

FILED  
Court of Appeals  
Division II  
State of Washington  
11/6/2019 8:32 AM

No. 53372-3-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

DAVID MILNER,  
Appellant,

vs.

CARPENTER GROUP, LLC,  
Respondent.

---

APPELLANT'S REPLY BRIEF

---

By FRANK F. RANDOLPH  
Attorney for Appellant

FRANK F. RANDOLPH  
WSBA #32572  
WALSTEAD MERTSCHING PS  
Civic Center Building, Third Floor  
1700 Hudson Street  
Post Office Box 1549  
Longview, WA 98632  
Telephone: (360) 423-5220  
Fax: (360) 423-1478  
Email: randolph@walstead.com

TABLE OF CONTENTS

	<u>Page</u>
I. Argument .....	1
A. <u>Respondent Concedes, By Failing To Respond To Appellant’s Argument, That The Trial Court Erred By Making Findings Of Fact And Conclusions Of Law In Connection With A Summary Judgment Ruling, Over Appellant’s Objection.</u> .....	1
B. <u>The Trial Court Erred When It Ruled As A Matter Of Law That Appellant And His Predecessors In Interest, As Owners Of Lot 21, Had To Interfere With Lot 19’s Use Of The 16’6” Strip, For Ingress/Egress To The Cul De Sac, In Order To Gain A Prescriptive Easement Over The Said Strip.</u> .....	2
C. <u>The Trial Court Erred When It Dismissed, As A Matter Of Law, Appellant’s Claim Under RCW 64.12.030, As Genuine Issues Of Material Fact Existed As To: (a) Whether Respondents Intentionally Or Willfully Crossed Over The Boundary To Cut The Appellant’s Shrubs; And (b) Whether Respondents Thereby Injured Appellant’s Shrubs.</u> .....	10
D. <u>Respondent Is Not Entitled To Attorney Fees For Defending The Claim For Prescriptive Easement In Accordance With This Court’s Decision In <i>McCull v. Anderson</i>, 6 Wash. App. 2d 88, 429 P.3d 1113 (2018).</u> .....	13

TABLE OF AUTHORITIES

	<u>Page</u>
I. CASES	
<i>City of Seattle v. St. John</i> , 166 Wash. 2d 941, 948–49, 215 P.3d 194, 198 (2009) .....	13
<i>Ellis v. City of Seattle</i> , 142 Wash.2d 450, 458, 13 P.3d 1065 (2000) .....	1
<i>Gamboa v. Clark</i> , 183 Wash. 2d 38, 52, 348 P.3d 1214, 1221 (2015) .....	2, 5, 7, 8, 9
<i>Gostina v. Ryland</i> , 116 Wash. 228, 199 P. 298 (1921) ...	10, 11, 12
<i>Herring v. Pelayo</i> , 198 Wash. App. 828, 397 P.3d 125 (2017) .....	10, 11, 12
<i>Kramarevcky v. Dep’t of Soc. &amp; Health Servs.</i> , 122 Wash.2d 738, 743, 863 P.2d 535 (1993) .....	12
<i>Kunkel v. Fisher</i> , 106 Wash. App. 599, 602, 23 P.3d 1128, 1130 (2001) .....	5, 6, 7
<i>McColl v. Anderson</i> , 6 Wash. App. 2d 88, 429 P.3d 1113 (2018) .....	13
<i>Mustoe v. Ma</i> , 193 Wash. App. 161, 371 P.3d 544 (2016) .....	10, 11
<i>Roediger v. Cullen</i> , 26 Wash. 2d 690, 715, 175 P.2d 690 (1946) .....	5, 9
<i>Tiller v. Lackey</i> , 6 Wash. App. 2d 470, 487, 431 P.3d 524 (2018) .....	5, 9, 10

TABLE OF AUTHORITIES (Continued)

	<u>Page</u>
<i>Vasquez v. Hawthorne</i> , 145 Wash. 2d 103, 106, 33 P.3d 735, 737 (2001) .....	1
<i>Wilson v. Westinghouse Elec. Corp.</i> , 85 Wash.2d 78, 81, 530 P.2d 298 (1975) .....	12
<i>Workman v. Klinkenberg</i> , 6 Wash. App. 2d 291, 430 P.3d 716 (2018) .....	13
 II. OTHER	
CR 56(c) .....	1
RCW 64.12.030 .....	10

I. ARGUMENT

- A. Respondent Concedes, By Failing To Respond To Appellant's Argument, That The Trial Court Erred By Making Findings Of Fact And Conclusions Of Law In Connection With A Summary Judgment Ruling, Over Appellant's Objection. CP 339-342, Appellant's Brief, 19-20.

