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No. 691741-I

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

ANNE WHYTE,
a married person on behalf of her marital community,

Appellant/Plaintiff,

v.

CHRISTOPHER JACK and PETRA JENNINGS,
and their respective marital community,

Respondents/Defendants.

APPELLANT ANNE WHYTE'S REPLY BRIEF

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I. INTRODUCTION

Christopher Jack (“Jack”) does not dispute that he erected a concrete barrier (the “Barrier”) which reduced the width of Anne Whyte’s (“Whyte”) sole access to her home by 68 percent. Instead, he argues for the first time on appeal that “undisputed” facts regarding June Skidmore’s use of the driveway lead to an inference of permissive use. But Jack is precluded from making this argument now because he did not make the argument below. Specifically, Jack failed to cite any facts whatsoever in support of his motion for summary judgment, instead mistakenly arguing that a presumption of permission in developed lands precluded Whyte’s claim for prescriptive easement altogether.

Regarding Whyte’s claim for adverse possession, Jack’s motion for summary judgment was based solely on attempts to assassinate Whyte’s character, ignoring facts regarding hostile use. Namely, Jack made much ado about Whyte’s dispute with Jack’s predecessor, Moore, which began 20 years after Whyte’s predecessor established adverse possession, and even if relevant, goes only to Whyte’s credibility (and to the credibility of Moore), factors that should have alone prevented summary judgment. In addition, Jack ignored entirely the fact that

Whyte's predecessor built a large rockery in the 1970's that precluded the area from being used as a roadway. Indeed, the rockery was so substantial that Jack required an excavation company to move the large, heavy rocks.¹

Although Whyte provided opposing affidavits, memoranda of law and other documentation that established genuine issues of material fact based on use by Whyte's predecessor, June Skidmore, the trial court awarded summary judgment to Jack, dismissing Whyte's claims for prescriptive easement and adverse possession. Because the trial court disregarded disputed facts that support Whyte's claims, summary judgment should be reversed.

II. REPLY

A. **Whether or not Jack now Claims They are Undisputed, Whyte Raised Genuine Issues of Material Fact That Should Have Precluded Summary Judgment on the Prescriptive Easement Claim**

The trial court erred in dismissing Whyte's prescriptive easement claim because Whyte introduced genuine issues of material fact. On summary judgment, all facts, and reasonable inferences therefrom, must

¹ Jack replaced the disassembled rockery with loose gravel, which increased Whyte's access to nine feet, but the width and angle remained insufficient for larger cars and trucks, leaving a width that is approximately half of what Whyte and her predecessor had used previously. (CP 3, 157, 159, 161 (9-Foot Teardrop in green, 13-foot prescriptive easement area in yellow), 180, 181, 194, 244, 246 (9-Foot Teardrop in green, 13-foot prescriptive easement area in yellow).)

be viewed most favorably to the party resisting the motion. Chelan County Deputy Sheriffs' Ass'n v. Chelan County, 109 Wn.2d 282, 294, 745 P.2d 1 (1987). Even if the facts are undisputed, if reasonable minds could draw different conclusions, summary judgment is improper. Id. In quiet title actions, whether use is adverse or permissive is a question of fact. Drake v. Smersh, 122 Wn. App. 147, 152, 89 P.3d 726 (2004).

Jack moved to dismiss Whyte's prescriptive easement based on an erroneous belief that under Washington law, a presumption of permission exists that calls for dismissal. (CP 26-28.) Indeed, the only facts Jack offered in support of summary judgment were letters and statements from Whyte pertaining almost entirely to the irrelevant, strained relationship between Whyte and Jack's predecessor, Moore, which began 20 years after Whyte's predecessor had established adverse possession. (CP 27, 38-67, 88-94, 123-27.) If anything, the fact that Whyte had a contentious relationship with her neighbors weighs against a finding of permissive use.

