

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

JAMES R. HERRIN, a single man,
and REBECCA HERRIN, as her separate property, Appellants,

v.

ELLEN O'HERN, a single woman, Respondent,
and all other persons or parties unknown claiming
any right, title, estate, lien, or interest in the real
estate described in the complaint herein, Defendants.

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COURT OF APPEALS
DIVISION I

BRIEF OF APPELLANT

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RCW 7.28.080 10

I. INTRODUCTION

The issue in this appeal is whether the trial court properly applied the doctrine of *Miller v. Anderson*, 91 Wn. App. 822, 964 P.2d 365 (1998), to hold as a matter of law that permissive use of a garage and fenced yard by the Plaintiff Herrin terminated on the death of the Defendant O’Hern’s predecessor, and not on the earlier conveyance of property by the Defendant’s predecessor to the Plaintiff claiming adverse possession. In this case, the date on which permissive use terminated determines whether the Plaintiff can satisfy the ten year statutory period for his adverse possession claim.

The Plaintiff submits that the court erred in granting summary judgment for the Defendant based on the doctrine of *Miller v. Anderson*, and that issues of fact remain for trial.

II. STATEMENT OF THE CASE.

A. Procedure.

The Plaintiffs James Herrin and Rebecca Herrin, his daughter, (hereafter “Herrin”) filed a Complaint for Quiet Title [CP 1] against the Defendant Ellen O’Hern (hereafter “O’Hern”) on May 6, 2009 in Whatcom County Superior Court. Herrin based his claim on adverse

possession and other theories. O'Hern denied the complaint, and counterclaimed for quiet title [CP 168]. O'Hern moved for summary judgment dismissing the complaint and granting her quiet title to the disputed property. [CP 161]. The Hon. Charles R. Snyder heard the motion on October 8, 2010 and ruled in favor of O'Hern. [RP 20-22, 10/8/2010]. Herrin moved for reconsideration [CP 19], which was argued and denied on October 29, 2010. [RP 9, 10/29/2010]. The court entered orders granting summary judgment for O'Hern and denying Herrin's motion for reconsideration on October 29, 2010 [CP 5 and 3].

The trial court stated, at the hearing and in the summary judgment order, that the basis for its decision was *Miller v. Anderson*. [RP 21-22, 10/8/2010; CP 6]. Herrin filed a timely appeal.

B. Statement of Facts

The properties at issue, owned by both Herrin and O'Hern, were originally owned by Ellen O'Hern's grandparents as a single parcel. The property was divided at their death, when the house now occupied by Herrin was sold to the Cassals [CP 40, 129]. The parcels were combined in common ownership again in 1988 when the Cassals sold the house to Howard and Janet Rothenbuhler (O'Hern's parents), who also owned the adjoining property, a field and barn, along with other acreage. [CP 40-41].

