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DIVISION II

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STATE OF WASHINGTON
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NO. 48051-4-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION II

DONALD W. AND BESSIE L. GREELEY

Respondents

v.

FRANK MINNICK

Appellant

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

A. Assignment of Error. The trial court erred by:

Upholding the Arbitrator's decision that Respondent (Plaintiff), who already held a non-exclusive easement over the disputed strip of property, met its burden of proof and established ownership in Fee Simple Absolute of the property by Adverse Possession.

B. Issues Relating to Assignment of Error.

1. Respondent cannot obtain Fee Simple Absolute ownership over an easement by Adverse Possession under Color of Title or under the standard Adverse Possession Statute simply by maintaining its own easement.
2. The Court erred by upholding the arbitrator's decision determining as a matter of law that the "hostile" and "exclusive" elements of Adverse Possession are not required to acquire title to property by adverse possession under the Color of Title Statute, **RCW 7.28.070**, contrary to well established legal authority **(Findings 11 and 12 of the Arbitrator's Award attached to the court's order)**.
3. The Court also errored by upholding the arbitrator's decision determining factually **(Finding Number 4 of the Arbitrator's Award attached to the court's order)**, over the clear position of

Plaintiffs (*as outlined in their Arbitration statement* and presented through testimony to at hearing). that all parties believed Plaintiff owned the disputed portion of property.

4. Finally, the Court erred by upholding the arbitrator's decision determining that Plaintiff has met its burden of proof in overcoming the presumption of permissive use by demonstrating sufficient adverse use of the property (even though Respondents don't even argue making no more use of the property than that of an easement holder).

II. STATEMENT OF THE CASE

A. Procedural History.

This appeal results from a stipulated arbitration after a civil lawsuit had been filed by Respondents to declare ownership of a strip of land between the parties' respective primary properties, based on a theory of adverse possession. The stipulation entered with the court and provided that appeals would be limited to errors based on the law. (CP 13-18). The arbitrator erred as a matter of law, and thus Defendant exercised his right under the stipulation to appeal to this court for relief. This is an appeal from the Court's confirmation of the Arbitrator's decision.

B. Underlying Facts.

This case involves a dispute over the West (30) feet of a former private road which of record title is owned in fee simple absolute by Appellant Frank A. Minnick. Respondents own the East (30) feet of said road but allege in this lawsuit that by virtue of a Statutory claim for adverse possession, they have acquired title to the West (30) feet of the former road over superior title of record vested in Appellant Minnick, because they have paid taxes on said property for the prescribed period of time, while also otherwise demonstrating adverse use sufficient to establish title under such theory. (CP 1-9). Both parties have an easement over the east and west half of the former road. (CP 1-9). Therefore, regardless of the outcome of the litigation, both the section of the road adjacent to the Respondents' property and the section of the road adjacent to the Appellant's property will continue to be burdened by an easement.

The issue of record title in this matter is undisputed. (CP 47-64). How the disputed portion of the former road which is directly adjacent to Appellant's unfenced property *should be owned* is in dispute.

Contrary to the assertion from Respondents (CP 100), they did not learn that they did not own the disputed strip of land when Mr. Minnick recorded a deed to the same in 2011. Rather, the Greeleys were actually notified by Pierce County prior to such time that there was an error in title leading to their being taxed for the parcel that they did not own. (CP 66).

It was not until Mr. Wambold researched the issue that he learned that Mr. Minnick had finally obtained title of record from his predecessor in interest, Edward Miller. (CP 67). When Mr. Minnick refused to concede his property to the Greeleys, they filed a quiet title action.

The chain of title to this strip proceeds as follows:

- Norman to (PSNB) dated February 17, 1983
- PSNB to Block dated February 7, 1983
- Block to Miller dated July 1, 1995
- Miller to Minnick dated October 24, 2011

(CP 62).

Pierce County concluded, based on these and other documents researched when they made their decision regarding title, that the Respondents had been paying taxes on a parcel that they did not own. (CP 75). Pierce County offered to refund three years of the Respondents' taxes, which was rejected by Respondents. (CP 66).

The disputed property is a narrow strip directly abutting Appellant's home and densely used property. (CP 77-80). This strip abuts an identically sized strip of land owned by Respondents, both of which are fenced off from Respondents' home and densely used property. See Id.

