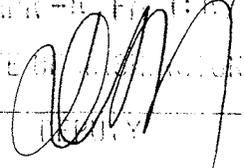


No. 34849-7-II

COURT OF APPEALS  
07 APR - 11 PM 1:17  
STATE OF WASHINGTON  
BY 

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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NORMA M. KINSMAN, a single woman,

Respondent.

v.

MICHAEL ENGLANDER and CAROLYN ENGLANDER, et. al.,

Appellants,

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**REPLY BRIEF OF APPELLANTS**

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1. **THE TRIAL COURT ERRED IN DETERMINING THAT BEVERLY VERGOWE WAS UNAVAILABLE.**

The Respondent Norma Kinsman (“Kinsman”) argues that the trial court properly determined that Ms. Vergowe was unavailable to testify at trial “due to her advanced age and the severity of her medical conditions” and therefore properly admitted her deposition. Respondent’s Brief at 9. Kinsman relies exclusively upon *State v. Whisler*, 61 Wn.App. 126 (1991) for the criteria necessary to determine when a witness who suffers from age or infirmity is considered unavailable pursuant to ER 804(a)(4). *Whisler* clearly demonstrates why the trial court erred in determining Ms. Vergowe’s unavailability.

ER 804 provides exceptions to the hearsay rule when the declarant is unavailable, providing in pertinent part ““Unavailability as a witness” includes situations in which the declarant: . . . (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity.” In interpreting this rule, the *Whisler* Court stated “the illness or infirmity must be so severe as to render the witness’ attendance “relatively impossible and not merely inconvenient”. *Whisler*, 61 Wn.App. at 132.

In *Whisler*, the prosecution contacted the witness's physician, who provided a medical opinion several days before trial that the 94 year old witness could not safely travel to court without jeopardizing her health due to her heart condition. *Id.* at 129. This information was promptly provided to the defendant, who could and did contact the witness's physician and confirmed the witness's medical condition prior to trial. *Id.* at 130. Based on the medical opinion of the witness's physician and the opportunity for the opposing party to confirm the information, the trial court declared the witness unavailable. *Id.* at 131.

In this case, Kinsman failed to provide any competent medical testimony or information to demonstrate that Ms. Vergowe could not safely attend trial. Rather, Kinsman waited until trial to provide a four month old declaration from her counsel that Ms. Vergowe could not attend trial because she "is wheelchair bound and receives continuous supplemental oxygen. She has severe diabetes and has been hospitalized at least once since these proceedings began." CP 41; RP Volume 2b of 8 at 4-15. Neither this belated declaration, which was intentionally withheld for four months, or Ms. Vergowe's own statements, establish her unavailability. Ms Vergowe herself could not provide anything more

than a conclusory statement of her medical condition, advising the trial court via telephone as follows:

THE COURT: Okay. Thank you. You know is it your belief that you are not able to physically be present in Court and would prefer us using your deposition?

MS. VERGOWE: Yes.

THE COURT: And that is based upon your medical infirmities?<sup>1</sup>

MS. VERGOWE: Yes.

THE COURT: Are you okay?

MS. VERGOWE: Yes.

THE COURT: All right. Thank you ma'am. I appreciate your taking the time today. You will not have to formally appear.

RP Volume 2b of 8 at 17-18.

Consequently, the only evidence Kinsman presented was Ms. Vergowe's subjective belief and conclusory statement that she could not be present in court. None of the information she provided was competent medical information nor was any of it sufficient to demonstrate that Ms. Vergowe's attendance at trial would be anything other than "merely inconvenient". Consequently,

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<sup>1</sup> Prior to being sworn in, Ms. Vergowe stated she had congestive heart failure, diabetes, and stenosis. RP Volume 2b of 8 at 16.

Kinsman's reliance upon the *Whisler* case proves the Englanders' argument, not her own.

2. **THE TRIAL COURT ERRED IN ADMITTING THE DEPOSITION OF BEVERLY VERGOWE.**

The trial court further erred in admitting the deposition of Ms. Vergowe. The admissibility of a deposition is governed by Civil Rule 32. Pursuant to that rule, when a witness is "unavailable", a witness's deposition may be admitted as a substitute for his or her testimony. See Hammond v. Braden, 16 Wn.App. 773, 775, 559 P.2d 1357 (1977). The Court must apply the following test in order to determine if a witness is "unavailable" prior to admitting a deposition transcript:

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: . . .  
(C) that the witness is unable to attend or testify because of age, illness [or] infirmity . . .