In response, and in addition to evidence that the original parties constructed the Driveway to be shared by owners of the Whyte Parcel and the Jack Parcel, Whyte provided excerpts from Whyte's predecessor, June Skidmore, describing her regular and continuous unchallenged use of the driveway, including the portion of the driveway that was constructed

outside of the easement, which was her only access to the Whyte Parcel, for 28 years. (CP 35-36, 133-38, 141-43.) Washington courts have repeatedly found adversity in cases involving jointly constructed shared driveways that provide claimants' sole means of access. See, e.g., Cuillier v. Coffin, 57 Wn.2d 624, 627, 358 P.2d 958 (1961) (concluding an adverse claimant's proof that her use has been unchallenged for the prescriptive period "is a circumstance from which an inference may be drawn that the use was adverse"); Drake, 122 Wn. App. at 154-56 (holding use was not permissive where the claimant did not ask for, or receive, permission to use the driveway, and the driveway was the sole means of access to the property)²; Lingvall v. Bartmess, 97 Wn. App. 245, 253, 982 P.2d 690, 696 (1999) (affirming prescriptive easement where claimant and her tenant's regular and continuous use of a driveway for ingress and egress as sole means of access was notice to the world that she used the driveway under a claim of right); Washburn v. Esser, 9 Wn. App. 169, 173, 511 P.2d 1387 (1973) (affirming trial court's finding that

² Jack argues that Imrie v. Kelley, 160 Wn. App. 1, 250 P.3d 1045 (2010) supports dismissal of the prescriptive easement claim. However, the facts in Imrie are distinguishable because, unlike here, there was no evidence that the road had been jointly constructed for the parties' shared use, or that the road was the claimant's sole access to his property.

original owners and their successors in interest had acquired an easement by prescription for ingress and egress on the existing road); also Smith v. Breen, 26 Wn. App. 802, 805-06, 614 P.2d 671 (1980) (affirming trial court's finding of prescriptive easement over shared roadway that was intended for use by both parties, the parties acquiesced to use for more than 10 years, and there was no challenge to the use for 30 years).³ Miller v. Jarman, 2 Wn. App. 994, 998, 471 P.2d 704 (1970) ("joint efforts of adjacent property owners in constructing a common driveway to be utilized by both is a circumstance tending to indicate adverse use, or use under a claim of right.")

Even though Jack offered no facts in support of his motion for summary judgment on the prescriptive easement claim, he now disingenuously argues that the facts in this case are "undisputed." Respondent's Brief at 22, 29. An undisputed fact is "a fact disclosed in the record or pleadings that the party against whom the fact is to operate either has admitted or has conceded to be undisputed." Heriot v. Lewis,

³ Jack argues that Washburn and Smith, which support hostile use where driveways have been constructed jointly don't apply because "there was no easement created in conjunction with the driveway construction." This is a distinction without a difference. Although there is an express easement over much of the shared driveway, the driveway was not constructed in accordance with the easement's dimensions, so the portion of the driveway at issue is outside the scope of the express easement, necessitating Whyte's claim for prescriptive easement. (CP 2, ¶¶ 3.1-3.6; 35-36, 243-44.)

35 Wn. App. 496, 501-06, 668 P.2d 589 (1983). Respondent's Brief was the first time Jack suggested that the facts Whyte raised in response to Jack's motion for summary judgment were uncontested. Respondent's Brief at 22, 29.

In any event, the facts that Jack claims are "undisputed" included only a few understated, cherry-picked facts from those that Whyte asserted in response to Jack's motion for summary judgment. For example, in Respondent's Brief, Jack repeatedly describes Whyte's claim over 13 feet of Jack's property as "a few feet" across "the corner of the driveway," and speculates that a neighbor would not be on notice of what Jack mischaracterizes as minor use. Respondent's Brief at 24-26. However, a fact-finder could just as easily find that a family that drove consistently for nearly three decades over at least 13 feet of another's property — an area larger than two sofas lined up end to end — had met its burden on hostility. When reasonable minds could reach different factual conclusions after considering the evidence, the motion for summary judgment should be denied and the case should go to trial. Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wn.2d 255, 256-57, 616 P.2d 644 (1980). It was improper for the trial court to award summary judgment

when the meaning of essential facts led to more than one factual conclusion.