Appellant has generally mowed, parked in, graded, and used the property in question in various ways since purchasing his home in 1999. (CP 168-182). These facts, which demonstrate Appellant using the property more like an owner than an easement holder, are undisputed by Respondents. (CP 97,98). Appellant's predecessor in interest also used the subject property, which was a source of consternation between the Greeleys and their former neighbor. (CP 99). Respondents on the other hand, only allege that they mowed the area and cleared debris occasionally. (CP 107-108). The aerial and recent photographs clearly show the disputed property being used by Appellant. (CP 168-182).

III. ARGUMENT

A. Standard of Review

When reviewing a trial court's ruling on a question of law, the appellate court reviews the question de novo. Columbia Cmty. Bank v. Newman Park, LLC, 177 Wash. 2d 566, 573, 304 P.3d 472, 475 (2013).

B. Substantive Legal Authority

1. Respondent cannot obtain Fee Simple Absolute ownership over an easement by Adverse Possession under Color of Title or under the standard Adverse Possession Statute simply by maintaining the easement.

RCW 7.28.070 provides in pertinent part as follows:

Every person in actual, open and notorious ***possession*** *of lands or tenements under claim and color of title, made in good faith, and who shall for seven successive years continue in possession, and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, devise or descent, before said seven years shall have expired, and who shall continue such possession and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section.*

(Emphasis Added)

An easement is a ***nonpossessory*** right to use in some way another's land without compensation. Richardson v. Cox, 108 Wash. App. 881, 884, 26 P.3d 970, 972 opinion amended on denial of reh'g. 34 P.3d 828 (Wash. Ct. App. 2001). The burden of maintaining an easement lies with the holder of that easement rather than the owner of the servient property. Crystal Ridge Homeowners Ass'n v. City of Bothell, 182 Wash. 2d 665, 672, 343 P.3d 746, 750 (2015).

Respondents argue in this case that they had acquired title to the 'disputed strip' by adverse possession, under the shortened (7) year statute of limitations for claims based on color of title, **RCW 7.28.070**. (CP 99). In order to meet the elements of the "possession" requirement of the statute (aside from payment of taxes), Respondents argued that they obtained ownership of the disputed strip of land simply by maintaining

their own easement. (CP 107-108) Respondents argue they established this "adverse possession" in the following manner:

- "After clearing the roadway easement area and beginning residence on their property, Greeley continuously maintained the easement area by mowing the lawn, removing occasional debris, and generally maintaining the area." (CP 107).
- "Throughout this period, the Greeleys had continued to maintain the easement area by clearing occasional debris and mowing the area to keep the tall grass down...." (CP 108).

Respondents do not argue at any point that they made "use" of the easement in any other manner other than to clear and maintain it[1]. On the other hand, Appellant provided ample evidence of his own use and maintenance of the easement, which Respondent even acknowledges. (CP 108-109).

Accordingly, Respondents argue that they have obtained ownership of the disputed strip *solely* by maintaining the easement, a duty that already legal inseparable from any dominant easement holder's *non-possessory* right to use of his easement. Crystal Ridge Homeowners Ass'n v. City of Bothell at 672. Respondents obviously failed to meet their burden of proving how they treated the property like a true owner would

[1] As will be argued later, Respondents acknowledge that their "use" or maintenance of the easement was not exclusive. But for the purposes in this section, that point makes no difference.

when they are merely fulfilling their ordinary duty of an easement holder by maintaining their easement.

Under the test outlined in Young v. Newbro, 32 Wash.2d 141, 144–45, 200 P.2d 975 (1948), Respondents cannot argue that they have used the property differently than one who has easement rights would, and therefore clearly cannot establish ownership of the property by adverse possession under **RCW 7.28.070**.

2. The trial court erred by upholding the Arbitrator's determination as a matter of law that the "hostile" and "exclusive elements of Adverse Possession are not required to acquire title to property by adverse possession under the Color of Title Statute. RCW 7.28.070 **(Findings 11 and 12)**.

Plaintiffs argued[2], and the Arbitrator ruled (Findings 11 and 12) that under the Color of Title Statute, Plaintiff is not required to prove two of the standard adverse possession elements, to wit: (1) Hostility; and (2) Exclusivity, because those words do not exist in **RCW 7.28.070**. (CP 201-202). The trial court confirmed this ruling.

The arbitrator ruled as follows:

"*11.* ***RCW 7.28.070*** *seems to be a modification of the traditional adverse possession elements. It states.*

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[2] See also (CP 111-115).

"Every person in actual, open and notorious possession of lands or tenements under claim and color of title, made in good faith, and who shall for seven successive years continue in possession, and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, devise or descent, before said seven years shall have expired, and who shall continue such possession and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section".