CR 32 (a)(3).

For all of the reasons articulated in the previous section, the trial court erred in determining Ms. Vergowe was unavailable. Additionally, the *Whisler* Court, as well as other Washington Courts, have held that a party seeking to introduce the deposition of a witness is required to make a showing that due diligence (and good faith) was exercised in attempting to procure the attendance of the

witness at trial. See *Sutton v. Shufelberger*, 31 Wn.App. 579, 585, 643 P.2d 920 (1982); *Palfy v. Rice*, 473 P.2d 606 (Alaska 1970); 8 C. Wright & A. Miller, Federal Practice § 2146 (1970). In this case, Kinsman made no effort to procure Ms. Vergowe's attendance at trial. Kinsman never issued a subpoena to Ms. Vergowe or offered to provide transportation for her to the courthouse. Rather, Kinsman endeavored to prevent her attendance at trial by waiting until then to have her declared unavailable.

For all of those reasons, the trial court erred in finding Ms. Vergowe unavailable and in admitting her deposition.

3. **THE TRIAL COURT ERRED IN CONCLUDING THAT MS. VERGOWE WAS AVAILABLE FOR REBUTTAL TESTIMONY AND ALLOWING HER TO TESTIFY TELEPHONICALLY.**

Kinsman argued successfully to the trial court and she continues to argue here in her Response Brief, that Ms. Vergowe was unavailable to testify at trial. Response Brief at 8-12. The trial court admitted Ms. Vergowe's deposition based upon her unavailability. Despite the fact that the trial court thereafter allowed Ms. Vergowe to testify telephonically, Kinsman states "the court's determination of unavailability did not change throughout the course of the trial." Response Brief at 13.

Kinsman apparently defines “unavailability” as the inability to provide “in court testimony”. Response Brief at 14. However, neither ER 804 nor CR 32 support that argument.

ER 804(a)(4) only applies when the declarant “is unable to be present or to testify at the hearing”. CR 32(a)(3)(c) only allows a deposition to be admitted if the deponent “is unable to attend or testify”. Therefore, to allow Ms. Vergowe to testify telephonically, the trial court must implicitly declare that the witness is now “available”. Since there was no evidence to suggest that Ms. Vergowe’s condition or circumstances had changed, it was error to suddenly declare the witness available.

Kinsman further argues that “telephonic rebuttal testimony was appropriate as Vergowe’s deposition could not provide the information sought on rebuttal.” Response Brief at 13-14. This clearly violates CR 43(a)(1), which provides “In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise directed by the court or provided by rule or statute.”

It also demonstrates the inherent prejudice to the Englanders. The trial court allowed Kinsman to use Ms. Vergowe’s deposition without the risk associated with live testimony and to avoid cross-examination. Then, the trial court allowed Kinsman to

provide Ms. Vergowe's testimony telephonically to supplement the deposition knowing the Englanders would not be able to confront the witness, they would not be able to use any of the trial exhibits and that they would only have a limited ability to conduct cross examination.

In addition, Ms. Vergowe's telephonic testimony was allowed even though no one was present with her to administer the oath, without an officer of the court to verify that the person speaking was Ms. Vergowe, without supervision to prevent her from using notes or from being improperly influenced.

For those reasons, the trial court erred in allowing Ms. Vergowe to testify telephonically and her testimony must be excluded.

**4. THE TRIAL COURT'S ERRORS WERE PREJUDICIAL TO THE ENGLANDERS.**

Kinsman argues that even if the trial court erred in admitting Ms. Vergowe's deposition and subsequent telephonic testimony, there was no prejudice to the Englanders.

In order for error to be reversible, there must be prejudice. See *Ashley v. Lance*, 80 Wn.2d 274, 282, 493 P.2d 1242, 62 A.L.R.3d 962 (1972); *Capen v. Wester*, 58 Wn.2d 900, 902, 365

P.2d 326 (1961). Error will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial. *James S. Black & Co. v. P & R Co.*, 12 Wn.App. 533, 537, 530 P.2d 722 (1975). The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. *Nghiem v. State*, 73 Wn.App. 405, 413, 869 P.2d 1086 (1994).

