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No. 68439-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JAMES. A CHASE and JUDY CHASE, and the marital community
comprised thereof,

Respondents (Plaintiffs),

v.

JAMES EBELING, JR., a single individual,

Appellant (Defendant).

OPENING BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR.....	2
III. STATEMENT OF THE CASE.....	4
IV. ARGUMENT.....	5
A. Mr. Chase’s testimony, regarding his agreement with Mr. Parkison about permissive use, was admissible.....	6
1. The Standard of Review is Abuse of Discretion	6
2. Mr. Parkison’s agreement regarding permissive use was a verbal act.	7
3. Mr. Parkison’s agreement as to permissive use is admissible under the “state of mind” exception.....	8
4. Mr. Ebeling waived this objection.	9
B. The testimony of Carmen Hammons was relevant and thus properly admitted by the trial court.....	9
1. The Standard of Review is Abuse of Discretion	9
2. The testimony of Carmen Hammons was relevant	10
C. Plaintiffs introduced sufficient evidence at trial.	12
1. There is substantial evidence in the record to support the finding of permissive use.	12
2. A rational, fair-minded person would be convinced that Mr. Parkison used the Disputed Area with the permission of the true owner.	13
V. CONCLUSION.....	14

TABLE OF AUTHORITIES

I. RULES
ER 803(a)(3).....8

II. STATUTES
RCW 4.16.020.....5, 12

III. CASES
Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432 (2008).....6
Chaplin v. Sanders, 100 Wn.2d 853 (1984).....5, 6, 8
Granston v. Callahan, 52 Wn.App. 288 (1988).....11, 13
Hartford v. Faw, 166 Wash. 335 (1932)7
ITT Rayonier v. Bell, 112 Wn.2d 754 (1989)5, 12
Miller v. Anderson, 91 Wn.App. 822 (1998).....10-11
Roy v. Cunningham, 46 Wn.App. 409 (1986)5
Salas v. Hi-Tech Erectors, 168 Wn.2d 664 (2010)7, 10
State v. Gillespie, 18 Wn.App. 313 (1977)7
State v. Humason, 5 Wash. 499 (1893)7
State v. Miller, 35 Wn.App. 567 (1983)8
Teel v. Stading, 155 Wn.App. 390 (2010)6, 9, 13
Tuyen Thanh Mai v. Am. Seafoods Co.,
160 Wn. App. 528 (2011)12, 13
State v. Stamm, 16 Wn. App. 603 (1976)8

IV. OTHER AUTHORITIES
5B Wash. Prac., Evidence Law and Practice §801.10 (5th ed.)7
Broun, McCormick on Evidence §249 (two-volume 6th ed.)7

I. INTRODUCTION

This case involves a boundary dispute between adjoining neighbors. Mr. Ebeling claims ownership by adverse possession of a portion of the Chases' property. However, Mr. Ebeling's hostile use of the property at issue lasted less than 10 years before the Chases filed suit. In other words, in order to prevail on his claim of adverse possession, Mr. Ebeling must tack his use and possession onto that of his predecessor.

Accordingly, this story begins before, in fact long before, these parties purchased their respective parcels. Mr. Ebeling's property (the "Ebeling Parcel") was previously owned by David Parkison; the Chases' property (the "Chase Parcel") was previously owned by Carmen Hammons (formerly Carmen Parkison), David Parkison's mother. When Mrs. Hammons and Mr. Parkison owned their respective parcels, each had the other's standing permission to access and use the other's property.

The Chases bought their property from Mrs. Hammons in 1996, when Mr. Parkison was still living next door. By sheer coincidence, Jim Chase had grown up with David Parkison as childhood best friends, so they agreed to continue the arrangement that had been in place between Mr. Parkison and Mrs. Hammons. Accordingly, Mr. Parkison had the Chases' permission to access and use any portion of the Chases' property. In other words, until Mr. Parkison sold his property to Mr. Ebeling, the use of the area in dispute was with the true owner's permission.