12. Left out of that statute are the words hostile and exclusive. The Legislative intent seems somewhat confusing because case law still discusses those terms in the analysis by various courts."

(CP 201)

Respondents argued that the standard (10) year statute (**RCW 7.28.010**) is "imposed by case law" which requires the hostile and exclusive elements, but that **RCW 7.28.070** is a statutory adverse possession which is not in any way supplemented or affected by common law. (CP 99). The arbitrator agreed with this argument and so found when applying the law in this case. Simply put this interpretation of Washington law is misplaced, and Respondents have cited absolutely no legal authority to support this contention.

<u>*Neither*</u> **RCW 7.28.010** nor **RCW 7.28.070** contain all of the elements of Adverse possession within their statutory framework. Yet both statutes are over 100 years old, and both are interpreted again and

again in Washington caselaw, and no Washington cases distinguish the elements of adverse possession under the respective claims except to the extent that Color Title claims can be brought within (7) years, while standard Adverse Possession claims must wait the full (10) year statutory period.

For instance, the court's decision in Peeples v. Board of Bellingham, *a Color of Title case* brought under **RCW 7.28.070**, the court found as follows:

> *In order to gain title to property held under "color of title," a claimant must have more than a claim made in good faith.* ***RCW 7.28.070****, .080. The statute requires not only "actual, open and notorious possession of lands", but also payment of legally assessed taxes for 7 years in succession.* ***RCW 7.28.070****. Not only did the port not pay the taxes,* ***but as we have noted the other elements of possession were not clearly established. "It is possession that is the ultimate fact to be ascertained. Exclusive dominion over land is the essence **1135 of possession, . . . "*** *Wood v. Nelson, 57 Wash.2d 539, 540, 358 P 2d 312, 313 (1961). The port has not demonstrated its* ***exclusive, actual, or hostile dominion over the tidelands in question.***

Peeples v. Port of Bellingham, 93 Wash. 2d 766, 777, 613 P.2d 1128, 1134-35 (1980) overruled on unrelated issues by Chaplin v. Sanders, 100 Wash. 2d 853, 676 P.2d 431 (1984)

(***Emphasis Added***)

Washington Practice Manual further discusses the practical aspect of Color of title claims as follows:

"Washington's second most important adverse possession statute is RCWA 7 28.070, which will here be called the "payment-of-taxes" statute.[3] It allows an adverse possessor to gain title in only seven years if, ***in addition to fulfilling the usual common law requirements****, he (1) has "color of title," (2) has paid all taxes levied on the land for seven successive years, and (3) believes in "good faith" that he has title. Thus, the statute is a special adverse possession statute that adds elements to the usual ones. "Color of title" or "colorable title," which will be discussed fully later, means a document that on its face appears to convey title, but that, for some reason that does not appear on its face, is legally ineffective to do so. A familiar example is a sheriff's deed that appears regular on its face but that is void because of a substantial failure to follow the statutory procedures for a sheriff's sale.*

17 Wash. Prac., Real Estate § 8.2 (2d ed.)

(***Emphasis Added***)

With respect to Respondents' adverse possession claim, ITT Rayonier, Inc. v. Bell 112 Wash.2d 754, 757-758, 774 P.2d 6, 8 (Wash.,1989) outlines several standards for a party seeking to demonstrate adverse possession:

"In order to establish a claim of adverse possession, there must be possession that is: (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile Chaplin v. Sanders, 100 Wash.2d 853, 857, 676 P.2d 431 (1984). Possession of the property with each of the necessary concurrent elements must exist for the statutorily prescribed period".

The character of Respondents' possession is a question of fact. Mugaas v. Smith, 1949, 33 Wash.2d 429, 430, 206 P.2d 332, 9 A.L.R.2d 846. The burden of proof is upon Respondents to establish its adverse nature. One requirement is that it be exclusive. Scott v. Slater, 42 Wash.

