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Division III
State of Washington
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No. 36755-0

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CAROLINE RELPH,

Respondent.

v.

DAVID GLUBRECHT and MARTHA GLUBRECHT,

Appellants,

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIESi

I. INTRODUCTION1

II. ARGUMENT.....1

1. ER 408 Does Not Exclude Portions of the Declaration of David Glubrecht......1

2. An Existing Driveway, Not Built by Claimant, Does...4 Not Give Notice of Open and Notorious Use.

3. A Distinction Exists Between a Claim of Adverse.....5 Possession and An Easement by Prescription.

4. Respondent’s Use of the Property was Permissive.....6 and Therefore, Not Hostile.

5. No Physical Possession Exists as to the Area.....8 Easterly of the Driveway or for the Six-Inch Strip Westerly of the Driveway.

III. CONCLUSION.....9

IV. CERTIFICATE OF SERVICE.....10

TABLE OF AUTHORITIES

CASES:

Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984).....7, 8

Cullier v. Coffin, 57 Wn.2d 624, 358 P.2d 958 (1961).....8

Daughty v. Jet Aeration Co., 91 Wash.2d 704, 592 P.2d 631.....3 (1979).

<i>Gamboa v. Clark</i> , 182 Wn.2d 38, 348 P.3d 1214 (2015).....	7
<i>Harris v. Urell</i> , 133 Wn.App. 130, 135 P.3d 530 (2006).....	5
<i>Herrin v. O'Hern</i> , 168 Wn.App 305, 275 P.3d 1231 (2012).....	7
<i>In re Saltis</i> , 25 Wash.App. 214, 607 P.2d 316, <i>aff'd</i> , 94 Wn.2d 889.....	3
621 P.2d 716 (1980)	
<i>Keck v. Collins</i> , Wn.2d 358, 357 P.3d 1080 (2015).....	3
<i>Kunkel v. Fisher</i> , 106 Wn.App. 599, 23 P.3d 1128 (2001).....	6
<i>Lloyd v. Montecucco</i> , 83 Wn.App 846, 924 P.2d 927 (1996).....	8
<i>McMillain v. King County</i> , 161 Wn.App 581, 255 P.3d 364 (2011).....	7
<i>Miller v. Anderson</i> , 91 Wn.App 822, 964 P.2d 365 (1998).....	7
<i>Riley v. Andres</i> , 107 Wn.App. 391, 27 P.3d 618 (2001).....	1, 3, 4
<i>Right-Price Recreation, LLC v. Connells Prairie Cmty</i>	2
<i>Council</i> , 146 Wn.2d 370, 46 P.3d 789 (2002)	
<i>State v. Fortun</i> , 94 Wash.2d 754, 626 P.2d 504 (1981).....	3
<i>State v. Olson</i> , 74 Wn.App 126, 872 P.2d 64 (1994).....	2
<i>State v. Williams</i> , 96 Wash.2d 215, 634 P.2d 868 (1981).....	3

COURT RULES:

ER 408.....	1
RAP 5.3.....	2

OTHER AUTHORITIES:

BLACK'S LAW DICTIONARY (4 th Edition, p. 243 (1968)).....	4
RESTATEMENT OF PROPERTY § 480 (1944).....	5

I. INTRODUCTION

By her response, Respondent seeks to embellish her case by citing long standing precedents which are not relevant to the resolution of this case or the issues raised. Only the assigned errors are relevant hereto and have not been adequately responded to by Ms. Relph.

Additionally, Glubrecht's predecessor-in-intent (Homa) died, CP 36, the case should go to trial, because the alleged adverse possessor's credibility should be assessed in open court. *Riley v. Andres*, 107 Wn.App 391, 395, 27 P.3d 618 (2001).

As to ER 408 the court should accept Glubrecht's unopposed arguments and consider the proffered evidence in light most favorable to Glubrecht.

II. ARGUMENT

1. ER 408 Does Not Exclude Portions of the Declaration of David Glubrecht.

Relph makes no direct argument regarding Glubrecht's challenge to the trial court's order to strike portions of Glubrecht's declaration. Rather, Relph claims that the notice of appeal fails to cite error to that issue. Glubrecht timely filed the appeal and by Assignment of Error 1 and 2 claim error.

RAP 5.3(a) has been satisfied as the notice of appeal seeks review of the summary judgment order entered on April 19, 2019. That judgment necessarily includes the evidentiary ruling upon which that order is brought. There is but one summary judgment which has been appealed. Such satisfied the requirement of RAP 5.3(a) by identifying the decision made, RAP 5.3(a)(2).