However, the findings themselves show that the trial court failed to apply the proper standard for reviewing a motion for summary judgment:

A summary judgment motion under CR 56(c) can be granted only if the pleadings, affidavits, depositions, and admissions on file demonstrate no genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. The court must consider all facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Ellis v. City of Seattle*, 142 Wash.2d 450, 458, 13 P.3d 1065 (2000).

(*Emphasis added.*) *Vasquez v. Hawthorne*, 145 Wash. 2d 103, 106, 33 P.3d 735, 737 (2001). Here, the trial court failed to consider all facts and inferences in the light most favorable to Mr. MILNER. It is Appellant's contention, supported by ample evidence and rebutted by none, that when the hedge was planted in the front of Lot 21, blocking that lot's only direct access to the *cul de sac* for well over twelve years, and began ingress/egress thereafter only via the opening in the hedge and then crossing Lot 19's driveway, that was a "distinct, positive assertion

adverse” to the owner of Lot 19. Furthermore, Lot 19’s failure to challenge that use or interference is evidence that the easement was conceded by the fee owner (the second prong of the *Gamboa* test). *Gamboa v. Clark*, 183 Wash. 2d 38, 52. In the alternative, the extensive evidence presented to the trial court in favor of Appellant was more than sufficient to raise a genuine issue of material fact to defeat Respondent’s motion for summary judgment.

B. The Trial Court Erred When It Ruled As A Matter Of Law That Appellant And His Predecessors In Interest, As Owners Of Lot 21, Had To Interfere With Lot 19’s Use Of The 16’6” Strip, For Ingress/Egress To The *Cul De Sac*, In Order To Gain A Prescriptive Easement Over The Said Strip.

**Undisputed Facts:**

1. There was no evidence submitted to the trial court that Appellant MILNER’s use of the Respondent’s driveway was ever permissive, and Respondent merely prevailed below upon the legal presumption of permissive use. In fact, Respondent conceded that “Milner had no interaction with the neighbors regarding the driveway.” CP 90-92. The case law is clear that some evidence of a friendly or neighborly relationship, prior to the triggering dispute that soured those relationships, must be shown.

///

///

2. Appellant and Respondent both presented un rebutted evidence supporting Appellant's claim for a prescriptive easement:

a. Respondent admits that when they purchased Lot 18 in 2005, the hedges, which blocked Lot 21's direct access to the public *cul de sac*, were "old." And they never recall a time when those hedges were not located where they are now. CP 121.

b. When Appellant purchased Lot 21 in 2006, the prior owner told him that his driveway went through the opening in the hedge, across the lower portion of Lot 19, and to the public *cul de sac*. CP 104, 120-121, 138, 167, 201. There is no other way, visible or invisible, for the Appellant or his predecessor to ingress/egress his property since well before 2005. CP 202, 218.

c. Cutting down his hedge so that Appellant could directly access the public *cul de sac*, as argued by Respondent, is not a simple alternative for Respondent because there is un rebutted evidence that that area of his yard was (1) swampy, (2) drained toward his house and (3) frequently where he parks his 12-foot boat. CP 120.

d. Unlike the Carpenters who only reside at Lots 19 and 20, from late Spring until September, Appellant MILNER has spent 20 to 22 days per month at his Lot 21 since 2006. CP 123.

e. From 2006 (when Appellant purchased his residence, and the Eatons owned Lots 19 and 20) until 2015 (when the Eatons sold those lots to the Carpenters), Appellant never talked to the Eatons. From 2015 to 2017, Appellant only spoke to the Carpenters less than 30 minutes, and that was only in 2017 after this dispute began. CP 123. There is no history of friendly relations.

f. The Carpenters, despite living in Lot 18 from 2005-2015, and in Lot 19 from 2015 to the present, were not aware that Appellant trespassed by using the driveway until August 2017 when they had a survey made. CP 20, 124. Appellant has testified that prior to the August 2017 survey, nobody ever told him not to drive over the paved area on Lot 19 to get to his home on Lot 21. CP 106. That is further evidence that the owners of Lot 19 conceded his use was by right. *Id.*

g. Respondent admits that “because of the hedges on the Milner property, he drives between the hedges into his yard. This route results in him crossing little, if any, of the [Respondent’s] driveway.” CP 90.

h. Prior to the August 2017 survey, nobody ever objected to Appellant using the driveway to back his boats in his yard or to park his car. CP 106, 109, 122, 202-203. Mr. Carpenter reported that when he told Mr. MILNER the results of the survey, Mr. MILNER gave

an excited utterance: “I’m going to sue you. . . . You’re taking my property.” CP 204. Prior to the survey, all parties treated Appellant’s use of the driveway as a matter of right.

