

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON  
Case No. 36146-9-II

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DIVISION II  
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STATE OF WASHINGTON  
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*Dolores R. Martin, a single woman*  
*Respondent*  
v.  
*Michael F. Skellett and Debra P. Skellett,*  
*individually and the marital community*  
*Appellants.*

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APPELLANT'S OPENING BRIEF

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**I. ASSIGNMENT OF ERROR**

1. The trial court erred because there are genuine issues of material fact as to ownership of the property.
2. The trial court erred in considering evidence precluded by the Dead Man's Statute.
3. The trial court erred in considering evidence precluded by the hearsay rule.

**II. STATEMENT OF FACTS**

**A. *The Real Property at Issue.***

The plaintiff, Martin, and the defendants, the Skellets, own adjoining parcels of real property in Milton, Pierce County, Washington. CP 90. Martin claims to own a portion of the Skellett parcel by three separate theories: adverse possession; a boundary established by recognition and acquiescence; or estoppel. CP 57.

Martin has owned her property since 1967. CP 42. In 1994, Martin also acquired a portion of the adjacent parcel (now the Skellett Parcel) from her then neighbor, Grace Wilkinson. CP 53. Wilkinson, through her power of attorney (her daughter, Kathy Mundell), essentially deeded the back ½ of her property to the plaintiff for \$40,000. CP 69.

As a result of the 1994 transaction, the Skellett Parcel's eastern boundary became a "stair-stepped" line, evidently to follow along an existing fence-line. CP 76.

In January of 1996, Charles (Chuck) and Tracy Searle (later Tracy Donahue, CP 37) purchased the Skellett Parcel from the Estate of Grace Wilkinson, then deceased. CP 49. The Searles owned the property, as husband and wife, until September of 2000, when Chuck Searle quit-claimed his interest to Tracy as part of a property settlement in their divorce. CP 49. Tracy then owned the parcel until August of 2003, when she sold it to the Skelletts. CP 49.

***B. Use of the Real Property at Issue.***

The property in question is simply an area of grass, with a tree and some shrubs. CP 306. The area is fenced along Martin's driveway. CP 187. There is also fencing that extends along 19th Avenue and then along the Skellett driveway. CP 198, 234

There had been a barn on the property, which the Martins and the Wilkinsons tore down. CP 148. Both the Wilkinsons and the Martins used the barn. CP 148.

Mr. Searle testified that he put in the wooden fence extending along the street and along the side of his driveway. CP 194-95. He built the fence after he widened and improved his driveway. CP 194-95. He widened his driveway from eight feet to fifteen feet. CP 198. As part of that project, he tore down an existing electric fence. CP 194-95. After the driveway was widened, a wooden fence was placed closer to the Martin property line. CP 198, 234.

While Martin usually maintained the property, Mr. Searle mowed it a time or two. CP 214. When he did the mowing, Martin never objected to him being on the property. CP 214.

Martin had long used the property to pasture her horses. CP 144. Kathy Mundell, the Wilkinson's daughter, CP 135, testified that Martin and the Wilkinsons had a close relationship. CP 142. After Martin bought the property, the families interacted every day. CP 170. Martin pastured her horses on the Wilkinson property even before she bought a portion of that property. CP 144. Martin had permission to use all of the property to pasture her horses. CP 152. The Wilkinsons also continued to use the disputed area to pasture horses. CP 173. The Wilkinsons also used the area as a vehicle turn-around and trailer parking. CP 183. According to

Mundell, the Wilkinsons put in the wire fences and the wooden fence that existed before the Searle's built additional fences. CP 157;160-161.

***C. Conversations Between Martin and Searle***

When the Searle's bought the property in 1996, Mr. Searle talked to Mrs. Martin. She was concerned about losing the pasture for her horses. CP 200. The primary concern Martin expressed to Searle when he bought the property was whether she could continue to pasture her horses as she had done with the prior owners. CP 217; 227. Mr. Searle told her that he had no problem with her continuing to pasture her horses there. "[He] had no problem with [Martin's] horses being on [his] property as long as they weren't on the front porch at all." CP 217.

