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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

FRIENDS OF THE STEWART PUBLIC TRAIL, INC., Plaintiff, v. FRANKLIN D. PUGH, Jr., et al., Defendants.	Case No. 3AN-19-05746 CI

DEFENDANTS FRANKLIN D. PUGH, JR. AND OKSANA V. PUGH'S MOTION FOR RECONSIDERATION

COME NOW Defendants, Franklin D. Pugh, Jr. and Oksana V. Pugh, by and through counsel, Ingaldson Fitzgerald, P.C., and hereby move this Court for reconsideration of its Findings of Fact and Conclusions of Law dated September 1, 2022. Defendants move for reconsideration pursuant to ARCP 77(k)(1)(i/ii/iv).

Although there were factual errors, this motion will focus primarily on the Court's legal errors. Further, though there were legal errors with the Court's determination that the other three elements necessary to establish a public prescriptive easement were established, the focus of this motion is on the so-called hostility element. The Court concluded that there is "clear and convincing evidence that the public's use of the Trail was hostile". The Court is wrong.

1. The Court Fails To Acknowledge That It Has Previously Found That The Presumption Of Permissive Use Applies

Remarkably, in its findings this Court never makes mention of the legal findings it already made. This Court's Order

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Regarding Case Motion Nos. 34 & 39 issued on February 4, 2021 provides, in pertinent part, as follows:

> The legal question before the court is whether there is a presumption under Alaska law that use of an "alleged easement holding [is] permissive."[1] The parties agree that there is such a presumption and so does the court. The presumption is rebuttable "by proof of a distinct and positive assertion of a right hostile to the owner."[2]

The Court's order, then, was correct. The presumption of permissive use existed from the inception of the Homestead Road. What is more, it was totally in line with the well-recognized legal principle that use of another's land is permissive.[3]

The fact that the presumption applied from the inception was also wholly consistent with the nature of how the "Stewart Trail" was developed. See also Exhibit 2040. The homesteads along the Stewart Trail were not subservient estates to provide access to Chugach State Park, which did not exist when the Homestead Road was developed even to its terminus at the Stewart Homestead in approximately 1964. This was well before the public began using the Road and well before 1986, when this Court determined the prescriptive period was triggered.

Finally, this Court's determination that the presumption applied here was also consistent with a long line of cases that provide that when one assumes possession/use of another's property, there is a presumption that he/she does so with the rightful owner's permission and in subordination to his rights.[4]

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1 *McGill v. Wahl*, 839 P.2d 393, 397 (Alaska 1992).
2 *Id*. (quotation omitted).
3 *Yuk v. Robertson*, 397 P.3d 261, 266 (Alaska 2017).
4 *Ayers v. Day and Night Fuel Co.*, 451 P.2d 579, 581 (Alaska 1969); *Hamerly v. Denton*, 359 P.2d 121, 126 (Alaska 1961); *City of Anchorage v. Nesbett*, 530 P.2d 1324, 1330 (Alaska 1975).

The presumption of permissive use applies here from the inception of the Stewart Trail. Both the law and the facts so provide. Upon agreement of the parties so did the Court.

2. Once The Presumption Applies It Is Only Rebuttable "By Proof Of A Distinct And Positive Assertion Of A Right Hostile To The Owner"

Again, this Court has so found. Even so, the Court more recently determined that mere acquiescence was sufficient to successfully rebut the presumption of permissive use. There are a variety of problems with this theory. First, it conflates when it is that the presumption applies. The case law provides that the presumption of permissive use applies here from the inception of the Road given the very nature of the creation and development of the Road. Second, the Court's theory is directly contrary to applicable law.

"When one assumes possession of another's property, there is a presumption that he does so with the rightful owner's permission and in subordination to his title. 'This presumption is overcome only by showing that such use of another's land was not only continuous and uninterrupted, but was openly adverse to the owner's interest, i.e., by proof of a distinct and positive assertion of a right hostile to the owner of the property'[5]."[6]

In *City of Anchorage v. Nesbett*, 530 P.2d 1324, 1330 (Alaska 1975), the court, quoting *Scheller v. Pierce County*, 55 Wash. 298, 104 P. 277 (1909), stated "If permissive in its inception, then such permissive character being stamped on the use at the outset, will continue of the same nature, and no adverse user can arise until a distinct and positive assertion of a right hostile to the owner, and brought home to him, can transform a subordinate

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[5] *Hamerly v. Denton*, 359 P.2d 121, 126 (Alaska 1961).
[6] *Ayers v. Day and Night Fuel, Co.*, 451 P.2d 579, 581 (Alaska 1969).

