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Court of Appeals
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' OPENING BRIEF

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I
STATEMENT OF THE CASE

In November 2016, the parties became neighbors when David and Martha Glubrecht (hereinafter “Glubrecht”) purchased property from the Estate of Susan Lee Davis (CP 87). Caroline Relph (hereinafter “Relph”) acquired her property in 1974 (CP 36). Prior to Glubrechts purchasing the property, Relph represented the location of the boundary between the two parcels as being easterly of an existing driveway located entirely on the property purchased by Glubrechts (Declaration of David Glubrecht, p. 2, lines 1-8) (CP 87). Other portions of David Glubrecht’s Declaration were stricken under ER 408 and are subject to appeal. (CP 109-10).

The driveway bisects the property of Glubrecht. On the Relph side of the driveway is an expanse of land. With the exception of a steel post located near the property line identified by Ms. Relph, there are no fences or other physical monuments marking the property. (CP 86). With exception of the driveway, the property is bare, unimproved and unoccupied land. (CP 73).

Summary Judgment was opposed. Glubrecht plead that adverse possession did not exist and affirmatively alleging that a claim for a prescriptive easement could not be found (CP 30). The existence of a prescriptive easement was not plead by Relph. (CP 3-5).

By Summary Judgment Order entered April 19, 2017, the Honorable Annette Please ordered that Relph acquired title to the disputed property, roadway and a six-inch strip of land, adjacent thereto, by adverse possession. (CP 109-10). Glubrects have appealed. (CP 121).

II. ASSIGNMENT OF ERRORS

1. The trial court erred when it held ER 408 excluded statements made relating to the ownership and use of the disputed property.

2. The trial court erred when it held ER 408 excluded portions of the Declaration of David Glubrecht.

3. The trial court erred in holding that an existing driveway could be claimed by adverse possession.

4. The trial court erred in holding that a portion of the property located easterly of the driveway could be claimed by adverse possession.

5. The trial court erred by holding that a six-inch strip of land could also be adversely possessed for the purpose of clearing snow.

6. The trial court erred when it granted summary judgment in favor of Relph when issues of fact existed over the

relationship between Relph and the prior, but deceased owner of the disputed land.

III.

Issues Pertaining to Assignment of Error.

1. Whether the trial court erred in excluding statements under ER 408 as being made as offers of settlement or compromise contained in the Declaration of David Glubrecht.

(Assignment of Error 1 and 2)

2. Whether the trial court erred when it held that an existing driveway, not built by, but maintained by the adverse possessor, be claimed by adverse possession.

(Assignment of Error 3)

3. Whether the trial court erred by finding that an open area located easterly of the driveway was acquired by adverse possession.

(Assignment of Error 4)

4. Whether the trial erred in granting adverse possession to a six-inch strip of land as a penumbra for purposes of clearing snow.

(Assignment of Error 5)

5. Whether the trial court erred in granting summary judgment to the claim of adverse possession?

(Assignment of Err 6)

IV. ARGUMENT

A. Standards of Review on Appeal.

On a summary judgment motion, including decisions on the admissibility of evidence are reviewed de novo. *Keck v. Collins*, Wn.2d 358, 368-70, 357 P.3d 1080 (2015), citing *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). The standard of review is consistent with the requirement that the appellate court conducts the same inquiry as the trial court. *Mountain Park Homeowners Ass.n v. Tydings*, 125 Wn.2d 337, 341, 958 P.2d 301 (1998).

B. Summary Judgment Standards in Adverse Possession.

On summary judgment, the burden is on the adverse possessor to show there was no genuine issue of material fact as to each element of adverse possession. *ITT Rayonier v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989). Washington courts are reluctant to

grant summary judgment where “material facts are particularly within the knowledge of the moving party.” See *Michigan Nat. Bank v. Olson*, 44 Wn.App. 898, 905, 723 P.2d 438 (1986). In such cases, “it is advisable that the cause proceed to trial in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor of the moving party while testifying.” *Olson*, 44 Wn.App. at 905.

An example is, as here, when a prior owner of the property sought by adverse possession is dead and the subsequent title holders are unable to obtain contradictory evidence by virtue of this fact. *Riley v. Andres*, 107 Wn.App. 391, 395, 27 P.3d 618 (2001).