B. Jack Cannot Argue a New Issue Raised for the First Time on Rebuttal to Support Dismissal of the Prescriptive Easement Claim

Summary judgment should also be reversed because the trial court improperly awarded summary judgment based on a new issue Jack raised for the first time in his reply brief. It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment. White v. Kent Med. Ctr., Inc., P.S., 61 Wn. App. 163, 168, 810 P.2d 4, 8 (1991). Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond. It is for this reason that the rule is well settled that the Court will not consider issues raised for the first time in a reply brief. See, e.g., In re Marriage of Sacco, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990); RAP 10.3(c).

Jack incorrectly argued on summary judgment that a presumption of permission applied to prevent Whyte's claim for prescriptive easement.⁴

⁴ Jack repeated his confusion regarding the treatment of permission in prescriptive easement cases in Respondent's Brief, at pp. 22-23, wherein Jack incorrectly states the following: "In a claim for prescriptive easement, the court may imply or presume that use was permissive and not adverse." (Emphasis added.)

(CP 26-28.) Courts may not apply a presumption of permissive use in cases involving developed land. Drake provides:

In developed land cases, when the facts in a case support an inference that use was permitted by neighborly sufferance or accommodation, a court may imply that use was permissive and accordingly conclude the claimant has not established the adverse element of prescriptive easements. In contrast, courts should only apply the “vacant lands doctrine” and its presumption of permissive use in cases involving undeveloped land because, in those cases, owners are not in the same position to protect their title from adverse use as are owners of developed property.

122 Wn. App. at 153-54 (emphasis added). Despite this black letter law, Jack relied on Kunkel v. Fisher, 106 Wn. App. 599, 603, 23 P.3d 1128 (2001) in arguing that courts will presume permission in cases involving developed land, as opposed to the rule outlined in Drake that courts may imply permission in cases wherein the facts support an inference of neighborly accommodation. (CP 27.) As a result, apparently concluding it would be unnecessary, Jack offered no sworn testimony whatsoever to support his claim that the prior landowners had permission to use the prescriptive easement area. (CP 27-28.) In response, Whyte corrected Jack by providing the rule set forth in Drake and setting forth excerpts of testimony of June Skidmore in support of Whyte’s claim for prescriptive easement. (CP 107-09, 133-38, 141-43.)

For the first time in his reply brief on summary judgment, and again in Respondent's Brief, Jack raised a new issue never raised in his motion for summary judgment. Specifically, in rebuttal to Whyte's responsive brief correcting Jack's incorrect interpretation of the law, Jack changed his legal position, for the first time arguing — correctly — that a fact-finder may imply, rather than presume, permission. (CP 226.) Jack then went further, arguing that the trial court could imply that the genuine issues of material fact Whyte set forth in response to Jack's opening brief supported permissive use and therefore defeated Whyte's claim for prescriptive easement. (CP 226-27.) In particular, Jack argued that the minimal facts Whyte set forth for the sole purpose of correcting Jack's incorrect understanding of the law (which was supported by no facts) were insufficient to establish adverse use under a correct statement of the law.

Id.

Because the issue of whether the trial court could imply permission from June Skidmore's use of the driveway was raised for the first time in Jack's rebuttal brief and Whyte had no opportunity to respond by introducing her own facts on this issue,⁵ the trial court should have denied

⁵ Although Whyte asked the trial court to grant her summary judgment in her response to Jack's motion for summary judgment, Jack objected because there was an insufficient

summary judgment. See, In re Marriage of Sacco, supra. Instead, in its Order on Summary Judgment, the trial court improperly acted in the role of fact-finder, determined that “essential facts are not in dispute,” and awarded Jack summary judgment as to Whyte’s prescriptive easement claim. Graves v. P.J. Taggares Co., 94 Wn.2d 298, 616 P.2d 1223 (1980) (On a motion for summary judgment the court does not try issues of fact; it only determines whether or not factual issues are present which should be tried). For this reason alone, summary judgment should be reversed.