and friendly holding into one of an opposite nature, and exclusive and independent in its character." Additionally, even though the various property through which the "Road" runs has changed hands over the years, a mere transfer of ownership does not suffice to convert a permitted use to a hostile use.[7]

However, as noted in *Dault v. Shaw*, 322 P.3d 84, 95 (Alaska 2013), owner acquiescence is not a distinct and positive assertion of a right hostile to the owner. In *Dault* the court noted, "The trial court appears to have concluded that acquiescence in the use of the trail by the owners of lot 28 serves as evidence of hostility. But the conclusion was erroneous because owner acquiescence is not 'a distinct and positive assertion of a right hostile to the owner.' Moreover, the fact that one owner has acquiesced in a use is not at all inconsistent with the possibility that an earlier owner permitted it." *Id*. at 94-95.[8]

The Court relies entirely on *Dickson*[9] to suggest that mere acquiescence is sufficient to overcome the presumption. But this reliance is seriously misplaced. As noted in the Pughs' motion practice, incorporated here by reference, *Dickson* is inapposite on both its law and facts.

In *Dickson* there was little discussion of the hostility element at trial. Unlike the instant case, there was no judicial finding that the presumption of permissive use applied. Nor, based on the facts and law, does it appear that it would have applied. The presumption of permissive use did not apply and there was no evidence that prior homesteaders had provided

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[7] *City of Anchorage v. Nesbett*, 530 P.2d 1324, 1329 (Alaska 1975).
[8] This also serves to undercut this Court's unsupported premise that every landowner along the "Road" needs to expressly and specifically consent to the use.
[9] *Dickson v. State, Dept of Natural Resources*, 433 P.3d 1075 (Alaska 2013).

members of the public with permission. In fact, the opposite was true as the *Dickson* court noted that numerous homeowners had showed a "longstanding hostility toward public use of the trails across their property".[10]

This is to be contrasted with the instant case where there was ample testimony that the use of the Road by the public was always "welcomed". See also Exhibit 1041.[11] Additionally, nearly all the Plaintiff's members who testified confirmed that this was their understanding as well. There was ample evidence that many of Plaintiff's members received implicit, if not express, permission to use the Road by landowners. Finally, there was specific evidence that historically neighbors generally understood that the Road was private property but if they respected the private property they were welcome to use the Road for both access and recreation.

In short, there is not a single case, and the Court has not cited one, where like here the presumption applies and it has been determined that mere acquiescence is sufficient to show the requisite "hostility" by clear and convincing evidence.

3. The Quantum Of Evidence Of "Hostility" Fell Far Short Of What Is Required As A Matter Of Law

Independent of the Court's error that mere acquiescence was sufficient, the Court also appeared to suggest there was evidence of hostile acts with independent legal significance. For instance, the Court mentioned trimming alders and picking up litter as evidencing the public acting as if the land was their own. On one or two occasions Craig Medred was observed at some

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[10] *Id*. at 1085.

[11] Oddly, the Court cites to this 1972 publication for other propositions and not the one for which it was offered and admitted - that is it was generally understood that the public was welcome to use the Road if they respected private property.

uncertain time trimming some alders somewhere along the edge of the Road. What is more, it was not known whether this activity was permitted by any landowner or not. Appreciating that the landowners themselves occasionally cut the alders back from the edge of the Road to allow ingress and egress and to prevent scratching their vehicles, Mr. Medred's activity certainly was not adverse to the landowners' own interests. Similarly, picking up litter was wholly consistent with the well-publicized condition which was communicated directly by the landowners themselves as well as their neighbors to respect the private property. Far from showing adversity these activities as well as the other nonmotorized activities for which the public used the Road were wholly consistent with the permission both expressly and implicitly granted. These activities were also perfectly in line with the interests of virtually every landowner, all of whom permitted these uses, if not actively welcomed or invited them.

Even so, the notion that these various public uses put to the Road demonstrate sufficient hostility is laughable. First, starting with the language of AS 9.45.052(d) which provides in pertinent part:

> (d) Notwithstanding AS 09.10.030, the uninterrupted adverse notorious use, including construction, management, operation, or maintenance, of private land for public transportation or public access purposes... (emphasis added)

The public never engaged in construction, management, operation, or, to borrow a term, "formal" maintenance of the Road so as to trigger the prescriptive period and give the landowners sufficient notice of the assertion of a right hostile to their own.

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Second, the recent decision in *Jigliotti Family Trust v. Bloom* [12] makes clear that Plaintiff's evidence of hostility falls far short of what is required both as a matter of fact and law.

