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No. 68439-6-I

**IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

**James A. Chase and Judy Chase,
and the marital community comprised thereof,
Plaintiffs-Appellees**

vs

**James Ebeling, Jr., a single individual,
Defendant- Appellant**

**APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY**

THE HONORABLE JUDGE REGINA S. CAHAN

BRIEF OF APPELLANT

ORIGINAL

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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON
REGINA S. CAHAN

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ASSIGNMENT OF ERROR

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1. The trial court erred in entering finding of fact 2 in as much as part of the property was adversely possessed by James Ebeling.

2. The trial court erred in entering finding of fact 4 in as much as the Ebeling property now includes a portion of the Chase property (“Disputed Property”).

3. The trial court erred in entering finding of fact 7 because it was based upon irrelevant testimony and hearsay testimony.

4. The trial court erred in entering finding of fact 8 because it was based upon irrelevant testimony and hearsay testimony.

5. The trial court erred in entering finding of fact 11 because the basis for the finding is supported only by hearsay testimony which should have been excluded by the trial court and further is not supported by the overwhelming evidence establishing that there was no agreement.

6. The trial court erred in entering conclusion of law 1 because said conclusion was based upon inadmissible hearsay and was not supported by the records and evidence.

7. The trial court erred in entering conclusion of law 2 because the trial court did not allow the adverse possession of the Disputed Property by Mr. Ebeling’s predecessor to be tacked on to his occupancy of the land.

8. The trial court erred in entering conclusion of law 3 because it was based upon hearsay evidence and the trial court's refusal to allow Mr. Ebeling to tack on the time that his predecessor in title occupied the Disputed Property.

9. The trial court erred in entering its judgment dismissing Ebeling's counterclaim based upon adverse possession; and in granting Chase's request that title to the Disputed Property be quieted in favor of plaintiffs.

10. The trial court erred in ordering Mr. Ebeling to remove his personal property from the Disputed Property and further erred in ordering that the shed and the fence located on the Disputed Property belonged to the Chase's and that they could demolish the fence and shed after 90 days.

11. The trial court erred in allowing admission of the deposition of Carmon J. Hammons (Exhibit 48).

12. The trial court erred in granting plaintiffs' motion to allow hearsay testimony.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Should the trial court have granted James Ebeling judgment against the Chase's based upon Mr. Ebeling's counterclaim that he, by adverse possession, held the rightful ownership entitled to the real property described as the Disputed Property.

B. Did the trial court wrongfully allow hearsay evidence by the plaintiffs to defeat Mr. Ebeling's claim of adverse possession of the Disputed Property.

STATEMENT OF THE CASE

Undisputed Facts

James Ebeling, Jr. purchased certain real property located at 32422 173rd Avenue SE, Auburn, Washington on November 24, 1999. (RP 101) Plaintiffs filed this complaint seeking to quiet title on October 12, 2009, approximately 1 month short of ten years from the time that Mr. Ebeling purchased his property. (CP 1-23)

Prior to purchasing the property Mr. Ebeling visited the property in June, 1999. (RP 104) At the time that he first visited the property it was owned by David Parkison. (RP 104)

Mr. Ebeling's property at the time he purchased it from David Parkison, and for at least several months prior to his purchase, was fenced, which fence separated Mr. Ebeling's property, including the property which is at dispute in this action (Disputed Property) from the property now owned by the plaintiffs and plaintiffs' predecessors in title. (RP 104-106; Exhibit 2) The fence has been in its present location since at least June, 1999. (RP 104-105) At the time of his meeting with Mr. Parkison, Mr. Ebeling requested that Mr. Parkison point out the boundaries to the property he was selling. (RP 105-107) Mr. Parkison in fact pointed out the boundaries and the corners to his property. (RP 106-107) The boundary and the corners pointed out by Mr. Parkison to Mr. Ebeling are the same as the existing fence and the corners of the existing fence.

Since at least June, 1999, Mr. Parkison and then Mr. Ebeling have maintained a shed and shop building on the Disputed Property. (RP 105)

At the time that Mr. Parkison decided to sell his property and specifically on September 28, 1999 he signed a Real Property Transfer Disclosure Statement. (Exhibit 1) In the Disclosure Statement under section 1.C, it is disclosed that there are no encroachments, boundary agreements, or boundary disputes affecting Mr. Parkison's property. (Exhibit 1)

Hearsay Facts

Prior to the commencement of trial, plaintiffs moved for partial summary judgment quieting title to the Disputed Property. (CP 99-105) The summary judgment motion was supported primarily by the declaration of James Chase in which he testified that after he purchased his property he and David Parkison agreed to continue with the arrangement that David Parkison had previously had with his mother concerning use of each other's properties. (CP 106-109) The motion was also supported by an Affidavit of Carmon J. Hammons, the mother of David Parkison relating to permissive use of the Disputed Property. (CP 112)

In the memorandum in opposition to the motion for summary judgment quieting title, Mr. Ebeling objected to the declarations of James Chase and Carmon Hammons. (CP 121)

