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IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

No. 53831-8-II

Mark and Debra Martin,
Respondents

v.

Benjamin and Corey Orvold,
Appellants

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

REPLY BRIEF OF APPELLANTS

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I. SUMMARY OF REPLY

The central issues on appeal are whether the trial court erred in making findings of hostility and “open and notorious” use to support a claim for adverse possession by the Martins, whether the trial court erred in awarding the Martins fees and denying the same to the Orvolds, and whether the restraining order was overly broad.

II. ARGUMENT

A. **The Martins Did Not Meet Their Burden Of Proof In Establishing The Hostility Element Of Adverse Possession.**

1. **“Lack of express permission” is not the same as hostility.**

To establish hostility, the Martins rely on the testimony of various witnesses that the Martins never requested permission nor did the true owner ever grant express permission. However, this does not satisfy the element of hostility. Use is hostile only when it “would normally be objectionable to owners” of the land, and express *or implied* permission negates hostility as a matter of law. *LeBleu v. Aalgaard*, 193 Wn. App. 66, 72, 371 P.3d 7 (2016); *Teel v. Stading*, 155 Wn. App. 390, 396, 228 P.3d 1293 (2010).

The owners of the Orvold property from 1991-1999 and 2001-2015 all testified that they had no objection to the Martins’ use of the GPS. Mr. Sundsmo, owner from 1991-1992, “didn’t have any objection to anyone parking on the right-of-way.” RP 282. Mr. Pulicicchio, owner from 1992-1999, similarly “had no problem” with the Martins parking in the GPS. RP 581. Ms. Smith, owner from 2001-2015, also

had no objection to the Martins' use, testifying that "we both shared this with no problems. If they needed it, they parked there. If I needed it, we parked there." RP 168.

Further, the Martins testified that they believed their use was permitted by the owners. Mrs. Martin testified that she presumed it was ok with Mr. Pulicicchio that they parked in the GPS, and Mr. Martin testified he did not think Mr. Pulicicchio objected to their use. RP 419, 313. Furthermore, Ms. Martin admits that Mr. Pulicicchio told them "I have a million dollar umbrella policy because of your steep hill in case anybody was to ever get hurt on that and because it's within my property lines." RP 424-425. Mr. Pulicicchio clearly permitted them to use the GPS, as he indicated the policy was in place in case "anybody" got hurt.

Hostility requires that the Martins treat the land as their own "as against the rest of the world." *Chaplin v. Sanders*, 100 Wn. 2d 853, 860, 676 P.2d 431 (1984). Significantly, none of the owners testified that they thought the Martins were using the GPS as their own. In fact, they all testified that it was used by the Martins and the owners in a shared manner. No owner was ever excluded from the GPS, nor did an owner attempt to exclude the Martins or anyone else from using the GPS. The owners of the Orvold property all impliedly, if not expressly, granted permission to use the GPS.

It was error for the trial court to find the element of hostility was met as to the GPS, and that the Martins' use was of a nature that

would normally be objectionable to an owner. The evidence established that the owners of the Orvold property had no objection to the Martins' use and permitted the same. Accordingly, the Martins failed to establish the element of hostility and their claim for adverse possession must fail.

2. Parking is within the scope of the express Easement, and therefore a permitted use.

The Martins argue that parking is outside the scope of the express Easement, as it does not specifically reference parking. In support, they cite *Barnhart v. Gold Run* for the proposition that use interfering with enjoyment of an easement can result in adverse possession. In that case, Mrs. Harris built a house that encroached onto the right of way. *Barnhart v. Gold Run*, 68 Wn. App. 417, 419, 843 P.2d 545 (1993). A house clearly interferes with use of a roadway and the case is not analogous to the instant case. Transient parking in the GPS is not only temporary, but does not interfere with the use of the roadway.

