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Court of Appeals
Division III
State of Washington

No. 322734-III

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

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

Respondents

vs.

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

Appellant.

RESPONDENTS' BRIEF

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ASSIGNMENTS OF ERROR

Respondents Blankenship do not assign error to the Trial Court decision granting their Motion for Summary Judgment for implied and prescriptive easements and quieting title in the Private Road across the Bramhall property in their favor.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1) Where Respondents Blankenship provided undisputed evidence that 1) the property of the parties herein was originally held by a common owner; 2) at the time of severance an existing road was in place across both severed parcels as well as delineated on the Plat subdividing the property; and 3) the common owner and the Blankenships' predecessors continuously used the road as the sole access to what is now the Blankenships' land, did the Trial Court properly rule that Blankenships had an easement by implied reservation?
2) Where Respondents Blankenship provided undisputed evidence that 1) the property of the parties herein was originally held by a common owner; 2) at the time of severance an existing road was in place across both parcels; 3) the predecessor delineated the existing road as a Private Road to

access predecessor's adjacent land on the Plat subdividing the property; and 4) the Blankenships and their predecessors openly, notoriously, and continuously used the road as the sole access to what is now the Blankenships' land, did the Trial Court properly rule that Blankenships had an easement by prescription?

STATEMENT OF THE CASE

This case is an easement dispute between Respondents, Michael L. Blankenship and Yvonne M. Blankenship, husband and wife, and Appellant Jerry L. Bramhall, who trace their titles to a common grantor, J.C. Carson and Inger K. Carson.

J.C. Carson and Inger Carson purchased the SW ¼ of the NW ¼ of Section 33 in 1968. In 1971, the Carsons platted a portion of their property and dedicated the Nancy Creek Addition subject to restrictions, exceptions and easements contained on the Plat of Nancy Creek Addition (CP 69, Ex. F). The Dedication on the face of the Plat states:

> Know all men by these presents that J.C. Carson, the undersigned owner in fee simple of the land hereby platted, hereby declare this Plat and dedicate to the use of the Public forever, easements or whatever Public property there is shown on the Plat and the use thereof for any and all public purposes.

In addition to the Dedication to the Public of the easements shown on the face of the Plat of Nancy Creek Addition, a Certificate of Dedication, Certificate of Ratification, and Certificate as to Use was recorded March 19, 1971, as follows:

> As an owner in fee of such land, I hereby declare that I dedicate to the use of the Public forever, easements for whatever public property there is shown on the Plat and the use thereof for any and all public purposes....

(CP 69, Ex.G.)

The location of the easement road (Private Road) in dispute is clearly shown on the face of Plat of Nancy Creek Addition. Labeled a Private Road in the unplatted portion of the plat map, the road extends 30' to 50' feet into the Nancy Creek Addition and connects with Nancy Creek Road within the subdivision (CP 69, Ex. F) and on the Bramhall land.

Carsons first quitclaimed the Blankenship parcel to the Poiriers, in December 1989. Eunice Poirier is Carson's daughter; that transfer was a gift (CP 69, Ex. B; CP 120). Poiriers in turn quitclaimed the same parcel by way of gift to Blankenships in 2007. Yvonne Blankenship is Eunice Poirier's sister and the Carsons' daughter (CP 69, Ex. A; CP 112-113).

By a series of conveyances, Bramhall acquired his property by Statutory Warranty Deed in July, 1985, and that deed was subject to the plat dedication and restrictions noted above relating to the Nancy Creek Addition (CP 69, Ex. C).

On January 5, 2013 Blankenships entered into a Real Estate Purchase and Sale Agreement to sell their property (CP at 7). At that time, a question was raised as to validity of easement access rights appurtenant to the Blankenships' property, across the Private Road traversing part of Bramhall's property, because the common fee owner (Carson) of the Blankenship and Bramhall parcels did not specifically reserve an easement

over the road when they originally sold the Bramhall property (CP 69 at 80-81, Ex F).

Blankenships asked Bramhall to execute an easement for ingress, egress and utilities over the Private Road to clear any question as to the validity of the Dedication on the face of Plat of Nancy Creek. Bramhall declined to execute the easement and threatened to block the easement road that is the only reasonable access to the Blankenships' land.