The trial court judge (then the Honorable Brian Gain) who heard plaintiff's motion for partial summary judgment as well as each side's objection to the other side's declarations struck portions of Mr. Ebeling's declaration and

also struck portions of the declaration of Felix Lujan. (CP 158-160) The trial court also struck the declaration of James Chase in support of plaintiffs' motion for partial summary judgment and the affidavit of Carmon Hammons dated September 28, 2009. (CP 158-160)

Just prior to the commencement of trial in this action the plaintiffs filed with the trial court Plaintiff's Motion Re: Admissibility of Evidence. (CP 176-182) In that motion the plaintiffs requested an order by the trial court allowing the plaintiff, James Chase, to testify as to conversations he had allegedly had with David Parkison, Mr. Ebeling's predecessor in title, regarding an alleged agreement of permissive use. (CP 176-182) Mr. Parkison's current whereabouts at the time of trial were unknown. (CP 178) Mr. Ebeling objected to the admission of hearsay and specifically objected to any testimony relating to any interaction or conversations between Mr. Chase and the missing Mr. Parkison. (CP 210-213) The plaintiffs' motion was heard by the Honorable Regina S. Cahan, to which the case had been reassigned, on the first day of trial. (RP 2-26) After hearing argument regarding plaintiffs' motion, the court ruled that Mr. Chase would be allowed to testify with respect to the conversations and agreement between himself and Mr. Parkison. (RP 26)

Thus, in order to defeat Mr. Ebeling's claim of adverse possession, and specifically the hostile intent as well as the ten (10) year holding period, Mr. Chase was allowed to testify as follows:

A I let him know -- and being aware of how close he was to his mother, I let him know that we were okay, I was fine, his use of the property could continue

just as it had with his mother. I was great -- I was delighted that I had found me friend, David, and let him know that we were all cool. He -- David had long hair, he was kind of a hippy, free spirit sort of a guy. I wanted him to know everything was all right, and he had my permission to continue --this is where he grew up from the time he was fourteen.

Q So he had your permission to --

A To continue to use the property. He could come --

MR. O'CONNOR: Object as to leading.

THE COURT: It's overruled. Go ahead.

A He had my permission to use my property the same as he had with his mother. I didn't care where fences were between David and I, he was like family, their family was.

Q Did you reach any sort of agreement as to this conversation?

A Yes.

Q What was that? Describe that agreement.

A I don't remember the exact words. This was more than ten years ago, but as I told him, he had my permission, I was cool with it. And David said he was, too, and I was welcome to come over there. He had been married to Carey. I hadn't known that previously, but as I moved in and got caught up with David and he invited me over there, with the stipulation that, you know, as long as his dog was under control, that I was welcome to come over any time.

Q Did you guys memorialize this agreement in any fashion?

A Yes, we did a hand shake. It wasn't the formal legal style, it was like upper style, like buddies do, the clasp thing. And it was nice. (RP 33-34)

ARGUMENT

A. Mr. Ebeling should have been granted judgment quieting title to the Disputed Property in his name.

Adverse possession requires that the claimant provide proof of ten years of possession that was (1) exclusive, (2) actual and non-interrupted, (3) open and notorious, and (4) hostile. *ITT Rayonier, Inc v Bell*, 112 Wn.2d 754; 774 P.2d 6 (1989); *Miller v Anderson*, 91 Wn. App. 822, 964 P.2d 365 (1998).

The burden of establishing each of the elements of adverse possession rests upon the claimant. *ITT Rayonier*, 112 Wn.2d at 757-58; *Miller*, 91 Wn. App. at 828. In this action it is Mr. Ebeling's contention that all elements of adverse possession were established entitling him to a judgment quieting title to the Disputed Property in his name and against the plaintiffs.

Exclusive Use

To determine whether use is exclusive, the ultimate examination is the exercise of dominion over the land in question and whether it is used in a manner consistent with the actions a true owner would take with respect to the land. *Lilly v Lynch*, 88 Wn. App. 306, 945 P.2d 727 (1997). Furthermore, *Lilly* also holds that the claimants possession need not be absolutely exclusive in order to satisfy the exclusivity condition of adverse possession and that an occasional, transitory use by the true owner will usually not prevent adverse possession if the uses the adverse possessor permits are such as a true owner would permit a third person to do as a "neighborly accommodation." *Lilly*, 88 Wn. App at 313.

Mr. Parkison, prior to selling his property to Mr. Ebeling, and Mr. Ebeling have maintained a fence around the Disputed Property for more than 10 years prior to the filing of this suit. (RP 104-108) While there may be some evidence

that the servient land owner, Carmon Hammons, and thereafter Mr. and Mrs. Chase, occasionally were on the property, it was Mr. Parkison and Mr. Ebeling who exercised dominion over the property consistent with those of a true owner. (RP 109-110)

Actual And Uninterrupted

There was absolutely no evidence produced at trial that the fence surrounding the Disputed Property was ever moved or that there was some period of time when the actual possession and use of the property did not lie with Mr. Parkison or Mr. Ebeling. Thus the use by Mr. Parkison and Mr. Ebeling was actual and uninterrupted.

