

**FILED: January 30, 2013**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

DANIEL G. UHL  
and JANIE J. UHL,  
husband and wife,  
Plaintiffs-Respondents,

v.

STANLEY W. KRUPSKY  
and JULIE K. KRUPSKY,  
husband and wife,  
Defendants-Appellants.

Columbia County Circuit Court  
102190

A150512

Jenefer Stenzel Grant, Judge.

Argued and submitted on December 18, 2012.

Mark A. Gordon argued the cause and filed the briefs for appellants.

Paul J. C. Southwick argued the cause for respondents. With him on the brief were Timothy R. Volpert and Davis Wright Tremaine LLP.

Before Armstrong, Presiding Judge, and Duncan, Judge, and Brewer, Judge pro tempore.

BREWER, J. pro tempore.

Affirmed.

1 BREWER, J. pro tempore

2 The issue in this case is whether the requirements of ORS 105.620--in  
3 particular, the requirement of ORS 105.620(1)(b) that a party claiming adverse  
4 possession of real property must have an "honest belief" that the claimant is the true  
5 owner--apply to a claim by an owner of fee simple title for the extinguishment of an  
6 easement. Because the trial court correctly concluded that ORS 105.620 does not apply  
7 to such claims, we affirm.

8 The pertinent facts are not in dispute. Plaintiffs are the owners of fee  
9 simple title to real property that they purchased in 1995. When they acquired title to it,  
10 plaintiffs' property was encumbered by a recorded 60-foot-wide driveway and utility  
11 easement appurtenant to an adjoining five-acre parcel of real property. The adjoining  
12 parcel is landlocked, having been created out of plaintiffs' original road frontage parcel  
13 by the properties' former common owner. In 1999, defendants purchased the adjoining  
14 five-acre parcel. Defendants' driveway is located on the easement over plaintiffs'  
15 property. A fence on plaintiffs' property bisects the easement, separating approximately  
16 two-thirds of the width of the easement from defendants' driveway. The fence predates  
17 the parties' ownership of their respective parcels of land.

18 Plaintiffs were aware of the existence and location of the easement when  
19 they purchased their property in 1995. However, from 1995 until at least 2009, plaintiffs  
20 treated the disputed easement area--that is, the portion of the easement not used as  
21 defendants' driveway--as part of their property by maintaining the area, planting shrubs,

1 and installing irrigation. Plaintiffs also installed a black, steel, remote-controlled gate  
2 across their own driveway opening. The gate is located in the easement and has the  
3 effect of creating a complete barrier between the portion of the easement used as  
4 defendants' driveway and the remainder of the easement.

5           After a dispute arose between the parties concerning whether defendants'  
6 easement extended to the portion on "plaintiffs' side" of the fence, plaintiffs filed this  
7 action seeking quiet title and a declaration that defendants' easement rights in the  
8 disputed property had been extinguished by adverse possession. Based on the facts that it  
9 found, the trial court concluded that plaintiffs had established by clear and convincing  
10 evidence each of the elements of a common-law claim for adverse possession of the  
11 disputed portion of the easement. That ultimate conclusion was premised on the court's  
12 foundational conclusion that ORS 105.620, which applies to claims for adverse  
13 possession of fee simple title to real property that vested after January 1, 1990, does not  
14 apply to claims by an owner of fee simple title to real property for the extinguishment of  
15 an easement burdening the property.

16           Defendants appeal from the ensuing judgment for plaintiffs. On appeal,  
17 defendants reprise their argument before the trial court that ORS 105.620 applies to all  
18 adverse possession claims vesting after January 1, 1990, including claims by fee simple  
19 owners for the extinguishment of easements.

20           At common law, to establish ownership by adverse possession, claimants  
21 had to prove by clear and convincing evidence that they, or they and their predecessors in

1 interest, maintained actual, open, notorious, exclusive, hostile, and continuous possession  
2 of the property for a 10-year period. *Lieberfreund v. Gregory*, 206 Or App 484, 490, 136  
3 P3d 1207 (2006). In 1989, the legislature enacted ORS 105.620, codifying the common  
4 law and adding a requirement that a party seeking to acquire fee simple title to real  
5 property by adverse possession must have had an "honest belief of actual ownership"  
6 when he or she first entered into possession of the property. *Id.* ORS 105.620 provides:

7           "(1) A person may acquire fee simple title to real property by  
8           adverse possession only if:

9           "(a) The person and the predecessors in interest of the person have  
10           maintained actual, open, notorious, exclusive, hostile and continuous  
11           possession of the property for a period of 10 years;

12           "(b) At the time the person claiming by adverse possession or the  
13           person's predecessors in interest, first entered into possession of the  
14           property, the person entering into possession had the honest belief that the  
15           person was the actual owner of the property and that belief:

16           "(A) By the person and the person's predecessor in interest,  
17           continued throughout the vesting period;

18           "(B) Had an objective basis; and

19           "(C) Was reasonable under the particular circumstances; and

20           "(c) The person proves each of the elements set out in this section  
21           by clear and convincing evidence.