On this appeal, Mr. Ebeling argues at length that he satisfied the elements of his adverse possession claim. Brief of App. at 6-9. The Chases do not dispute that *during Mr. Ebeling's ownership* he may have

satisfied those elements. But Mr. Ebeling owned his property, and thus adversely used the adjacent property at issue, for less than 10 years before this suit was filed. Accordingly, Mr. Ebeling must tack his use to that of his predecessor David Parkison or his claim fails. Because Mr. Parkison's use of the area at issue was with the true owner's permission, Mr. Ebeling's cannot do so. This Court should affirm.

II. ASSIGNMENTS OF ERROR

Appellant has identified twelve assignments of error but just two issues.¹ The issues pertaining to these assignments of error are more accurately set forth as follows. Note that the first assignment of error is the primary and essentially dispositive issue raised by this appeal.

1. Did the trial court properly admit the testimony of Mr. Chase concerning his agreement with Mr. Parkison about permissive use, where Mr. Parkison's agreement (a) constituted a verbal act, and (b) reflected his state of mind as to permissive use? (Assignments of Error Nos. 1-12)

2. Was the testimony of Carmen Hammons relevant, where Mr. Chase and Mr. Parkison agreed to continue with the prior agreement between Mr. Parkison and Mrs. Hammons regarding permissive use of the property at issue? (Assignments of Error Nos. 3 and 11)

3. Was sufficient evidence adduced at trial to show that Mr. Ebeling's predecessor used the area at issue with the permission of the true owner? (Assignments of Error Nos. 5 and 6)

¹ The first "issue" identified by appellant is simply an overarching statement of the case from his perspective. It is not an "issue" raised by the assignments of error.

III. STATEMENT OF THE CASE

In approximately 1963, when plaintiff James (Jim) Chase was a child, his family moved to a new neighborhood. CP at 220. There he met David Parkison, another boy his age, and Carmen Parkison (now Carmen Hammons), David's mother. RP at 28; Ex. 48 (Dep. of Hammons) at 4. Jim and David became best friends, and they maintained that relationship for approximately 10 years until David moved away. RP at 28-29; Ex. 48 at 7-8.

After Carmen and David left the neighborhood, Mrs. Hammons purchased the property that is now at issue. Ex. 48 at 6-9. Originally, when she purchased it, the property included both the Chase Parcel and the Ebeling Parcel. *Id.* In approximately 1983, Mrs. Hammons conveyed the Ebeling Parcel to her son. *Id.* at 9-10.

While they owned adjacent properties, Mrs. Hammons and Mr. Parkison maintained a close family relationship. *Id.* at 17. Mrs. Hammons trusted her son to do what was right and she was unconcerned about the location of any improvements constructed by Mr. Parkison. *Id.* at 14-16. Mr. Parkison had her permission to use any portion of her property if he felt it was necessary. *Id.* at 14.

Before he sold his property to Mr. Ebeling, Mr. Parkison constructed a chain link fence approximately parallel to the boundary with the Chase Property but which encroached approximately 40 feet onto the Chase Property. *Id.* at 14-15; Ex. 2. The fence included a gate between the parcels. Ex. 48 at 16. Mr. Parkison built this fence with Mrs. Hammons's permission. *Id.* This fence remains today and forms the

boundary of the area at issue (the “Disputed Area”). Ex. 2 (a survey of the Chase Property showing the encroaching fence).

The Chases purchased their property from Mrs. Hammons in 1996. RP at 29-30. Mr. Chase soon discovered his childhood friend David Parkison living next door. *Id.* About a week after moving in, Mr. Chase spoke with Mr. Parkison about their relationship as neighbors. *Id.* at 33-35. Mr. Chase told Mr. Parkison that, given their life-long and newly rediscovered friendship, he was fine with continuing whatever arrangement Mr. Parkison previously had with his mother, Mrs. Hammons, as to their respective use of each other’s property. *Id.* Accordingly, Mr. Chase and Mr. Parkison agreed that each had the other’s permission to use any part of the other’s property. *Id.* The agreement was sealed with a handshake. *Id.* at 34.