***D. Conversations between Martin and the Skelletts***

In conversations between Martin and the Skelletts, Martin acknowledged that she knew the disputed property belonged to them. CP 94. Martin told Mr. Skellet that he "could kick her off" any time he wanted. CP 91. She asked them if they would be willing to exchange the disputed property in return for squaring off their eastern boundary, as that eastern boundary is in a stair-step line. CP 94. This mirrors a conversation that Martin had with Chuck Searle years earlier. CP 209. At a later time,

Martin also told the Skelletts that she was painting her fence and asked for permission to paint the Skelletts' fence. CP 94. At the time, she was referring to the fence along the Skellet's driveway and along 19<sup>th</sup> Avenue as the Skelletts' fence. CP 94. Mr. Skellet told her "no" and that they were planning to take the fence down. CP 92, 94.

Following a hearing, the trial court granted summary judgment for Martin. This appeal followed.

### **III. LEGAL ARGUMENT**

This Court should reverse the summary judgment because there are genuine issues of material fact concerning the ownership of the property in dispute.

#### ***A. Standard of Review for Summary Judgment.***

The appellate court makes the same inquiry as the trial court in reviewing summary judgment. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

Summary judgment is designed to do away with unnecessary trials when there is no genuine issue of material fact. LaPlante v. State, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). The moving party faces a heavy burden in obtaining a summary judgment; the moving party must prove the

absence of a genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Jacobson v. State, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977).

The basic rule as to the moving party's burden in a motion for summary judgment is as follows:

One who moves for summary judgment has the burden of proving that there is no genuine issue of material fact, irrespective of whether he or his opponent would, at the time of trial, have the burden of proof on the issue concerned.

Preston v. Duncan, 55 Wn.2d 678, 682, 346 P.2d 605 (1960).

"If any issue of material facts exists, there must be a trial."

Klossner, 21 Wn. App. at 692 [emphasis supplied].

***B. The Trial Court Erred in Granting the Motion for Summary Judgment Because There Are Genuine Issues of Material Fact as to Adverse Possession.***

The trial court erred in granting the motion for summary judgment because there are genuine issues of material fact as to adverse possession. Adverse possession is generally a mixed question of law and fact -- whether the essential facts exist is for the trier of fact, and whether those facts constitute adverse possession is for the court to decide as a matter of law. Anderson v. Hudak, 80 Wn. App. 398, 401-402, 907 P.2d 305

(1995). A question of fact is left to the trier of fact. Only when reasonable minds could reach but one conclusion are questions of fact to be determined as a matter of law. Ruffer v. St. Francis Cabrini Hosp., 56 Wn. App. 625, 628, 784 P.2d 1288, review denied, 114 Wn.2d 1023, 792 P.2d 535 (1990).

To obtain title to real property through adverse possession, there must be ten years of possession that is (1) exclusive; (2) actual and uninterrupted; (3) open and notorious; and (4) hostile. RCW 4.16.020; ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 757, 774 P.2d 6 (1989).

While there is no question that the plaintiff's horses have used the Property in Question for more than 10 years, this use fails to meet the requirements to establish an adverse claim.

**(1) First Element: Exclusivity.**

Exclusive dominion over land is the essence of adverse possession, and it can exist in **unused land** only if others have been excluded therefrom. Wood v. Nelson, 57 Wn.2d 539, 540, 358 P.2d 312 (1961).  
Emphasis added.

In this case, the Martin Parcel is improved (she lives on that parcel); however, the area over which Martin seeks to quiet title is simply

a grassy area with a tree and some shrubs, so the law as set forth in Wood applies.

There is no evidence that Martin tried to exclude the Skellets, or their predecessors in interest, from any portion of the property. In fact, the property was shared by Martin and her neighbors all throughout the years.

First, Martin has recognized and stated, on multiple occasions, that the Property in Question is owned by the Skellets (and, previously, the Searles), not by her. Chuck Searle knew the Property in Question was his, but had no problem when Martin approached him wanting to continue using the area for her horses. He allowed her horses to graze there, and all over his property – “[He] had no problem with [Martin’s] horses being on [his] property as long as they weren’t on the front porch at all.”

Second, dating back to when Martin first acquired her property in 1967, the Property in Question was shared by her horses and the horses of her neighbors and friends, the Wilkinsons. According to Kathy Mundell “[The Martin and Wilkinson] horses had always been pastured together.”

