

**FILED**

MAY 19 2014

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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MICHAEL L. BLANKENSHIP and  
YVONNE M. BLANKENSHIP,  
husband and wife,

Respondents

V.

JERRY L. BRAMHALL, a married man,  
as his sole and separate property,

Appellant.

NO. 322734-III

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APPELLANT'S BRIEF

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### **III. Introduction and Relief Requested**

This case involves a dispute over whether or not the Respondents, Michael and Yvonne Blankenship, have a right to use Appellant Jerry Bramhall's property to access their property north of Mr. Bramhall's property. The Blankenships did not meet their burden of demonstrating that they are entitled to judgment as a matter of law; there were and are material facts in dispute in this matter. Mr. Bramhall requests that the Court reverse the trial court's summary judgment order and remand this matter for trial.

### **IV. Assignments of Error**

A. The trial court erred when it granted the Blankenships' motion for summary judgment establishing an easement by implied reservation and prescription across Mr. Bramhall's property. CP at 127-128.

B. The trial court erred when it entered a Judgment and Decree Quieting Title to Road Easement. CP at 134-135.

C. The trial Court erred when it entered a judgment for statutory attorney fees against Mr. Bramhall. CP at 137-138.

### **V. Statement of the Case**

Mr. Bramhall acquired property along Nancy Creek in Ferry County in 1985. CP at 80, 101. The Blankenships have owned the property to the north of Mr. Bramhall since 2007. CP at 4. Before 1974,

the Blankenship and Bramhall properties were owned by the same person: J.C. Carson. CP at 16-36. There was a road through the Carson property which crossed what later became the Bramhall and Blankenship properties. CP at 36. This road was labeled "Private Road" on the Plat which Mr. Carson dedicated in 1974. *Id.* Mr. Bramhall has never seen anyone use the portion of this road which is on his property for ingress or egress to the Blankenships' property. CP at 10-101. The deed to Mr. Bramhall's property does not contain a description of an easement across Mr. Bramhall's property for the benefit of the Blankenships' property. CP at 80-81. Mr. Bramhall has personal knowledge that the Blankenships own adjacent properties and that they have access to the property north of Mr. Bramhall via roads other than the road through Mr. Bramhall's property. CP at 101-102. In addition, a neighbor, Gail Herbst has never seen anyone use the road across Mr. Bramhall's property. CP at 103.

In 2013, the Blankenships apparently decided to sell their property. CP at 7. During the sale process, they, for the first time, informed Mr. Bramhall that they were asserting a right to use his property. CP at 6. The Blankenships filed suit against Mr. Bramhall on March 6, 2013. CP at 3. The Blankenships then moved for summary judgment on December 23, 2013. CP at 47-60. Mr. Bramhall filed a motion to strike inadmissible portions of the Blankenships' verified complaint and declaration in

support of summary judgment. CP at 104-106. The trial court heard oral argument on the motions on January 24, 2014. Report of Proceedings (RP). At oral argument, Mr. Bramhall objected and moved to strike the new information the Blankenships submitted in reply to Mr. Bramhall's opposition to summary judgment. RP at 3-4. The trial court granted Mr. Bramhall's motions to strike in part and granted the Blankenships' motion for summary judgment. CP at 126-128. The trial court subsequently entered a judgment quieting title and a judgment for statutory attorney fees against Mr. Bramhall. CP at 134-138. This appeal followed. CP at 129-133.

## **VI. Law and Argument**

This Court reviews summary judgments de novo. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Trial courts are required to deny motions for summary judgment where a party has not produced sufficient admissible evidence to make a prima-facie case indicating they are entitled to a judgment as a matter of law. CR 56. Courts must also deny motions for summary judgment where there are material facts in dispute. *Id.* "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). A party moving for summary judgment "is held to a strict standard. Any doubts as to the existence of a

genuine issue of material fact is resolved against the moving party.”

*Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn. 2d 506, 516, 799 P.2d 250 (1990). When considering a summary judgment motion, the Court must construe all facts and reasonable inferences in the light most favorable to the non-moving party.

*Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). “A court may not consider inadmissible evidence when ruling on a motion for summary judgment. The legal opinions of witnesses are inadmissible.”

*King Cnty. Fire Prot. Districts No. 16, No. 36 & No. 40 v. Hous. Auth. of King Cnty.*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994). “Summary judgment exists to examine the sufficiency of legal claims and narrow issues, not as an unfair substitute for trial.” *Babcock v. State*, 116 Wn.2d 596, 599, 809 P.2d 143 (1991).

**A. There were material issues of fact in dispute related to the Blankenships’ claim to an easement by implied reservation.**

Our Supreme Court has defined the elements required to establish the easement by reservation or implication:

An implied easement (either by grant or reservation) may arise (1) when there has been unity of title and subsequent separation; (2) when there has been an apparent and continuous quasi easement existing for the benefit of one part of the estate to the detriment of the other during the unity of title; and (3) when there is a certain degree of necessity (which we will discuss later) that the quasi easement exist after severance.