C. The Declaration of David Glubrecht is Admissible and is Not Barred by ER 408.

ER 408 is attached as Appendix “A.” Portions of the Declaration of David Glubrecht were stricken by the trial court as being barred by ER 408. CP 109-10. The statements stricken are restated and followed by Glubrechts’ response:

We also discussed her purchasing the portion of my property with the driveway on it. At no time did Ms. Relph or anyone else make a claim that Ms. Relph had any rights to or ownership of any portion of the property in question, I did give Ms. Relph permission

to use the driveway while we negotiated an agreement. (CP 101, lines 2-5).

Response:

The assertion is not an offer of compromise or settlement. It is a statement in contemplation of future settlement negotiations involving the issue. (CP 105).

On or about April 15, 2017, my wife and I again met with Relph and one of her sons to discuss property purchase and driveway access again. While we still disagreed on the accuracy of SCOUT imagery of the property line, the property line was never disputed, and no claims were made from her having any rights to the property I purchased. (CP 101, lines 5-7).

Response:

The assertion references meetings in contemplation of settlement and identification of the disputed boundary line. (CP 105).

We discussed her purchasing the portion of my property that contains the driveway. We also discussed the availability of putting in another driveway access to her secondary house as she would lose access through my property if she did not reach an agreement with me for rights to the driveway or purchased the land. (CP 101, lines 9-11).

Response:

The Assertion references failed negotiations. (CP 105).

I had several other brief discussions with Relph in which I gave her continued permission to use the driveway on my land. She did state that she discussed purchasing the property from the previous owner, Susan

Lee Davis but that she did not want to sell. (CP 101, lines 17-18).

Response:

The assertion references continuing discussions and a declaration against interest whereby an attempt was made by Plaintiff to purchase the property from the prior owner (now deceased). (CP 105).

I also told Relph that a travel trailer was on my property and she would need to remove it as a requirement to continue use of the driveway on my land. The trailer was then removed. (CP 101, lines 17-18).

Response:

Asserts the fact that an encroaching travel trailer was removed from Defendants' property. (CP 105).

March 14, 2018, I received a "Property Line Disagreement Settlement Proposal" from Charles V. Carroll Law Office. It proposed Relph purchasing the portion of my property that contained the driveway. The purchase price was not acceptable to me. (CP 102, lines 2-3).

Response:

Asserts that an offer to purchase was made but was rejected. No purchase priced is mentioned therein. (CP 105).

On May 9, 2018, and after some negotiations, it seemed unlikely that we were going to be able to reach an agreement and I sent a letter to Relph terminating my permission for her use of the driveway on my land. (CP

102, lines 2-3).

Response:

The assertion is not an offer of settlement, but a conditional demand granting permissive use of the driveway. (CP 105-6).

On appeal, this court reviews de novo decisions on the admissibility of evidence made in conjunction with a summary judgment decision. *Keck v. Collins, supra*.

ER 408 bars only statements made in connection with settlement negotiations. It does not bar statements made outside of the context of settlement negotiations. Each of the statements made by Glubrecht, or attributed to Relph, are all pre-litigation statements. It was not until March 14, 2018, that an attorney was involved. (Letter dated March 14, 2018 from Attorney Charles L. Carroll). (CP 102). The lawsuit was not filed until May 10, 2018. (CP 1).

The trial court (RP 10-11) embraced a broad opinion that any offers of settlement or compromise involved an actual dispute thereby invoking the exclusion under ER 408. (RP 10).

Statements made before the initiation of litigation "are excluded by Rule 408 only if there was an actual dispute at the time and at least some hint of possible litigation." 5A KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 408.5, at 62 (6th ed. 2016).

Further, "[T]he point at which a claim is asserted, thus triggering the rule, is normally the filing of the action." 5D KARL B. TEGLAND, WASHINGTON PRACTICE: COURTROOM HANDBOOK ON WASHINGTON EVIDENCE CR 408 AUTHOR'S CMTS. At 266 (2012/2013 ed.) ("Statements made *before* the plaintiff asserts a claim remain admissible.") Although pre-filing statements may in some cases be barred, and actual dispute must have arisen and litigation must be "imminent." *Id.*

As another treatise explains:

A dispute need not reach the point of threatened litigation for ER 408 to apply. It is sufficient that "an actual dispute or difference of opinion exists" between the parties. However, while litigation need not have commenced for Rule 408 to apply, there must be some dispute that the parties are attempting to resolve through discussion. "A dispute arises only when a claim is rejected at

the initial or some subsequent level." Indicia of an "actual dispute" include the hiring of lawyers, and the threat or filing of a lawsuit.