The Martins cite *Nickell v. Southview Homeowners Association* for the proposition that a homeowner may adversely possess a common area. However, that is an incorrect recitation of that case. In *Nickell*, homeowners adversely used a portion of adjoining property commencing in 1985. *Nickell v. Southview Homeowners Association*, 167 Wn. App. 42, 271 P.3d 973 (2011). In 1994, pursuant to a preliminary plat approval by the adjacent owner, a portion of the

area was designated as a greenbelt. There was no “common area” designation, nor did the *Nickell* Court address whether the claimant’s use was consistent with or exceeding the scope of permitted use. *Id.*

In *Timberland Homeowners Association v. Brame*, also cited by the Martins, the claimant constructed a patio and fully enclosed fence within a common area. *Timberland Homeowners Association v. Brame*, 79 Wn. App. 303, 901 P.2d 1074 (1995). All members of the association had a non-exclusive right to use that area. *Id.* In finding that the claimant’s use was non-permissive, the court noted that “the construction of a fence and a concrete patio on the property far exceeded a reasonable exercise of that easement right.” *Id.* at 311.

Similarly, in *Littlefair*, in looking at a fence built within an express ingress/egress easement, the court considered whether it was “an obstruction that clearly interferes with the proper enjoyment of the easement.” *Littlefair v. Schulze*, 169 Wn. App. 659, 666, 278 P.3d 218 (2012).

Here, there was no obstruction, fence, patio, or other barrier put in place by the Martins that clearly interfered with the neighborhood’s use of the express ingress/egress easement. In fact, this case is strikingly similar to *York v. Cooper*, wherein an express ingress and egress easement had been used for parking for many years. *York v. Cooper*, 50 Wn.2d 283, 373 P.2d 493 (1962). The Washington Supreme Court, in considering the intent of the parties who created the easement, held that “use of the easement is evidence of that intent,” and

found that parking fell within the scope of the express ingress/egress easement. *Id.* at 285.

The Martins specifically address parking cases, including the unpublished opinion of *City of Redmond v. Howe*, 2015 Wn. App. LEXIS 175 (February 2, 2015). That case is not analogous to the current case in any way. First, the claimant had originally acquired possession of the disputed area through a lease. *Id.* The lease provided for exclusive possession of the parking lot and was thus permissible use at its inception. *Id.* After the lease expired and the claimant stopped paying rent, the owner, BNSF, attempted to exclude the claimant from the parking lot by placing a barricade, terminating the prior permission. *Id.* The claimant removed the barricade and continued to use the parking lot, exclusively, from 1993-2010. *Id.* Such use was hostile because the owner clearly revoked permission by placing the barriers and attempting to exclude the claimant. *Id.* The court then considered whether the claimant's offer to purchase the property constituted "objective conduct necessary to acknowledge superior title in another," and concluded that the mere making of an offer, without more, does not negate hostility. *Id.* Here, no owner of the Orvold property ever attempted to exclude the Martins from using the GPS. Furthermore, the Orvolds are not claiming that Mr. Pulicchio's offer to transfer them the disputed area was acknowledgment of superior title by the Martins. The Martins' reliance on *City of Redmond v. Howe* is simply misplaced.

The Martins further rely on the unpublished opinion from *Severson v. Clinefelter* to support hostile use through parking. *Severson v. Clinefelter*, 2015 Wn. App. LEXIS 2254 (September 22, 2015). However, there was no express easement involved and hence no consideration of whether parking was a permitted use. *Id.* Furthermore, the claimant did much more than merely park in the disputed area, including “occupying, maintaining by mowing as a lawn up to the fence, storing and parking vehicles”, and grading and maintaining a driveway that only the claimant used. *Id.* *Severson v. Clinefelter* does not address the issue of permitted use or scope of an easement and is not on point as to that issue.

