

**SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY**

Crest AERO, et al.
v.
Norman C. Grier, et al.

NO. 06-2-07149-2 KNT
NOTICE FOR HEARING
KENT REGIONAL JUSTICE CENTER ONLY
(Clerk's Action Required) (NTHG)

TO: THE CLERK OF THE COURT and to all other parties per list on Page 2:
PLEASE TAKE NOTICE that an issue of law in this case will be heard on the date below and the Clerk is directed to note this issue on the calendar checked below.
Calendar Date: February 8, 2008 Day of Week: Friday
Nature of Motion: Motion for Partial Summary Judgment

CASES ASSIGNED TO INDIVIDUAL JUDGES - RJC

Working Papers: The judge's name, date and time of hearing must be noted in the upper right corner of the Judge's copy. Deliver Judge's copies to Judges' Mailroom at RJC

Without oral argument (Mon - Fri)

With oral argument Hearing Date/Time: February 8, 2008, at 10:00 a.m.
If oral argument on the motion is allowed (LR 7(b)(2)), contact staff of assigned judge to schedule date and time before filing this notice.

Judge's Name: Honorable Laura Gene Middaugh Trial Date: February 25, 2008

CHIEF CIVIL DEPARTMENT - RJC

All Chief Civil calendars are at 10:00 on Fridays, except as noted. See signs posted at RJC for calendar location. Deliver working copies to Judges' Mailroom, Room 2D at RJC. In upper right corner of papers write "Chief Civil Department" and date of hearing.

Extraordinary Writs (Show Cause Hearing) (LR 98.40)

Supplemental Proceedings (9:15 am) (LR 69)

Motions to Consolidate with multiple judges assigned (LR 40(a)(4) (without oral argument) M-F

Non-Assigned Cases:

Dispositive Motions and Revisions (10:30 am) Non-Dispositive Motions M-F (without oral argument)

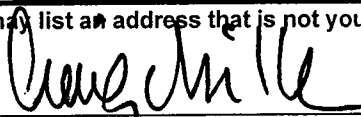
Certificates of Rehabilitation- Weapon Possession (Convictions from Limited Jurisdiction Courts) (LR 40(2)(B))

Certificates of Rehabilitation (Employment)

PARTIES: The address of the Regional Justice Center is 401 4th Avenue North, Kent, WA 98032. You must bring this document and appear as scheduled.

Room: See Posted Signs

You may list an address that is not your residential address where you agree to accept legal documents.

Sign: 
WSBA # 10239 (if attorney)
Address: 1201 Third Avenue, #2200
Telephone: 206-757-8104

Print/Type Name: Craig Miller
Attorney for: Plaintiffs
City, State, Zip Seattle WA 98101-3045
Date: January 11, 2008

DO NOT USE THIS FORM FOR FAMILY LAW, EX PARTE OR RALJ MOTIONS.

LIST NAMES AND SERVICE ADDRESSES FOR ALL NECESSARY PARTIES REQUIRING NOTICE

Name: Paul A. Spencer

Service Address: 11100 NE 8th Street, Suite 350

City, State, Zip: Bellevue, WA 98004

Telephone: (206) 464-1001

WSBA # 19511 Atty For: Defendants

IMPORTANT NOTICE REGARDING CASES

Party requesting hearing must file motion & affidavits separately along with this notice. List names, addresses and telephone numbers of all parties requiring notice (including GAL) on this page. Serve a copy of this notice, with motion documents, on all parties.

The original must be filed at the Clerk's Office not less than **six** court days prior to requested hearing date, except for Summary Judgment Motions (to be filed with Clerk 28 days in advance).

THIS IS ONLY A PARTIAL SUMMARY OF THE LOCAL RULES AND ALL PARTIES ARE ADVISED TO CONSULT WITH AN ATTORNEY.

The REGIONAL JUSTICE CENTER is in Kent, Washington at 401 Fourth Avenue North. The Clerk's Office is on the second floor, Room 2C. The Judges' Mailroom is Room 2D.

The Honorable Laura Gene Middaugh
Hearing Date: February 8, 2008
Hearing Time: 10:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CREST AERO, Inc., a Washington corporation;
ARTHUR BERKELL and LYNN BERKELL;
MIKE McGAHAN and CHARLENE
McGAHAN; LEIGH LEWIS and JOY LEWIS;
WILLIAM SWICKARD and KAY
SWICKARD; JOHN TOMLINSON; JOSEPH
GISH and RAMONA GISH; RODNEY CLAUS
and JILL CLAUS, all as representatives of a
Class of persons,

Plaintiffs,

v.

NORMAN C. GRIER and JANE DOE GRIER,
and the marital community comprised thereof;
GRIER FAMILY HOLDINGS, L.L.C., a
Washington limited liability company; and
CREST AIRPARK, INC., a Washington
corporation

Defendants.