Third, the barn razing that Martin attempts to use as proof of her adverse claim was a group effort according to Mundell, with her mom and dad, as well as the Martins, assisting in tearing it down. Before that time,

the barn was used by both Martin and the Wilkinsons, not the Martins exclusively.

Finally, Kathy Mundell also testified her family used the Property in Question as a vehicle turn around, and an area to park their trailer.

So, not only did Martin never exclude anyone from the Property in Dispute, she shared her use with the neighbors and acknowledged her neighbors' superior title. Her use fails to meet the first adverse requirement – exclusivity.

**(2) Second Element: Actual and Uninterrupted.**

The only use of the Property in Question that Martin alleges was continuous for 10 years is her horses' grazing. She admits the barn was removed only after she received the Wilkinsons' permission.

The property in question is just a strip of grass with a tree and some shrubs. The area does not require any regular maintenance. The horses (and Martin's horses, only there with her neighbor's permission) kept the grass down.

More importantly, Martin's alleged adverse use was interrupted substantially in 1996, when Chuck Searle installed his new fencing. Thence that existed when Martin purchased her property in 1967, along

the southern border of the Property in Dispute, was the Wilkinsons' fencing, used for hay and horses. Searle moved that fencing a substantial distance into the area. It was not, and is not Martin's fence, most obviously because it existed before she bought her property. She also did not dispute Searle's right to remove it, and told the Skelletts that they owned it. She made no issue of the fact that Searle's removal and relocation of that fence substantially altered the square footage of the area Martin now seeks to adversely possess. He widened his driveway from 8 foot to 15 feet by moving the fence farther over toward the Martin Parcel. She also told Mr. Searle, who purchased the property in 1996, and the Skelletts, who purchased the property in 2000, that the property was not hers, but theirs. This all occurred as recently as 1996.

**(3) Third Element: Open and Notorious.**

In determining whether acts are sufficiently open and notorious to manifest to others a claim to land, the character of the land must be considered. Chaplin v. Sanders, 100 Wn.2d 853, 863, 676 P.2d 431 (1984) *citing* Krona v. Brett, 72 Wn.2d 535, 433 P.2d 858 (1967).

In this case, on the occasions when she discussed the property, Martin offered to essentially "buy" that land, in exchange for deeding

property along the Skelletts' eastern boundary. Martin made the same offer to the previous owners of the Skellet parcel. Martin also did not protest when previous owners moved their fencing onto the Property in Dispute.

The acknowledgment of the Skelletts' ownership, together with the acquiescence in the movement of the fence, were more than sufficient to create a genuine issue of material fact as to ownership of the property.

Moreover, prior to Searle and Skelletts owning the neighboring parcel, Martin and the Wilkinsons recognized no boundaries at all between their properties. The families shared one another's properties as if it was one large tract – just as it actually was prior to Martin's purchase. When the old barn needed to be torn down, the families did that together after Martin received the Wilkinsons' permission.

Before that, they shared use of the barn. Maintenance was not needed in the area on any regular basis, so there were no occasions where the Martins recognizably maintained the area more than the Wilkinsons (or the horses, for that matter). No actions of the Martins between 1967 and 1996 put the Wilkinsons on notice of an adverse claim.

Because there are genuine issues of material fact as to the ownership of the property, this court should reverse the summary judgment and remand for trial.

**(4) Fourth Element: Hostile.**

Whether a claimant's possession is sufficiently hostile will be determined on the basis of how she treats the property and, particularly, whether she treats it as her own as against the world for the statutory period. Chaplin v. Sanders, 100 Wn.2d 853, 858, 676 P.2d 431 (1984).

Permission to occupy the land, given by the true title owner to the claimant or his predecessors in interest, negates the element of hostility. Chaplin, at 861-62. Whether use is hostile or permissive is a question of fact. Miller v. Jarman, 2 Wn. App. 994, 997, 471 P.2d 704 (1970)); Peeples v. Port of Bellingham, 93 Wn.2d 766, 771, 613 P.2d 1128 (1980). Finally, as stated by the plaintiff in her motion for summary judgment, hostile possession does not require enmity or ill-will, but only that she has possessed the land as owner, *not as one who recognizes the true owner's rights*. Chaplin, 100 Wn.2d at 857.

To negate the element of hostility, a use can be either expressly or implied permissive. Granston v. Callahan, 52 Wn. App. 288, 294, 759

P.2d 462 (1988); Roediger v. Cullen, 26 Wn.2d 690, 175 P.2d 669 (1946).