In this case, the trial court expressly relied upon Ms. Vergowe's testimony, citing to it as the sole basis for Findings of Fact 5, 6, 7, 8 and 10. CP 76-77. Since those findings were critical to Kinsman's case, and since there was no other evidence or testimony (let alone cumulative evidence as Kinsman states)<sup>2</sup> to support those findings, there is no doubt that the outcome of the trial was affected by Ms. Vergowe's testimony. Therefore, the Englanders were clearly prejudiced by the trial court's admission of Ms. Vergowe's testimony, which prejudice requires reversal.

Kinsman also argues that the Englanders could not have suffered any prejudice because they knew about and attended Ms.

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<sup>2</sup> Kinsman fails to provide any citation to the record for the proposition that Ms. Vergowe's testimony was cumulative of other evidence.

Vergowe's deposition and the deposition was always considered a "preservation" deposition. Response at 15. First, the notice for the videotape deposition specified it was taken pursuant to CR 30(b)(8) and not as a perpetuation deposition pursuant to CR 27. Consequently, the Englanders were never advised that the video would be used for perpetuation purposes. Second, this argument completely ignores the fact that none of the testimony elicited during the deposition would have been admissible. It also ignores the fact that without Ms. Vergowe present in court, it was impossible to judge her credibility, it prevented effective cross-examination, it prevented the Englanders from confronting this witness or using any of the trial exhibits in reference to her testimony.

Kinsman's argument also ignores the fact that the trial court permitted Ms. Vergowe to testify without the inherent court protections such as someone present with her to administer the oath, the ability to verify that the person speaking was Ms. Vergowe, and to prevent her from improperly using notes or from improper influence during her testimony.

For all of the above reasons, the trial court's error was prejudicial to the Englanders necessitating reversal of this case.

5. **KINSMAN FAILS TO SUPPORT ANY OF THE FINDINGS WITH SUBSTANTIAL EVIDENCE.**

A. Adverse Possession.

The parties agree that the elements of adverse possession consist of possession that is: (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile. *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984). The parties also agree, as Kinsman states in her brief, that the Englanders' predecessors, the Vergowes, gave Kinsman permission to encroach over the property line as follows:

Due to the increased size of the Kinsman bulkhead and the need to tie into the Vergowe bulkhead, the lookout portion of the Kinsman bulkhead encroached onto the Vergowe property line. RPI at 103, 326-27; Exhibit 31 at 37, 43. Coy Vergowe and Kinsman's father agreed to this encroachment before construction of the Kinsman bulkhead. RPI at 159, 376, 409; Exhibit 31 at 37, 43.

Response Brief at 6.

Consequently, there is no dispute that the Vergowes and Kinsman knew where their common property line was located and that Vergowe gave Kinsman permission to encroach. There was disputed testimony regarding whether or not Vergowes were giving the property for the lookout to Kinsman "in fee" or as an easement.

Nevertheless, in either instance, Kinsman cannot establish the element of hostility under these facts.

Permission to occupy the land, given by the true title owner to the claimant or his predecessors in interest, will operate to negate the element of hostility and will defeat a claim of title by adverse possession. Chaplin v. Sanders, 100 Wn.2d at 861-862; Roediger v. Cullen, 26 Wn.2d 690 175, 707-709, P.2d 669 (1946). A use acquired merely by consent, permission, or indulgence of the owner of the servient estate can never ripen into a prescriptive right, unless the user of the dominant estate expressly abandons and denies his right under license or permission, and openly declares his right to be adverse to the owner of the servient estate. Roediger v. Cullen, 26 Wn.2d at 709 (quoting Hurt v. Adams, 86 Mo. App. 73).

In this case, Kinsman admitted at trial that she acquired the right to use the property by permission and never acted in a way to declare her right to be adverse to the Vergowes or to the Englanders, until this lawsuit was filed. RP 19, 162-164, 166, 171, 229-230, 409, 413, 415, 418, 452, 900-901, 907-908; see also Deposition of Beverly Vergowe at page 37.

Kinsman also argues that even though the Vergowes used the disputed property and had drain lines through the disputed property, Kinsman still satisfied the requirements of exclusive use. Response Brief at 18-19. The only “use” of the disputed property by Kinsman is the existence of the lookout itself. However, Vergowes, Englanders and their friends and neighbors all used the lookout without restriction or interference. RP 389, 470, 472-473, 480-481, 510-511, 514, 595, 597, 604-605, 707-708, 724, 739-740, 774; Finding of Fact No. 23. Consequently, the Vergowes and Englanders use of the disputed property is consistent with that “of an owner under the circumstances.” See *Crities v. Koch*, 49 Wn.App. 171, 174, 741 P.2d 1006 (1987). Therefore, Kinsman has failed to support the findings of adverse possession with substantial evidence that her use of the disputed property was either hostile or exclusive.