Over the next three years, Mr. Parkison and the Chases lived happily next door to each other and frequently accessed the property on both sides of the fence. *Id.* at 35-36. The gate in the fence was always unlocked. *Id.* Mr. Parkison had a garden on his side of the fence, and the Chases helped to maintain it and consumed the vegetables and flowers that it produced. *Id.* Each party would occasionally mow the lawn on both sides of the fence. *Id.* at 36. Mr. Parkison continued to use the barn on the Chases’ property for personal storage. *Id.*

Mr. Ebeling purchased his property from Mr. Parkison on November 24, 1999. Ex. 3. When Mr. Ebeling first moved in, he had a cordial relationship with his neighbors the Chases. RP at 37. However, that relationship eventually soured. *Id.* at 38. When the Chases obtained a

survey of their property in 2008, they realized for the first time that the Disputed Area was really part of their parcel. *See* Ex. 2. The Chases filed this action in October of 2009, less than nine years and eleven months after Mr. Ebeling bought his property. *See* CP at 1.

IV. ARGUMENT

This Court should affirm the trial court's decision in this matter. Mr. Ebeling is appealing only the trial court's finding that he failed to satisfy the elements of his adverse possession claim. The elements of an adverse possession claim, including the burden of proof, are long-standing and well-known:

In order to establish a claim of adverse possession, there must be possession that is: (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile. Possession of the property with each of the necessary concurrent elements must exist for the statutorily prescribed period of 10 years. As the presumption of possession is in the holder of legal title, the party claiming to have adversely possessed the property has the burden of establishing the existence of each element.

ITT Rayonier v. Bell, 112 Wn.2d 754, 757 (1989) (citations omitted). A claimant may tack his period of adverse use to the period of adverse use of his predecessor in order to satisfy the 10 year requirement. RCW 4.16.020; *Roy v. Cunningham*, 46 Wn.App. 409, 413 (1986).

In the present matter, Mr. Ebeling failed to satisfy the fourth element. In *Chaplin v. Sanders*, 100 Wn.2d 853 (1984), the seminal case in the modern law of adverse possession, the Supreme Court significantly revised the fourth element. The Court held that subjective intent, the prior indication of hostility, was irrelevant; instead, hostility was to be

determined solely by the manner in which the claimant treated the property. *Id.* at 860-62.

Nonetheless, the Court specifically retained the longstanding principle that the true owner's permission to use the area at issue defeats the element of hostility. *Id.* at 861-62 (“[P]ermission to occupy the land given by the true title owner to the claimant or his predecessors in interest will still operate to negate the element of hostility.”). This principle remains good law. *See Teel v. Stading*, 155 Wn.App. 390, 394 (2010) (citing *Chaplin*, 100 Wn.2d at 861-62).

Permissive use is the dispositive issue in this matter. As set forth below, the trial court did not err in admitting evidence, and based on that evidence the trial court correctly found that Mr. Parkison's use of the Disputed Area was with the true owner's permission.

A. Mr. Chase's testimony, regarding his agreement with Mr. Parkison about permissive use, was admissible.

1. The Standard of Review is Abuse of Discretion.

“Out-of-court statements offered in court to prove the truth of the matter asserted are hearsay, which is generally not admissible.”

Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 450 (2008). An appellate court reviews admission of evidence under hearsay exceptions for abuse of discretion. *Id.*

A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. A trial court's decision is manifestly unreasonable if it adopts a view that no reasonable person would take. A decision is based on untenable grounds or

for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts.

Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 668-669 (2010) (quotations and citations omitted).

