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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

CAROLINE E. RELPH, individually, Respondent, v. DAVID GLUBRECHT and MARTHA GLUBRECHT, husband and wife, Appellants.	)	No. 36755-0-III UNPUBLISHED OPINION

KORSMO, J. — David and Martha Glubrecht challenge a summary judgment ruling awarding their neighbor, Caroline Relph, title to the property by adverse possession. We affirm.

FACTS

Ms. Relph moved onto her south Spokane property in 1974 when she married. The only access to the house was through a driveway on an old railroad grade along the western side of the property. That grade belonged to the Relphs' western neighbors, who had acquired title to the railroad grade from Spokane County a year earlier.

The Relphs used and cared for the driveway continuously from 1974, plowing snow and filling potholes. Flowers were planted on Relphs' (eastern) side of the driveway. The western property went through multiple owners until the Glubrechts purchased the land in 2016. Ms. Relph attempted to purchase the driveway from the Glubrechts, but the two sides were unable to reach an agreement. During negotiations, Mr. Glubrecht expressly permitted Ms. Relph to continue to use the driveway. Once Ms. Relph obtained an attorney and made a written offer to purchase the land, the Glubrechts withdrew permission for use of the driveway and threatened to block it.

Ms. Relph then brought an action to quiet title to the driveway by adverse possession. She eventually brought a motion for summary judgment. In response, the Glubrechts argued that there was no evidence of permanent improvement of the driveway. By declaration, Mr. Glubrecht discussed the negotiations with Ms. Relph concerning the property line and efforts to purchase the driveway.

Ms. Relph moved to strike those portions of the declaration that recited statements from the parties' settlement discussions. Concluding that ER 408 applied to settlement discussions by unrepresented parties, the trial court granted the motion to strike those portions of the declaration. The court subsequently granted Ms. Relph's motion for summary judgment and included a six-inch penumbra along the western edge of the driveway to account for snow plowing, along with additional land to the east.

The Glubrechts timely appealed to this court. The case originally was scheduled for oral argument, but the case was moved to a non-argument calendar in light of the Covid-19 outbreak.

ANALYSIS

This appeal presents two issues. The Glubrechts contend that the court erred by applying ER 408[1] and that summary judgment was improperly granted because factual questions existed concerning whether Ms. Relph used the driveway with permission and/or used the property against the interests of the true owner. The trial court did not err in applying ER 408 and correctly determined that no material factual questions existed. Ms. Relph adversely possessed the driveway long before the Glubrechts acquired their property.

We review a trial court's summary judgment ruling de novo, performing the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The facts, and all reasonable inferences to be drawn from them, are viewed in the light most favorable to the nonmoving party. *Id*. If there is no genuine issue of material fact, summary judgment will be granted if the moving party is entitled to judgment as a matter of law. *Id*.

[1] Relph wrongly argues that we cannot review this claim because it was not included in the notice of appeal. She cites no relevant authority suggesting that trial and pretrial rulings must be listed in the notice of appeal; evidentiary rulings are subsumed in the judgment. We require assignments of error in the briefing, not in the notice of appeal.

ER 408

ER 408 is not limited to discussions between attorneys. The trial court correctly excluded statements made during the negotiations over purchasing the driveway.

The rule provides in part:

> In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

ER 408. We review an order striking evidence at summary judgment de novo. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

The trial court struck only the portions of the declaration relating to statements made during the parties' discussions about the driveway. Ms. Relph claimed a right to use the driveway and desired written acknowledgement. There was a "claim" at issue and the parties were discussing Ms. Relph's interest in settling the claim. These were "statements made in compromise negotiations." ER 408. Nothing in the text of the rule suggests that it only involves discussions involving lawyers, nor have the parties provided any case authority suggesting such a limitation should be read into the rule.

The trial court correctly applied the rule. There was no error.[2]

[2] In light of the fact that the property was adversely possessed during the Reagan Administration, any error in excluding the modern statements would have been harmless.

