IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 82112

TY ALBISU, ROSIE ALBISU, and
ANCHOR S-RANCH AND RENTALS, LLC.

Appellants,

v.

KIMBLE WILKINSON,

Respondent.

Appeal from a Bench Trial Findings of Fact and Conclusions of Law and Judgment
The Sixth Judicial District Court of Nevada
The Honorable Michael Montero, District Judge
District Court Case No. CV-0021509

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

I. DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, Ty Albisu is an individual. Anchor S-Ranch and Rentals, LLC is an expired Nevada limited liability company. In the proceeding below, Appellant was represented by John F. Sloan, Esq., a Professional Corporation.

II. STATEMENT OF FACTS

Respondent's Answering Brief fails to demonstrate that each of the required elements of a prescriptive easement existed to grant him access to the Albisu Property. It is worth highlighting the inconsistencies presented to the district court at trial. Respondent testified under oath as to the neighborly custom of ranchers and property owners to allow cattle to cross another's land: That without a mutual agreement as to a specific cattle drive, the custom in the region is that "a lot of people would like to know when you're moving through so that you can – they can have their cattle out of the way, or obstructions out of the way, just for courtesy on their parts as far as mine. It's [been] that way for a hundred years, 70 years that I've been here." JA. v.3 at 433. In discussing the custom of moving cattle through another's property, Respondent noted how he would treat gates, "If you find it open, you normally leave it open, unless you've discussed it with the owner, and he requests that you would close it after to help him, so he didn't have to do it." *Id.* at 434. Respondent testified that the first time his access to the Albisu Property was blocked

was on April 5, 2018 when a boulder was placed in front of a gate. *Id*. at 437. "After several disputes of going through the blocked fence, I had to keep cutting the fence to move and use access to that ground. And in one trip through there I received a flat tire, and started searching around, and there were spikes thrown in – driven into the form of my path in four different places." *Id*. at 438. Respondent's son, Barry Wilkinson, also testified that their access was first denied in 2018. *Id*. at 509.

On the one hand, Respondent testified that he had run cattle across the Albisu Property since 1984. *Id*. at 431. On the other hand, Respondent admitted that he had never had any association with Frank Albisu, who owned the Albisu Property from 1984 until 1997. *Id*. at 454. "… we weren't moving cattle across that land under Frank Albisu's time." *Id*. On a third hand, Respondent testified he had run cattle since he purchased the Minor Ranch in 1994. *Id*. at 434. Respondent admitted that the Amended Complaint he signed was incorrect in asserting that John and Rosie Albisu "did not allow or consent to the plaintiff moving his cattle across their land." *Id*. at 455. He denied that this ever happened. He testified that John Albisu used to help Gary [Minor] go through the Albisu Property when it was BLM land. *Id*. at 489. He testified that upon inheriting the Albisu Property, John and Rosie Albisu put up fences over the next couple of years. *Id.* at 490. John and Rosie Albisu maintained the fencing of the Albisu Property and the No Trespass signage. John Albisu leased the Albisu Property to Respondent's cousins, Fred and Nick Wilkinson

from 2011 to 2018. *Id*. at 468, 546. He admitted that during that time, his cousins gave him permission to move cattle across the Albisu Property, and he would let them know when he intended to do a drive as per the above stated custom and courtesy. *Id.* Nick Wilkinson testified that John Albisu gave him instruction to get the dates from Respondent of his cattle drives and notify him of such. *Id*. at 552.

Ty and Linda Albisu own a cow/calf operation that utilizes all of the Albisu Property and certain BLM allotments. Ty Albisu testified that he had not witnessed any cattle drive of the Wilkinson Ranch across the Albisu Property from 2010 through 2018. He testified that the Albisu Property was fenced, gated, locked, and had No Trespass signage. Further, he testified that no one ever made the "customary" call to request access. *Id*. at 586. Rosie Albisu was a housewife during her marriage to John Albisu. She testified that she never gave consent to Respondent to run cattle over the Albisu Property. JA v.4 at 637. John Albisu died by suicide prior to the trial of this matter, so there is no court record of his position beyond the testimony of other witnesses.