ROBERT H. ARONSON & MAUREEN A. HOWARD, THE LAW OF EVIDENCE IN WASHINGTON § 6.04 [1] (5th ed. 2017)

In *Fetty v. Wenger*, 110 Wn.App. 598, 602, 36 P.3d 1123 (2001), a letter from a client demanding an itemized statement of charges was not barred by ER 408 when offered by the attorney. The letter contained no offer to settle or compromise of the claim only seeking an itemization of the charges.

Generally, the statements objected to never involved a settlement of the matter or formal negotiations. ER 408 also “does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.” The assertions, when not otherwise denied, are admissible under ER 408.

The Declaration of David Gulbrecht are statements of fact derived from his own personal knowledge and statements made by Relph, which were not rebutted by Relph.

Further, the rule in Washington is as here, where the offeror of the evidence seeks admission, the threat of admissibility should not be a deterrent to its admission when shown for other purposes such as intent rather than the establishment of liability. *Bulaich v. AT & T Information System*, 113 Wn.2d 254, 264. 778 P.2d 1031 (1989).

The assertions attributed to Relph are not denied. An issue exists over ownership of the property. Discussions were had to resolve the dispute; no offer was accepted, and no dollar amount is disclosed by any statements made by either party. At some point Relph removed a trailer from the disputed property. Relph previously sought to purchase the property from the prior owner. (Stricken under ER 408, CP 101). Those facts are not related to an offer of settlement and precede the filing of litigation.

A two-fold purpose exists for ER 408 to be invoked. First, the evidence itself may have little probative value because an offer to settle may be a desire to buy one's peace. Secondly, public policy encourages the settlement of disputes by creating a limited privilege

for settlement negotiations. 5A TEGLAND *Id.*, §408.1 at 56-7. Neither are applicable to discussions between these parties.

In the context of adverse possession cases, *Riley v. Andres*, 107 Wn.App. 391, 395, 27 P.3d 618 (2001), the court held that a statement from the adverse possessors that they “did not own the property” was relevant evidence of whether they “use[d] it as an owner would use it” *Id.*, at 397. The court was careful to note that it did not use the statement to inquire as to the alleged adverse possessor’s subjective belief. *Id.* Specifically, the court concluded: “The Rileys have stated facts sufficient to establish such use [as an owner]. But their claim to have acquired title by using the property as an owner is inconsistent with Ms. Riley’s statement that the property was not theirs.” *Id.*, at 397 (emphasis added). The court also observed that Mrs. Riley’s statement supported a reasonable inference that the Rileys had permission to use the property from the Gaults, who were both deceased. The court reached this conclusion even though Rileys “watered and pruned the plants, spread beauty bark, and pulled weeds” in the area over which they claimed ownership. Notably, the Rileys’ statement that they did not own the

property at issue was made after they alleged that they acquired the property via adverse possession. The Rileys claimed they acquired the property based on their use of it from 1968 to 1993, but Andres did not purchase the property until 1993. *Id.* The Rileys made a statement after the fact that they did not own the property. *Id.*, at 394-95.

Relph does not dispute the factual assertions made by Glubrecht, only their admissibility under ER 408. The Declaration of David Glubrecht does not contain any offer of settlement made by Relph. As no offer of settlement was made ER 408 is not applicable.

Here, no settlement was made. Discussions were had but, in each case, it was the Glubrechts who were making the overtures for settlement. Additionally, and as to Relph there could be no reason to invoke ER 408. There was no corresponding offer made by Relph.

ER 408 does not serve as a basis to strike portions of the Declaration of David Glubrecht.

D. A Claim of Adverse Possession to Any of Glubrechts'

property Does Not Exist.

Relph claimed adverse possession to include a roadway, all land easterly and adjacent thereto, and six inches of land on the easterly edge of the driveway for purposes of snow removal. Each must fail.