In Granston, an adverse possession claim was based, in part, upon a period of ownership where two brothers had been neighbors. The court found that all uses made during this period failed to meet the element of hostility:

“The facts of the case before us demonstrate a clear, almost indisputable, case of permissive use. The brothers Granston worked together in building the driveways, walkways and other improvements that served both properties. Their affection for each other and completely open, cooperative, and trusting lifestyles were completely consistent with an implied permission by each to the other to use his property and the improvements freely.”

Granston, 52 Wn. App. At 295.

The Granston court found the inference of permissive use applicable to any situation in which it is reasonable to infer that the use was permitted by sufferance and acquiescence and that it was not even necessary that permission be requested. Granston, 52 Wn. App. At 295, citing to Cuillier v. Coffin, 57 Wash.2d 624, 626, 358 P.2d 958 (1961); Roediger v. Cullen, at 26 Wn.2d at 707, 175 P.2d 669; Crites v. Koch, 49 Wash. App. at 177.

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. Granston, 52 Wn. App. at 295, citing to Stoebeck, The Law of Adverse Possession in Washington, 35 Wash.L.Rev. 53, 75 (1960). Furthermore, a friendly relationship between parties is a circumstance more suggestive of permissive use than adverse use. Granston, 52 Wn. App. at 294, citing Miller v. Jarman, 2 Wash. App. 994, 997, 471 P.2d 704 (1970).

Here, Martin never made any claim to own the Property in Question until the Skelletts said they intended on removing their fence. After that, Martin filed this suit. All of her communications and actions with respect to the property prior to that time showed that she was using it with the permission of the true owner. Although Martin suggested to Debra Skellett that she “felt” she had some claim to the area because she had used it, in this same conversation with Debra Skellett, she made absolutely no claim of ownership. In all conversations with the Skelletts and their predecessors, (the Searles), Martin recognized and stated that the Skelletts (and Searles) owned it. Martin even offered to trade some of her property for the Property in Question.

The facts, when viewed in the light most favorable to the non-moving party, Skellett, show that Martin’s use of the property when the

Wilkinsons owned it was permissive: the Martins and the Wilkinsons were very close; they shared their properties like family; the Wilkinsons sold ½ of their tract to the Martins “on a handshake”; Kathy Mundell testified to personal knowledge of a *specific agreement* whereby the Martins could use any of the Wilkinson property for horse grazing; the Martins pastured their horses on the property even before they purchased a portion of the property; the families shared the area in dispute to pasture the horses; they also shared the barn that was there; according to Mundell, when these two families were neighbors, there were “no boundaries.”

Notably, to change a permissive use to an adverse, hostile use, the claimant must make a distinct and positive assertion of a hostile claim. Granston, 52 Wn.App. at 294. In this case, the opposite is true. Where it came to use of the Property in Question, Martin repeatedly sought permission of the true owners and recognized their superior title. Her use was permissive at its inception and continued to be, at least until the Skelletts purchased in 2000.

Finally, the recorded Lot Line Adjustment from 1994, signed by Martin and Grace Wilkinson’s attorney-in-fact (Kathy Mundell) made no adjustment to the east-west boundary between the parcels. The surveyed

line remained the same. This is more evidence that the legal boundaries were not intended to be changed, and that Martin simply used the area with her neighbor's permission.

Because there are genuine issues of material fact as to the adverse possession claim, the summary judgment should be reversed and the case remanded for trial.

***C. There Are Genuine Issues of Material Fact as to Boundary by Recognition and Acquiescence.***

There are genuine issues of material fact as to boundary by recognition and acquiescence (or estoppel). The requirements for a boundary by mutual recognition and acquiescence are:

- (1) A certain, well-defined line designated in some fashion on the ground;
- (2) Either:
  - (A) Express agreement; or
  - (B) Acts, occupancy, and improvements on both sides of the line manifesting a good faith mutual recognition (an agreement implied by law);
- (3) Ten years of such possession.

Lamm v. McTighe, 72 Wn.2d 587, 592-93, 434 P.2d 565 (1967).

