IN THE SUPREME COURT OF THE STATE OF OREGON

JOHN B. WELS, JR., Respondent on Review, vs. DOUGLAS W. HIPPE, Defendant, and LE ROY HIPPE and CHERYL HIPPE, Defendant-Appellants.	S063486 Court of Appeals No. A150238 Jackson County Circuit Court No. 101215E3

RESPONDENT JOHN B. WELS, JR.'S RESPONSE BRIEF ON THE MERITS

On Review from a decision of the Court of Appeals on appeal from Judgments of the Circuit Court for Jackson County, Honorable Ronald D. Grensky, Judge

Opinion Filed: March 18, 2015
Before: the Court of Appeals, en banc
Author of majority opinion: Nakamoto, J., joined by Haselton, C.J. Armstrong, J., Egan, J., Garrett, J. and Flynn, J.
Author of concurring opinion: Lageson, J., joined by Sercombe, J.
Author of dissenting opinion: Devore, J., joined by Ortega, J. Duncan, J., Hadlock, J. and Tookey, J.

(cover continued on next page)

May 2016

CLAYTON C. PATRICK, P.C., OSB #772989
79988 Stewart Creek Road
Clatskanie, OR 97016
Telephone: 503-728-3400
Fax: 503-728-2578
eMail: clay@claypatrick.com
Attorney for Petitioners on Review LeRoy Hippe
and Cheryl Hippe

JOHN R. HANSON, OSB #772101
TRACEY R. HOWELL, OSB #123474
800 West 8th Street
Medford OR 97501
Telephone: 541 776-3405
Fax: 541-734-7465
eMail: jrhlaw@hotmail.com
Attorney for Respondent on Review John B. Wels, Jr.

Also on Respondent's Brief was Milan Robert Hanson, OSB #131082, of Portland, Oregon.

INDEX TO RESPONDENT'S RESPONSE BRIEF ON THE MERITS

INDEX OF CITATIONS

INDEX OF CITATIONS CONT'D

OTHER AUTHORITIES

STATEMENT OF THE CASE

Respondent restates Petitioner's Statement of the Case as follows:

RULE OF LAW PROPOSED BY PETITIONER ON REVIEW

Petitioner's proposed rule of law is argumentative. It incorrectly assumes the existing rule of law has been overruled.

STATEMENT OF THE NATURE OF AN ACTION

Respondent agrees with Defendants' Statement as to the nature of the case.

LEGAL QUESTION OR QUESTIONS PRESENTED ON REVIEW

Petitioner's Statement of Legal Questions is argumentative. It makes assumptions and states conclusions not supported by the facts or existing law.

STATEMENT OF FACTS

Defendants misstate, misquote and inaccurately set forth the facts.

Defendants' presentation of the facts is contrary to ORAP 5.40(8). In the absence of de novo review, the court is bound by the trial court's express and implied findings of fact if supported by the evidence.

Plaintiff's position is that the majority opinion in Wels v. Hippe, 269 Or App 785, 787 - 791 (2015) accurately sets forth the facts.

Plaintiff, Mr. Wels, is a retired welder and sheet metal worker (Tr. 11-12). He purchased three of his four parcels of land in 1998 (Tr. 11-12; Ex. 4-6). The only access to Plaintiff's property is over and across Lewis Creek Road (Tr. 14). Lewis Creek Road is the only access to Plaintiff's property (Tr. 14).

Lewis Creek Road has been shown on Jackson County maps since at least 1932 (Tr. 57). An old cabin exists on Plaintiff's property (Tr. 15, 52). Lewis Creek Road provides access to numerous land owners, in addition to Plaintiff and Defendants. Other property owners using Lewis Creek Road include Unsinn, Kingsley, Johnson, Sharp, Bergs, Ward, Meyers, Larson, and Jordan (Tr. 24). The point is that numerous people use Lewis Creek Road for access to their properties (Tr. 83).

Plaintiff believed that Lewis Creek Road was a public road (Tr. 21, 36). The trial court judge was of the opinion that Lewis Creek Road was a public road (Tr. 21).