Adverse Possession

Ms. Relph established her exclusive and hostile use of the driveway for more than 40 years. The trial court correctly granted summary judgment in her favor.

Four elements must be proved to establish a claim of adverse possession. The claimant's possession of the land must be (1) exclusive, (2) actual and uninterrupted, (3) open and notorious, and (4) hostile. *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989). Each of the elements must exist concurrently for at least 10 years. *Id.* The claimant bears the burden of proof on each element. *Id.* Claims of adverse possession are governed by the ten year limitations period of RCW 4.16.020(1).

The Glubrechts take issue with the "hostility" element, arguing that Ms. Relph permissively used the driveway and never made any improvements on it. They also challenge the scope of the award, claiming the driveway should not also include the six-inch western penumbra or the eastern flower bed.[3]

"Hostility" simply means that the claimant treated "the land as his own" and is established "solely on the basis of the manner in which he treats the property." *Chaplin v. Sanders*, 100 Wn.2d 853, 860-861, 676 P.2d 431 (1984). The evidence in the record establishes that there was no material question of fact concerning this element.

[3] The size of the eastern area is not identified in our record, but does not appear to be particularly wide.

Relph and her witnesses filed declarations stating that the couple had built the driveway, maintained the driveway, and exclusively used the driveway for more than 40 years; she never sought or received permission to maintain the driveway. Relph claimed that these actions were taken with the knowledge of the property owners, whose driveway was close to the Relphs' driveway. In other words, the evidence shows that the Relphs treated the land as their own by building a driveway across it and using it as a driveway with the apparent knowledge of their neighbors.[4] On its face, these declarations established the claim of hostile use of the land for the requisite period.

In contrast, the Glubrechts argue that an inference of permissive use exists that Relph did not overcome. Any inference was overcome by the evidence showing that Relph and her husband treated the driveway as their own; no contrary evidence was presented stating that the Glubrechts' predecessor expressly gave permission to build and use a driveway. The Glubrechts also suggest that use of the driveway was permissive because their predecessors knew of the use and did not contest it. If that argument is accepted, no adverse possession claim could ever succeed if the true owner knew of the

[4] The Glubrechts note that no "permanent improvements" were placed on the land, but driveways typically are not impeded with obstacles. The land was improved for its expected purpose of transit. Permanent improvements consistent with the use of the land are evidence of hostile use of the land, but they are not a mandatory requirement. *See Riley v. Andres*, 107 Wn. App. 391, 397, 27 P.3d 618 (2001).

use and did not contest it since the open use would be considered permissive. One element would defeat the other. No authority permits or requires such a result.

The Glubrechts also contend that the six-inch penumbra was unreasonably large and that no evidence suggests that Relph possessed the land east of the driveway and west of her property line. Courts may create a penumbra around the adversely possessed land in order to settle these types of boundary disputes. *Lloyd v. Montecucco*, 83 Wn. App. 846, 853-854, 924 P.2d 927 (1996). Six inches of unused land beside a driveway is a minimal amount of land on which to help place snow. It is not an unreasonably large award. Finally, the evidence showed that Relph maintained the eastern segment and grew flowers on the land. These actions, too, are evidence of the hostile use of the land because they are actions that a true owner would take. *Riley v. Andres*, 107 Wn. App. 391, 397, 27 P.3d 618 (2001) (planting shrubs and landscaping).

Relph presented evidence that, beginning in 1974, she and her husband openly treated the driveway as their own despite not having received permission to do so. Coming to the land 42 years later, the Glubrechts quite understandably were unable to muster contrary evidence that would have justified a trial on the plaintiff's claim. Since there were no material questions of fact raised, the trial court properly granted judgment to the plaintiff.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

Korsmo, J.

WE CONCUR:

Pennell, C.J.

Pennell, C.J.

Siddoway, J.

Siddoway, J.