No. 06-2-07149-2 KNT

PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT

Plaintiffs move for a partial summary judgment against defendants.

This motion is based upon evidence submitted with the Declaration of Craig Miller (authenticating various exhibits); and chiefly on the deposition testimony of the principal defendant Norman C. Grier.

A. Summary and Relief Requested

Plaintiffs seek a declaration of a prescriptive easement in their favor, confirming their right to walk and jog across land adjacent to their homes that is owned by Defendant Norman C. Grier.

1 The walking and jogging usage has been continuous from at least 1985, a date
2 admitted by Defendant Grier, until it was abruptly, and angrily, terminated by Mr. Grier in
3 May 2005. Mr. Grier apparently was angered by his loss in an earlier lawsuit against the
4 homeowners, and decided to get some measure of revenge by ordering the homeowners to
5 cease using the property for walking and jogging.

6 Defendant Grier's deposition testimony has established the following elements of
7 the Plaintiffs' claim for a prescriptive easement:

8 **First**, Mr. Grier's testimony has established that the Plaintiffs' use of his property
9 was continuous from at least 1985 through 2005 (when, following entry of judgment in the
10 earlier suit, he began shouting at walkers and joggers, and aggressively and dangerously
11 driving towards them in his truck), and that the use, absent permission, was adverse and
12 trespassory.

13 **Second**, Mr. Grier's testimony has established the nature and location of the
14 adverse use. At his deposition, Mr. Grier unhesitatingly drew on a map the location of a
15 well-defined path, worn bare over the years by continuous walking and jogging usage by
16 the Plaintiffs.

17 Defendant Grier apparently contends that the Plaintiffs' use of his property, until
18 2005, was "permissive." That assertion is false. It will be proven at trial that no
19 permission was sought or obtained by the homeowners for their adverse use of the
20 property. However, in view of Mr. Grier's apparent willingness to testify to the contrary, a
21 genuine issue of fact probably therefore is created on that point, and that issue will thus
22 require resolution at trial.

23 **B. Factual Background**

1. Flying Acres Subdivisions

The Plaintiffs are homeowners who live adjacent to Crest Airpark, a small private
airport in south King County, Washington. The homeowners are organized into a

1 homeowners association, Plaintiff Crest Aero, Inc. (that name recently was changed to
2 "Flying Acres Homeowners Association").

3 The Court is referred to the map that shows the homeowners' properties (located in
4 Flying Acres Subdivisions Nos. 1, 2, 3 and 4); the airport runway and Grassy Area
5 adjacent to the runway; and the small airport itself (located east of the runway, and
6 identifiable on the map by the "Hangars"). Miller Decl., Ex. A. Defendant Grier owns the
7 airport and the Grassy Area. (At hearing, the Court will be shown aerial photographs of
8 the property.)

9 The Flying Acres subdivisions were platted in the early to mid-1970s. The homes
10 in the Flying Acres subdivisions are unique, in that all lots are joined to grass taxiways that
11 feed out into the large Grassy Area and thence to the runway. Many of the homeowners
12 own and fly small private aircraft which are hangared in hangars at their homes.

13 In passing, it is worth mentioning that many of the homeowners are highly
14 experienced pilots, including working and retired commercial airline and military pilots.
15 As a group, the homeowners are very knowledgeable about aviation and are concerned
16 with issues of aircraft and airport safety and security.

17 2. Nesland Easement/Nesland Easement Lawsuit

18 Defendant Grier bought the airport property in 1976 from the Neslands, the party
19 who had platted the Flying Acres subdivisions.

20 All of the homeowners' properties were benefited by the "Nesland Easement,"
21 which was the subject of the earlier lawsuit between the homeowners and Grier. At the
22 time they platted the Flying Acres subdivisions, the Neslands intended to ensure that the
23 homeowners could continue to use the airpark for their own private airplanes. For that
reason, the Neslands granted to all Flying Acres homeowners the Nesland Easement,
which provides in relevant part as follows:

1 Stanley N. Nesland and Virginia S. Nesland, hereinafter
2 referred to as Grantors or Airport Owners, grant to owners of
3 property [Flying Acres Subdivisions Nos. 1, 2, 3 & 4] the
4 right to use the airplane landing strip and taxiways of the
5 Crest Airpark Airport ...until December 31, 2000, for the
6 purpose of landing and taking off small private aircraft.

7 Property Owners shall have the option to extend this
8 agreement for an additional 25 years to December 31, 2025,
9 under the following conditions:

10 1. That at least 60% of the then property owners
11 agree to pay 50% of the cost of maintenance of the landing
12 strip and taxiways and 50% of the taxes assessed or
13 attributable to the landing strip and taxiways...