22           "(2)(a) A person maintains 'hostile possession' of property if the  
23           possession is under claim of right or with color of title. 'Color of title'  
24           means the adverse possessor claims under a written conveyance of the  
25           property or by operation of law from one claiming under a written  
26           conveyance.

27           "(b) Absent additional supporting facts, the grazing of livestock is  
28           insufficient to satisfy the requirements of subsection (1)(a) of this section.

1                   "(3) As used in this section and ORS 105.005 and 105.615, 'person'  
2 includes, but is not limited to, the state and its political subdivisions as  
3 created by statute."<sup>1</sup>

4                   The statutory requirements apply to claims that are filed and interests that  
5 vest after January 1, 1990. Or Laws 1991, ch 109, § 3. In this case, it is undisputed that  
6 plaintiffs' adverse possession claim vested, if at all, after January 1, 1990. The parties  
7 also agree, for present purposes, that the dispositive issue on appeal is whether the statute  
8 applies to plaintiffs' claim. If it does, plaintiffs failed to satisfy the honest belief  
9 requirement of subsection (1)(b), in that they knew of defendants' predecessors' easement  
10 interest when they first entered possession of their property in 1995. If, on the other  
11 hand, the statute does not apply, the trial court properly concluded on the facts found that  
12 plaintiffs satisfied the common-law hostility requirement.<sup>2</sup>

---

<sup>1</sup>           The statute has been amended twice, first in 1991, Or Laws 1991, ch 109, § 2, and again in 1999, Or Laws 1999, ch 950, § 1. Because neither of those amendments related to the issue at hand on appeal, we set out the current version of the statute, which, for present purposes, is identical to the original version that was enacted in 1989.

<sup>2</sup>           To establish the requisite hostility at common law, a claimant must demonstrate a subjective intent to "possess the property intending to be its owner and not in subordination to the true owner." *Hoffman v. Freeman Land and Timber, LLC.*, 329 Or 554, 561, 994 P2d 106 (1999). "If an adverse possession claimant establishes an intent to appropriate land to him or herself, to the exclusion of all others, then the claimant is said to possess that land under "claim of right" or "claim of ownership." In *Nedry v. Morgan*, 284 Or 65, 71, 584 P2d 1381 (1978), the court explained:

    "[C]laim of right' simply means that the possession is not permissive and that the party in possession has not led the true owner to believe that the possessor recognizes the true owner's rights. When it appears that the possessor is aware of the possibility that another party had an interest in the property, the court must examine the evidence to determine whether or not the possessor nevertheless intended to claim the entire property as his own."

1           Generally, in interpreting a statute, we examine the statutory text in context  
2 and in light of any pertinent legislative history offered by the parties. *State v. Gaines*,  
3 346 Or 160, 171-72, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317  
4 Or 606, 610-11, 859 P2d 1143 (1993). In this case, the statutory text, in context, is  
5 dispositive.<sup>3</sup> The pivotal portion of ORS 105.620 is found in the first sentence, which  
6 reads, "A person may acquire fee simple title to real property by adverse possession only  
7 if \* \* \*." The first significant term in that clause is "acquire." Acquire means "to come  
8 into possession, control, or power of disposal of often by some uncertain or unspecified  
9 means." *Webster's Third New Int'l Dictionary* 18 (unabridged ed 2002). The second  
10 significant term is "fee simple title." "Fee simple" title means "(a)n interest in land that,  
11 being the broadest property interest allowed by law, endures until the current holder dies  
12 without heirs." *Black's Law Dictionary* 648-49 (8th ed 2004). Fee simple title is an  
13 "estate" in real property, which means, among other requirements, that it "is or may  
14 become possessory." *Restatement (First) of Property* § 9, 23 (1936). "The word  
15 'possessory' as here used has a considerable exclusionary effect. Such interests as  
16 easements \* \* \* are not interests which may become possessory." *Id.* at § 9 comment b;  
17 *see also Kesterson v. California-Oregon Power Co.*, 114 Or 22, 25, 228 P 1092 (1924)

---

(Citations omitted.)