Open And Notorious

The fence surrounding the Disputed Property is of itself open and notorious as to anybody who would view the property. Open and notorious is often times determined by how the claimant has manifested a claim to the land and must take into consideration the character of the land. *Chaplin v Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984). Here you have relatively small parcels in a rural area. Mr. Ebeling's property is separated and divided from the plaintiffs' property by a chain link fence and that chain link fence has been in existence for more than 10 years.

Hostile Element

The hostility element of adverse possession requires that Mr. Ebeling, and his predecessor in title treat the land as his own as against the world

through the ten year statutory period. *Chaplin v Sanders*, id at 860. In fact, Mr. Ebeling and his predecessor in title treated the property as a true owner would treat the property. Mr. Parkison maintained and used the Disputed Property, and fenced it, since at least June, 1999. Since his purchase in 1999, Mr. Ebeling has maintained the fence in its present location and has also maintained the shed. These acts are consistent with a true owners acts and should satisfy the element of hostility.

Only if the Disputed Property was occupied with permission of the true owner could Mr. Ebeling's claim of adverse possession be defeated.

B. The court erred in allowing the testimony of James Chase regarding his conversations with David Parkison.

The primary evidence provided at the time of trial to defeat Mr. Ebeling's claim of adverse possession was the testimony of Mr. Chase relating to his conversations with Mr. Parkison, the predecessor in title to Mr. Ebeling. The testimony of Mr. Chase was offered to prove the existence of an alleged reciprocal agreement between he and Mr. Parkison for the continued permissive use of their respective properties. 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. The agreement described by Mr. Chase depends upon statements and acts by Mr. Parkison offered in evidence to prove the truth of the matter asserted, that being the agreement. It is the contention of Mr. Ebeling that this is classic hearsay not subject to any hearsay exceptions.

Pursuant to ER 801 and ER 802, Mr. Chase's testimony should not have been allowed.

Furthermore, Mr. Chase's testimony obviously was based upon the testimony of Carmon Hammons (Exhibit 48). Ms. Hammons' testimony is not relevant. She testified with respect to an "agreement" which allegedly she and her son had regarding permissive use of property (*see generally* Exhibit 48). Mr. Chase's testimony is that he and Mr. Parkison agreed to continue the agreement. However, even if there had been an agreement between Mr. Parkison and Ms. Hammons, that agreement ceased to exist when Ms. Hammon sold her property to Mr. and Mrs. Chase.

In Washington a person who initially occupies or possess land with the owner's permission cannot thereafter obtain title by adverse possession unless the owner in some manner revokes the permission, dies, or sells his/her estate, ... *Miller vs Anderson, id*, at 831-832. Thus, since she sold the property to plaintiffs, Ms. Hammons' testimony is irrelevant and should have been rejected by the court.

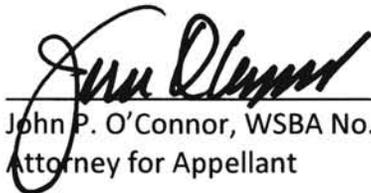
SUMMARY

If Mr. and Mrs. Chase are allowed to utilize the testimony of Mr. Chase with respect to his discussions with David Parkison, then most likely they will prevail upon their claim that Mr. Ebeling did not adversely possess the Disputed Property. However, if the plaintiffs are allowed to use the hearsay regarding the

alleged agreement between Mr. Chase and Mr. Parkison, the hearsay rule will be turned upside down and will become a nullity.

Mr. Ebeling has in fact acquired all right, title and interest in and to the Disputed Property by virtue of adverse possession. The Appellate Court should reverse the trial court, remand the matter back to the trial court with direction to enter a judgment in favor of Mr. Ebeling quieting title to the Disputed Property in the name of Mr. Ebeling.

Respectfully submitted this 18th day of July, 2012.



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IN THE COURT OF APPEALS, DIVISION I
COUNTY OF PIERCE, STATE OF WASHINGTON

JAMES A. CHASE and JUDY CHASE, and
the marital community comprised thereof,
Plaintiffs/Appellees,
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JAMES EBELING, JR.,
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APPEAL NO. 68439-6-I

CERTIFICATE OF SERVICE

Pursuant to the laws of the State of Washington, the undersigned certifies under penalty of perjury that a true and correct copy of the **BRIEF OF APPELLANT, and this certificate of service** were on this date, sent out for service by July 19, 2012, to the following:

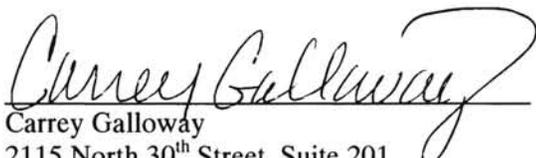
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Signed at Tacoma, Washington this 18th day of July, 2012.


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