B. Acquiescence.

The parties agree on the elements for acquiescence, which at a minimum are as follows:

- (1) The line must be certain, well defined, and in some fashion physically designated upon the ground, e.g., by monuments, roadways, fence lines, etc.;
- (2) in the absence of an express agreement establishing the designated line as the boundary line, the adjoining landowners, or their

predecessors in interest, must have in good faith manifested, by their acts, occupancy, and improvements with respect to their respective properties, a mutual recognition and acceptance of the designated line as the true boundary line; and (3) the requisite mutual recognition and acquiescence in the line must have continued for that period of time required to secure property by adverse possession.

Lamm v. McTigue, 72 Wn.2d 587, 591 (1967).

Kinsman argues that the first element, a line that is certain and well defined, “was marked by the garden wall and southern wall of the lookout, as well as other intervening markers.” Response Brief at 25. The existence of the bulkhead on one end and 110-120 feet away and up a hill the existence of a retaining wall, both of which are fairly small, does not create or constitute a well defined line.

For example, the Englanders’ bulkhead does not run to the line alleged by Kinsman to be the new property line. See Exhibits 6, 7 and 8. Rather, it runs beyond that line and into the disputed property. *Id.* There is nothing to suggest that the line is marked by the south side of the lookout wall, the north side of the lookout wall or the north corner of the Englanders’ bulkhead. Consequently, there is no “well defined” corner.

Similarly, there is nothing to suggest that the line is marked by the north side of the cylinder wall 110-120 feet or so away or the

south side of the cylinder wall. Consequently, this too does not create a “well defined” corner.

Kinsman argues that “the actions of the parties over the following decades also supported their agreement” regarding the location of the agreed property line. Response Brief at 26. This argument ignores the testimony at trial. For example, beginning from the east end of the line and traveling west:

- The north edge of the cylinder wall is at the surveyed line. The wall was built in part by the Vergowes for the benefit of the Vergowes. It would only make sense that the wall would be located on the Vergowe’s property as they have an obligation to provide lateral support to Kinsman if they cut the slope down. Kinsman sought Vergowes permission to cut ivy growing over the wall. RP 426-427.
- The stumps do not serve as any type of marker. Even if they did, Beverly Vergowe maintained a flower pot on the stump demonstrating her belief that the stump was on her property. RP 404, 957. Furthermore, Kinsman admitted that she thought the property line was through the middle of the stumps, which is the same location as the surveyed line. RP 404, 407; Exhibit 21.

- The rose arbor is clearly located north of the surveyed line as depicted in Exhibit 24.
- Kinsman knew the Vergowes maintained their drain lines around the north corner of their bulkhead and through the lookout. RP 414-418, 904-905; Exhibits 1 and 8. The Vergowes bulkhead "return" is north of the lookout wall. Exhibits 6, 7 and 8.

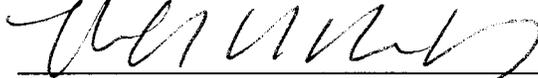
Consequently, Kinsman failed to support the claim of acquiescence with substantial evidence and that claim must also fail.

**6. CONCLUSION**

Appellants respectfully request that this Court reverse and remand this case back to the Trial Court with instructions to dismiss Kinsman's claims.

Respectfully submitted this 3<sup>rd</sup> day April, 2007.

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Attorneys for Appellants Englander

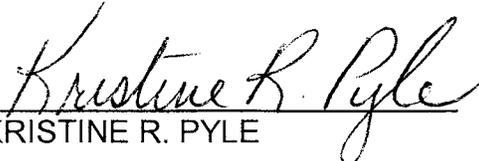
**CERTIFICATE OF SERVICE**

I hereby certify that on the 4<sup>th</sup> day of April, 2007,  
I caused to be served the foregoing REPLY BRIEF OF  
APPELLANTS on the following individual in the manner  
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SIGNED this 4<sup>th</sup> day of April, 2007, at Gig Harbor,  
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07 APR -6 PM 1:53  
STATE OF WASHINGTON  
BY   
COURT REPORTERS  
AND  
SERVICES