2d 366, 369, 255 P.2d 377, 378 (1953) overruled on different grounds by Chaplin v. Sanders, 100 Wash. 2d 853. 676 P.2d 431 (1984)

As the presumption of possession is in the holder of legal title, the party claiming to have adversely possessed the property has the burden of establishing the existence of each element. ITT Rayonier, Inc. v. Bell at 757. Possession itself is established only if it is of such a character as a true owner would make considering the nature and location of the land in question. Young v. Newbro. 32 Wash.2d 141, 144–45, 200 P.2d 975 (1948), overruled on other grounds, Chaplin v. Sanders, supra. As quoted in Wood v. Nelson, supra, use alone does not necessarily constitute possession. The defining test in an adverse possession case is the exercise of dominion over the land in a manner consistent with actions a true owner would take. Where neighbors both use a property, the party claiming adverse possession cannot argue its acquiescence in the other party's use of the land to be described to be simply the attitude of a good neighbor. ITT Rayonier, Inc. v. Bell at 758. Rather, it shows that there was a shared occupation of land which defeats any claim for adverse possession. Id. Limited use of property to cut wild grass thereon would not of itself conclusively establish adverse possession of wild, unimproved, or unfenced land. Wood v. Nelson, 57 Wash. 2d 539. 539 358 P.2d 312 (1961).

There is no way that Respondents can establish the type of possession necessary to establish their claim under existing Washington law. Logistically, the strip is directly adjacent and contiguous to Plaintiff's unfenced developed property, while Respondents erected a fence between their primary property and both sides of the former road. (CP 91,92,93). Their use has not been ***exclusive***, nor has it been ***actual*** or ***uninterrupted***. (CP 99). At hearing, Appellant presented testimony and photographs of his use of the disputed area, demonstrating clearly by the photos, that he used the disputed area for much more than just accessing his property as an easement. (CP 168-182). In fact, Appellant demonstrated at hearing, and Respondents even admit that Appellant has used the property far more than the Respondents, and in a manner more like an owner would do. (CP 97-98).

Respondents, on the other hand, submitted no photos at all which support their claim of "adverse use" or possession beyond use as a mere easement, other than mowing of grass (and allegations of occasionally clearly debris from the property). While it is difficult for the trial court (or the court of appeals) to ascertain facts presented at hearing, the photographs submitted, as well as the pre-hearing statements and briefing, are fairly demonstrative of the relative use of the disputed strip by the

parties. Moreover, as mentioned earlier, Respondent's prehearing statement gives an even more telling story of the historic use, as follows:

*"Throughout this period the **Greeleys** had continued to maintain the easement area by **clearing occasional debris and mowing the area to keep the tall grass down**, and the area was clear and well maintained when Minnick began his occupancy of his property to the east.*

*After taking up residence on his property, **Minnick began a practice of acquiring and bringing onto his property a steady flow of junk cars, trucks, boats, and other objects**.*

*During the approximately twelve year period that followed, Don Greeley had to on more than one occasion approach **Minnick** and request that he stop **his practices of either tearing up the area with his backhoe or cutting wood on his property and leaving debris on the easement area.** Numerous times, Greeleys had to clean up rocks and other to [sic] debris to prevent damage to their lawnmower. On one occasion, apparently in an effort to organize his own property, **Minnick moved a number of vehicles, boats etc.. Out to and left them on the entire expanse of the 60 foot roadway.** The junk vehicles were left there **so long** that Don Greeley again had to confront Minnick about the situation and eventually enlisted the aid of Mr Minnick's son, Chris Minnick, to help Greeley move the vehicles and boats back onto the Minnick property.*

*During more than one of these encounters, when approaching Minnick, Donald Greeley advised him that he owned and paid the taxes on this property, and on one occasion he offered to show Minnick a copy of the tax statement which he held in his hand, but **Minnick refused to acknowledge it.**"*

(CP 97,98). (***Emphasis added***)

Even in this, their pre-hearing statement, where they could frame their factual and legal argument in a light most favorable to their position, Respondents acknowledge the following:

- **Greeley's use** of the easement area was limited to how one would maintain an easement it uses – "clearing occasional debris and mowing to keep the tall grass down

- **Minnick's use** of the easement was for, storage of cars, boats and other objects, running a backhoe on the property; and cutting wood.

(CP 97.98).

Respondents' testimony and other evidence presented at hearing were consistent with what they outlined in their Prehearing Statement. Respondents did not show that they possessed the property consistent with "ownership" any different than how one with easement rights might demonstrate. In fact, if anyone showed dominion over the property like an owner, it would be Appellant, as for a period of twelve years (as acknowledge by Respondents in the above referenced statement), Minnick made use of the easement in a manner fare more than simply traversing the property. (CP 168-182).

As mentioned above, Respondents chose to place a fence in between their primary parcel and their adjacent section of the former road which abuts Mr. Minnick's portion of the road (the disputed tract). Conversely, there is no fence or structure in between the two vacant

parcels and Mr. Minnick's primary parcel[3]. (CP 91-93). The land is vacant and has served absolutely no purpose to the Respondents and their other 'fenced in' property.