Blankenships instituted suit to Quiet Title in the Private Road crossing a portion of Bramhall's property, asserting an easement by prescription as well as an implied easement by necessity (CP 3). Blankenships moved for Summary Judgment on December 23, 2013 (CP at 47-60). On January 24, 2014, the Trial Court heard oral argument on Blankenships' motion as well as motions by Bramhall to strike inadmissible portions of Blankenships' Complaint and information filed by Blankenships in reply to Bramhall's opposition to Summary Judgment (RP 3-4). The Trial Court granted Bramhall's motion to strike in part as to legal conclusions. It also granted Blankenships' Motion for Summary Judgment (CP at126-128) and entered a Judgment quieting title and a Judgment for statutory attorney fees against Bramhall (CP 134-139). Bramhall filed his Notice of Appeal (CP 129-133).

ARGUMENT

A. Summary Judgment Standard

Summary Judgment shall be rendered if the pleadings and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. CR 56(c). In considering a Motion for Summary Judgment, the Court must view the facts in a light most favorable to the non-moving party. *Wilson v. Steinbach,* 98 Wn.2d. 434, 437, 656 P.2d 1030 (1982). "Material fact" has been defined as "... one upon which the outcome of litigation depends, in whole or in part." *Hash v. Children's Orthopedic Hospital and Medical Center,* 110 Wn. 2d. 912, 915, 757 P.2d 507 (1988). Summary Judgment should be granted when it is shown that a trial is unnecessary in that the moving party is entitled to a Judgment as a matter of law. *Balise v. Underwood,* 62 Wn.2d. 195, 199, 381 P.2d 966 (1963). The moving party bears the initial burden of showing the absence of an issue of fact. *Young v. Key Pharmaceuticals, Inc.* , 112 Wn.2d 216, 225, 770 P.2d 182 (1989). After the moving party has met its initial burden of showing that there is no issue of material fact, the non-moving party

> ...may not rest upon the mere allegations or denials of his pleading, but his response, by Affidavits or

> otherwise provided in this rule, must set forth *specific facts* showing that there is a genuine issue for trial. If he does not so respond, Summary Judgment, if appropriate, shall be entered against him.

CR56(e); Grimwood v. University of Puget Sound, Inc., 110 Wn.2d. 355, 359, 753 P.2d 517 (1988) (italics added).

B. Evidence Submitted By The Parties

Evidence submitted by Blankenships included:

1. Eunice Poirier, predecessor in title to the Blankenships, by declaration stated that since 1989, when she was gifted the property from her parents, she and her husband used the road several times each year when they visited the property for inspection, maintenance and recreation. They continued that use for eighteen (18) years, until they gifted the [Blankenship property] (and additional property) to her sister and brother-in-law, Yvonne M. and Michael L. Blankenship, in 2007 (CP 120).
2. By declaration and based on personal knowledge, Blankenships stated that during most of the years that their predecessors in interest owned the property (J.C. Carson and Inger Carson from 1968 to 1989, and Eunice Poirier and Robert Poirier, from 1989 to 2007), Blankenships not only used the easement road themselves, but witnessed their

predecessors' use of the road. They also stated they and their family members discussed use of the easement road when talking about their farming activities on the adjoining properties. The family has farmed on this and adjacent real property since prior to J.C. Carson and Inger Carson purchasing the SW ¼ of the NW ¼ of Section 33 in 1968 (CP 112-13).

3. In their declaration, Blankenships stated unequivocally that the Private Road was the only road to and from the subject properties at the time of severance of title (CP 112-119). The Private Road goes nowhere else, except to Blankenship's adjacent property and would serve no purpose whatsoever except to provide access to their land (CP 113).
4. Likewise, Realtor Ronald Snyder submitted a declaration stating he has used the Private Road numerous times since 2008 to access the Blankenship land, and that the Private road is the only existing access to the property (CP 123-125).
5. Both Blankenships and Snyder, in their declarations, stated that it would be cost prohibitive to build an alternate road through adjacent Blankenship property to access the lot Blankenships are selling because it would require building a new bridge or installing a culvert to cross Nancy Creek (CP 123-125) or constructing a road

several miles in length and installing a bridge or culvert over Katy Creek (CP at 113), which would be cost prohibitive.