Defendants admit that Plaintiff has the right to use Lewis Creek Road (Tr. 71). Ironically, Defendants are in the same legal position as the Plaintiff. Defendants do not have an easement from their neighbors to access their property over Lewis Creek Road (Tr. 75).

Defendants agree that Plaintiff has the right to use the road. Further, Defendants admit they are in the same legal position as Plaintiff regarding legal access (Tr. 94-97). The trial court concluded that the parties' use of the Lewis Creek Road "was an easement in everything, except documentation (Tr. 95,102).

No conversation ever took place between the parties regarding Plaintiff's right to use Lewis Creek Road (Tr. 24). A conversation did take place on Highway 62 in 2002 or 2003. Plaintiff was trying to sell a vehicle on Highway 62 (Tr. 54). Defendant stopped and talked with Plaintiff. Plaintiff testified that he "didn't remember that conversation" (Tr. 55).

Representative examples as to Defendants' incorrect representations as to the facts are:

A. Defendants state that there was a chain across the road which is "locked" (App. Brief, p. 7). The correct fact is that the chain was not locked and Defendants testified that "the lock is always open" (Tr. 84).

B. Defendants represent that Plaintiff's property has other access over an old logging road (App. Brief, p. 12). This representation is not correct. Plaintiff testified that there was no access other than Lewis Creek Road (Tr. 14, 61, 62).

C. Defendants testified that the old logging road does not provide access to Plaintiff's property (Tr. 70). Defendants testified that the logging road comes out within three-quarters of a mile of Plaintiff's property (Tr. 70). Plaintiff would have to walk three-

quarters of a mile across a third party's property to access his property (Tr. 70-71). The point is that there is no other access to Plaintiff's property other than Lewis Creek Road.

D. Defendants testified that they wanted $70,000.00 for a written easement (Tr. 98).

SUMMARY OF ARGUMENT

Defendants' argument as to whether "adversity" could be established by the Plaintiff's state of mind regarding his right to use the road has been analyzed and rejected by the Oregon Supreme Court.

Plaintiff and Defendants agree that Plaintiff has the right to use Lewis Creek Road. Plaintiff's right to use Lewis Creek Road only became an issue when Jackson County required a written easement as a condition to issue Plaintiff a building permit.

This case involves the parties' and the court's attempt to find a legal principle to acknowledge and confirm Plaintiff's right to use Lewis Creek Road. Plaintiff commenced a Claim for Relief alleging that he held an easement over and across Lewis Creek Road.

The evidence at trial established that Plaintiff's use was "adverse to Defendants' rights." "Adverse" use may be established by evidence that Plaintiff's use (1) interfered with Defendants' rights, or (2) that Plaintiff's use was "not in subordination" to Defendants' rights. Plaintiff established

"adverse" use under both grounds. The undisputed evidence is that Plaintiff interfered with Defendants' rights by (1) driving in close proximity to Defendants' home, and (2) generating dust from the use. Plaintiff also established "adverse" use by introducing evidence that he had a right to use the road. Oregon law has been and is that the requirement that the use be "adverse" means that Plaintiff's use was "not in subordination" to Defendants' rights.

STANDARD OF REVIEW

The court is bound by the trial court's express and implicit factual findings if they are supported by any evidence in the record. The court reviews the trial court's legal conclusions for errors of law. Morton v. Morton, 252 Or App 525, 527, 287 P3d 1227 (2012) (Appellate Court reviews trial court's legal conclusions for errors of law and is bound by the trial court's findings if they are supported by any evidence in the record).

Defendants have the burden of proof to show that Plaintiff's use did not interfere with Defendants' use of the servient land or that Plaintiff's use was permissive. R & C Ranch, LLC v. Kunde, 177 Or App 304, 313, 33 P3d 1011 (2011). The trial court found for Plaintiff on both issues.

////

ARGUMENT

Introduction

This case involves the use of Lewis Creek Road. Lewis Creek Road is a rural road in Jackson County that has multiple users. The road has existed since at least 1932. Defendants purchased their property in 1973. At trial, Defendants testified that Plaintiff had the "right" to use Lewis Creek Road (Tr. 94-102).