In the present matter, the trial court did not abuse its discretion in admitting this evidence as falling within an exception to the hearsay rule. In fact, this evidence falls within two exceptions as found by the trial court. RP at 26.

2. Mr. Parkison's agreement regarding permissive use was a verbal act.

“Statements that are ‘in issue,’ or have independent legal significance, are not hearsay.” 5B Wash. Prac., Evidence Law and Practice §801.10 (5th ed.) (citing Broun, McCormick on Evidence §249 (two-volume 6th ed.)). In light of this rule, the following statements have been found to not constitute hearsay: (1) oral consent to the assignment of a lease where consent was at issue, *Hartford v. Faw*, 166 Wash. 335 (1932); (2) oral and written consent to search certain premises, *State v. Gillespie*, 18 Wn.App. 313 (1977); and (3) statements that rescinded a contract, *State v. Humason*, 5 Wash. 499 (1893). Such statements, or “verbal acts,” are relevant simply because they were made. 5B Wash. Prac., Evidence Law and Practice §801.10 (5th ed.). Thus, a verbal act is admissible not to prove whether the content of the statement is true, but to

prove the verbal act in saying it. *State v. Miller*, 35 Wn.App. 567, 569 (1983).²

Here, any statements by Mr. Parkison regarding his agreement that use of the area was with the true owner's permission were verbal acts and therefore are not hearsay. On a claim of adverse possession, permissive use of the area at issue is dispositive and defeats the claim. *See Chaplin*, 100 Wn.2d at 860-62. Thus, statements by Mr. Parkison regarding his permissive use are "in issue," and the true owner's permission to use the area at issue has independent legal significance. Therefore, any statement by Mr. Parkison regarding agreed permissive use of the area at issue constitutes a verbal act and is not barred by the hearsay rule.

3. Mr. Parkison's agreement as to permissive use is admissible under the "state of mind" exception.

A statement of the declarant's then existing state of mind may fall within an exception to the hearsay rule. ER 803(a)(3). To fall within this exception, the evidence must be relevant: "Out-of-court statements are admissible to show a declarant's state of mind only if said state of mind is relevant to a material issue in the cause." *State v. Stamm*, 16 Wn. App. 603, 611 (1976).

In the present matter, Mr. Parkison's agreement concerning permissive use goes directly to Mr. Parkison's state of mind as to his use

² This is a long-standing legal principle in the civil law. *See Hartford v. Faw*, 166 Wash. 335, 341 (1932) ("Where the utterance of specific words is itself a part of the details of the issue under the substantive law and the pleadings, their utterance may be proved without violation of the Hearsay rule, because they are not offered to evidence the truth of the matter that may be asserted therein.")

of the area at issue. Furthermore, his state of mind as to this issue is clearly relevant, because if his use was permissive then his possession was not adverse. See *Teel*, 155 Wn.App. at 394. In other words, Mr. Parkison's state of mind as to permissive use is not only relevant but virtually dispositive of the entire case. Accordingly, this testimony was properly admitted under the state of mind exception to the hearsay rule.

4. Mr. Ebeling waived this objection.

Finally, it must be noted that counsel for Mr. Ebeling failed to adequately preserve this error for appeal. In arguing the pre-trial evidentiary motions that addressed these hearsay issues, counsel for Mr. Ebeling framed the issue as follows:

I think the court simply has to look at these all in the context of this case, if this testimony is going to come in or isn't going to come in. By that I mean the testimony with respect to conversations with Mr. Parkison by everybody involved. If it comes in, it should all come in. If it doesn't come in, none of it should come in.

RP at 9.

The Court did just that, allowing in all of the evidence concerning the parties' conversations with Mr. Parkison, exactly as requested by counsel. Thus, even if Mr. Chase's testimony about his agreement with Mr. Parkison constitutes inadmissible hearsay, appellant waived this objection (since the trial court admitted all of the hearsay testimony) and failed to preserve it for appeal.