Upon transfer of the remaining Albisu Property to Ty Albisu beginning in 2018, Ty and Linda Albisu have continuously and forcibly attempted to eject Respondent from using the Albisu Property for the spring and fall cattle drives, and for Respondent's use of the Albisu Property to move certain farm equipment in a manner convenient to him. To say the relationship between the Appellants and the

Respondent is hostile would be an understatement. The Albisus have suffered greatly at the hands of the Wilkinson family and continue to suffer to this day. Since the filing of this appeal, Rosie Albisu died while working cattle on the Albisu Ranch.[1]

III. ARGUMENT

A. Necessary Joinder.

In his Answering Brief, Respondent states that regardless of the fact that he acknowledged to the trial court that his wife and the Trustee of the Wilkinson Trust were necessary parties to the litigation, this Court should not make that finding because he alleges that this is an easement in gross, of a commercial nature, that was created to benefit Respondent alone. Respondent relies on the Utah case of *Crane v. Crane*, 683 P.2d 1062 (1984) for this proposition. However, this case refutes the core of Respondent's argument. In *Crane*, the Utah Court addressed the claim of an unincorporated grazing association that they had a right to traverse the appellants' property to drive their cattle to grazing allotments on public land appurtenant to appellants' property. No member of the association had land appurtenant to the private property, and it is for that very reason that the court found the purported easement to be an easement in gross. "Since the claimed easement is not appurtenant to any particular dominant estate (none of the plaintiffs owns land adjoining

[1] The district court entered judgment against all defendants Respondent sued by way of the underlying complaint, including John Albisu, deceased, Anchor S-Ranch and Rentals, LLC, a defunct company, and Rosie Albisu who is now also deceased.

defendants), it is an easement in gross." *Crane* at 1064. With our case, it is undisputed that the Wilkinson Property is appurtenant to the Albisu Property, and that Respondent's access of the Albisu Property is for (a) driving cattle from the Wilkinson Property in Nevada to the Wilkinson ranch in Oregon without the need to go up the highway and through McDermitt; and (b) for convenient storage of equipment next to Wilkinson's pasture lands. This is not an easement in gross. Respondent acknowledges in his Answering Brief that if a dominant estate exists, then Sue Wilkinson and the Trustee of the Wilkinson Trust are necessary parties as co-owners of the dominant estate. *See* Answering Brief at 13.

There is no authority cited for the proposition that the Appellant was required to stipulate to the management of Respondent's litigation. Motions were made to join these parties, and the Court failed to address them. While Appellant appreciates the case law cited by Respondent asserting that should a subsequent lawsuit be filed, it would surely be barred due to the law of privity, the purpose of NRCP 19 is to avoid unnecessary litigation in the first place. The citation of a string of cases that reached the Ninth Circuit does not in fact prove that litigation was actually avoided. NRCP 19 should have been addressed in this case by the district court, and it was not. A district court is obligated to, *sua sponte*, join a necessary party, if the litigants have not done so, and failure to join a necessary party does not constitute a waiver of the issue. *Blaine Equip. Co. v. State*, 122 Nev. 860, 864 (2006).

B. Prescriptive Easement.

The district court erred in finding that Respondent met by clear and convincing evidence each of the required elements to establish a prescriptive easement across the Albisu Property: adverse, continuous, open, and peaceable. The use by Respondent of the Albisu Property changed over time, and more importantly, the Albisu Property changed over time. Respondent argues that he has perfected a prescriptive easement due to decades long use, yet this is not indicative of a finding of prescriptive easement by clear and convincing evidence. Prior to 1984, the Albisu Property was held by the Bureau of Land Management as public land. From 1984 to 1997, Frank Albisu owned the Albisu Property as open ground, and constructed certain roads. Respondent testified that he never used the Albisu Property while Frank Albisu owned it. In 1997, John and Rosie Albisu inherited the Albisu Property and began constructing fences within a few years, and gates at the existing roads. From 2011 to 2018, Wilkinson family members were tenants in possession of the portions of the Albisu Property used by Respondent. From 2018 to present, Ty Albisu, and later Ty and his wife Linda Albisu, have owned the Albisu Property and have exerted their rights as owners. Respondent admits that his access to "Gate 1" had never been interfered with until April 5, 2018. JA v. 3 at 437.

i. Respondent's Use of the Albisu Property Was Not Adverse to the Appellant Landowners Until 2018.