<sup>3</sup> Both parties have submitted selected legislative history of the original enactment of ORS 105.620, as well as legislative history pertaining to the 1999 amendment of the statute. Suffice it to say, there is nothing authoritative as respects the issue at hand in any of the material that the parties proffered. Rather than dwell on the tangential cross-currents in the parties' submissions, we focus on the plain text of the statute in its context.

1 ("[I]n treatment of the subject in hand, the right of the defendant \* \* \* will be considered  
2 as an easement and not as an estate in fee simple.").

3           In conjunction, those significant terms limit the statute's reach to adverse  
4 possession claims involving the acquisition of possession, control, and the power of  
5 disposal of the broadest property interest allowed by law, which does not include an  
6 easement. Here, plaintiffs did not seek to acquire fee simple title to the disputed property  
7 because they already owned that broad property interest. They also did not ask the trial  
8 court to grant them an easement interest in the disputed property. Rather, they sought to  
9 quiet title by the extinguishment of defendants' easement. Although plaintiffs' fee simple  
10 title was burdened by defendants' easement, extinguishing the easement merely removed  
11 that burden; it did not alter the status of plaintiffs' fee simple ownership of their property.

12           Furthermore, ORS 105.620(1)(b) supports an interpretation that limits its  
13 application to the acquisition of fee simple title. As noted, that section states:

14           "At the time the person claiming by adverse possession or the  
15           person's predecessors in interest, first entered into possession of the  
16           property, *the person entering into possession* had the honest belief that the  
17           person was *the actual owner of the property*."

18 (Emphasis added.) Possession means "the fact of having or holding property in one's  
19 power; the exercise of dominion over property." *Black's* at 1201. Here, plaintiffs have  
20 had possession of the property since they purchased it. In contrast, as easement holders,  
21 defendants held a nonpossessory interest in the property. ORS 105.170(1) defines an  
22 easement as

1            "a *nonpossessory interest* in the land of another which entitles the holders  
2            of an interest in the easement to a private right of way, embodying the right  
3            to pass across another's land."

4            (Emphasis added.) The use of the phrase "actual owner" in ORS 105.620(1)(b) also is  
5            significant in that plaintiffs are the undisputed fee simple owners of the property at issue.  
6            Again, defendants' easement burdened that ownership, but defendants did not actually  
7            own the property. For that reason, the trial court properly concluded that "the 'honest  
8            belief that the person was the actual owner of the property' language simply does not  
9            make sense in the context of an easement where the servient property owner already has  
10           fee simple title to the property." Stated differently, the statutory text presumes that the  
11           would-be adverse possessor is not the actual owner of the property but, rather, was  
12           "honestly mistaken" in believing that he or she was the owner. *Stiles v. Godsey*, 233 Or  
13           App 119, 127-28, 225 P3d 81 (2009). Thus, logically, the statute does not contemplate  
14           the circumstance where, as here, the would-be adverse possessor is in fact the actual  
15           owner of the property.

16                    Defendants essentially ask us to read the phrase, "had the honest belief that  
17           the person was the actual owner of the property," as "had the honest belief that the person  
18           was the actual owner of the easement." However, the term "the property" in subsection  
19           (1)(b) must be read in the context of the rest of the statute. The preface to the statute  
20           describes the kind of property to which it applies, that is, "fee simple title to real  
21           property." That meaning is transcendent. *PGE*, 317 Or at 611 ("[u]se of the same term  
22           throughout a statute indicates that the term has the same meaning throughout the



1 statute[.]").

2           To support their contrary assertion, defendants rely on footnotes found in  
3 three appellate decisions involving the extinguishment of easements by adverse  
4 possession. In each case, the court determined that the claim arose outside of the  
5 temporal reach of the statute, which, as noted, only applies to adverse possession claims  
6 that vested after 1989. In *Faulconer v. Williams*, 327 Or 381, 964 P2d 246 (1998), the  
7 court analyzed whether an express easement over the plaintiffs' property was  
8 extinguished through adverse possession. The court explained that, for such an  
9 extinguishment to occur, each element of adverse possession must be proved by clear and  
10 convincing evidence. In a footnote, the court noted:

11           "ORS 105.620, adopted by the legislature in 1989, imposes a similar  
12 requirement. That statute also contains other requirements for the  
13 successful maintenance of a claim for adverse possession, but it applies  
14 only to claims for title in which the interest vested after 1989. Here,  
15 plaintiffs claim and the Court of Appeals held that plaintiffs' interest vested  
16 before 1989."

17 *Faulconer*, 327 Or at 388 n 4.

