Foster Garvey

How Adverse is Adverse?

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The law recognizes that under certain circumstances, continued unauthorized crossing of another's land for a long time can lead to the right to do so indefinitely, notwithstanding that there is no agreement from the landowner. The right so gained is called a prescriptive easement. When the law allows one landowner to lose property rights in favor of another, without compensation, disputes often occur. No surprise. If it were my land, I'd be upset, too.

The Oregon Court of Appeals, in *Wels v. Hippe*, 269 Or App 785, 787 (2015), recently dealt with such a dispute, and provided the litigants and practitioners of the law with an in-depth analysis of one element of a prescriptive easement case – "adversity".

In order to obtain a prescriptive easement to cross over or use the property of another under Oregon (as well as Washington) law, a plaintiff claiming a prescriptive easement is required to show, "by clear and convincing evidence, that his use (or use by former owners of his property) of the road on defendants' property was 'open and notorious,' 'adverse to the rights of defendants,' and 'continuous and uninterrupted' for 10 years." *Id*, at 787.

In the *Wels* case, the trial court determined that the neighbor who accessed his property by driving on a shared road over the defendants' land was entitled to a prescriptive easement. Mr. Wels believed that he had a written easement to cross defendants' property, but he didn't. After decades of use of the road by the plaintiff and his predecessors, Mr. Wels sought a building permit to build on his property, and was asked to provide written proof of the right to access his land, which he could not produce. After unsuccessfully asking Mr. Hippe for a

written easement, Wels brought the lawsuit to establish his legal right to use the road to access his land. On appeal, the owner of the burdened property argued, among other defenses, that Mr. Wels failed to show that the use of the road/easement was "adverse to the rights of defendants" because use of the road did not interfere with the landowner in any way. The Court of Appeals ruled that Mr. Wels "established adversity through direct evidence of his mistaken claim of right, which does not require that plaintiff show that his use interfered with defendants' use of their property."

The primary issue before the Court of Appeals was whether the plaintiff had shown that his use of the road across defendants' property was "adverse". The Court indicated that the element of "adversity" can be established in two ways:

1) Open [use] for ten years equates to a presumption of adversity, *Feldman* [*et ux*] *v. Knapp* [*et ux*], 196 Or 453, 250 P2d 92 (1952). This presumption can be overcome by showing the easement was over an existing way and the use did not interfere with the owner's rights, *McGrath v. Bradley*, 238 Or App 269, 242 P3d 670 (2010). Such presumption can also be overcome by showing the use was 'permissive,' but to overcome the presumption the evidence must do more than show 'mere acquiescence' in the non-owner's use of the land, *Id.* & *Feldman Supra*; or

2) Direct evidence that claimant mistakenly thought he had a right to use the property (e.g., Plaintiff always thought he had the right and so never asked for permission). *Kondor v. Prose*, 50 Or App 55, 622 P2d 741 (1981).

Id, at 791-792. The key according to the Court of Appeals, is that the party claiming a prescriptive easement must show that his use of the road is not in "subordination" to the property owners' rights. Either a belief in a legal right or a claimed legal right to use the servient property is inconsistent with use by permission of the servient owner, thus establishing use that is not in subordination to the servient owner.

The defendants and the dissent argued that there must be some element of interference, or something more than the property owner's acquiescence to the use of the road for the plaintiff to prevail by clean and convincing evidence. However the majority of the Court said the plaintiff's mistaken belief that he had the right to cross over defendants' land, was enough to satisfy this element.

The dissent, written by Judge DeVore, argues that the majority view will create a "subjective theory of adverseness". *Id*, at 812.

The conflict requires this court to decide whether the law will continue to require that, in order to claim a prescriptive easement over preexisting roads of unknown origin, the claimants must show that their use *interfered* with the owner's use of the road, so as to prove the requisite open, notorious, and adverse use. The majority opinion offers a nascent alternative that will render the long-established rule immaterial. The alternative posited is that the court will now

recognize a claimant's testimony about a prior, unexpressed, and subjective belief in the claimant's right to use a road as sufficient evidence—indeed, as so-called "direct evidence"—of open, notorious, and adverse use of preexisting roads of unknown origin.

My sense is that the dissent overstates the element of subjectivity. The majority discussed the trial court's findings of the facts and circumstances which are consistent with Mr. Wels' use of the road believing he held an easement, as he held written easements to other portions of the road leading to his property. To the extent he held a belief that he had the right to use the road which could be viewed as "unreasonable," and did not otherwise satisfy the requirements for "hostility," it's hard to imagine that a prescriptive easement would be found.

The effect of this ruling is that it will be easier to acquire prescriptive rights. It also puts a burden on neighbors, who are truly acting neighborly but who do not wish to give up rights to their own property, to be more assertive that use of their land is based on permission. On the other hand, the public policy in maintaining the status quo, letting people access their land in the way they've done so for at least ten years, is advanced by the court's ruling. However you feel about the nuance of establishing "adversity" in such a case, this is a well written 59 page opinion which provides a clear discussion of prescriptive easements, which I found to be a helpful refresher on this area of the law.