To establish a claim of adverse possession, a party's possession of property must be: (1) exclusive, (2) actual and uninterrupted, (3) open and notorious, and (4) hostile and under a claim of right. *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984). All of these elements must exist concurrently for at least 10 years. RCW 4.16.020. Because courts presume that the holder of legal title is in possession, "the party claiming to have adversely possessed the property has the burden of establishing the existence of each element." *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989).

LeBLou v. AAlgaard. 193 Wn.App. 66, 311 P.3d 76 (2016).

Exclusive use has not been proved as no physical claim to exclusively hold the property is shown. Relph did not construct the driveway. It had not been gated or access controlled in any manner. As to the easterly portion of the property no attempt was made to prevent use by anyone. No fencing, gates or barriers exist.

No evidence supports that Relph ever sought to exclude the true owner of the property. *Harris v. Urell*, 133 Wn.App. 130, 142

P.3d 530 (2006). No evidence supports any conclusion that Relphe was claiming the property as her own. There must be some notice to the true owner that the land is held by claimant as his own. *Id.* In *Harris* a driveway was physically constructed to prove adverse use. Here, the driveway had been in existence for many years.

To establish actual and uninterrupted use of property a claimant must demonstrate the same type of use that a true owner would make of the property, considering its nature, character, location and ordinary uses. *Bryant v. Palmer Coking Coal Co.*, 86 Wn.App. 204, 210, 936 P.2d 1163 (1997).

A claimant's statement suggesting the he does not own the property may support an inference that the claimant's use of the property was permissive. *Riley v. Andres, supra* at 398.

The party claiming adverse possession can satisfy the open and notorious element by showing either (1) that the titled owner had actual notice of the adverse use, or (2) that the claimant used the land in such a manner that any reasonable person would have thought they owned it. *ITT Rayonier v. Bell*, 112 Wn.2d 754, 757, 744 P.2d 6 (1989).

Again, no evidence supports that the property's use was open and notorious to provide notice to Glubrecht. Other than the driveway, no other improvements exist, which would demonstrate the intent of the Relph to claim the property as her own.

Other than the steel post thought to be located on the boundary line, there are no monuments indicating a claim of ownership, which would identify Relph's adverse use. There is nothing of a physical presence upon the Glubrechts' property which would demonstrate an intent for Relph to claim the property as her own. Stated otherwise, the Glubrechts, or their predecessors, were never placed or made notice that a claim of adverse possession was sought. See *Harris. Id.*, and *Kunkel, Id.*

The adverse possessor must also exercise dominion over the property to put the true owner on notice of the hostile claim. The "Disseisor must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard conquest" *Peoples Savings Bank v. Bufford*, 90 Wash. 204, 206, 155 P. 1068 (1916).

As to hostility, no evidence suggests anything but neighborly acquiescence and tolerance as described below.

E. Alternatively, No Claim For A Prescriptive Easement Can Be Held.

There exist no fences or other physical monuments, which would demonstrate the required intent for Relph to claim the land as her own, or that the use of the driveway was anything but permissive. *Kunkel v. Fisher*, 106 Wn.App. 599, 603, 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.

Under the facts of this case, no showing can be demonstrated.

The Declaration of David Glubrecht asserts that prior to purchasing his property (approximately October 30, 2016) (CP 87) he met with Relph, (without CR 408 objection) who represented the location of the boundary line between the parcels as being easterly of the driveway located on the Glubrechts' property. Unsuccessful discussions ensued regarding the use of the driveway and other settlement options.

A presumption exists that when the claimed property is open and unenclosed that any use thereof is permissive. If the use is permissive then can be no conclusion that a prescriptive easement exists. *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 123 P.2d 771 (1942).

Gamboa v. Clark, 182 Wn.2d 38, 44, 348 P.3d 1214 (2015), requires the existence of the three elements to support a finding of permissive use, generally claiming,

1. Unenclosed or undeveloped land, or
2. When it is reasonable to perceive neighborly acquiescence, or
3. When the road was created or maintained by the landowner and used by claimant in a non-interfering matter.

As to No. 1, the driveway here is unenclosed or undeveloped land. Absent anything further, the law perceives the use to be permissive. *Charles R. Roediger et al v. C. D. Cullen et al*, 26 Wn.2d 690, 708, 711, 175 P.2d 669 (1946).