The fencing at issue here was never a recognized boundary. From

1967 to 1996, when Martins and Wilkinsons were neighbors, there were no boundaries recognized between the owners at all. Acts and occupancy with respect to the property during this period was shared between the families and nothing in those actions indicates a good faith mutual recognition of the boundary. The fencing existing in 1967 was placed there by the *Wilkinsons* and was merely for hay and horses, not a boundary, because the Wilkinsons owned the entire tract at that time. Once Martin purchased a portion of the tract, the fencing remained, but the area in between that fence and Martin's driveway was shared.

In 1996, that fencing was substantially altered when Chuck Searle removed it, improved upon it, and reinstalled fencing closer to Martin's driveway. Martin never protested. Chuck Searle never sought her permission. In between that fence relocation and removal (1996 to present date), neither Searles nor Skelletts recognized it as the boundary. Searle knew the surveyed line was over near Martin's driveway, as did Skelletts. In fact, Martin recognized this fact, both in conversations with Chuck Searle, and in her discussions with the Skelletts.

The 1994 Lot Line Adjustment showed the true boundary to be the surveyed line, not the fenced line. Martin had an opportunity at that

junction to protest the surveyed line; yet, she did not. Later, in 1996 when Searle relocated the fence, Martin had another chance to protest. She did not. Martin did not recognize the fence as the true line; Martin knew and acknowledged her neighbors owned the property north of that fence and her horses grazed there with her neighbors' permission only.

According to Lamm, in order to establish a boundary by recognition and acquiescence, the parties must have intended, accepted, and acted upon the designated line (ie. the fence) as the true boundary, not simply a barrier. Lamm, 72 Wn.2d at 592.

In this case, the fencing was only a barrier for hay and horses to begin with, and that purpose never changed. If Martin's horses continued to graze in the area, fencing was needed to keep them off of the neighbor's driveway. No one, including Martin herself, treated it or recognized it to be the true boundary.

Because there are genuine issues of material fact as to the boundary by recognition and acquiescence possession claim, the summary judgment should be reversed and the case remanded for trial.

***D. There Are Genuine Issues of Fact as to Whether Martin Is Estopped, or Has Waived, Her Claims in this Case, and Also as to Whether the 10 Year Period Has Run.***

There are genuine issues of fact as to whether Martin is estopped, or has waived, her claims in this case, and also as to whether the 10 year period has run. Skellets have affirmatively alleged that Martin's use of the Property in Question was, at all relevant times, permissive, and there is sufficient evidence for trial on that issue alone. However, there are additional factual issues with respect to the defenses of estoppel and waiver, both of which are affirmatively alleged against Martin in this case.

The elements of equitable estoppel are (1) an admission, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act. Dombrosky v. Farmers Ins. Co. of Washington, 84 Wn. App. 245, 256, 928 P.2d 1127 (1996) citing McDaniels v. Carlson, 108 Wn.2d. 299, 308, 739 P.2d 254 (1987).

Waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. It may result from an express agreement or be inferred from

circumstances indicating an intent to waive. It is a voluntary act which implies a choice by the party to dispense with something of value or forego some advantage. The party must intend to relinquish such right, advantage, or benefit; and his actions must be inconsistent with any other intention than to waive them. Rhodes v. Gould, 19 Wn. App. 437, 441, 567 P.2d 914 (1978), citing to Bowman v. Webster, 44 Wn.2d 667, 269 P.2d 960, 961 (1954).

In this case, Martin conducted herself in such a way that her neighbors could never have known she was making an adverse claim (whether by adverse possession, boundary by acquiescence, or otherwise) to the Property in Question. In reliance on her actions and words, the Skelletts (and, upon information and belief, their predecessors) never took any action to eject her (or, more accurately, her horses) from the Property in Question.

One of the significant dates in this case is May 31, 1994, when Dolores Martin and Kathy Mundell (as attorney-in-fact for Grace Wilkinson) signed the Lot Line Adjustment that changed the eastern boundary of the Skellett parcel, but made no change to the east-west boundary between the parcels. That boundary remained as the surveyed

line. The parties' signature to this Lot Line Adjustment, recorded with the Pierce County Auditor, puts any interested party on notice what the parties' recognize those lines to be the true boundaries of the parcels. Before this Lot Line Adjustment, Martin's sporadic use of the Property in Question (razing a barn and horse grazing) was permissive, as is supported by both the relationship between the parties and also Martin's own Complaint, which alleges her neighbor agreed to her use (defendants' objections notwithstanding).