In his Answering Brief, Respondent emphasizes the Amended Complaint, wherein he alleged in paragraph 14 that the Frank Albisu never gave him permission to run cattle across his land. Answering Brief at 20. Respondent emphasizes the fact that Appellants neither admitted nor denied this allegation in their original and Amended Answer and thus it is deemed admitted pursuant to NRCP 8(b)(6). *Id*. While the Amended Answer does not specifically address paragraph 14 of the Amended Complaint, it does address the identical issue set forth in paragraph 114 of the Amended Complaint, and they did in fact deny that *any owner or prior owner of the Albisu Property "acquiesced to a prescriptive easement*." JA v.1 at152. More importantly however, is the fact that Respondent was specifically questioned about paragraph 14 of the Amended Complaint at trial, and he testified as follows:

> Q: Now, take a look at paragraph 14 in this verified Complaint. That's on page 2.
> A. Okay.
> Q. And it states that, "Frank Albisu did not allow or consent to plaintiff moving his cattle across Frank Albisu's land." Is that correct?
> A. Yes, sir; that's correct. And it -- because we weren't moving cattle across that land under Frank Albisu's time.
> Q. And then it said, "However, Frank Albisu eventually quit complaining about the cattle crossing the land."
> So, anyway, Frank Albisu, during the time that he owned the land, complained, and didn't want you to move any cattle across it; is that correct?
> A. No. That's a misprint. I never had any association with Frank Albisu, at all.
> Q. But you did read this Complaint and said it was true.
> A. I skimmed over it. It's a very thick Complaint. I never read every word. I assumed that all of the stuff was right in there. Yeah, that's true.

Id. at 454 – 455. It defies logic, and frankly fundamental fairness, that Appellant can be deemed to have admitted a fact in Respondent's Amended Complaint that Respondent specifically denied was true and should not have been stated at all. It certainly calls into question whether Respondent moved any cattle across the Albisu Property until at least 1998 after Frank Albisu died. *Id*. at 454. "… we weren't moving cattle across that land under Frank Albisu's time." *Id*. Thus, the evidence concludes that Respondent did not use the Albisu Property between 1984 and 1997.

Respondent repeatedly contradicted the allegations made in the Amended Complaint in regards to the issue of adverse use. Specifically, he stated that the Amended Complaint was incorrect in asserting that John and Rosie Albisu "did not allow or consent to the plaintiff moving his cattle across their land." *Id*. at 455.

> Q: Where it said, "After John Albisu and Lucy (sic) Albisu became owners of land between the plaintiff's land, they did not allow or consent to the plaintiff moving his cattle across their land." Is that true?
> A. That's not true.
> Q. But you said it was when you signed this Complaint.
> A. Yeah. Yes, I did. I guess, again, assume, read over it. But that has no bearing. It never happened.

Id. These contradictory sworn statements do not meet the clear and convincing standard necessary to find that the use of the Albisu Property was adverse.

Adverse use is established by asserting a right to use the land. *Michelsen v. Harvey*, 107 Nev. 859, 863, 822 P.2d 660 (1991). In the case of a prescriptive easement, if there is cause to believe the use is merely permissive, it does not meet

the threshold of being adverse. “Courts are reluctant to find prescriptive easements over open and unclosed land since such use tends to be permissive in nature and does not imply a hostile or adverse use." *Wilfon v. Hampel 1985 Trust,* 105 Nev. 607, 609, 781 P.2d 769 (1989). In the case of *Wilfon*, "The mere fact that Hampel and his predecessors crossed over a corner of Wilfon's property does not show any hostile claim of right on Hampel's part.” *Id.* Respondent appears to concede this point in his Answering Brief at page 21, as the Albisu Property was not fenced when under Frank Albisu’s ownership, regardless of the fact that he testified that he did not use the Albisu Property during Frank’s ownership of it.

Shortly after Frank Albisu purchased the Albisu Property from BLM, he recorded a plat map with easements for proposed roads and utilities that were never constructed. The granting of roadway easements in the plat map reflects the permissive nature of the crossing, as set forth clearly in Nevada law. Respondent stated that when he did use the Albisu Property, presumably after 1998, he primarily used these existing dirt and gravel roads to move his cattle across the Albisu Property. JA. v.3 at 426.

Respondent attempts to limit the holding of *Wilfon* and the cases cited therein to cases involving *only* unfenced and open ground, arguing that once the Albisu Property was fenced Respondent’s use was adverse. This is not an accurate assessment of the law. Specifically, the *Wilfon* Court cited numerous cases to

support the proposition that the use of existing roads is generally deemed permissive, and it is irrelevant whether that road is gated by the landowner. The *Wilfon* Court relied on *Howard v. Wright*, 38 Nev. 25, 143 P. 1184 (1914) which addressed a respondent's claim for prescriptive easement through appellant's fenced and gated pasture to reach respondent's ranch on the other side. The Court held that, despite the existence of a gate, this passage was permissive and neighborly, much like the historic use that Respondent swore to in the case at bar – a custom throughout the region to allow for the driving of cattle, with neighborly notice to the landowner. The Court stated:

> The entire record, in this case relied upon by respondents to establish a right of way through the premises of appellant, typifies the general conditions and the general attitude of the pioneer of this section. To our mind it shows nothing more than the usual neighborly accommodation where, for convenience, one neighbor uses the premises of another and, in the spirit of hospitality, the other either welcomes him or remains silent. To apply to these conditions either adverse intent on the part of the user, or acquiescence to the extent of recognizing a right on the part of the one whose premises are used, would be to put a penalty upon generosity and destroy the neighborly spirit wholesome to such communities.