*Adams v. Cullen*, 44 Wn.2d 502, 505, 268 P.2d 451 (1954). The *Adams* court went to hold that the test of necessity is “whether the party claiming the right can, at reasonable cost, on his own estate, and without trespassing on his neighbors, create a substitute.” *Adams*, 44 Wn.2d at 507 (quoting *Berlin v. Robbins*, 180 Wash. 176, 189, 38 P.2d 1047 (1934)).

In an earlier case, the Supreme Court listed other factors that must be considered in whether to grant an easement by implied reservation:

[I]t is necessary to determine [1] the extent of the use, the character, and the surroundings of the property, [2] the relationship of the parts separated to each other, and [3] the reason for giving such construction to the conveyances as will make them effective according to what must have been the real intent of the parties.

*Bailey v. Hennessey*, 112 Wash. 45, 49, 191 P. 863, 864 (1920).

The Blankenships produced no admissible evidence as to the *Bailey* factors. Instead, they made bald assertions with no demonstration of personal knowledge as to the intent of the party who divided the property; the use of the property before the severance of the unity of title; and the necessity of the easement for enjoyment of their property. To acquire an easement by implication a party must present some admissible evidence regarding continuous use of the alleged easement and the necessity of the easement to enjoy the divided property. See *McPhaden v. Scott*, 95 Wn. App. 431, 439, 975 P.2d 1033 (1999)(affirming a directed

verdict denying easement by implication where no evidence of continuous use and necessity was presented at trial).

Questions as to extent of the use of the property, the intent of the parties, and whether a reasonable substitute access may be had are fact intensive and not amenable to summary judgment; thus few cases on implied easements are decided by summary judgment. *See e.g. Woodward v. Lopez*, 174 Wn. App. 460, 474, 300 P.3d 417 (2013)(reversing summary judgment granting implied easement because there were material issues of fact surrounding necessity of easement); *Bays v. Haven*, 55 Wn. App. 324, 329, 777 P.2d 562 (1989)(affirming easement by implication following trial).

In the present case, the burden was on the Blankenships to show that there was no issue of material fact regarding the necessity for the easement at the time of severance of title, and regarding whether the Blankenships can now create a substitute at a reasonable cost. Conclusory statements and bald assertions were not enough to sustain the Blankenships' burden of proof on these issues. In short, the Blankenships failed to support their claim for an implied easement with admissible evidence. Even if the Blankenships had offered some evidentiary support for their claims, Mr. Bramhall's personal knowledge of reasonable access to the Blankenship property via roads other than the one through Mr.

Bramhall's property means that necessity was a disputed issue of fact which should have precluded summary judgment.

**B. There were material issues of fact in dispute related to the Blankenships' claims to an easement by prescription.**

To establish a prescriptive easement, the party asserting the easement has the burden to prove "(1) use adverse to the owner of the servient land, (2) use that is open, notorious, continuous, and uninterrupted for 10 years, and (3) knowledge of such use by the owner at a time when he was able to assert and enforce his rights." 810 *Properties v. Jump*, 141 Wn. App. 688, 700, 170 P.3d 1209 (2007). Courts begin with the presumption that use of another's property is permissive. *Id.* "Prescriptive rights are not favored." *Id.* (citing *Roediger v. Cullen*, 26 Wn.2d 690, 706, 175 P.2d 669 (1946)).

This Court recently discussed the burdens of proof with regard to prescriptive easement cases. See *Gamboa v. Clark*, \_\_\_ Wn. App. \_\_\_, 321 P.3d 1236 (No. 30826-0, March 14, 2014). In *Gamboa*, this court reversed a trial court's granting of a prescriptive easement *following trial*, because the party asserting the prescriptive easement had failed to meet their burden of rebutting the presumption that the use of the property was permissive. *Id.*, 321 P.3d at 1248. In the present case, the Blankenships submitted no evidence beyond bald assertion that their use was not

permissive. As with implied easement by reservation cases, most cases involving adverse possession or prescriptive rights are decided following a trial. *See e.g., Harris v. Urell*, 133 Wn.App. 130, 139, 135 P.3d 530 (2006); *Drake v. Smersh*, 122 Wn. App. 147, 155-56, 89 P.3d 726 (2004). This is because whether a party is entitled to land based upon adverse use is “a question of fact.” *See Jacobsen v. State*, 89 Wn. 2d 104, 111, 569 P.2d 1152 (1977).

In the present case, there has been no trial, no possibility of cross-examining witness, and no possibility for the trial court to assess credibility. There has also been no evidence to suggest that the Blankenships have rebutted the presumption of permissive use of Mr. Bramhall’s property. The facts taken in the light most favorable to Mr. Bramhall suggest that the road was not used at all during the time the Blankenships allege they and others used it. The trial court impermissibly chose to believe the Blankenships’ conclusory statements rather than following the law and drawing inferences in favor of Mr. Bramhall.