For reasons not clear, when Plaintiff approached Defendants for the purpose of obtaining a written easement in order to obtain a building permit from Jackson County, Defendants refused to acknowledge Plaintiff's right to use Lewis Creek Road in writing. As a result, Plaintiff was required to file the legal action alleging that he had an easement for ingress and egress over Lewis Creek Road.

The evidence at trial also establishes that Plaintiff held an easement by agreement. In other words, both Plaintiff and Defendants testified at trial that Plaintiff had the right to use the road.

This case is an example of where the court and the parties have attempted to find a legal remedy to correct a wrong. The dilemma is that the facts in some cases, including this case, do not fit neatly into the

elements of a legal claim. The practical solution is to acknowledge that Plaintiff has an easement by agreement. Oregon recognizes that an easement may be established by oral agreement. *See*, Luckey v. Deatsman, 217 Or 628, 632, 343 P2d 723 (1959). (There is ample authority in our cases for the proposition that an oral agreement for the use of land may, under appropriate circumstances, be enforced).

Adverse Use

A. **"Open and Notorious" is "Adverse."** At trial, Defendants stipulated that Plaintiff's use was "open and notorious." The term "open and notorious" is by definition "adverse." In other words, the undisputed evidence is that Plaintiff "trespassed" on Defendants' land for in excess of ten years.

B. **Plaintiff's Use "Interfered" with Defendants' Rights.** The evidence at trial established that Plaintiff "interfered" with Defendants' rights in at least two different ways. Defendants testified that the close proximity of the road interfered with Defendants, and Defendant, Mr. Hippe, testified that his wife always complained about the dust generated by use of the road. Defendant Mr. Hippe testified (Tr. 87):

/ / /

"Question: If Mr. Weis was given a prescriptive easement by the Court, how would that effect you or your wife? Would it - - would it pose any burdens on you?

"Answer [Mr. Hippe]: Mentally it would be disturbing. In the physical sense you can ask my wife. She always complains that everything's always dusty. Even with the windows closed in the wintertime, everything's dusty. The road's - - it's not paved or anything. You got dust, noise, vehicle traffic, intrusion into the silence that we purchased when we bought the house. It's just kind of a medusa head of things that would be disruptive."

Defendants admitted that Plaintiff's use of Lewis Creek Road caused interference. Mr. Hippe testified (Tr. 88):

"Question: ***[you] said it causes dust and that your wife finds an interference. She's co-owner is she not?

Answer [Mr. Hippe]: Absolutely.

Question: Okay. So did you interfere in that sense? Causing the dust?

Answer: I guess so.

Question: And he probably has caused dust ever since he's been on the property hasn't he?

Answer: Right.

Question: For well over ten years.

Answer: Yes."

C. **Plaintiff's Use of the Road "Not in Subordination" to Defendants**. The law in Oregon is and has been that "adverse" use may

be established by proof that the use was "not in subordination" to Defendants' rights.

Section 458, Comment C, of the *Restatement (First) of Property* (1944), instructs that the key concept in the term "not in subordination" is non-recognition of the Defendants' authority to prevent Plaintiff's use.

The majority decision does an excellent job of explaining the facts and the applicable law. The majority decision correctly states the law and the facts as determined by the trial court. In the interest of brevity, the majority legal analysis is not repeated here.

Plaintiff simply wants to emphasize that the law in Oregon was and is that "adverse" use may be established by proof that the use was "not made in subordination" to Defendants' authority to prevent use.

The Appellate Court in Kondor v. Prose, 50 Or App 55, 622 P2d 741 (1981) set forth the law as follows:

> "In context of prescriptive easements, the requirement that the use be 'adverse' to the rights of the property owner means that the use is not in subordination to those rights. Arrien v. Levanger, supra, 263 Or at 371, 502 P2d 573. Therefore, even if the user mistakenly believes he has the right to use the easement, that use is sufficiently adverse. City of Ashland v. Hardesty, supra, 23 Or App at 527-28, 543 P2d 41.

The law in Oregon is and has been that "adverse" use may be use "not made in subordination" to those against whom it is claimed to be

adverse. Plaintiff has not been able to locate any Oregon authority to the contrary.