Secondly, under *Roediger*, it is more likely than not, that all of the prior owners of the Glubrechts' parcel, silently acquiesced and tolerated the Relph's use of the driveway. This does not shift the presumption away from a permissive use.

Finally, the driveway itself is a historical accident allegedly existing from a railroad right of way. (RP 21). The fact that Relph has maintained the driveway is of little consequence under these facts, for either a claim by prescription or adverse use. Such itself, also supports a finding of permissive use under the circumstances.

Of the three elements suggested, the fact that Relph has made repairs or maintained the driveway do not defeat the permissive use of the roadway.

Relph argued that *Cuillier v. Coffin*, 57 Wn.2d 624, 358 P.2d 958 (1961) defeats a finding of permissive use. *Cuillier* is called in doubt by *Gamboa*. *Gamboa*, at 280, declined to shift away from a presumption of permissive use, except when the use is shown to be adverse, hostile or an admission to the right of the easement. *Gamboa* by footnote 9, page 279, takes exception to *Cuiller* in that generally the passage of time erodes a finding of permissive use. *Gamboa*, page 271, citing *Scheller v. Pierce County*, 55 Wash. 298, 301, 104 P.2d 277 (1909) states the passage of time itself, even for a century, would not itself prevent a finding of permissive use and would destroy neighborly accommodations.

Every inference is that the use was permissive as was held in *Kunkel, supra*, at 605. The record does not demonstrate that the permissive use ever ripened into an adverse use.

F. Adverse Possession to a Penumbra of Land is Not Reasonable.

Although requested by counsel's argument (RP 16), any claim for an additional six-inch strip of land was never separately plead. (CP 3-5). It was suggested by Relph that Glubrecht desired

to place a fence along the property line and a three-foot setback was requested. (RP 34). Also, that extra land was needed for snow removal. (RP 35). The trial court then ordered that six inches would be added to the westerly edge of the driveway. (RP 37).

Here, the Trial Court has essentially granted adverse possession to a penumbra of land. Courts may create a penumbra of ground around an area actually possessed, when reasonably necessary to carry out the objective of settling boundary disputes. *Lloyd v. Montecucco*, 83 Wn.App. 846, 853-54, P.2d 927 (1996).

There is no evidence to prove adverse possession relating to the use of the property as discussed above. Additionally, and if Relph is successful on her claim for adverse possession to the driveway, no reasonable need exists for the additional land.

To add insult to injury, to award a six-inch strip of land to for snow removal is not reasonably necessary to achieve the purpose of a driveway when such is of sufficient width to do otherwise. A six-inch strip of ground is not necessary to resolve the boundary line dispute or reasonably interferes with the use claimed.

In *Shelton v. Strickland*, 106 Wn.App 45, 51 P.3d 1179 (2001), the court granted a two foot strip of land in order to provide for maintenance of a building.

The claim for an additional six inches of land is not reasonable under the facts of this case and would unnecessarily extend the purpose of a claim of adverse possession.

V. CONCLUSION

Relph failed to prove the elements of adverse possession as to any of the property owned by Glubrecht. Relph's claim of ownership is one of convenience and not based upon her intent to claim the property with hostility and for other reasons stated herein. maximum use of the land. Although not argued by Relph, any potential claim for a prescriptive easement must also be denied because of the permissive use of the driveway. No reasonable basis exist for the granting of an additional six-inch strip of land.

It is requested that the decision of the trial court be reversed as not properly applying the law of adverse possession and not serving its primary purpose of maximizing the use of land. The

rightful owners of the land are the Glubrechts. Insufficient evidence exists to prove otherwise.

RESPECTFULLY SUBMITTED this 12th day of September 2019.

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

VI. APPENDIX

RULE 408. COMPROMISE AND OFFERS TO COMPROMISE

In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

VII. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 12, 2019, I caused to be served a true and correct copy of the foregoing Appellants' Opening Brief on the following named person(s) via Court of Appeal E-Serve Portal:

s/Kathy Schroeder
Kathy Schroeder
Legal Assistant to John Montgomery

WALDO SCHWEDA & MONTGOMERY PS

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