On the other hand, Mr. Minnick's primary property which adjoins his parcel of former road (the disputed tract), has no fence or obstruction separating his two parcels. (CP 82). In other words, both the Greeley's section of road and Mr. Minnick's (the disputed section) sit on the other side of the Greeley's fenced primary property. In addition, Greeleys admit that "Defendant made use of this property over their objection". (CP 97-98). Yet they never erected a fence to separate Mr. Minnick from this disputed section.

Most importantly, historic photographs and testimony established that Mr. Minnick and his predecessor made regular use of his property, sufficient to defeat any claim for adverse possession. (CP 97-98).

3. The trial court erred by upholding the Arbitrator's **(Finding Number 4)**, over the clear position of Plaintiffs, as outlined in their Arbitration statement (and testified to at hearing), that "all parties believed Plaintiff owned that portion of property".

[3] Although historic photos and testimony at hearing show that there *even* was a fence between the disputed strip and Respondents' "side" of the former road for a lengthy period of time. It is undisputed that the fence has been removed.

While it is just a factual finding, the court should note that the arbitrator clearly misunderstood some of the facts before him with respect to this matter. Finding Number 4 by the arbitrator was as follows:

"From 1997 through the first part of 2011, it appears that all parties believe Plaintiffs owned that portion of property."

(CP 200)

Even Plaintiff's own prehearing statement contradicts this as follows:

During more than one of these encounters, when approaching Minnick, Donald Greeley advised him that he owned and paid the taxes on this property, and on one occasion he offered to show Minnick a copy of the tax statement which he held in his hand, but ***Minnick refused to acknowledge it.****"*

(CP 97-98). (***Emphasis added***)

Appellant did not acknowledge Respondents' ownership of the strip, which is why he accepted a deed to the area in 2011, and why he has defended this lawsuit.

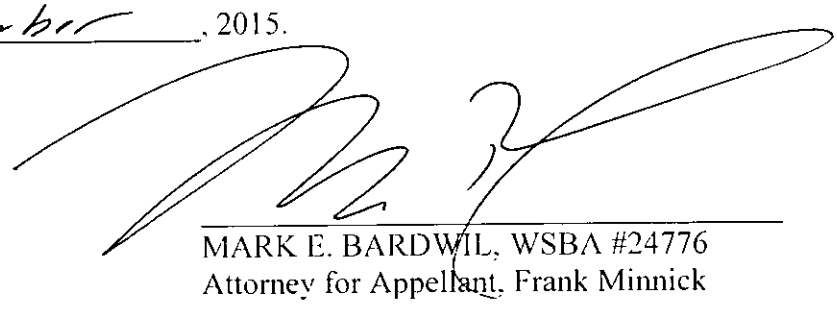
4. Finally, the Court erred by upholding the arbitrator's decision determining that Plaintiff has met its burden of proof to overcome the presumption of permissive use through adverse "possession", even though Respondents made no more use of the property than that of an easement holder.

The use by the public is presumed to be permissive where land is wild, uncultivated and unenclosed. Turner v. Davisson, 47 Wash. 2d 375, 384-85, 287 P.2d 726, 732 (1955). Based on the foregoing, Respondents have not met its burden of proof, or overcome the presumption of permissiveness by a preponderance of the evidence. Rather, Respondents, at most, can show only shared non-possessory use of the area, not inconsistent with Respondents' existing easement rights over the strip.

IV. CONCLUSION

For the above reasons, this court should reverse the trial court's order. In the alternative, this court should remand the matter back to the trial court for further proceedings consistent with its opinion.

Respectfully submitted this 7th day of December, 2015.



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Certificate of Service

On December 7, 2015, the undersigned caused to be sent by first class mail, postage prepaid in the mails of the United States at Tacoma, Washington, and by email, a copy of the Brief of Appellant to the following:

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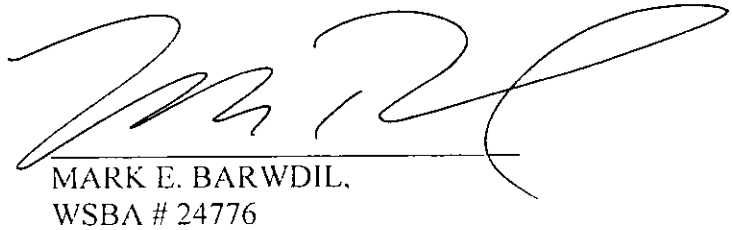
I certify under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

Signed at Tacoma, Washington, this 7th day of December, 2015.



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