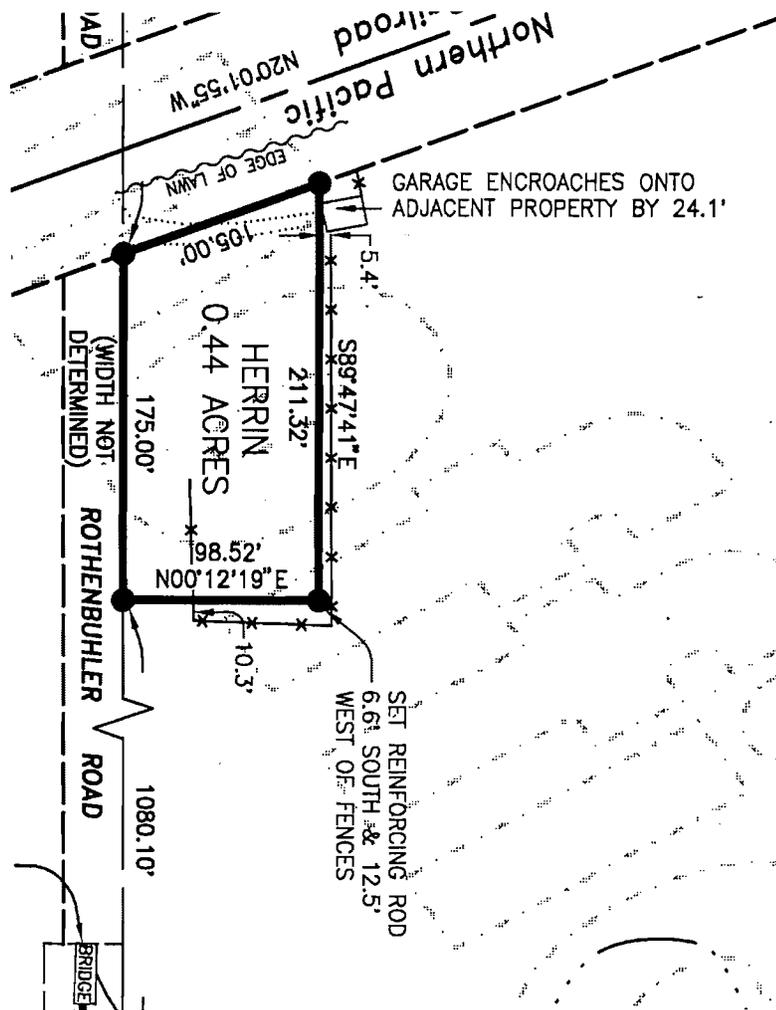
James Herrin married Julia Rothenbuhler, O'Hern's sister, but the marriage ultimately ended in divorce [CP 41]. James Herrin was an engineer like his former father in law Howard Rothenbuhler, had worked for him, and continued to get along with him. After his marriage to Julia ended, James Herrin resided in the house on the property (5342 Rothenbuhler Road, Acme, WA) as a caretaker for Howard and Janet Rothenbuhler (who resided elsewhere but nearby) [CP 40-41, 129-130]. He resided on the 5342 Rothenbuhler Road property with the Rothenbuhlers' permission, living in the house and taking care of the property but paying no rent [CP 41, 44]. There is no question but that Herrin's occupation of the property – all of it – was with permission of the Howard and Janet Rothenbuhler at this time, and his tenancy was by their consent – they were good to him, and he looked after the property for them while he lived in it [CP 44].

In 1993 the Rothenbuhlers gifted the property for which he was caring to James Herrin (50%) and his two children, Rebecca and Sheldon (25% each) [*Deed of Gift*, CP 50]. Sheldon quit claimed his interest to his father and sister in 2005 [CP 58]. James Herrin and his daughter Rebecca continue to own the house and yard. Rebecca lives in Florida, but visits the property periodically.

Janet Rothenbuhler died in 1997, and Howard Rothenbuhler died in 2001. Following the death of Howard and Janet Rothenbuhler, Ellen O'Hern inherited the adjoining property – a field and barn – by a deed from the Rothenbuhlers' personal representative, recorded in 2004. (*Personal Representative's Deed*, CP 41, 53). Ellen O'Hern is the sole owner of the property on the North and East of Herrin's property, which are the disputed boundaries. She also owns a barn to the East of the Herrin property, outside of his fence lines, which is not subject to the adverse possession claim [CP 41, 44].

Herrin's property consisted of .44 acres. It has historically been separated from the adjoining field and barn now owned by O'Hern by a fence [CP 42-44]. The property includes a house, yard and a one car garage constructed as early as 1912, enclosed by fences, a road and the BN railroad right-of-way [CP 41]. For the entire time Herrin owned the property, from 1993 to filing this case, Herrin and Herrin alone had exclusive use of the land inside the fences which defined the perimeter of his yard, and had exclusive use of the garage associated with the property, and believed that he owned the garage and yard inside the fence [CP 42-44, 94, 93]. However, in 2008 he obtained a survey which showed that 5 to 10 feet of his yard on the North and East and the entire garage, which he thought he owned, encroached on a field owned by O'Hern [CP 41, 74].

Prior to obtaining the survey, no one had ever raised the question of ownership to Herrin [CP 41-42, 93, 94]. (The property boundaries are depicted on the 2009 survey [CP 74] and detailed surveyer's sketch [CP 90].) An excerpt of the survey shows the encroachment:



Garage. The garage was originally constructed from cedar planks and a shake roof. It has only been accessed from the driveway to the

Herrin house, and cannot be accessed from the O'Hern property without trespassing on the Herrin property [CP 41-42]. Herrin has used the garage from 1988 to 1993 with permission when he lived in the house as caretaker, and from 1993 to the present under the belief that it was his garage [41-42]. In 2004 Herrin completely rebuilt the garage at a cost of about \$2,400 materials and much personal labor. The improvements were obvious to all as shown in the photographs [CP 82-87], and at no time did anyone tell Herrin that the garage was not his, or that he was using it with their permission [CP 42, 44].

