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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

MICHAEL L. BLANKENSHIP and
YVONNE M. BLANKENSHIP,
husband and wife,

Respondents,

V.

JERRY L. BRAMHALL, a married man,
as his sole and separate property,

Appellant.

NO. 322734-III

APPELLANT'S REPLY BRIEF

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II. TABLE OF AUTHORITIES

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I. Introduction

In their Respondent's Brief, the Blankenships invite this Court to weigh the evidence presented at summary judgment in their favor. This is apparently what the trial court did. But this is not the standard on summary judgment. To obtain summary judgment, the Blankenships were required to prove that a trial would be a useless exercise because there are no disputed facts and they were entitled to judgment as matter of law. The Blankenships did not even come close to meeting this standard. They failed to produce admissible evidence as to key elements of their claims; they failed to demonstrate that there was no disputed issue of fact as to their alleged use of Bramhall's land; they failed to demonstrate that there was no disputed issue fact surrounding the necessity of the easement they are claiming; and they failed to rebut the presumption that their alleged use of Mr. Bramhall's land was permissive. Finally, the Blankenships failed to cite any authority which would suggest that summary judgment was appropriate on facts similar to this case. For all these reasons, Mr. Bramhall again requests that the Court reverse the summary judgment order and remand this matter for trial.

III. LAW AND ARGUMENT IN REPLY

A. The trial court impermissibly concluded as a matter of law that Blankenships had demonstrated the elements of an implied easement.

As Mr. Bramhall pointed out to the trial court and in his opening brief before this Court, in order to obtain an easement by implication, a party must show that the purported easement was used during the unity of title for the benefit of both parcels and that continuing access to the easement is necessary to enjoy one or both parcels. *See Adams v. Cullen*, 44 Wn.2d 502, 505, 268 P.2d 451 (1954). The Blankenship presented no admissible evidence regarding the use of the road during the unity of title, that is before 1974 when title to the two parcels was severed. Their complaint and motion for summary judgment contained conclusory statements with no demonstration of personal knowledge as to what the road was used for and whether using it as an easement is necessary now. They made no response to this argument in the Respondent's brief. For these reasons, the Blankenships claim for summary judgment as to an implied easement should have failed.

B. The trial court impermissibly concluded as a matter of law that there were no issues of fact regarding the Blankenships prescriptive easement claim.

To obtain summary judgment as to their prescriptive easement claim, the Blankenships were required to show ten years of adverse use with knowledge of the use by Mr. Bramhall. The evidence taken in the light most favorable to Mr. Bramhall, which is the legal standard at summary judgment, leads to the reasonable inference that no one has ever used the road at issue in this since at least the 1980s. Even if there had been use, any such use is presumed permissive, a presumption which the Blankenships failed to rebut. *See Gamboa v. Clark*, ___ Wn. App. ___, 321 P.3d 1236 (No. 30826-0, Div. III, March 14, 2014). The Blankenships presented no admissible evidence in their initial summary judgment filing regarding the use of the road prior to 2007. Both Mr. Bramhall and Gail Herbst, who have live on and near the property containing the road since the 1980s, submitted declarations indicating that they had never seen anyone use the road. While Eunice Poirier, in the Blankenships summary judgment reply materials, did allege that she had used the road in 1990s, Mr. Bramhall's and Ms. Herbst's declarations contradict her statement. The trial court was required to resolve this factual dispute in favor of Mr. Bramhall. The logical inference from the Bramhall and Herbst declarations is that no one used the road during their time on the property.

In their reply materials on summary judgment and in their brief before this Court, the Blankenships argue that Mr. Bramhall and Ms. Herbst did not live close enough to the road to see the Blankenships and others' activities. *See* CP at 113 (ln 6-11) and Respondent's Br. at 12. This argument demonstrates why summary judgment was inappropriately granted. In essence, the Blankenships asked the court to believe their assertions over those of Mr. Bramhall and Ms. Herbst. If one has to make an argument about why a material fact should or should not be believed, summary judgment is inappropriate. In addition, if one were to assume the Blankenships were correct that that no one saw their activities, then Mr. Bramhall never received the required notice of the Blankenship's adverse use of the property. Such notice is a required element of obtaining rights by prescription. *See 810 Properties v. Jump*, 141 Wn. App. 688, 700, 170 P.3d 1209 (2007).

The inferences taken in the light most favorable to Mr. Bramhall also lead to the logical inference that there is no necessity for creating an easement across Mr. Bramhall's property. In their Complaint and in their Motion for Summary Judgment, the Blankenships presented conclusory statements regarding reasonable access to their property. In their reply materials on summary judgment, the Blankenships did submit additional information regarding alleged necessity. However, Mr. Bramhall

objected to these materials as untimely. RP at 3-4. It was the Blankenship's burden to prove, in their initial summary judgment materials, that there was no disputed issue of material of fact regarding necessity. They failed to do this, so their summary judgment claim as to easement by implication should have failed for lack of proof as to necessity.