### **Legal Argument**

3. Prescriptive Easement. Appellant MILNER reiterates his request that this Court find that the trial court erred when it failed to rule, as a matter of law, that Appellant was entitled to a prescriptive easement over the lower portion of Respondent’s driveway. The Trial Court further erred when it ruled, as a matter of law, that Respondent proved the converse. Appellant asks this Court to so rule and remand the case to the trial court to determine the extent of that prescriptive easement. Appellant’s Brief, 1-7, 10-17. In the alternative, Appellant requests that this Court find that Appellant raised genuine issue of material fact and that his claim for a prescriptive easement be remanded to the trial court for a resolution by trial. None of the cases Respondent cites in its reply brief<sup>1</sup>, dictate such a result:

a. In *Roediger*, the thirty-four plaintiffs claimed prescriptive easement over a footpath across the defendants’ property. The prescriptive easement was denied by the court because “the usage has

---

<sup>1</sup> *Roediger v. Cullen*, 26 Wash. 2d 690 (1946) (“*Roediger*”), *Kunkel v. Fisher*, 106 Wash. App. 599 (2001), *Gamboa v. Clark*, 183 Wash. 2d 38 (2015) and *Tiller v. Lackey*, 6 Wash. App. 2d 470 (2018).

been of recent date only, and it accordingly furnishes no basis for a finding of ten years' user." 26 Wash. 2d 690, 715. In the case before the Court now, the hedges were in place more than twelve years before suit was filed in 2017.

b. In *Kunkel*, Division 1 succinctly stated the law of prescriptive easement:

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.

(*Emphasis added.*) *Kunkel v. Fisher*, 106 Wash. App. 599, 602, 23 P.3d 1128, 1130 (2001). Division 1 reversed a trial court ruling that a prescriptive easement had been proved, because:

One of the previous owners of the property operated an insurance business on it. He testified that he and John Kunkel discussed the Kunkels' use numerous times. John Kunkel would ask him if his use was a problem and he would answer that it was not. There is also evidence that on one occasion John Kunkel had to ask someone to move a vehicle so he could pass. Kunkel himself stated that his neighbors were very accommodating to him about the use.

This evidence is not sufficient to overcome the presumption that the use was permissive. Indeed, the only reasonable inference from the evidence is that the Kunkels' use was permissive. Nor is there any evidence that the Kunkels at any time made a distinct positive assertion of a right adverse to any of the property owners

prior to this action. Thus, the evidence is also insufficient to support a conclusion that the Kunkels' permissive use ripened into an adverse use.

Taken in the light most favorable to the Kunkels, the evidence is insufficient to overcome the presumption in favor of a permissive use. We reverse.

(*Emphasis added.*) *Id.*, 106 Wash. App. 599, 604–05. In the case now before this Court, there was no trial, and the lower court ruling was based solely on the “permissive presumption.” There was extensive evidence presented by the Appellant and the Respondent, of a “distinct and positive assertion of ownership” by Appellant over the easement, or a right conceded by the owners of Lot 19, including the Carpenters.

c. *Gamboa*. Again, the facts in *Gamboa* are very different from those in the case now before this Court. There, two farm families had what the appeals court characterized as “a friendly neighborly relationship for years,” *i.e.*, 1995-2008 (thirteen years), 180 Wash. App. 256, 263, 321 P.3d 1236 (2014). A dispute began over a dog in 2008, and by September 2009 a lawsuit erupted between the two families regarding a driveway. The trial court, after a trial, ruled that the Gamboas had a prescriptive easement. However, the Court of Appeals reversed, holding that the evidence supported a reasonable inference of neighborly accommodation by the Clarks, which the Gamboas failed to overcome. The Supreme Court then affirmed, holding that there was an initial

presumption of permissive use, the evidence itself supported an inference of neighborly use and claimants failed to overcome this presumption and evidence.