The photographs of the property in the record best show the relationship of the garage and house, and illustrate better than words how the owner of the house would normally assume that they owned and had exclusive use of the garage based on the physical relationship of the two structures and the location of the driveway. [CP 68, *Exhibit G to Declaration of James Herrin, etc.*; CP70, *Exhibit H to Declaration, etc.*; CP 72, *Exhibit I to Declaration, etc.*)

Fences. The garage is physically connected to two fences. One is at the North end of the garage and runs a short distance West to the BN RR tracks, encroaching about 24 feet onto the O'Hern property. The other is at the South end of the garage and runs about 200 feet East and then South to a boundary road, encroaching about 5 feet onto the O'Hern

property. The location of the fence to the garage and property line is illustrated on the excerpt of the survey above. [CP 41-43].

Herrin mowed the area within the fences, planted a garden, and maintained the fences. He used it as a residential yard to the exclusion of all others. At no time did anyone object to his exclusive use of the garage and property inside the fences, nor did he share the use with anyone else. [CP 42-43]. In contrast, when O'Hern received title to the barn she required Herrin remove his property which he had stored there with permission of the Rothenbuhlers. O'Hern did not ask Herrin to quit using the garage or yard [CP 44-45].

O'Hern argues that Herrin has moved fences further out from their original location since he acquired the property [CP131, 139]. However, Herrin contradicts these statements by specific reference in his declaration [CP 43] and states unequivocally that the fences and fence posts have been in the same location the entire time he has occupied the property [CP 42-43]. For purposes of this motion the contradictions in the declarations of the parties must be resolved in favor of Herrin.

Some facts are consistent with both Herrin's and O'Hern's theories of the case. That no one objected to Herrin's use of the garage and yard, but did object to his use of the barn, is proffered by Herrin as evidence of exclusive use and acquiescence to his ownership of the garage and entire

yard; O'Hern argues that it is evidence of his permissive use of the garage and yard, unlike Herrin's use of the barn, which she terminated. But the interpretation of these facts is for the court at trial, where they can be fleshed out with testimony. For purposes of a motion for summary judgment, and therefore for this appeal, the court should resolve debatable inferences of facts in favor of Herrin, the non-moving party.

Julia Reed, James Herrin's ex-wife and O'Hern's sister, and Neil Rothenbuhler, O'Hern's brother, both filed declarations in support of Herrin's position that Howard Rothenbuhler did not claim, believe or act as if he owned the garage and yard inside the fences, and that no one knew of the location of the Herrin property lines prior to the survey. They also state that O'Hern would have objected to Herrin's use of the garage and yard, as she did the barn, had she known it might be subject to her own claim [CP 92-93, 94-95].

III. ARGUMENT

Summary Judgment. The court reviews an order granting summary judgment de novo. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Summary judgment is proper if no genuine issue of material fact remains and the moving party is entitled to a judgment as a matter of law. CR 56(c). All facts are viewed in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*,

154 Wn.2d 16, 26, 109 P.3d 805 (2005). Summary judgment is appropriate only if reasonable persons could reach but one conclusion from all the evidence. *Id.*

Adverse Possession. In order to establish a claim of adverse possession, the possession must be: 1) exclusive, 2) actual and uninterrupted, 3) open and notorious and 4) hostile and under a claim of right. *Peeples v. Port of Bellingham*, 93 Wn.2d 766, 613 P.2d 1128 (1980); *Skansi v. Novak*, 84 Wash. 39, 146 P. 160 (1915). The period throughout which these elements must concurrently exist is 10 years. RCW 4.16.020. Hostility, as defined by this court, "does not import enmity or ill-will, but rather imports that the claimant is in possession as owner, in contradistinction to holding in recognition of or subordination to the true owner." *King v. Bassindale*, 127 Wash. 189, 192, 220 P. 777 (1923). *Chaplin v. Sanders*, 100 Wn.2d 853, 857-8, 676 P.2d 431 (1984).

"Hostility" Element. The "hostility/claim of right" element of adverse possession requires only that the claimant treat the land as his own as against the world throughout the statutory period. The nature of his possession will be determined solely on the basis of the manner in which he treats the property. His subjective belief regarding his true interest in the land and his intent to dispossess or not dispossess another is irrelevant

to this determination. Cf. RCW 7.28.070 and 7.28.080. *Chaplin v. Sanders*, 100 Wn.2nd at 860-2.

