caretaker or permissive tenant. This is a factual basis from which the court may, at trial, conclude (and for purposes of summary judgment should find,) that Rothenbuhler *intended* to terminate the caretaker/permissive occupancy of the property by Herrin, when Rothenbuhler deeded substantially all the property to Herrin which he was using.

Note that Herrin is not arguing that the trial court may not decide, after considering all the evidence at trial, that Herrin continued to use the garage and strip inside the fenced yard with Rothenbuhler's permission. Herrin's argument is only that, for purposes of this summary judgment motion, the court cannot *presume as a matter of law* that permissive use continues until the owner of the burdened property dies or conveys his property to another, when the one previously giving permission to use his

property deeds substantially all of the property that was subject to permissive use to the claimant.

B. THE POLICY REASON FOR THE RULE IN *MILLER V.*

ANDERSON DOES NOT APPLY TO THIS CASE.

The policy behind the rule in *Miller v. Anderson* does not apply to this case. “Because permission is personal to the grantor and cannot extend beyond that person’s ownership, the relevant viewpoint for determining when permissive use terminates is that of the party granting permission.” *Miller v. Anderson*, 91 Wn. App. at 829. In *Miller v. Anderson* the court said:

Certainly it is true that permission to use another's land is not assignable. Our cases hold, however, that 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. (Citations omitted.)

We do not believe that an owner who gives his neighbor permission to use his land should be required to monitor any and all transfers of his neighbor's estate to insure that his permission is not extinguished. Many kinds of transfers will give no notice to the world. For example, if the neighbor transfers title but remains in residence, even a vigilant owner of the servient estate may have no knowledge of the transfer. One who grants permission to his neighbor should not be required to question the status of his neighbor's title in order to make sure that his permission has not been terminated and a potentially adverse use created by operation of law. Such a requirement would run contrary to the threshold presumption in adverse possession analysis that possession is "in subordination to the title of the true owner." (Citations omitted.) 91 Wn. App. at 830.

The purpose for the rule in *Miller*, of a presumption that permission continues until notice is given to the owner of the servient estate that use is adverse, makes sense when the servient estate's owner has no other basis for knowing of a change in ownership or use of the dominant estate. However, in Herrin's case, the owner of the servient estate (Rothenbuhler) had reason to know of a change in the nature of the use of his property, because he personally signed the deed which conveyed to Herrin substantially all of the property which Herrin had previously occupied with permission. This change in use, from tenancy at will to fee ownership, occurred because and only because Rothenbuhler decided to make a gift of this property to his former son-in-law and his grandchildren. Rothenbuhler had no need to check the title, see who was living in the house, or question the status of Herrin's occupancy, as he knew that there had been a change in the nature of the occupancy from "at will" to "fee title". Thus, the policy behind *Miller*, to give notice or its equivalent to the owner of the servient estate, is satisfied in this case as the change in status of use occurred by the actions of the owner of the servient estate himself.

The fundamental differences in the position of the parties are set forth on page 21 of *Response Brief of Respondent*. First, O'Hern states that Herrin cannot claim adverse possession as his "continuing initial and

unchanged use was permissive”. Second, O’Hern claims that “there is no evidence that permissive use terminated as to “all of Rothenbuhler’s property” at the time the deed was given by Rothenbuhler to “a portion of the property”. However, the deed itself is the best proof, as a document of independent significance that is not dependant upon the parties’ testimony that a permissive use or caretaker relationship terminated.

In effect, O’Hern argues that Herrin can never prove adverse possession if he once occupied any part of the property at issue with permission, until the death of the grantor who gave him the property. However, the rule in *Miller* is only a presumption, and it is rebutted by Rothenbuhler’s quit-claim deed to Herrin.

IV. CONCLUSION

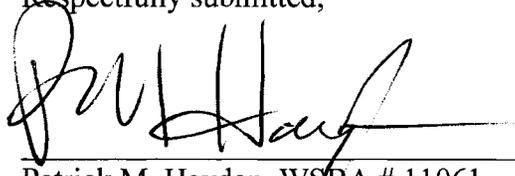
In summary, O’Hern misstates the rule in *Miller*. O’Hern reads *Miller* to hold that permissive use is conclusively presumed to continue until the owner of the servient estate is deceased. But a more precise reading of *Miller* is that permissive use ceases when the owner of the servient estate has reason to know of a change in the nature of the use of his property by the owner of the dominant estate. If so read, *Miller* supports the position of the Appellant Herrin, and requires the trial court make hear the evidence at trial to determine whether the requirements of adverse possession are satisfied.

V. ATTORNEY FEES.

Pursuant to RAP 18 and RCW 4.84.080, Apellant Herrin moves and requests that he be allowed his attorney fees and costs as provided by law.

Dated May 31, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Patrick M. Hayden", written over a horizontal line.

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