After the 1994 boundary adjustment, Martin's new neighbor, Chuck Searle, removed existing fencing and moved it closer to Martin's driveway. Martin never said a word. This is additional evidence of estoppel or waiver.

From 1996 to 2003 (Searle) and then in 2003 when Skelletts purchased their property, Martin recognized and acknowledged her neighbors' superior title, even offering to exchange real property in consideration for a deed to the Property in Question. The exchange of land was discussed with Searle, and Martin mentioned it again to the Skelletts.

An adverse period, if any, starts to run in this case after Wilkinson and Searle were no longer owners. During Wilkinsons' period of

ownership, Martin's use was permissive. After that time, Chuck Searle altered the boundary of the area in dispute and discussed Martin's continued use of that area – with his permission. He granted her continuing permission to graze her horses there, and all over his property (similar to the situation with Wilkinsons). In 2003, Skellets purchased the property and asserted ownership superior to Martin. Ten years of adverse use have not taken place. In fact, the fence existing now has only been there since 1996.

Because there were genuine issues of material fact as to the affirmative defense of estoppel, the summary judgment should be reversed.

***E. Errors Concerning Evidence***

While the errors concerning the evidence are not central to this appeal, the Court of Appeals should address these issues to avoid errors on remand. See RAP 2.4.

***F. Standard of Review: Evidence***

The admission or exclusion of evidence is within the discretion of the trial court and will not be disturbed absent an abuse of discretion.

Caruso v. Local Union No. 690 of Internat'l Bhd. of Teamsters.

Chauffeurs, Warehousemen, and Helpers of America, 107 Wn.2d 524, 534, 730 P.2d 1299 (1987).

***G. The Trial Court Abused its Discretion in Considering Martin's Statements Because They Are Precluded By The Dead Man's Statute and the Hearsay Rule.***

The trial court abused its discretion in considering Martin's statements because they are precluded by the Dead Man's Statute and the Hearsay Rule. In the plaintiff's Amended Complaint at paragraph 5.4, it is alleged that Grace Wilkinson, now deceased, agreed that Martin could destroy a barn located on the Property in Question "and use the land as [Martin's] own." CP 25. At paragraphs 5.7 and 5.8 of the Amended Complaint, it is alleged that the Skelletts' predecessor's in interest, the Searles, believed and recognized that fencing around the Property in Question marked the boundary between the Martin and Skellett properties. CP 26. These allegations are reiterated at Section V of the Amended Complaint, "Causes of Action." CP 27.

Under RCW 5.60.030, the Dead Man's Statute, testimony may be excluded as follows:

" . . . [ ] HOWEVER, That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, or as the guardian or

limited guardian of the estate or person of any incompetent or disabled person, or of any minor under the age of fourteen years, then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent or disabled person, or by any such minor under the age of fourteen years . . .”

In this case, Martin seeks to derive title through Grace Wilkinson,

now deceased. In similar cases, the court has excluded testimony by the claimant (Martin) as to transactions had or statements made by the deceased (Wilkinson) that are offered to support an adverse claim.

For instance, in a case requesting imposition of a resulting trust or, alternatively, adverse possession, the court excluded testimony from the claimants that they had conversed with the deceased property owner about purchasing the property and made an agreement to purchase. The testimony was within the scope of the rule because the statements related to a transaction with a deceased person. See Diel v. Beekman, 7 Wn. App. 139, 499 P.2d 37 (1972), overruled on other grounds by Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984).

In this case, Martin’s statements about Wilkinson’s alleged agreement that Martin could use the property “as her own,” are inadmissible hearsay and violate the Dead Man’s Statute. The allegations are hearsay because they are out of court statements offered to prove the

truth of the matter asserted – that the Property in Question was Martin’s by virtue of her neighbor (Wilkinson’s) agreement that she could use it as her own. ER 801, 802. The allegations violate the Dead Man’s Statute because they are statements allegedly made by a deceased person (who is unavailable to refute them) that are offered to support Martin’s adverse claim. The trial court abused its discretion in considering the evidence at the summary judgment hearing and the evidence should be excluded on remand.