To put this into the terms of the instant litigation, the Supreme Court provided the following concerning the proof necessary to demonstrate hostility:

> The prescriptive period begins when the **easement seeker's** use of the easement unreasonably interferes with the **landowner's** current or prospective use of it; such unreasonable interference should put **landowner** "on notice of the hostile nature of the possession so that [they] may take steps to vindicate [their] rights by legal action." The **easement seeker's** use of the easement area must be "extensive," sufficient to demonstrate the **easement seeker's** "'distinct and positive assertion'... that [its] use of the easement is hostile to the rights of the **landowner** and is not merely a permissive use."
>
> "Determining what constitutes unreasonable interference, and thus triggers the prescriptive period, [is] heavily fact dependent." If the **landowner** does not often use it, as in this case, the **easement seeker** "enjoys wide latitude with respect to use of the easement area, and a showing of extensive activity will be required to demonstrate adversity." "As a general guideline, temporary improvements to an unused easement area that are easily and cheaply removed will not trigger the prescriptive period; permanent and expensive improvements that are difficult and damaging to remove will trigger the prescriptive period." (citations omitted)

4. Other Errors

A. The Standard For Determining Hostility Is An Objective One

The Court claims that only the "public's use is relevant to the analysis". But the neighbors and neighborhood are part of

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[12] *Jigliotti Family Trust v. Donald Edward Bloom, Deborah Jane Bloom, and John W. Moore*, Supreme Court No. S-17614.

the public. Further, the element of hostility must be objectively established: this means from the public's perspective, most of whom testified that they understood the property was private and they must respect the private property interests, and did; this means the neighbors who uniformly testified that they understood the property was private and both acknowledged and appreciated the landowners' grant of permission; and, this means from the landowners' perspective; all of whom provided either directly or indirectly that the public's use of the Road was permitted so long as they respected private property.[13]

B. Permission Does Not Need To Be Express

The Court repeatedly provides that with perhaps the exception of Charles Barnwell, easily one of the earliest if not most frequent users of the Road, many of the others never sought or received "express or formal permission" to use the Road. The Pughs do not quite understand the import of this qualification. First, it serves to conflate the burden of proof. As noted above, once the presumption applies, which it did here, it was Plaintiff's burden to "prove a distinct and positive assertion of a right hostile to the owner of the property". This they utterly failed to do. Second, the words: "I hereby expressly and formally grant you permission to use the road" are not talismanic. Most of the Plaintiff's members understood that by words or conduct either directly or indirectly the landowners consented to Plaintiff's use of the Road for both access and recreation. Indeed, virtually every Plaintiff member testified that they had "never been prevented or obstructed from using the Stewart Trail by any of the landowners whose land is crossed by the trail".

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[13] In the opinion the Court refers to the testimony of both Lettie Miller and Don Waddell. But both testified that access to and recreational use of the Road by the public was always permitted.

Conversely, no Plaintiff member was able to articulate anything they had done which constituted a distinct and positive assertion of a right hostile to the owner of the property - other than to use the Road in the very manner and scope permitted, which is to say respect it like it was private property, which it was. As noted above, this is insufficient to demonstrate hostility as a matter of law.

Finally, the language of AS 09.65.202(e) provides:

> (e) Except as provided for under AS 09.45.052(d), land use allowed by a landowner for a recreational activity without charge may not form the basis of a claim for adverse possession, prescriptive easement, or a similar claim.

The one indisputable fact is that all landowners, plural, without a doubt allowed recreational activity without charge. Therefore, there is no basis for a prescriptive easement claim.

C. Landowners Could Consent To Public Use Of The Road

At various places in the Opinion, the Court concluded that successive landowners could not consent to allow the public to use the Road across others' properties. The Court does not cite to any law to support this proposition. Indeed, both the facts and the law are to the contrary.

The Stewarts could always allow their guests, invitees, or members of the public to use the Road to access their property. So could the proceeding landowners. This is true because given the nature of why and how the Road was created a homesteader could always allow guests, invitees, or members of the public to use the Road to access their property. In this respect, as a matter of law, the Stewart homestead was the dominant estate. Indeed, such was the nature of the Homestead Road with its terminus at the Stewart property that no prior landowner along the Road could have legally prevented guests or members of the

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public from ingress to or egress out of the Stewart property along the Road.

5. Conclusion

The Court has erred in a myriad of ways. The Motion for Reconsideration should be granted.

Dated the 10th day of October, 2022 at Anchorage, Alaska.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10th day of October, 2022, a copy of the foregoing was sent to the following via:

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