RAP 5.3(f) states:

Defects in Form of Notice. The appellate court will disregard defects in the form of a notice of appeal or a notice for discretionary review if the notice clearly reflects an intent by a party to seek review.

As authority for her position Relph cites *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 46 P.3d 789 (2002). That case involved the review of several motions apparently not designated in a notice of discretionary review. The Supreme Court reversed the Court of Appeals holding that it should have reviewed those motions not specifically identified in the petition for discretionary review. *Id.* 380. The Supreme Court states generally that the order appealed would not have happened but for a prior order which was not specifically appealed. *Id.*

Further, *State v. Olson*, 74 Wn.App 126, 128, 872 P.2d 64 (1994), states:

The purpose of a notice of appeal is to notify the adverse party that an appeal is intended. See **RAP 5.3(a)**. Even though the notice is jurisdictional, “where the deficiency in the notice is one of form only, and not of substance, the court is not necessarily deprived of jurisdiction.” *In re Saltis*, 25 Wash.App. 214, 219, 607 P.2d 316, *aff’d*, 94 Wash.2d 889, 621 P.2d 716 (1980). Generally, issues are not considered on appeal unless raised by an assignment of error. *State v. Fortun*, 94 Wash.2d 754, 756, 626 P.2d 504 (1981). However, a “technical violation of the rules will not ordinarily bar appellate review, where justice is to be served by such review... [W]here the nature of the challenge is perfectly clear, and the challenged finding is set forth in the appellate brief, [we] will consider the merits of the challenge.” *State v. Williams*, 96 Wash.2d 215, 220, 634 P.2d 868 (1981), quoting *Daughy v. Jet Aeration Co.*, 91 Wash.2d 704, 710, 592 P.2d 631 (1979).

By her reply Relph, more or less, claims that the declaration of David Glubrecht does not raise a material issue of fact. No objection to relevancy or materiality was made by Relph. The evidence ruled inadmissible was not considered by the trial court.

On appeal, this Court reviews de novo decisions on the admissibility of evidence made in conjunction with a summary judgment decision. *v. Collins*, 181 Wn.App 67, 80, 325, P.3d 306 (2014).

As will be shown the portions of declaration stricken demonstrate that the statements of Relph (by not knowing the location of the boundary, by not disputing the boundary line, attempt to purchase the property), are each indicative that Relph’s use of the disputed property was permissive. *Riley v. Andres*, 107 Wn.App 391, 397, 27 P.3d 618 (2001).

A portion of the Declaration of Dave Glubrecht not stricken (Brief of Respondent, p. 7), by itself suggests that Relph's use of disputed property was permissive. Again, her suggestion that she did not own the property supports the inference that the use was permissive, *Riley Id.*, at 397.

As argued previously, *Riley* at 395 states that when the facts are known solely by a claimant that summary judgment is not proper and the matter should proceed to trial in order to permit the cross-examination of witnesses.

2. An Existing Driveway, Not Built by the Claimant, Does Not Give Notice of Open and Notorious Use

Relph restates Glubrecht's Assignment of Errors number 2, by now claiming that the driveway was "built" by Relph (Brief of Respondent, p. 8, 20 and 22). A deliberate reading of the numerous affidavits submitted by Relph do not claim that the driveway was "built" or "created" by Relph. The opposite is true in that the prior existence of the driveway is not disputed. (Brief of Respondent, p. 8)

"Built" has a rather common meaning, to wit: "To construct and raise anew." Black's Law Dictionary (4th Edition, p. 243 (1968)). It is a quantum leap for Relph to now claim that the driveway was built by her and her husband. A much fairer claim is that Relph maintained the

driveway and which is much closer to a potential claim of a prescriptive easement.

It is a falsehood to suggest that Relph “built” the driveway. At page 20 of her brief, Relph also claims the “creation of the driveway and care and maintenance of adjacent property” or that they “developed” the property (Brief of Appellants, p. 15-16).

An owner of an easement by prescription has the privilege to make effective the enjoyment of the easement through acts that are not part of the use interest obtained through prescription. RESTATEMENT OF PROPERTY § 480 (1944).

The question is accurately addressed by Glubrecht in his brief. Requiring that notice be imparted (Brief of Appellants, p. 15.), *Harris v. Urell*, 133 Wn.App 130, 135 P.3d 530 (2006). However, *Harris* is instructive. *Harris* involved the building of a driveway, the clearing of several areas, and permitting no one except her family and invited guests onto the property, Id. 140. Here, the evidence does not demonstrate that Relph was using the driveway as her own. No gates, fences or obstructions were ever employed by Relph.