C. After Jack Attacked her Credibility, Whyte Raised Genuine Issues of Material Fact That Should Have Precluded Summary Judgment on the Adverse Possession Claim

Dismissal of the adverse possession claim was also improper because the facts that Jack provided in support of summary judgment were only relevant, if at all, to issues of credibility, and because Whyte introduced genuine issues of material fact related to her adverse possession claim in response to Jack’s motion for summary judgment.

Courts should not grant summary judgment when there is some question as to the credibility of a witness whose statements are critical to

notice period. (CP 95-96; RP 28.) As a result, Whyte was unable to file a reply brief in support of her request for summary judgment that would have allowed her to rebut Jack’s revised position.

an important issue in the case. Powell v. Viking Ins. Co., 44 Wn. App. 495, 503, 722 P.2d 1343 (1986). Although Jack argued below that weeding, watering and shoveling snow in the 9-Foot Teardrop was insufficient to establish adverse possession, Jack failed to cite to any evidence establishing what activities Whyte, or anyone else, actually performed in the adverse possession area. (CP 22-26.) The only “facts” Jack included were excerpts from Whyte’s deposition in which Whyte was asked about the troubled relationships between Whyte and Jack’s predecessor, Moore, and other documents regarding the history with Moore, in an apparent attempt to attack Whyte’s character and credibility (CP 37-94.)⁶

Specifically, through exhibits and excerpts from Whyte’s deposition, Jack suggested that Whyte’s position on adverse possession conflicts with prior statements she made to Jack’s predecessors. However, in Washington, genuine issues of material fact regarding a claimant’s credibility concerning their allegedly hostile use of a disputed strip of land between their property and a neighbor’s property precludes summary judgment. Riley v. Andres, 107 Wn. App. 391, 397-98, 27 P.3d 618

⁶ In Appellant’s Brief, Whyte mistakenly wrote: “Here, Jack relied solely on Whyte’s testimony regarding her use of the 9-Foot Teardrop....” Appellant’s Brief at 24. Upon

(2001) (holding summary judgment precluded where the fact that one claimant told neighbors that claimants did not own disputed strip and other claimant paid neighbors' tenant to move claimants' sprinkler heads from disputed strip created credibility issues as to whether claimants actually used strip as they claimed.) The trial court should have denied summary judgment on this basis alone.

Moreover, in response to Jack's credibility attacks, Whyte introduced material facts regarding her predecessor's use over three decades of the 9-Foot Teardrop, including but not limited to the fact that June Skidmore constructed a rockery with large rocks so substantial that Jack was forced to hire an excavation company to move them. (CP 3 at ¶¶ 3.11, 123-32, 145-46, 157, 159, 161 (9-Foot Teardrop in green), 180-81, 186, 244, 246 (9-Foot Teardrop depicted in green).) These are of the type of disputed material facts that Washington courts have held preclude summary judgment in quiet title actions. Cole v. Laverty, 112 Wn. App. 180, 186-87, 49 P.3d 924 (2002) (holding genuine issue of material fact existed as to issue of notice of hostile use precluded summary judgment in quiet title action); MacMeekin v. Low Income Housing Institute, Inc., 111

further review, the record is devoid of any reference whatsoever to Whyte's use.

Wn. App. 188, 196-99, 45 P.3d 570 (2002) (holding genuine issue of material fact, whether landowner had implied easement by prior use over neighbor's property, precluded summary judgment in owner's action against neighbor to quiet title in easement); Northlake Marine Works, Inc. v. City of Seattle, 70 Wn. App. 491, 503-06, 857 P.2d 283 (1993) (holding genuine issue of material fact in adverse possession claim precluded summary judgment).

Although Jack ignores almost entirely the fact that June Skidmore erected a rockery in the 1970's that blocked nine feet of the easement, Jack nevertheless underscores precisely why a trial is necessary in this case, by complaining that more information is needed to define the precise period during which June Skidmore performed landscaping,⁷ and by questioning the precise location of June Skidmore's rockery, rocks that were located in the adverse possession area. Respondent's Brief at 11, 13-14. Had Jack's summary judgment motion focused on June Skidmore's use, Whyte would have been required to submit evidence to establish the exact timeframe and precise location of the rockery. But Jack's argument did not center around June Skidmore's rockery, or her landscaping work.