6. Blankenships submitted the 1971 Nancy Creek Addition Plat and Dedication, clearly showing the existence of the Private Road crossing Bramhall's property (CP 69, Exs. F & G).
7. Blankenships submitted Bramhall's deed, showing it was subject to the Nancy Creek Addition restrictions, exceptions and easements contained on that Plat (CP 60, Ex. C).
8. Blankenships submitted a photograph of the Private Road, showing it is not overgrown or obstructed (Blankenship Declaration, CP 112, Ex. B).
9. Blankenships submitted an aerial photograph showing that the neighbor Herbst's view of the Private Road is obstructed by trees (Blankenship Declaration, CP 112, Ex. A).
10. Blankenships, in their complaint, asserted that they and their predecessors in interest have used the Private Road as their own, asking permission of no one. Further, that their and their predecessors' use of the roadway has been open, notorious, continuous and uninterrupted for a period of more than forty (40) years under a claim of right based upon the dedication on March 19, 1971 and by necessity.

Evidence submitted by Bramhall included:

1. General denials in his Answer. CP 41-44.
2. A Declaration by Bramhall in which he stated he has owned his property since 1989 and that he has never seen anyone use the Private Road at issue. He also stated that Blankenships have alternate access to their adjacent property. (Notably, he did not dispute the physical existence of the Private Road nor did he identify the alternate access.)
3. A Declaration by a neighbor of Bramhall, Gail Herbst, in which she stated she can see the road at issue in this case and that she has never seen anyone use the road to access the Blankenship's adjacent property since moving on her land in 1980.

C. The Trial Court Properly Granted Respondent Blankenships' Motion For Summary Judgment Quieting Title In Their Favor By Implied Easement.

The elements necessary to make a claim of easement implied from prior use are: (1) during unity of title, an owner has made use of one (1) part of a parcel of land for the benefit of another part of the parcel in a way that would be an easement if the land were in separate hands, (2) there were subsequent severance of unity of title, and (3) the continued use of the quasi-easement must constitute a *reasonable* necessity for the

enjoyment of the dominant property. *Rogers v. Cation,* 9 Wn.2d 369, 115 P.2d 702 (1941); *Roe v. Walsh,* 76 Wash. 148, 135 P. 1031, *reh'g denied,* 76 Wash. 148 (1913); *Bushy v. Weldon,* 30 Wn.2d 266, 191 P.2d 302 (1948).

The creation of such an implied easement does not require absolute necessity, but only reasonable necessity. *Evich v. Kovacevich*, 1949, 33 Wash.2d 151, 157, 204 P.2d 839 (1949). "Reasonable necessity" is that degree of necessity that makes the easement essential to the convenience of comfortable enjoyment of quasi-dominant property as it existed when the property transfer occurred. *Schumacher v. Brand,* 72 Wash. 543, 130 P. 1145 (1913); *Bailey v. Hennessey,* 112 Wash. 45, 191 P. 863 (1920). With respect to the second element of implied easement, prior use, the prior use must be by the owner of the property during the unity of title, and must be apparent and continuous. The *Rogers, Roe, Bushy, Schumacher,* and *Bailey* cases all so hold. *See also*, *Adams v. Cullen,* 44 Wn.2d 502, 68 P.2d 451 (1954) and *Ashton v. Buell,* 149 Wash. 494, 271 P. 591 (1928).

This is a textbook case where, during the unity of title, an apparently permanent and obvious servitude was imposed on one part of an estate in favor of another, which, at the time of the severance, was in use, and was reasonably necessary for the fair enjoyment of the other.

Upon a severance of such ownership, whether by voluntary alienation or by judicial proceedings, there arises by implication of law a grant or reservation of the right to continue such use. The law implies that with the grant of the one, an easement is also granted or reserved, as the case may be, in the other, subjecting it to the burden of all such visible uses and incidents as are reasonably necessary to the enjoyment of the dominant estate.

Of particular significance is the fact the 1971 Plat included an illustration of the Private Road on the map and that Bramhall had record notice of the existence of the private road. The physical existence of the Private Road was not denied by either Bramhall or Herbst; they simply stated they never saw anyone use it. As shown by the aerial photograph, trees obstruct the views from Herbst's home and the Bramhall residence.

As there is no issue of material fact regarding the intent of the Carsons, the existence of the Private Road at severance and the continued use, the Trial Court properly awarded Respondents Blankenship summary judgment creating an implied easement over the Private Road to their property.

D. The Trial Court Properly Granted Respondent Blankenships' Motion For Summary Judgment Quieting Title In Their Favor By Prescriptive Easement.