B. The testimony of Carmen Hammons was relevant and thus properly admitted by the trial court.

1. The Standard of Review is Abuse of Discretion.

As with the decision regarding the admissibility of hearsay, the standard of review for a trial court's decision to admit evidence as relevant is reviewed for an abuse of discretion. *See Salas*, 168 Wn.2d at 668-69.

The threshold is relatively low:

All relevant evidence is admissible unless its admissibility is otherwise limited. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The threshold to admit relevant evidence is low, and *even minimally relevant evidence is admissible*.

Id. at 669 (citations and quotations omitted) (emphasis added).

2. The testimony of Carmen Hammons was relevant.

As Mr. Chase testified at trial, he agreed to continue the arrangement that existed between his predecessor, Mrs. Hammons, and the adjacent owner David Parkison regarding permissive use of the Chase Parcel. RP at 33-35. In that context, the existence and terms of the prior agreement between Mrs. Hammons and Mr. Parkison are relevant. Evidence of the prior agreement renders the existence of the new agreement more probable. To put it rhetorically, because Mr. Chase testified about continuing a prior agreement, how can evidence of that prior agreement *not* be relevant?

Mr. Ebeling makes a strained argument that Mrs. Hammons's testimony is not relevant by operation of law. According to Mr. Ebeling, because Mrs. Hammons sold her property, her agreement as to permissive use with Mr. Parkison was extinguished. Brief of App. at 10 (citing *Miller*

v. Anderson, 91 Wn.App. 822, 831-32 (1998)). Thus, according to Mr. Ebeling, because her agreement was extinguished, it cannot be relevant to this matter.

This argument fails on its face, particularly given the relatively low standard for “relevance”. First and foremost, there is no dispute and no legal authority to the contrary that an agreement as to permissive use can be reinstated by a subsequent purchaser. The case of *Granston v. Callahan*, 52 Wn.App. 288 (1988), is illustrative in this regard.

In *Granston*, the adjacent properties at issue were originally owned by two brothers who each gave permission to the other to use the other’s property. In 1962, one brother (owner of the servient estate in the eventual dispute) conveyed ownership to his son. By operation of law, that conveyance terminated the permissive use. *Granston*, 52 Wn.App. at 295 (“A permissive use necessarily terminates when the licensor dies or alienates the servient estate.”). However, in 1971, the son entered into another agreement with his uncle, who still owned the adjacent parcel, conferring permissive use to a portion of the servient estate. This renewed agreement conferring and acknowledging permissive use defeated the eventual adverse possession claim as to that portion of the servient estate encompassed by the renewed agreement.

The same thing occurred here. When Mrs. Hammons sold to the Chases, her conveyance terminated the permissive use by Mr. Parkison of the Disputed Area. However, just like the true owner in *Granston*, albeit after a few days rather than nine years, the Chases renewed the prior agreement with the potentially adverse user recognizing permissive use.

Thus, as in *Granston*, the renewed agreement should defeat the claim of adverse possession, notwithstanding prior conveyance of the servient estate.

Where a subsequent purchaser alleges (and the adverse user denies) that a prior agreement was renewed on the same terms, evidence of that prior agreement is relevant to proving the existence of the new agreement, as noted by the trial court. RP at 21.

C. Plaintiffs introduced sufficient evidence at trial.

Mr. Ebeling owned his property, and thus adversely possessed the Disputed Area, for less than ten years. Ex. 3. Accordingly, Mr. Ebeling must tack his use and possession to that of his predecessor in order to satisfy the ten year requirement for an adverse possession claim, or his claim fails. *ITT Rayonier*, 112 Wn.2d at 757; RCW 4.16.020(1). On this appeal, Mr. Ebeling now challenges the sufficiency of the evidence supporting the trial court's finding of permissive use. If the evidence of permissive use was sufficient, this Court must affirm.