Generally, the hostility element requires proof that the possessor treated the property as an owner would. *Chaplin v. Sanders*, 100 Wn.2nd at 860-61. A different set of rules applies when the initial use is permissive. Use with the true owner's permission cannot be hostile to the true owner's title. *Miller v. Anderson*, 91 Wn. App. at 829.

A. The Trial Court Erred in Concluding that the Original Permissive Use by Herrin Survived the Termination of his Caretaker Role.

Though on appeal the Court of Appeals reviews this case de novo, that the trial court stated the reason for its decision in the summary judgment order emphasizes the narrow issue on review. The trial court ruled in favor of O'Hern, granting her motion for summary judgment on the basis of the holding and dicta of *Miller v. Anderson*, and directed that it be so stated in the order:

"The Court confirms in this Order, at the request of Plaintiffs, that, in keeping with the holdings of *Miller v. Anderson*, 91 Wn. App. 822, 964 P. 2d 365 (1998), permissive use [of the garage and fenced area] by Plaintiffs did not terminate until the death of Howard Rothenbuhler".

[RP 21, 10/8/2011; RP 7-8, 10/29/2010; CP 6].

In *Miller v. Anderson*, the court analyzed a use which was initially permissive and sought to determine when the permissive use ceased and hostile use, within the meaning of *Chaplin*, began. In *Miller* case two adjacent owners entered into a formal agreement that they would accept a plat line, rather than a fence line, as their true property line, allowing one owner the permissive use of the other owner's land. Both parties sold their property to subsequent owners. The owner of the dominant or encroaching estate sold first, and the owner of the subservient, burdened estate sold later, without the new owners making any agreement that continued use would be permissive, and thereby negating an adverse possession claim. Whether the owner of the encroaching estate could prevail on a claim of adverse possession depended upon whether the actual consent given to his predecessor in interest terminated upon sale of the permissive user's estate, which occurred first, or upon the sale of the property owned by the person giving consent, which occurred later, thus commencing the element of hostility. Only the former would satisfy the ten year statute of limitations.

In *Miller* the court ruled that permissive use ended when the owner of the burdened property who gave consent either died or sold his property, and that the sale of the permissive user's property would not

itself terminate consent. The court said that termination of permissive use is evaluated from the perspective of the party granting permission.

The question then is whether any subsequent act terminated permission such that a hostile use arose. Generally, the party claiming adverse possession bears the burden of proving that permission terminated either because (1) the claimant has asserted a hostile right, or (2) the servient estate has changed hands through death or alienation. *Granston*, 52 Wash.App. at 294-95, 759 P.2d 462; see also *Ormiston v. Boast*, 68 Wash.2d 548, 551, 413 P.2d 969 (1966) (permissive use cannot ripen into prescriptive use unless distinct change in use provides notice to owner). Because permission is personal to the grantor and cannot extend beyond that person's ownership, the relevant viewpoint for determining when permissive use terminates is that of the party granting the permission. See *Granston*, 52 Wash.App. at 295, 759 P.2d 462.

Miller v. Anderson, 91 Wn. App. at 829 (emphasis added).

O'Hern argued, and the court agreed, that permission existed after the termination of the caretaker relationship for Herrin's use of the garage and the 5 to 10 foot strip of property lying inside the fence, property which was not included in Herrin's deed [RP 15-16, 10/8/2010]. The trial court did not analyze the nature of the prior consent integral to the terminated caretaker arrangement which Rothenbuhler controlled. Instead, it applied the literal language of *Miller* without considering the change in their relationship which occurred when Rothenbuhler conveyed the property to Herrin, concluding that once permissive use existed, it continued to exist until revoked or (in this case) the death of Howard Rothenbuhler [RP 21, 10/8/2010]. The court read *Miller* to mean that the permissive use by

Herrin of the entire property when he was caretaker continued for a small portion of the property – the garage and fence perimeter – after Herrin ceased to be caretaker, and ended only when Howard Rothenbuhler died, as a matter of law. In doing so the trial court ignored the reason for the holding in *Miller*.

The trial court did not give due credit to several facts that distinguish this case from *Miller*. First, Rothenbuhler was the owner of both the encroaching/dominant and subservient/burdened properties, at the time he conveyed the encroaching property to Herrin. Unlike the original owner who gave consent in *Miller*, Rothenbuhler and not a third party conveyed the encroaching/dominant property to Herrin. This is a “change in use [which] provides notice to owner” of the termination of the prior consensual use as required by *Miller*.