18           *Stonier v. Kronenberger*, 230 Or App 11, 214 P3d 41 (2009), also involved  
19 the extinguishment of an easement by the servient property owner. We held that the  
20 claimant was required to prove the elements of a common-law adverse possession claim  
21 "and that the use was inconsistent with the use of the easement by the owners of the  
22 dominant estate." *Id.* at 18. In a footnote, we observed:

23           "ORS 105.620(1)(b) also requires proof that the claimant have an  
24 'honest belief' that the claimant is the true owner, but that statute applies  
25 only to claims in which the period of adverse possession necessary to

1 establish prescription extends beyond January 1, 1990. Or Laws 1989, ch  
2 1069, § 4. In this case, plaintiffs contend that the period of prescription was  
3 completed in 1989 and that, as a result, the statute does not apply."

4 *Id.* at 18 n 5. Again, that passage did not engage in any statutory interpretation of ORS  
5 105.620 that is pertinent to the issue at hand; it merely took the first principled "door out"  
6 by noting that the statute does not apply to adverse possession claims where vesting was  
7 completed before 1990.

8 Finally, in *Slak v. Porter*, 128 Or App 274, 875 P2d 515 (1994), we held  
9 that the claimants were required to "show that their use or occupancy was inconsistent  
10 with plaintiffs' use of the easement." *Id.* at 278. In a related footnote, we noted that  
11 "[d]efendants contend that their rights in the easement vested, at the latest, by 1989." *Id.*  
12 at 278 n 1. Therefore, the statutory requirements for adverse possession that were  
13 enacted in 1989 do not apply." Again, we did not hold that ORS 105.620 applies to the  
14 extinguishment of an easement through adverse possession by the fee simple owner of  
15 servient property. Rather, as was the circumstance in *Faulconer* and *Stonier*, we merely  
16 affirmed the temporal limits of the statute. In short, none of those three cases involved  
17 the issue at hand and, accordingly, they included no pertinent statutory construction  
18 analysis of that issue.

19 Defendants also rely on *Stiles* to support their proposed construction of  
20 ORS 105.620. In that case, the plaintiffs sought to acquire fee simple title to disputed  
21 property and to extinguish an easement on the property through an action for common-  
22 law adverse possession and statutory adverse possession under ORS 105.620. The

1 plaintiffs did not have fee simple title to the real property, nor did they have an easement  
2 interest in it. 233 Or App at 122. Because the vesting period for their claims occurred  
3 after 1990, we concluded that ORS 105.620, not the common law, governed their claims.  
4 *Id.* at 125-26.

5           In examining the hostility requirement, we concluded that the plaintiffs had  
6 a reasonable, though mistaken, belief that they were the actual owners of the disputed  
7 property. *Id.* at 130. We then applied the honest belief requirement to all of the  
8 plaintiffs' claims, without considering whether their claim for fee simple title should have  
9 been analyzed separately from their claim for extinguishment of easement interests on the  
10 same property. Although we had a duty to properly construe the statute irrespective of  
11 the parties' arguments as to its meaning, none of the parties' briefs in that case engaged in  
12 any separate construction of the statute with respect to the claims involving the  
13 extinguishment of the easements, and neither did we. To properly account for the  
14 limitations of ORS 105.620, we arguably should have applied the honest belief  
15 requirement to the plaintiffs' claim for fee simple title to the disputed property and the  
16 common law, not the statute, to the plaintiffs' claim to extinguish the easement interests  
17 on that property.

18           However, *Stiles* is nonetheless distinguishable from this case both on its  
19 facts and in its procedural posture. As noted, in that case, in contrast to the circumstances  
20 here, the plaintiffs were not the actual owners of the real property at issue when they  
21 "entered into possession," making their claim fit more comfortably within the confines of

1 ORS 105.620(1)(b). Second, as noted, *Stiles* involved both adverse possession claims  
2 whereby the plaintiff sought to acquire fee simple to the disputed property and,  
3 concurrently, to extinguish easement claims. In the absence of any argument by the  
4 parties for separate treatment of such claims, we batched them together and conducted no  
5 independent statutory analysis that is pertinent to the issue at hand.

6           Here, plaintiffs' claim sought only the extinguishment of an easement that  
7 burdened their preexisting fee simple title to the real property at issue. Accordingly, we  
8 need not disturb our decision in *Stiles* in order to reach the conclusion that the text of the  
9 statute, in its context, plainly compels. Because ORS 105.620 does not apply to adverse  
10 possession claims whereby the owner of fee simple title to real property seeks to  
11 extinguish an easement on that property, the trial court did not err in entering judgment  
12 for plaintiffs.

13           Affirmed.