1. There is substantial evidence in the record to support the finding of permissive use.

When reviewing a trial court's findings of fact, this Court determines whether substantial evidence in the record supports those findings. *Tuyen Thanh Mai v. Am. Seafoods Co.*, 160 Wn. App. 528, 537-38 (2011). "Substantial evidence exists if a rational, fair-minded person would be convinced by it." *Id.* at 538 (quotation omitted). This Court does not "reweigh the evidence or rebalance competing testimony and inferences." *Id.* at 547. Rather, this Court reviews "the record in the light most favorable to the party who prevailed in the court below." *Id.*

2. A rational, fair-minded person would be convinced that Mr. Parkison used the Disputed Area with the permission of the true owner.

As discussed above, the trial court properly admitted the testimony of both Carmen Hammons and Mr. Chase regarding their agreements with Mr. Parkison as to permissive use. This testimony shows that Mr. Parkison's use of the Disputed Area was indeed permissive. There is no evidence in the record to directly rebut this showing.

Given applicable law, there is further evidence in the record to support a finding of permissive use. Permission to use the property of another may be express or implied. *Teel*, 155 Wn.App. at 394. The Court should infer permissive use where the adjacent properties are owned by persons with a close or family relationship. *Granston*, 52 Wn.App. at 294-95. "A finding of permissive use is supported by evidence of a close, friendly relationship or a family relationship between the claimant and the property owner." *Id.* at 294. "There is at least an inference, if not a presumption, that a use is permissive where the owners of the two estates have a close family relationship." *Id.* at 295 (quotation omitted).

In the present matter, this Court should infer, if not presume, permissive use while Carmen owned the property at issue because of the close family relationship between David and his mom Carmen. Ex. 48 at 17. Moreover, a finding of continued permissive use, after the Chases bought the property, is supported by the fact that Jim Chase and David Parkison had a longstanding "close, friendly relationship." RP at 28-29, 75-76.

Looking at the evidence in the record, in the light most favorable to the Chases, a rational and fair-minded person would easily conclude that Mr. Parkison's use of the Disputed Area was with the permission of the true owner. *Mr. Ebeling concedes this point.* In the remarkably short "Argument" portion of his brief, Mr. Ebeling does not even mention let alone discuss this issue.³ He fails to note any evidence in the record that would disprove permissive use. Indeed, Mr. Ebeling specifically acknowledges just the opposite: "*Mr. Chase's testimony, if allowed, establishes that Mr. Parkison used the Disputed Property at issue in this case with the permission of Mr. Chase.*" App.'s Brief at 9 (emphasis added). Thus even Mr. Ebeling recognizes that Mr. Chase's testimony, standing alone and without reference to the close relationship between the parties, is dispositive. When the appellant concedes the dispositive point, surely this Court should affirm.

V. CONCLUSION

The trial court did not abuse its discretion when admitting both the testimony of Carmen Hammons as well as the testimony of Mr. Chase concerning his agreement with Mr. Parkison over permissive use. Because that evidence is correctly in the record, even Mr. Ebeling

³ Mr. Ebeling spends the first two and a half pages of his argument explaining that he satisfied the elements of adverse possession, before recognizing the dispositive point: "Only if the Disputed Property was occupied with permission of the true owner could Mr. Ebeling's claim of adverse possession be defeated." The Chases are in complete agreement. Mr. Ebeling likely satisfied the elements of his adverse possession claim, subject only to permissive use that would defeat the element of hostility. There is no dispute on this point.

concedes that the Chases are entitled to prevail. This Court should affirm the trial court in all respects.

SIGNED this 7 day of September, 2012.

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DECLARATION OF SERVICE

I, the undersigned, certify under penalty of perjury under the laws of the State of Washington, that on the below date, I sent the foregoing by U.S. Mail, first class postage prepaid and addressed as follows:

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DATED this 7th day of September, 2012, at Seattle, Washington.



Claire Hartman
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