In support of their motion for summary judgment, the only admissible evidence the Blankenships submitted with regard to use of Mr. Bramhall’s land is their bald assertion that they have used the road through Mr. Bramhall’s property since 2007. Even this evidence was conclusory and is directly contradicted by Mr. Bramhall’s personal observation. In

their initial briefing, the Blankenships offered no admissible evidence related to the use of the land by their predecessors-in-interest. In their reply materials, the Blankenships did submit a declaration from Eunice Poirier in which she asserted that she occasionally used the road from 1989-2007. There is no indication as to whether this use was permissive or not; the presumption is that it was permissive. In any event, Mr. Bramhall objected to this new evidence on reply, and Ms. Poirier's declaration is again contradicted by Mr. Bramhall's and Ms. Herbst's declarations stating that they saw no one use the road. The reasonable inference, which at this stage of the litigation must be drawn in favor of Mr. Bramhall, is that no one used the road. Thus, the Blankenships cannot and did not meet their burden to prove that there is no material issue of fact regarding the requisite ten-year period of adverse use.

Even if they had produced evidence of adverse use, the Blankenships did not present evidence that Mr. Bramhall had knowledge of this use at a time when he could assert his legal right to contest it. Indeed, in their responsive materials to summary judgment (which Mr. Bramhall objected to as untimely, RP at 3) the Blankenships as much as admit that Mr. Bramhall did not know about the use. *See* CP at 113(ln 6-11). Landowners are not required to vigilantly police their lands to spot any use that may later be construed as adverse. Again, the presumption is

that use is permissive. In order to overcome the presumption of permissiveness, there must be evidence of actual knowledge of the use or the adverse use must be “so open, notorious, visible, and uninterrupted that knowledge and acquiescence” on the part of the landowner will be presumed. *Nw. Cities Gas Co. v. W. Fuel Co.*, 13 Wn. 2d 75, 87, 123 P.2d 771 (1942). The Blankenships conclusory statements and Ms. Poirier’s statement about occasional use do not even come close to meeting this standard. This is true even without Mr. Bramhall’s and Ms. Herbst’s declarations which suggest that no use had taken place. With all these issues of disputed facts, summary judgment on the Blankenships’ prescriptive easement claim was inappropriate.

**C. The Blankenships did not prove that the road across Mr. Bramhall’s land was a dedicated public or private easement.**

While the Blankenships, wisely, did not expressly argue in their motion for summary judgment that the road across Mr. Bramhall’s property was a dedicated public or private easement, they made the claim in their complaint, and they implied it in several points in their motion for summary judgment, so out of an abundance of caution, and in the event that the trial court considered this implied argument, Mr. Bramhall will address this issue.

Private roads are not automatically easements. There must be some evidence of intent to create an easement in a document which allegedly conveys the easement. *Zunino v. Rajewski*, 140 Wn. App. 215, 222, 165 P.3d 57 (2007). In the present case, the plat map offered by the Blankenships merely labels the road across Mr. Bramhall's present property as a "private road." There is no indication on the plat that the intent of drawing this road on the plat was to burden Mr. Bramhall's property; a reasonable inference is that the road was drawn merely to mark a landmark. There is no language on the plat such as "easement" or "ingress and egress" or any other indication of what the purpose of the road was. The dedication to the public of easements shown on the plat does not include the private road because the road was not labeled an easement on the plat. In addition, the Blankenships produced no evidence that the public accepted the alleged dedication, thus any such dedication is invalid. *See City of Spokane v. Catholic Bishop of Spokane*, 33 Wn.2d 496, 502-03, 206 P.2d 277 (1949)(requirements for a valid dedication are "(1) an intention on the part of the owner to devote his land, or an easement in it, to a public use, followed by some act or acts clearly and unmistakably evidencing such intention; and (2) an acceptance by the public"). The Blankenships submitted no evidence that the private road across Mr. Bramhall's property was accepted for public use.

The Blankenships submitted no other admissible evidence of the intent of the drafter of the plat. Their self-serving, conclusory statements as to intent and legal effect were not admissible evidence because they did not demonstrate that they have personal knowledge upon which to base their assertions.

### **VII. Conclusion**

For the reasons stated above, Mr. Bramhall requests that the Court reverse the trial court's ruling on summary judgment and remand this matter for trial.

Submitted this 16<sup>h</sup> day of May, 2014.

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\_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that she is a person of such age and discretion to be competent to serve papers.

That on the 16<sup>th</sup> day of May, 2014, I caused to be served a copy of the Appellant's Brief via hand delivery and/or email to the persons hereinafter named:

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A handwritten signature in black ink, appearing to read "Erika A. Willaford", written over a horizontal line.

Erika A. Willaford, Legal Assistant