During the trial court’s oral ruling after trial (upon presentation of final orders), the trial court considered use interfering with an easement. In doing so, the trial court discussed the Martins’ paved driveway and landscaping that falls on the north side of the driveway (whereas the GPS is on the south side of the driveway). The court stated “I can’t think of anything more interfering than having pavement down in the easement.” RP 698. Even assuming a paved driveway interferes with an ingress/egress easement, the driveway and landscaping were not at issue at trial and were awarded to the Martins on summary judgment. The trial was limited to the issue of adverse possession of the GPS, and the Martins’ use of any other area was irrelevant to the issues at trial. A court cannot rely on a claimants’ use

of one portion of property to support adverse possession of other property.

In the instant case, there is no dispute the GPS falls within an express ingress and egress easement. Nearly every witness testified that the GPS had been used for parking, by the Martins and others, since 1991. Two creators of the easement and original plat testified that they intended the Easement to include the right to park along the street, and no witness testified to the contrary. RP 278, 282, 338, 341. Because parking is a use consistent with and permitted by the express Easement, the Martins' "use" of parking in the GPS was permissive and not hostile.

3. Neighborly acquiescence has never been limited to prescriptive easement cases and the rationale applies equally to adverse possession.

The Martins argue that the doctrine of neighborly acquiescence applies exclusively in prescriptive easement cases and does not apply in adverse possession cases. In *Kunkel v. Fisher*, the court did discuss differences between prescriptive easement and adverse possession claims. *Kunkel v. Fisher*, 106 Wn. App. 599, 602, 23 P.3d 1128 (2001). However, before that discussion, the *Kunkel* Court addressed how the claims are similar. In doing so, the Court noted:

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.'

Id. at 603. Immediately *following* the above passage, the court then went on to discuss the differences in the two doctrines. Nowhere did the *Kunkel* Court hold that neighborly acquiescence applies only in prescriptive easement cases, and in fact discussed it when considering the similarities between the two.

In *Miller v. Anderson*, an adverse possession case, the court held that “[i]n cases involving neighbors, the permission is often indeed a ‘neighborly accommodation’ dependent not upon the user’s personal identity, but upon his status as a neighbor.” *Miller v. Anderson*, 91 Wn. App. 822, 831, 964 P.2d 365 (1998). The court went on to hold that the trial court erred in finding that the inference of permissive use must be established by a preponderance of the evidence. *Id.* at 832. The court held that, once use is established as 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. *Id.*

Furthermore, in the unpublished adverse possession case of *Severson v. Clinefelter*, cited by the Martins, this court found that the evidence did not give rise to a reasonable inference of neighborly sufferance or acquiescence. *Severson v. Clinefelter*, 2015 Wn. App. LEXIS 2254 (September 22, 2015). This court did *not* conclude that the neighborly acquiescence doctrine was inapplicable to adverse possession cases and in deed considered it. *Id.*

While other distinctions have been drawn between adverse possession and prescriptive easement claims, Washington cases have

never drawn such a distinction when it comes to implied permission by neighborly acquiescence. As set forth in the Orvolds' Opening Brief, there is a reasonable inference of neighborly acquiescence and the trial court erred in finding the Martins' use hostile.

B. The Martins' Use Of The Subject Property Was Not So Open And Notorious To Put The True Owner On Notice Of A Claim To Ownership.

The Martins argue that their use of the GPS was "open and notorious" because it could be seen from space (satellite photography). However, "open and notorious use" is not simply use that is visible by others. This element requires use such that the "true owner knew, or should have known, that the occupancy constituted an ownership claim." *Anderson v. Hudak*, 80 Wn. App. 398, 405, 907 P.2d 305 (1995). The use must constitute a "warning" to an adversary, as "property will be taken away from an original owner by adverse possession only when he was or should have been aware and informed that his interest was challenged." *Hunt v. Matthews*, 8 Wn. App. 233, 236-237, 505 P.2d 819 (1973), overruled on other grounds by *Chaplin*, 100 Wn.2d 853, 676 P.2d 431.