Arrien v. Levanger, 263 Or 363, 371, 502 P2d 573 (1972) ("All that must be shown is that the use is not made in subordination to those against whom it is claimed to be adverse); Thompson v. Scott, 27 Or 542, 528 P2d 509 (1974) (Adverse use is defined by 5 Restatement of Property, §458 (1944) (Use not made in "subordination" of owner's rights).

Majority Decision Uses Identical Test Used by Supreme Court and Appellate Courts in Adverse Possession Cases

To establish ownership by adverse possession the claimant must prove the element of "hostility" which appears to be identical to the prescriptive easement requirement of "adverse." In fact, some Appellate cases use the two terms interchangeably.

The law in Oregon has been and is that the claimant must prove that they possessed the property "not in subordination" to the true owner. Slak v. Porter, 128 Or App 274, 280, 875 P2d 515 (1994). This is the identical test used by the Oregon Appellate Courts to establish the element of "adversity" in prescriptive easement cases.

////

The Oregon Supreme Court in Norgard v. Busher, 220 Or 297, 349 P2d 490, 80 A.L.R. 2d 1161 (1960), in the context of an adverse possession case, dealt with the identical issue argued by Defendants. The Supreme Court considered and rejected Defendants' argument as to claimant's "subjective unstated beliefs." (Plaintiff's Brief, p. 21).

The Oregon Supreme Court rejected Defendants' argument as follows, 220 Or at 30:

> "Where an occupant of land is in doubt as to the true location of the true line, it is reasonable to inquire as to his state of mind in occupying the land in dispute. *** If the occupation of the strip is under mistaken belief that it is included in his description in his deed (a state of mind sometimes described as 'pure mistake' to distinguish it from the cases of 'conscious doubt') then his possession is "adverse." [Citation omitted]. (Emphasis added).

The Norgard decision contains an extensive analysis and study of the cases, texts and periodicals discussing a person's subjective state of mind for the purpose of establishing the element of adversity.

Another case on point is the Oregon Supreme Court decision in Faulconer v. Williams, 327 Or 381, 964 P2d 246 (1998). The issue in Faulconer was whether an express easement was extinguished through adverse possession. In order to resolve the case, this Court was required to state the evidence required to establish the "element of hostility or adversity."

In Faulconer, as in the present case, the Defendant's primary argument was that Plaintiff failed to prove the element of hostility or adversity. The Court stated, 327 Or at 388, 389:

> "We begin with the element of hostility or adversity, because Defendant's primary argument is that Plaintiffs have failed to prove that element. In the context of adverse possession, the term "hostile" means that the claimant possessed the property intending to be its owner and not in subordination to the true owner." [Citations omitted] [Emphasis added].
>
> The Oregon Supreme Court held, 327 Or at 391:
>
> "*** The element of hostility is met when the claimant intends to occupy the land as the owner and not in subordination to the true owner. In the easement context, hostility entails an intent to occupy land without subordination to the rights of the holder of the dominant estate." [Emphasis added].

Subjective Intent

Defendants criticize the majority decision because it allows evidence as to a claimant's subjective intent. As the majority opinion acknowledges, "Witnesses testify concerning their subjective beliefs and knowledge in all manner of cases." Wels v. Hippe, 269 Or App at 785. Further, a claimant's subjective intent has always been evidence in cases involving ownership of real property. Uhl v. Krupsky, 254 Or App 736, 294 P3d 559 (2013) (Claimant must demonstrate a subjective intent to possess the property); Fitts v. Case, 243 Or App 543, 267 P3d 160 (2011) (Claimant may prove hostility by

evidence that claimant possessed property with a "subjective intent to possess the property"); Wiser v. Elliott, 228 Or App 489, 209 P3d (2009) (To establish hostility, "a claimant must demonstrate a subjective intent to possess the property"); Union Cemetery of Crawfordsville v. Coyer, 214 Or App 24, 162 P3d 1072 (2007) (Plaintiff demonstrates a subjective intent); Lieberfreund v. Gregory, 206 Or App 484, 136 P3d 1207(2006) (Claimant must demonstrate a subjective intent).

The point is that claimant's requirement to demonstrate a "subjective intent" has always been an element of Oregon cases involving real property.

Presumption/Inference

The presumptions and inferences should not be applied to rebut the adversity of Plaintiff's use. Several problems exist if the court attempts to resolve the issues of adversity with inferences or presumptions.