14 Miller Decl., Ex. B.

15 As the year 2000 exercise date for the 25 year extension of the Nesland Easement
16 approached, the homeowners: (1) notified Grier that they intended to exercise the option
17 for the 25 year extension; and (2) made provision for payment of the 50% expenses and
18 taxes, by means of assessments made through their homeowners' association. However,
19 Grier took the position that: (1) the option had not been validly exercised (thus leaving the
20 homeowners and their airplanes without an adjacent airport); and (2) in any event, the
21 homeowners would be responsible not only for 50% of the expenses of the "maintenance
22 of the landing strip and taxiways" and taxes, as specified in the Nesland Easement, but also
23 would be responsible for 50% of all overhead expenses of the airport.

The homeowners filed suit in October 2002. Miller Decl., Ex. C. The earlier
lawsuit was styled CREST A.E.R.O., Inc, et al. v. Crest Airpark, Inc., et al., King County
Superior Court, No. 01-2-33022-5 KNT ("Nesland Easement Lawsuit"). The Plaintiffs
moved for Summary Judgment, which was granted by The Honorable Dean S. Lum on or
about August 29, 2003. Miller Decl., Ex. D. The Order Granting Summary Judgment
ruled that the 25 year option had been exercised timely and properly by the homeowners.¹

¹ The Nesland Easement Lawsuit concerned only the Nesland Easement. The Nesland Easement is limited, by its terms, to "landing and taking off small private aircraft." The Nesland Easement has nothing to do with the prescriptive easement for walking and jogging at issue in this lawsuit.

1 Thereafter, the detailed issue of the determination of the 50% share of maintenance
2 expenses was referred to arbitration. The arbitration was conducted in March 2004, before
3 arbitrator J. Richard Manning. Arbitrator Manning's rulings, Miller Decl., Ex. E, entered
4 in December 2004, were substantially in favor of the homeowners. Judge Lum adopted the
5 Arbitrator's decision; and on February 11, 2005, there was a final Judgment entered
6 reflecting the Arbitrator's rulings in favor of the homeowners as to the amount of expenses
7 owed under the Nesland Easement. No appeal was taken.

8 Thus, the net result of the Nesland Easement Lawsuit was that: (1) the 25 year
9 option was adjudged to have been validly exercised; and (2) the 50% share owned for
10 maintenance was far less than the amount demanded by Mr. Grier.

11 The adverse result suffered by Grier in the Nesland Easement Lawsuit apparently
12 triggered in Grier an attitude of resentment toward the homeowners.

13 3. Homeowners' Prescriptive Easement

14 Between the homeowners' homes and the landing strip is a large Grassy Area. See
15 map, Miller Decl, Ex. A. The major portion of the Grassy Area is located to the west and
16 north of the landing strip, and a narrower strip continues around the east side of the landing
17 strip.

18 Since at least 1985², the Grassy Area has been continuously used by the
19 homeowners for walking and jogging, and other similar light recreational activities. Miller
20 Decl., Ex. F (Grier Dep., 39:19-40:4; 54:2-55:10). Indeed, the homeowners' continuous
21 walking and jogging has worn a well-defined footpath into the Grassy Area. The existence
22 of that footpath is absolutely established. At his deposition, Defendant Grier, when asked
23 to draw the location of the "pedestrian footpaths" on a map, did so accurately and without
contesting that the pedestrian footpath was an undisputed fact.

² Mr. Grier testified that the walking and jogging started at the time trees standing to the west of the runway were removed. Grier Dep., 39:19-40:4. Mr. Grier testified that the trees were removed in 1984 or 1985. Grier Dep., 54:2-55:10.

1 Q: I'm going to hand you a red pen ... and I'd like you to
2 ...draw the pedestrian footpaths that exist on in [sic] the
3 grassy areas to the west of the runway.

4 A: They're west of the runway... (Complies.)

5 Q: Tell us what you've drawn there, sir.

6 A: I've drawn where they walk.

7 Q: The line that you've drawn, I know you're not a
8 surveyor and we're not working with precision here this
9 morning, but that's your best estimate of where there actually
10 is a worn groove in the grass that is made from the constant
11 use by pedestrians and joggers and so forth, right?

12 A: Uh-huh.

13 Q: Your answer is yes?

14 A: Yes.

15 Miller Decl., Ex. F (Grier Dep., 40:10-41:15). The map that Mr. Grier then drew is found
16 at Miller Decl., Ex. H. (For ease of reference the red ink line that he drew at his deposition
17 has been identified in pink highlighter pen.)