In considering whether use rose to an "ownership claim," the court in *Kesinger v. Logan* determined that the owner "knew, or should have known, that the construction of the fenced-in mobile home park situated on the disputed area manifested an ownership claim." *Kesinger v. Logan*, 51 Wn. App. 914, 921, 756 P.2d 752 (1988). The court further noted that the "structures conveyed a notice of permanency." *Id.*

In addition to their “use” of the space by parking in it occasionally, the Martins also argue that they “created” the GPS. However, the evidence on this issue is conflicting at best and insufficient to establish use that gave notice of an ownership claim. Mr. Martin testified that he “flattened it out basically,” and that he did it personally in 1992. RP 92. Mrs. Martin testified that Mr. Martin “dug it out smooth all the dirt because it was coming down towards the street.” RP 373. Ed Tharp, their son-in-law, testified that he helped create the spot when he did some excavation and foundation work at the Martin house, which was in 1996. RP 357-359. Ed Meier testified that Mr. Martin simply filled in a ditch “like everyone else along that side of the street,” Meier included. RP 344-345. Clayton Horton testified that he “just dug into the hillside and threw gravel down, nothing major.” RP 218. Bonita Anderson testified that the disputed parking strip was already there when she bought her home in 1991, and a bit more may have been dug out by the Sundsmos, “but it was basically there was space there.” RP 519, 536. Ryan Radke testified that he parked his moving truck there in August of 1991, nearly a year before the Martins testified to creating it. RP 539. The testimony clearly established that the parking spot already existed when the Martins purchased their home in 1991, and at most, the Martins dug a bit into the hillside to make the parking spot larger in 1992.

Here, the Martins’ transient and shared use of the parking space, for a few hours per day 3-5 times per week, is not sufficiently

“open and notorious” to put the true owner on notice of an ownership claim. No barrier, structure, or other demarcation was ever erected by the Martins. Furthermore, no owner of the Orvold property believed or had reason to believe the Martins were challenging their ownership of the GPS. The Martins did not meet their burden in establishing “open and notorious” use.

C. CONTRARY TO THE MARTINS’ ASSERTION, THIS APPEAL DOES NOT RELATE TO THE INJUNCTION ISSUED BY THE COURT, ONLY THE ANTI-HARASSMENT PROTECTION ORDER.

The Martins argue that part of this appeal focuses on the injunction. However, that is not the case. The trial court entered an injunction enjoining the Orvolds from using or parking in the GPS. CP 883, 1025. The Orvolds did not appeal that ruling (although the injunction would necessarily be vacated if the Orvolds are successful in overturning adverse possession). The Orvolds did, however, appeal several provisions of the anti-harassment protection order (although entered as a restraining order by agreement of the parties).

The Martins further argue that “we are not technically dealing with a protection order under RCW 10.14,” the anti-harassment statute, apparently to argue that the Orvolds were not entitled to fees under that statute. The Martins similarly argue that the Orvolds were not successful with their anti-harassment protection order claim. In fact, the Orvolds were successful both at the temporary stage and at trial.

The Orvolds filed a Petition for Order for Protection on November 16, 2018 and had a separate hearing on that matter prior to trial. CP 116-120. The Orvolds requested a no contact provision, no surveillance, and no photographing them while in their home. CP 119. On November 30, 2019, the court ordered that all parties must stop photographing or filming the other parties in their yards or gravel area and that all contact between the parties should be through counsel. CP 356.

Furthermore, after trial, the court ruled “There is no dispute that each party has engaged in photography and filming of the other party... The conduct was clearly designed to alarm, annoy, and harass the other party.” CP 883. The court went on to say it was entering “a mutual antiharassment order, restraining both parties for a period of two years.” CP 883.

While it is true the parties agreed to enter a mutual restraining order instead, that is a matter of form over substance. Both parties requested an anti-harassment protection order under RCW 10.14.080, presented testimony regarding the same, and the court granted the requests, including the Orvolds request prior to trial. CP 356, 883. The Orvolds were a prevailing party under RCW 10.14.090 and should have been awarded fees.