The Supreme Court explained how the presumptions in a prescriptive easement case shift between the parties. First, an initial presumption of “neighborly sufferance” applies to both undeveloped or developed land (the case before this Court is developed land). Second, the Clarks provided evidence of neighborly acquiescence (there is none in the case now before this Court). And third, based on the facts before the Supreme Court, the Gamboas failed to overcome the presumption of permissive use:

Here, the Gamboas cannot demonstrate either that they interfered with the Clarks’ use of the driveway or that the Clarks indicated that the Gamboas had an easement over the driveway.

*(Emphasis added.) Gamboa v. Clark*, 183 Wash. 2d 38, 52, 348 P.3d 1214, 1221 (2015). In contrast, in this case the actions and inaction of both the Eatons and Carpenters in this case show that Mr. MILNER had an easement.

///

///

In the case now before this Court, the trial court, on a motion for summary judgment, applied only the first prong of the *Gamboa* test, overlooking the second prong created by the Supreme Court. The trial court has explained its decision:

The Plaintiff was not able to establish a “distinct, positive assertion adverse” to the owner, as the most Plaintiff could show was that it used the driveway as a matter of right. Under *Tiller*, using the driveway as a matter of right is not sufficient to establish the “distinct, positive assertion” element.

CP 341. Under *Gamboa*, the presumption of permissive use may be overcome either by (1) proof of interference with owner’s use; or (2) that evidence shows that the owner concedes an easement. The distinction is important because interference with use can be the basis for adverse possession of the disputed area and not just the creation of a prescriptive easement. Here, Mr. MILNER only seeks to maintain his easement which he has used since 2006.

d. In *Tiller* (but unlike the case now before this Court), there was evidence that “the owners along Lakeview Street were friendly, neighborly and some fairly close-knit,” *Id.*, 6 Wash. App. 2d 470, 487, and “the residents in and around the plat . . . were friendly with one another”. *Id.* at 488. Quoting *Gamboa*’s discussion of *Roediger*, Division 1 quoted the test to be that the person asserting a prescriptive easement must make “a positive assertion to the owner . . . that he claimed to use the path as of

right.” *Id.* at 490. Despite the fact that Respondent resided at Lot 18 from 2005-2015 and at Lot 19 beginning in 2015, in 2017 Carpenter never viewed MILNER’s use as permissive, never doubted Mr. MILNER’s easement over the driveway and even in 2017, had doubts as to who had the right to use the driveway (“We just need to establish where our property is”, CP 124), but Mr. MILNER did not (“You’re taking my property”). CP 124.

C. The Trial Court Erred When It Dismissed, As A Matter Of Law, Appellant’s Claim Under RCW 64.12.030, As Genuine Issues Of Material Fact Existed As To: (a) Whether Respondent Intentionally Or Willfully Crossed Over The Boundary To Cut The Appellant’s Shrubs; And (b) Whether Respondent Thereby Injured Appellant’s Shrubs.

1. The cases cited by Respondent with regard to this matter are: *Gostina v. Ryland*, 116 Wash. 228 (1921), *Mustoe v. Ma*, 193 Wash. App. 161 (2016), *Herring v. Pelayo*, 198 Wash. App. 828 (2017).

a. In *Gostina*, the neighbor’s attorney sent a demand to the owner of the overhanging branches that they be trimmed within ten days. The demand was not complied with, so fifteen days after the deadline the complaining owner filed suit and allowed the Court to resolve the difference. *Id.* 116 Wash. 229-230. That was not the approach of the Respondent in the case now before this Court. Respondent hand delivered a note requesting the trim on September 8, 2017 and requested a response

by September 18 or 19. CP 35. However, less than a week after delivery of the note and before waiting for a response, Respondent hacked Appellant's hedges back to the desired line and erected a chain link fence against the shrubs, killing 8 to 10 shrubs on Appellant's land. CP 35, 39-77. In addition, in *Gostina*, the overhang had been for months not years, *Id.* at 235, and therefore, the complaining neighbor was not found to have "slept on his rights". But in the case now before the Court, that "very old" hedge had been there since before 2005, certainly well over twelve years.

b. In *Mustoe*, the owner of the damaged tree sued in negligence, and the Court of Appeals refused to limit the right to trim over-extended root to a right to act reasonably. *Id.* at 167-170. However, here the action was based on either an intentional or reckless tort. CP 3. In *Mustoe*, the court also acknowledged that "Mustoe correctly argues, however, that even if Jordan acted lawfully in severing the tree roots, however, he may still commit a nuisance if in so doing he unreasonably interfered with her use and enjoyment of her property." *Id.* at 169.

c. In *Herring*, there was no allegation of willfulness by the party trimming the tree:

Because the evidence at trial did not reveal any factual dispute as to whether the Pelayos' conduct in trimming the remaining branches from the tree

was willful, the trial court was not required to enter a specific finding on this issue to conclude that Pelayos were liable for timber trespass.