This is not a case where only one party is requesting an easement over a single parcel of property. This is not a case where the "road" only benefits one neighbor. In this case, multiple parties use and rely upon access over multiple parties' properties. Defendants themselves are one of the many owners who use Lewis Creek Road to access their property and who do not have an easement to do so.

There is a big difference between the roads in R & C Ranch, LLC, supra, (gravel road becoming a pair of ruts, then a trail); in Thompson, supra, at 551 (road bed less and less distinct, then impassable) versus Lewis Creek Road. In this case, Lewis Creek Road has been in existence since at least 1932 and is a public road. As a matter of logic, the inferences simply do not apply to a well-established road used by multiple owners over multiple properties.

DECISIONS COMPLIES WITH LONG STANDING OREGON LAW

Defendants argue that the decision overruled numerous cases (App. Brief, p. 15). Defendants are wrong. The issue as to whether "adverse use" could be established by the test set forth in *Restatement (First) of Property*, §458 ("Not in subordination to those against whom it is claimed to be adverse) was not an issue nor was it analyzed in the cases cited by Defendants.

FAIRNESS

Lewis Creek Road has been shown on Jackson County maps since at least 1932 (Tr. 57). Defendants purchased their property in 1973 (Tr. 66). Defendants knew Lewis Creek Road was used as access to neighboring properties prior to his purchase (Tr. 83). Defendant, Mr. Hippe, testified (Tr. 83):

"Question: Do you know what purpose it served in the past?

Answer [Mr. Hippe]: In the past?

Question: Yes.

Answer: I guess in the late 1990's it was used as a logging road. It was used to serve owners if they were going to go to their properties. It had tourists and hunters and wood thieves and drug growers easily.

Question: Now - - and that was prior to your purchase?

Answer: Yes."

The point is that Defendants are not in a position to complain about Plaintiff's easement. The reason is that Defendants acknowledge and admit that they were fully aware that Plaintiff's predecessors-in-interest and others used the road prior to the purchase of their property in 1973.

In the context of a case involving an easement by implication, the court noted that the road was readily observable on the ground. Therefore, the servient owner was not in a position to complain as to claimant's easement. Alger v. Smith, 151 Or App 47, 54 948 P2d 1244 (1991).

SUMMARY

Defendants are in the same position as Plaintiff. Defendants do not have a written easement from their neighbors to use Lewis Creek Road to access their property. Defendants agree that Plaintiff has an easement.

However, Defendants simply refuse to acknowledge Plaintiff's easement in writing (Tr. 94-102).

Plaintiff relied upon existing Oregon law which entitles him to establish "adversity" by evidence as to (1) interference, or (2) use "not in subordination." This has been the law in Oregon for many years. As a matter or law, fairness and logic, the decision of the Court of Appeals and the Judgment of the trial court should be affirmed.

Dated this 8 day of May 2016.

Respectfully submitted,

John R. Hanson, OSB #772101
Tracey R. Howell, OSB #123474
Of Attorneys for Respondent on Review

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on May 7, 2016, I served the foregoing Respondent John B. Wels, Jr.'s Response Brief on the Merits on the counsel for the Petitioners on Review herein, below, via the court's electronic filing system.

CLAYTON C. PATRICK, P.C., OSB #772989
79988 Stewart Creek Road
Clatskanie, OR 97016
Telephone: 503-728-3400
Fax: 503-728-2578
eMail: clay@claypatrick.com
Attorney for Petitioners on Review LeRoy Hippe
and Cheryl Hippe

I also certify that the Brief on the Merits was filed with the Supreme Court on this date by e-Filing.

Certificate of Compliance With Petition Length and Type Size Requirements

Brief Length

I certify that (1) this Brief complies with the word-count limitation in ORAP 9.05(3)(a) and (2) the word count of this Brief (as described in ORAP 5.05(2)(a)) is 3,169 words.

Type Size

I certify that the size of the type in this Brief is not smaller than 14 point for both the text of the Brief and the footnotes as required by ORAP 5.05(4)(f).

Dated this 7th day of May 2016.

John R. Hanson, OSB #772101
Of Attorneys for Respondent on Review