Rather, Jack confined his argument to credibility attacks on Whyte. As a result, the trial court had a duty to consider the facts that Whyte offered regarding June Skidmore's use of the adverse possession area, and all reasonable inferences therefrom, in a light that was favorable to Whyte. Karlberg v. Otten, 167 Wn. App. 522, 535, 280 P.3d 1123, 1130 (2012). Because the trial court failed to do so, summary judgment should be reversed.

D. Summary Judgment on the Adverse Possession Claim was Also Improper as a Matter of Law Because Whyte's Predecessor Misused the Easement for Decades

Jack's argument that adverse possession fails because Jack and Whyte, as parties to the JUMAE, have a duty of maintenance, ignores the fact that Skidmore misused the portion of the JUMAE located in the 9-Foot Teardrop for nearly three decades. Whyte's adverse possession claim is not based on any work Skidmore may have done to fix or repair the portion of the JUMAE covering paved roadway, or utilities. Whyte's claim is based on the fact that Skidmore blocked nine feet of the easement area with a rockery so substantial that Jack required an excavation

⁷ Jack's motion for summary judgment was based only on the argument that Whyte could not establish hostility. Jack did not challenge Whyte's establishment of the requisite time period below, and cannot do so now for the first time on appeal.

company for its disassembly. Moreover, Skidmore's decision to block nine feet of the easement with a rockery was inconsistent and outside of the scope of the JUMAE.

The JUMAE limits the scope of the easement to "the construction, improvement, repair and maintenance for roadway and utilities..." (CP 35, emphasis added.) Rather than treat the entire easement area as a driveway, Skidmore erected a rockery over nine feet, which eliminated the ability to use that nine feet as a driveway or other roadway. Although Jack attempts to minimize Skidmore's actions by referring to the large rockery as a "border," it is clear that Skidmore's use exemplifies the very kind of hostility that supports adverse possession in Washington.

Indeed, under authority Jack cited in Respondent's Brief, Skidmore's neighbors would have been on notice of Skidmore's type of inconsistent use: "For instance, an easement of passage may be extinguished if the owner of the burdened land or an adverse possessor of that land maintains a substantial object, such as a wall or building, that blocks the easement sufficiently to prevent its use." Respondent's Brief at 18 (citing 17 W. Stoebeck & J. Weaver, Wash. Prac., Real Estate: Property Law §8.6 (2d ed. 2012). Constructing a large rockery that blocks an easement's use as a roadway is the very kind of obtrusiveness that

would “be unmistakable to an adversary.” Respondent’s Brief at 16 (citing Hunt v. Matthews, 8 Wn. App. 233, 236-37, 505 P.2d 819 (1973)).

As a matter of law, it was error for the trial court to grant summary judgment dismissing Whyte’s adverse possession claim.

III. CONCLUSION

For all the reasons stated above, Whyte respectfully requests that the appellate court reverse the summary judgment ruling of the trial court dismissing Whyte’s claims for prescriptive easement and adverse possession, and remand for further proceedings.

DATED this 4th day of February, 2013.

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CERTIFICATE OF SERVICE

I, Betty Lou Taylor, hereby certify that on the 4th day of February, 2013, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

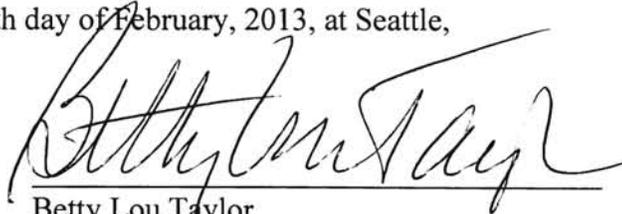
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I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 4th day of February, 2013, at Seattle, Washington.


Betty Lou Taylor

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