C. The Blankenships failed to distinguish the cases cited by Mr. Bramhall regarding the appropriateness of summary judgment in prescriptive and implied easement cases.

As Mr. Bramhall pointed out in his opening brief, issues of easement by implication and easement by prescription are fact intensive and thus, are rarely, if ever, amenable to summary judgment. Appellant's Br. at 6, 8. The Blankenships failed to cite a single case where an appellate court has affirmed a grant of summary judgment on facts similar to this case.

The Blankenships cite *Beebe v. Swerda*, 58 Wn. App. 375, 384, 793 P.2d 442 (1990) for the boilerplate elements of prescriptive easement. Respondent's Br. at 13. While that case was resolved on summary judgment, the judgment was a ruling against the person asserting a prescriptive right to extinguish an existing easement. *Id.*, 58 Wn. App. at 384. The Court in *Beebe* held that the Swerda's alleged prescriptive use was "privileged rather than adverse." *Id.*

The Blankenships cite *Chaplin v. Sanders*, 100 Wn. 2d 853, 861, 676 P.2d 431 (1984) for the proposition that the subjective intent of the party asserting a claim to the land is not relevant to a claim of hostility. Respondent Br. at 13. That is true, but that is not the central issue in this case; notice to Mr. Bramhall of the alleged hostile acts is the issue here. The Blankenships misconstrue *Chaplin* to imply that any use of land that a true owner would make is sufficient to provide notice. This is not what *Chaplin* held. In fact, the *Chaplin* court held “The traditional presumptions still apply to the extent that they are not inconsistent with this ruling.” *Chaplin* 100 Wn. 2d at 862. And the Court held that some evidence of notice is required to prove adverse possession; it held that constructive notice may be sufficient in some circumstances. *See Id.*, 100 Wn.2d at 863-864 (emphasis added). In *Chaplin*, there was a sharp contrast between undeveloped land and developed land that was in constant use which put the landowner on constructive notice of the adverse use. *Id.* Finally, *Chaplin* was another case where the trial court made factual findings, presumably following a trial. *See Id.* All of the other cases which the Blankenships cite for principles related to easement by implication or easement by prescription were also decided following a trial.

In the present case, there was no evidence of notice to Mr. Bramhall, constructive or otherwise, that the Blankenships or others were asserting a right to use Mr. Bramhall's land prior to 2013. At trial, the Blankenships would be free to provide evidence to satisfy the required element of notice. Their allegation that a road drawing on a plat map means that a Mr. Bramhall was on notice of a claim of right to use his land is simply not reasonable. *See* Respondent's Br. at 15. Even if it were a reasonable inference, for the purposes of summary judgment, Mr. Bramhall is entitled to the equally reasonable inference that the drawing was simply marking a landmark, such as Nancy Creek, which was also marked on the same plat. *See* CP at 36.

IV. CONCLUSION

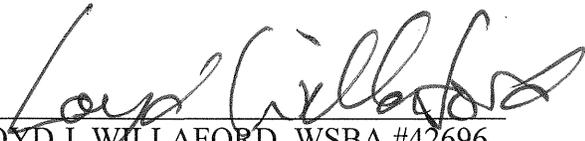
The trial court in this matter erroneously concluded that the Blankenships had met their burden of showing that they were entitled to judgment as a matter of law based upon undisputed facts. There is a real dispute in this case about whether the Blankenships or their predecessors in interest ever used Mr. Bramhall's property; a real dispute about whether there was notice of any alleged adverse use; a real dispute about whether the Blankenships rebutted the presumption of permission, and a real dispute about whether access to Mr. Bramhall's property is reasonably

necessary to enjoy the Blankenship's property. Mr. Bramhall is entitled to a trial on these issues.

The trial court's ruling on summary judgment deprived Mr. Bramhall of his right to a trial to protect his property interests. At trial, the court will be able to assess the credibility of witnesses and the witnesses will be subject to cross-examination. A trial is the proper forum to decide this fact-intensive dispute. For these reasons, the other reasons given above, and the reasons given in his opening brief, Mr. Bramhall requests this Court reverse the summary judgment ruling and remand this matter for trial.

Submitted this 16^h day of July, 2014.

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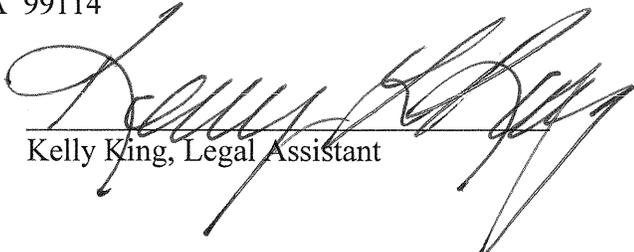
CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is a person of such age and discretion to be competent to serve papers.

That on the 17th day of July, 2014, I caused to be served a copy of the Appellant's Reply Brief via hand delivery and/or email to the persons hereinafter named:

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