3. A Distinction Exists Between a Claim of Adverse Possession and an Easement by Prescription

The elements for adverse possession and an easement by prescription are similar but are not the same. *Kunkel v. Fisher*, 106 Wn.App 599, 603-4, 23 P.3d 1128 (2001) states:

Although adverse possession and easements by prescription are often treated as equivalent doctrines, they have different histories and arise for different reasons. Adverse possession promotes the maximum use of the land, encourages the rejection of stale claims to land and, most importantly, quiets title in land. Easements by prescription do not necessarily further those same goals. Their principal purpose is to protect long-established positions. Easements by prescription are disfavored in the law because they effect a loss or forfeiture of the rights of the owner. On the other hand, adverse possession is not disfavored. The differences in the historical origins and rationales behind prescriptive easement and adverse possession have resulted in a single but important difference in how they are applied.

In a claim for a prescriptive easement there is a presumption that the servient property was used with the permission of, and in subordination to, the title of the true owner. If the use is initially permissive, it may ripen into a prescriptive easement only if the user makes a distinct, positive assertion of a right adverse to the property owner.

Overall the use of the property by Relph is presumed to be permissive under either claim. The use of the property remained constant.

4. Respondent's Use of the Property was Permissive and, Therefore, Not Hostile

Glubrecht has adequately addressed the hostility element. *Gamboa v. Clark*, 183 Wn.2d 38, 348 P.3d 1214 (2015) (Brief of Appellants, p. 18-19), citing for the position that no prescriptive easement exists.

Relph (Brief of Respondent, p. 22) suggests that because the property is undeveloped that prescription of permissive use exists. No such argument is made in the context of adverse possession by Glubrecht. The property is currently undeveloped land. There is no development. There is only the existing driveway, on or across the disputed property. The issue is raised by Glubrecht in regard to a prescriptive easement (Brief of Appellants, p. 19), which states that if the driveway is over “unenclosed or undeveloped land” a determination of permissive use follows.

Assuming that the use of any portion of the property was permissive, hostility can only exist once the permissive use is terminated. *Herrin v. O’Hern*, 168 Wn.App 305, 316, 275 P.3d 1231 (2012). “Hostility” requires the claimant to prove that he used the property as his own, without permission, as against the world. *Chaplin v. Sanders*, 100 Wn.2d 853, 860-61, 676 P.2d 431 (1984). The element of hostility is defeated by permission. *Id.*, 100 Wn.2d at 861-862; *Miller v. Anderson*, 91 Wn.App 822, 828, 964 P.2d 2365 (1998). Permission may be explicit or implied. *McMillain v. King County*, 161 Wn.App 581, 601, 253 P.3d 739 (2011). “The fact that no permission was expressly asked, and that no

permission was expressly given, does not preclude a use from being permissive..." *Cullier v. Coffin*, 57 Wn.2d 624, 626, 358 P.2d 958 (1961).

As to the area of land easterly of the driveway there is scarce evidence, only conclusionary statements, that Relph worked the property as her own. *Chaplin v. Sanders*, 100 Wn.2d 853, 860-1, 676 P.2d 431 (1984). Any specific use of the property has not been proved. The area is without improvement or visible markings.

5. No Physical Possession Exists as to Area Easterly of the Driveway or for the Six-Inch Strip Westerly of the Driveway

The area easterly of the driveway is open and unenclosed. The trial court likely considered the driveway as a boundary encompassing the undeveloped land easterly thereof. For reasons stated previously without actual physical possession constituting notice, adverse possessions fails.

Adverse possession is required to be specific to the land so claimed. Neither its use, nor the alleged benefit of a snow removal area, is either reasonable or necessary for a claim of adverse possession. *Lloyd v. Montecucco*, 83 Wn.App 846, 853-54, 924 P.2d 927 (1996).

Any assertions that Relph plowed snow does not give use to a claim of adverse possession over the six-inch strip of land as no physical possession existed. Nor is it reasonable to include, when sufficient area to place plowed snow otherwise exists.

III. CONCLUSION

The decision of the trial court is contrary to the law of adverse possession. Accordingly, this Court should reverse the trial court's decision and permit the case to proceed to trial.

RESPECTFULLY SUBMITTED this 23rd day of December 2019.

WALDO, SCHWEDA & MONTGOMERY, P.S.
By:/s/ JOHN MONTGOMERY, WSBA #7485
Attorney for Appellants

IV. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 23, 2019, I caused to be served a true and correct copy of the foregoing Appellants' Reply Brief on the following named person(s) via Court of Appeal E-Serve Portal:

J. Gregory Lockwood
Attorney at Law

s/Kathy Schroeder
Kathy Schroeder
Legal Assistant to John Montgomery

WALDO SCHWEDA & MONTGOMERY PS

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