To establish prescriptive rights by adverse possession, the claimant must show use which was open, notorious, continuous, uninterrupted, and adverse to the owner for the statutory period. *Beebe v. Swerda*, 58 Wn. App. 375, 793 P.2d 442, *review denied*, 115 Wn.2d 1025 (1990) (*citing Mood v. Banchero*, 67 Wn.2d 835, 841, 410 P.2d 776 (1966)). It is the objective, observable acts of the claimant, rather than subjective intent, that determines the hostility or adversity element, and open and notorious use need only be the character that a true owner would assert in view of the property's nature and location. *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984).

Once the ten-year limitations period is passed, no further action is required, and the adverse possessor's title can only be divested by such acts as are required to divest a title acquired by deed. *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 376 P.2d 528 (1962); *Mugaas v. Smith*, 33 Wn. 2d 429, 206 P.2d 332 (1949).

When the Carsons recorded their 1971 Plat for the Nancy Creek Addition showing the existence of the Private Road over a portion of Lot 8 to their remaining adjacent land, the Carsons established, openly and notoriously, their intent to claim the Private Road as access to the land.

They had used this road since 1968. The declaration of Eunice Poirier, Carson's successor, shows that she and her husband used that same road continuously for 18 years beginning in 1989 until the adjacent land was transferred to the Blankenships in 2007. Blankenships and their agents and invitees have continued to use the road to the present date.

Bramhall asserts that Blankenships have not sustained their burden of proof that the initial use of the road was not permissive. The undisputed facts indicate otherwise. Although the moving party bears the initial burden of showing the absence of an issue of material fact, once this initial showing is met, the burden shifts to the non-moving party, who must set forth specific, admissible facts showing that there is a genuine issue of material fact for trial. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225-226 (1989). The moving party can satisfy its initial burden in either of two ways: (1) it can set forth its version of the facts, and allege there is no genuine issue as to those facts; or (2) it can simply point out to the court that no evidence exists to support the non-moving party's case. *Howell v. Blood Bank*, 117 Wn.2d 619, 624 (1991); *Guile v. Ballard Community Hospital*, 70 Wn.App. 18, 21 (1993).

As the foregoing indicates, there are no material facts in dispute and there is no evidence to support Bramhall's contention that the use of the roadway was permissive. At the time the road was first used, there

was unity of title. Permission was not needed. At the time of severance, the road was specifically delineated on the plat as a Private Road providing access to the adjacent land. It is reasonable to infer that the use of the road was claimed as a matter of right; otherwise, there would have been no need to illustrate the road on the plat map. The road was in fact used open, notoriously and continuously for more than 40 years by the Carsons, Poiriers and Blankenships. Title ripened by adverse possession years far more than ten years ago and there has never been any ouster or threat of ouster until this suit.

The Trial Court properly ruled that Blankenships held a prescriptive easement in the Private Road across Bramhall's land.

E. Respondents Are Substantially Prevailing Parties and therefore entitled to fees and costs on on Appeal.

Blankenships were awarded statutory attorney fees pursuant to RCW 4.84.080(1) by the Trial Court. As recently noted by this Court in *Guillen v. Contreras*, 147 Wn.App. 326, 333, 195 P.3d 90 (2008), *reversed on other grounds, Guillen v. Contreras*,169 Wn.2d 769, 238 P.3d 1168 (2010)) the party that receives judgment is the prevailing party (citing *Blair v. Wash. State Univ.*, 108 Wash.2d 558, 571, 740 P.2d 1379 (1987)). RAP 14.2 allows fees and costs to the substantially prevailing

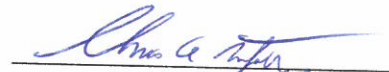
party. If this Court affirms the decision below, Blankenships are the substantially prevailing party and are entitled to fees, costs and expenses on appeal. RAP 14.2 and RAP 18.1.

CONCLUSION

In view of the foregoing, Respondents respectfully request that the decision of the Trial Court quieting title in the favor of the Private Road by implied easement and/or prescriptive easement be affirmed. Respondents also respectfully request their attorney fees and costs on appeal pursuant to RAP 14.2 and 18.1.

Dated this 17th day of June, 2014

Respectfully submitted,



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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 June, 2014, I caused to be served a copy of the Respondents' Brief via hand delivery to the person hereinafter named:

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