Second, the relationship that gave rise to consensual use of the entire parcel – the caretaker relationship – was terminated by the party who gave permission as well as by the party who used the property with permission. Rothenbuhler knew when the relationship terminated, because he gave Herrin a deed.

Third, the consensual relationship between Rothenbuhler and Herrin had nothing to do with the boundary fence and garage at issue in

this case – it was an agreement to be a caretaker, and not an agreement about lines of occupation.

Fourth, the property was conveyed not only to Herrin, but also to his children, who were not party to the original caretaker/tenant relationship and whatever agreement it encompassed.

Fifth, assuming for the sake of argument that Rothenbuhler knew of the boundary issue and had previously given permission to Herrin, the policy for the rule in *Miller*, which is to relieve the landowner who grants permission from the burden of monitoring transfers of his neighbor's property and to encourage permissive use, is not served by its application in this case. As grantor, Rothenbuhler had nothing but his own actions to monitor, and he could have address the issue either for or against permissive use when he signed the deed to Herrin.

B. The Dead Man's Statute Bars the Testimony of the Parties as to the Express or Implied Intent of Howard Rothenbuhler.

The court concluded that *Miller* applied as a matter of law to preclude hostile possession prior to the death of Howard Rothenbuhler. However, O'Hern will argue that Rothenbuhler gave actual consent to the use of the garage and fenced property after he conveyed the house and yard to Herrin. This is problematic for O'Hern, as both Herrin and O'Hern are barred by the Dead Man's Statute, RCW 5.60.030, from

testifying as to the express or implied agreements, including consent, of the deceased.

The Dead Man's Statute excludes testimony of the survivor of a transaction with the decedent offered by an interested party against the decedent's estate. The purpose of the statute is to "prevent invasion of a deceased person's estate, or of the interest of one claiming through a decedent, because the lips of the dead are sealed and cannot rebut testimony unfavorable to their cause." *Fies v. Storey*, 21 Wash.App. 413, 418, 585 P.2d 190 (1978), overruled on other grounds, *Chaplin v. Sanders*, 100 Wash.2d 853, 861 n. 2, 676 P.2d 431 (1984).

Although RCW 5.60.030 provides "a party in interest or to the record, shall not be admitted to testify", a party to the record may testify if he lacks an interest in the outcome, that is, if he does not testify "in his own behalf." *Showalter v. Spangle*, 93 Wash. 326, 330, 160 P. 1042 (1916). A person is a "party in interest" if they would "gain or lose by the direct legal operation and effect of the judgment." *State v. Robbins*, 35 Wash.2d 389, 395, 213 P.2d 310 (1950); accord *Estate of O'Steen v. Wineberg*, 30 Wash.App. 923, 935-36, 640 P.2d 28 (1982). The interest that will disqualify a witness from testifying must be direct and certain at the time of trial. *Earnheart v. Carlson*, 47 Wn.App. 670, 736 P.2d 1106 (Wn.App. 1987). Both *Fies v. Storey* and *Earnheart v. Carlson* support

the proposition that the Dead Man's Statute may apply to adverse possession claims.

O'Hern stands in the shoes of her father, from whose estate she inherited the property at issue. Her success in this case is directly dependant on the existence of an agreement, express or implied, between her father and Herrin. Therefore, she is disqualified by the Dead Man's Statute from offering her testimony and conclusions about statements, or inferences in lieu of statements, of an implied agreement for consensual use of the property by Herrin.

C. Whether the Element of Hostility in an Adverse Possession Claim is Satisfied Should be Reserved for Trial.

It may be that Herrin is similarly prohibited from testifying about the absence of an agreement, express or implied, with Howard Rothenbuhler. However, Julia Reed and Neal Rothenbuhler are both qualified to testify about Howard Rothenbuhler's intentions, and have both submitted declarations which state unequivocally that there was no such agreement, and preserve the issue for trial. These declarations contradict that of O'Hern, and are sufficient to avoid summary, regardless of the limiting effect of the Dead Man's Statute, as they are not interested parties.