*Herring v. Pelayo*, 198 Wash. App. 828, 833, 397 P.3d 125, 127 (2017). Here, there is clear and undisputed evidence of willfulness. The *Herring* court affirmed that “our Supreme Court in *Gostina* quoted with approval the rule that a landowner does not have legal authority to cut down an encroaching tree.” *Id.* at 835.

Furthermore, in *Herring*, the Defendants did not give any warning of their intention to trim the trees. In the case now before the Court, the Respondent gave the Plaintiff until September 17 or 18 to trim his shrubs. If Mr. MILNER had trimmed his bushes carefully, the damage to his bushes would not have been so extensive. CP 41-77. However, before Appellant could respond to the demand and before the passing of the deadline, the Respondent butchered his shrubs, causing the death of 8 to 10 of them. Accordingly, Respondent should be equitably estopped from claiming that the shrubs were not a boundary tree:

Under the principle of equitable estoppel, “a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.” *Kramarevcky v. Dep’t of Soc. & Health Servs.*, 122 Wash.2d 738, 743, 863 P.2d 535 (1993) (quoting \*949 *Wilson v. Westinghouse Elec. Corp.*, 85 Wash.2d 78, 81, 530 P.2d 298 (1975)). “The elements of equitable estoppel are: (1) a party’s admission, statement or act inconsistent

with its later claim; (2) action by another party in reliance on the first party's act, statement or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission." *Id.*

*City of Seattle v. St. John*, 166 Wash. 2d 941, 948–49, 215 P.3d 194, 198

(2009). The case before the Court meets this criteria.

D. Respondent Is Not Entitled To Attorney Fees For Defending The Claim For Prescriptive Easement In Accordance With This Court's Decision In *McColl v. Anderson*, 6 Wash. App. 2d 88, 429 P.3d 1113 (2018).

Appellant was unable to find any indication that the Supreme Court has accepted the Petition for Review in *Workman v. Klinkenberg*. 6 Wash. App. 2d 291, 430 P.3d 716 (2018). Until the Supreme Court does, *McColl* is the precedent for this Court.

DATED: November 6, 2019.

Respectfully submitted,



---

FRANK F. RANDOLPH, WSBA #32572  
Of Attorneys for Appellant

CERTIFICATE

I certify that on this day I caused a copy of the foregoing APPELLANT'S REPLY BRIEF to be mailed, postage prepaid, to Respondent's attorney, addressed as follows:

David A. Nelson  
Nelson Law Firm, PLLC  
1717 Olympia Way, Suite 204  
Longview, WA 98632  
Fax No.: (360) 425-1344  
Email: dave@lighthouselaw.com

DATED this 6<sup>th</sup> day of November 2019, at Longview,  
Washington.

  
\_\_\_\_\_  
JOYCE A. DONALDSON

**WALSTEAD MERTSCHING PS**

**November 06, 2019 - 8:32 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53372-3  
**Appellate Court Case Title:** Dave Milner, Appellant v Carpenter Group, LLC, Respondent  
**Superior Court Case Number:** 17-2-01217-4

**The following documents have been uploaded:**

- 533723\_Briefs\_20191106082847D2907441\_6769.pdf  
This File Contains:  
Briefs - Appellants Reply  
*The Original File Name was Appellant's Reply Brief-Milner.pdf*

**A copy of the uploaded files will be sent to:**

- dave@lighthouselaw.com
- nelsonlawfirm@me.com

**Comments:**

---

Sender Name: Joyce Donaldson - Email: joyce@walstead.com

**Filing on Behalf of:** Francis Fitz Randolph - Email: randolph@walstead.com (Alternate Email: )

Address:  
PO Box 1549  
Longview, WA, 98632  
Phone: (360) 423-5220

**Note: The Filing Id is 20191106082847D2907441**