18 After more than 20 years of continuous walking and jogging use, there came a day
19 in May 2005 -- shortly after the conclusion of the Nesland Easement Lawsuit --on which
20 Defendant Grier suddenly began demanding that the homeowners cease their walking and
21 jogging. Miller Decl., Ex. G (Birge Dep., 107:1-13).

22 As the evidence at trial will show, Defendant Grier's sudden eviction of the
23 homeowners was done in a fit of ill-will, apparently motivated by his defeat in the Nesland
Easement Lawsuit. In his deposition, Mr. Grier claimed that he made the sudden decision,
in May 2005, based on "security" issues stemming from the 9/11 attacks. The
homeowners' evidence at trial will demonstrate that the "9/11 attacks" reason is totally
pretextual. (Indeed, there are many disturbing instances where Mr. Grier demonstrated a

1 disinterest in airport security and safety; whereas, by contrast, the homeowners have been
2 the ones who maintain a vigilant, watchful eye on the airport and its users.)

3 **C. Elements of Prescriptive Easement**

4 An easement is a nonpossessive right or interest to use the land of another without
5 compensation. See, e.g., Stoebuck and Weaver, 17 *Washington Practice* § 2.1 (2004)
6 (“Washington Practice”); Harris v. Ski Park Farms, Inc., 120 Wn.2d 727, 737 (1993). The
7 principal purpose of easements is to protect long-established positions. See Kunkel v.
8 Fisher, 106 Wn. App. 599, 603 (2001) (citing 28A C.J.S. Easements § 14 (1996)).

9 Under Washington law, an action for trespass must be brought within 10 years.
10 RCW 4.16.020(1). It is undisputed that the Plaintiffs' use of the Defendant's property
11 extends at least back to 1985. Thus, the Plaintiffs' adverse use has continued for more than
12 two decades without a trespass action being filed by the property owner.³

13 In this action, the Plaintiffs seek a declaratory judgment that any possible trespass
14 action is time barred, and that, therefore, a prescriptive easement exists. In order to
15 establish a prescriptive easement, the Plaintiffs must prove that:

16 (1) they have used the property adverse to the right of the servient owner,
17 Defendant Grier;

18 (2) that their use was open, notorious, continuous, and uninterrupted for the
19 entire prescriptive period;

20 (3) and that Mr. Grier knew of this use at a time when he was able to assert
21 and enforce his rights.

22 See, e.g., Lingvall v. Bartmess, 97 Wn. App. 245, 249 (1999) (citing Dunbar v. Heinrich,
23 95 Wn.2d 20, 22 (1980)). Those elements are discussed in turn.

³ Indeed, Mr. Grier has not yet sued for trespass. His counterclaim in this action, remarkably, omits a cause of action for trespass. Thus, the limitations period continues to run even today.

1 1. Adversity

2 For the purpose of establishing a prescriptive easement, courts have defined a
3 claimant's use as adverse "when he uses the property as a true owner would, under a claim
4 of right, disregarding the claims of others, and asking no permission for such use." Drake
5 v. Smersh, 122 Wn. App. 147, 152 (2004) (citing Kunkel v. Fisher, Wn. App. 599, 602,
6 *rev. denied*, 145 Wn.2d 1010 (2001)). Courts have stated that adversity is generally a
7 question of fact, but if the essential facts are in not in dispute, it can be resolved as a matter
8 of law. *Id.* (citing Lingvall, 97 Wn. App. at 250). "Failure on the part of the owner of the
9 servient estate to interrupt the user of a right of way across his land by another is strong
10 evidence that the parties thought that the way was used as a matter of right." Northwest
Cities Gas Co. v. Western Fuel Co., Inc., 13 Wn.2d 75, 87 (1942).

11 Adverse use is measured objectively based on the observable acts of the user and
12 rightful owner and adversity does not import any subjective "ill will." Lingvall, 97 Wn.
13 App. at 250. Indeed, the subjective intent of the party establishing the prescriptive
14 easement is irrelevant. In Lee v. Lozier, the court stated that:

15 The neighbors' subjective beliefs. . .are irrelevant...it is only
16 important that uses they made of the dock were inconsistent
17 with [the true owner's] rights:

18 The "hostility/claim of right" element of adverse possession
19 requires only that the claimant treat the land as his own as
20 against the world throughout the statutory period. The nature
21 of his possession will be determined solely on the basis of
22 the manner in which he treats the property. His subjective
23 belief regarding his true interest in the land and his intent to
dispossess or not dispossess another is irrelevant to this
determination.

88 Wn. App. at 184, n.2 (emphasis added) (quoting Chaplin v. Sanders, 100 Wn.2d 853,
860-61 (1984)).

"Use is not adverse if it is permissive[,]" Drake, 122 Wn. App. at 152. Mr. Grier
has testified at deposition to the effect that the 20-plus years of otherwise apparently