In her declaration, Julia Reed stated:

“The property owned by my ex-husband, James Herrin, was previously owned by my grandparents, my aunt, the Cassals, my parents, and James Herrin and my two children. At no time prior to a 2008-09 survey, to my knowledge did anyone question that the land inside the fence lines around the house, and the garage, belonged to the owner of the house. I have never heard this issue raised until Ellen O’Hern, my sister, raised it as part of this case. The general understanding of everyone, including my father if he even thought about it, was that the land inside the fence, and particularly the garage, belonged to the owner of the house, who is now James Herrin. It was not an issue – it was just commonly understood. The contrary position was never stated by anyone prior to the results of the 2008-09 survey.” [CP 94-95].

In his declaration, Neal Rothenbuhler stated:

“I can say with certainty that until the location the legal description for James Herrin’s property was revealed by a survey which I obtained in 2008-09, no one knew that the garage and fences surrounding the property were outside his legal description. I have never heard this issue raised by anyone prior to obtaining the survey – neither by James Herrin, my father Howard Rothenbuhler, nor my sister Ellen O’Hern.

“It was generally accepted by all parties that the garage was owned by whomever owned the house, and that the fences were the property boundaries for James Herrin’s property. It was a “non-issue” to everyone. The statements made by Ellen O’Hern that James Herrin had actual consent of my father or herself, either express or implied, to use the garage and land within the fences is pure fiction. If such consent was given, I would have heard about it, and it would have been known to me. I have had extensive dealings with Ellen O’Hern about her rights arising from property which we inherited from our parents. There has been a lot of family conflict related to this property. There is no doubt that, had she known that she owned the garage and other land within the fence, she would not have let James Herrin use it without a documented basis for preserving her rights in the property.” [CP 92-93].

The purpose in citing these portions of the declarations is to show first, that O’Hern’s declaration concerning implied permission is

contradicted by competent witnesses so as to bar her claim for summary judgment. Admittedly, these statements contain conclusions, but O'Hern argues only that failure to articulate an objection is proof of implied permission. Her brother and sister declare that their father did not object to Herrin's use of the garage and fence because everyone in the family thought he owned it.

In addition, the character of the actual use of the disputed property by Herrin, apart from the parties' own statements concerning an agreement or lack thereof, is objectively hostile to the ownership of others to negate the implication of "implied consent" offered by O'Hern for purposes of summary judgment. Herrin used the property in the following manner:

a. Herrin had exclusive use of the garage, as did all of his predecessors who owned the house. It is only accessible from his property, via his driveway [CP 42]

b. The garage receives its electricity from the house, and Herrin pays the bill [CP 42].

c. Herrin has invested \$2,400 and a month of labor into rebuilding the garage in a color scheme that matches the house and other outbuildings [CP 42].

d. Herrin has stored wood and other items (characterized as “trash” by O’Hern) around the garage in a five foot cartilage [CP 42, 132].

e. Herrin has maintained and rebuilt the fences which form the boundaries of his property [CP 42-43].

f. Herrin has cultivated the fenced yard as garden and curtilage, and has incorporated it into the landscaping scheme of his property [CP 42-43].

g. There is a distinct difference between the characters of the uses of the property on different sides of the fence – one is pasture and the other is a residential yard [CP 43].

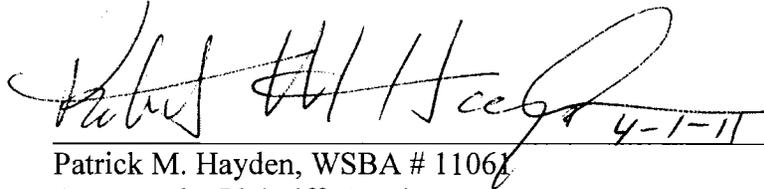
h. The exclusive use of the property and garage by Herrin has continued since 1993 to present [CP 42-44].

Under the objective standard of *Chaplin*, uncommunicated intentions and consent are not particularly relevant, whether by Rothenbuhler or O’Hern. Under the Dead Man’s Statute, neither Herrin nor O’Hern can testify about Howard Rothenbuhler’s unstated intentions. But at trial a court might reasonably conclude that Herrin’s conduct gave notice that he claimed the property as his own, and makes the existence of express or implied permissive use unlikely.

IV. CONCLUSION

The Plaintiffs ask the court to find that the trial court erred in finding for purposes of summary judgment that Herrin used the disputed property with Rothenbuhler's consent as a matter of law, from the time the Rothenbuhlers conveyed the property to the Herrins to the time Howard Rothenbuhler died. The Plaintiff ask the court to enter an order reversing the trial court's orders granting O'Hern summary judgment and denying Herrin's motion for reconsideration.

Respectfully submitted,



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