Finally, the Orvolds’ fees incurred in their anti-harassment protection order claim were not “inextricably intertwined” with their defense of the adverse possession claim. The Orvolds submitted an

affidavit of fees solely related to the issue of the anti-harassment protection order petition and hearing of November 30, 2019. CP 967-970. While the Martins may have been unable to segregate their fees, the Orvolds were able to do so. Accordingly, because both parties were successful in pursuing their anti-harassment protection order claims, there was no basis to award the Martins fees for the same but deny them to the Orvolds.

D. THE COURT'S ORDER PROHIBITING AUDIO RECORDING IS OVERLY BROAD AND CONTRARY TO THE PRIVACY ACT.

First, the Martins again incorrectly argue that the order prohibiting audio recording is part of their request for injunctive relief. That is not the case, it was part of the anti-harassment restraining order. CP 883, 1025. The Martins admit as much when they cite RCW 10.14.080(6) for the proposition that an anti-harassment protection order may restrain a respondent from keeping the “petitioner under surveillance.” RCW 10.14.080(6). However, the trial court went far beyond restraining surveillance of the parties. The trial court required the Orvolds to stop *all* audio recording on their own property without written consent. This prevents the Orvolds from audio recording someone standing at their front door, breaking into their home, or threatening violence on their property, unless they have written consent.

As set forth in the Orvolds' Opening Brief, the communications that can be heard and recorded from the Orvold security system are not

“private communications.” RCW 9.73.030(1)(b). Furthermore, the sign they posted regarding audio recording constitutes “reasonably effective” notice that conversations are being recorded. RCW 9.73.030(3). Both Mr. Martin and Jody Woodward testified regarding the existence and content of this sign, proving its efficacy. RP 259, 304. Furthermore, RCW 10.14.080(9) states that an anti-harassment protection order “shall not prohibit the respondent from the use or enjoyment of real property.” Based on the above, the trial court’s complete ban on all audio recording without written consent is overly broad, not supported by law, and should be vacated (along with Finding of Fact #29).

E. THE TRIAL COURT’S ORDER TO MAKE SECURITY LIGHTS MOTION ACTIVATED WAS DESIGNED SOLELY TO PROTECT NON-PARTIES.

Mrs. Martin testified very clearly that the Orvolds’ security light “has totally hurt how our neighbors live because of a light shining bright in their homes.” RP p. 411. Neither of the Martins testified that the Orvolds’ security light shines in their home or impacts them in any way. Furthermore, the court specifically prevented such an inconvenience to the Martins when it restrained the parties from shining flood lights into each other’s windows and required lights to be pointed only at the party’s own property. CP 833, 1004, 1026.

If other neighbors believe they are being harassed by the Orvolds by their security light, then they have the right to seek their own remedies. It is improper for the court to interfere with the Orvolds’ use or enjoyment of their real property, or in this case the

protection of their real property, or to enter an order protecting non-parties. RCW 10.14.080 (9) (property rights); *Trummel v. Mitchell*, 156 Wn.2d 653, 131 P.3d 305 (2006) (non-parties); *Price v. Price*, 174 Wn. App. 894, 301 P.3d 486 (2013) (property rights). Because the Martins are adequately protected by the court's other orders regarding lighting, and because it was designed to protect non-parties (specifically the Woodwards), the court's overly broad requirement to make all lighting motion sensitive should be vacated.

III. CONCLUSION

The Orvolds request that this court reverse the trial court's finding of adverse possession, as the Martins failed to establish hostile and open and notorious use. The Orvolds additionally request modification of the restraining order to remove the provisions regarding audio recording and motion-activated lighting. Finally, the Orvolds request an award of attorney's fees and costs at trial and on appeal as the prevailing party.

Respectfully submitted this 4th day of March, 2020.

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Certificate of Service

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 4th day of March, 2020, she electronically filed the attached Brief of Appellant and Certificate of Service for filing with the Court of Appeals, Division II, and true and correct copies of the same were electronically delivered to each of the following parties and their counsel of record:

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