***H. The Trial Court Abused its Discretion in Considering Evidence Precluded by the Hearsay Rule.***

The trial court abused its discretion in considering evidence precluded by the Hearsay Rule. The declarations offered to support the summary judgment motion also contain testimony that violates the Dead Man’s Statute and are hearsay.

Hearsay is an out of court statement used to prove the truth of the matter asserted. ER 801. Hearsay is inadmissible absent an exception that would allow admission. ER 802.

Martin’s declaration states that the fencing was the recognized boundary line separating the Martin and Skellett parcels, which is basically a reiteration of the allegations made in her Amended Complaint

concerning Wilkinson's statement that Martin could use the Property in Question as "her own." The testimony is hearsay. The trial court abused its discretion in considering the evidence in the summary judgment hearing and the evidence should be excluded on remand.

In the Declaration of Ronald Larson, a neighboring property owner, he states that, in 1973, the Wilkinsons (now deceased) "relinquished control" of the Property in Question to Martin. He also states that the fencing served "as the boundary line for the parties (i.e. the Martin's and the Wilkinson's)." CR 56 requires that affidavits be based on personal knowledge. There is nothing in Larson's declaration to suggest he has personal knowledge to support these summary conclusions. The trial court abused its discretion in considering the evidence at the summary judgment hearing and the evidence should be excluded on remand.

Similarly, neighbor Betty Hasting's declaration states that the Wilkinsons' "relinquished control" of a portion of the Skellett Parcel to Dolores Martin and, also, that the fencing in question "served as the boundary line for the parties." Her testimony is identical to Ronald Larson's and should have been excluded for the same reasons. The trial court abused its discretion in considering the evidence at the summary

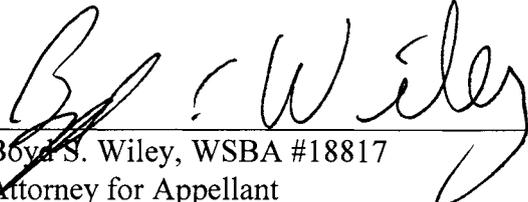
judgment hearing and the evidence should be excluded on remand.

**IV. CONCLUSION**

Because there are genuine issues of material fact concerning the ownership of the property, this court should reverse and remand for trial.

This court should also order the inadmissible evidence be excluded on remand.

**RESPECTFULLY SUBMITTED** this 1 day of June, 2007.

  
Boyd S. Wiley, WSBA #18817  
Attorney for Appellant

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

FILED  
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STATE OF WASHINGTON  
BY gjm  
DEPUTY

Dolores R. Martin, a single woman,

Respondent,

and

Michael F. Skellett and Debra P. Skellett,  
individually and the marital community,

Appellant.

No. 36146-9-II

**AFFIDAVIT OF  
MAILING**

MICHELLE A. LEA, being first duly sworn on oath, deposes and  
says:

That on the 11<sup>th</sup> day of June, 2007, she placed a true copy of the  
APPELLANT'S OPENING BRIEF on file in the above-entitled matter, in  
an envelope addressed to below stated as follows:

Jacqueline McMahan  
Attorney at Law  
102 Bridge Street South  
Post Office Box 1569  
Orting, WA 98360  
Attorneys for Respondent

That she placed and affixed proper postage to the said envelope,  
sealed the same, and placed it in a receptacle maintained by the United  
States Post Office for the deposit of letters for mailing in the City of

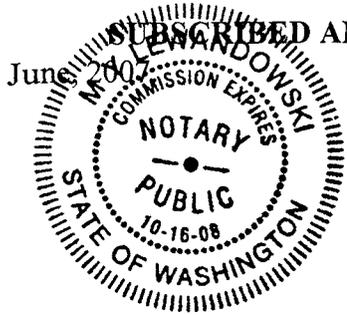
Affidavit of Mailing

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Puyallup, County of Pierce, State of Washington.

Michelle Lea  
MICHELLE A. LEA

SUBSCRIBED AND SWORN to before me this 11<sup>th</sup> day of  
June 2007



M. U. Newandowski  
Printed Name M. U. Newandowski  
NOTARY PUBLIC in and for the State of  
Washington residing at Puyallup  
My commission expires: 10/16/08

Affidavit of Mailing

I:\DATA\BSW\Appeals\skellet\AAffidavit of Mailing<sup>2</sup>Court of Appeals.wpd