Howard at 24.

Accordingly, Respondent must overcome Nevada's long held presumption "that the neighbor's use is not adverse but is permissive and the result of neighborly accommodation on the part of the landowner." *Turrillas*, 72 Nev. at 291-92, 303 P.2d at 1003. He cannot to do so, and his sworn testimony supports this conclusion.

While he contended that there have never been any express agreements allowing him to move cattle across the Albisu Property, he acknowledged that the custom in the area, as it pertains to cattle drives across another's property, is to simply inform the landowner of when the planned cattle drive will take place so that the landowner can move their own cattle out of the way and remove any obstructions, and to leave gates generally as he found them. Thus, with this custom and understanding, it cannot be claimed that Respondent has a prescriptive right to all the land he traverses with his cows — he simply presumes the ability to use the land out of neighborly permissiveness.

Nick Wilkinson's testimony confirms that John Albisu, to the extent he knew of Respondent's use of the Albisu Property when it was subject to a leasehold with Fred and Nick Wilkinson, was also permissive and in line with the "custom" of notifying landowners of passage. Nick Wilkinson testified that John Albisu asked to be informed of such events. Only upon the transfer of Albisu Property to Ty Albisu in 2018, and later to Ty and Linda Albisu as joint tenants, was the use of the Albisu Property by Respondent adverse, under the law, to the owners. Given these facts, and Respondent's testimony that his actions were both customary and neighborly in the region, it was error for the district court to find by clear and convincing evidence that Respondent's use was adverse prior to 2018.

ii. The Term of the Lease of the Albisu Property Cannot be Tacked Onto Any Prescriptive Period.

Regardless of the presumption of permissive use prior to the lease to Nick and Fred Wilkinson, the tenancy over the Albisu Property from 2011 to 2018 cannot be used by Respondent to satisfy the element of continuous use for a finding of prescriptive easement. From 2011 to 2018, the relevant area of the Albisu Property was subject to the lease. It is undisputed that Respondent's use of the Albisu Property during this time frame was permissive by the tenants. That the tenants violated the terms of the lease with John Albisu is irrelevant and does not grant a trespasser a prescriptive easement during the time the landlord is not in possession of the leasehold. A future interest, such as a landlord's reversion, cannot be the subject of a prescriptive easement because the statutory period for acquiring the easement runs only against a possessory interest, i.e. that of the tenant. *See Dieterich International Truck Sales, Inc. v. J. S. & J. Services, Inc.,* 3 Cal. App. 4th 1601, 1610, 5 Cal. Rptr.2d 388, 393 (1992).

Thus, the district court erred in finding that Respondent met his burden of clear and convincing evidence that his use of the Albisu Property had been adverse prior to 2018. Respondent's use of the land had only been adverse since 2018, failing to meet the statutory timeframe of five years adverse use.

iii. Respondent's Use of the Albisu Property Was Not Peaceable.

Respondent's argument that the district court appropriately found that his use of the Albisu Property was "peaceable" misses the mark. The district court's sole

focus on this issue was whether the behavior included physical violence. This is not the applicable standard; therefore, it is irrelevant whether the district court found the testimony of Respondent as to physical violence more credible than that of Rosie Albisu. The district court ignored the legal definition of "peaceable possession." A prescriptive easement is a possessory interest. As cited in Appellant's Opening Brief, Black's Law Dictionary defines peaceable possession as "[p]ossession (as of real property) not disturbed by another's *hostile or legal attempts* to recover possession; esp., wrongful possession that the rightful possessor has appeared to tolerate." *Peaceable Possession, Black's Law Dictionary* (10th ed. 2014) (emphasis added). There is no requirement of physical violence. The remainder of Respondent's argument applies to whether his use of the Albisu Property was for the requisite time to perfect a prescriptive easement before the animosity began, addressed above.

The district court found that Respondent's actions of cutting locks and fences and locking out the Albisus from their property was "not violent." Under the legal definition of "peaceable possession," the actions of parties are not clear and convincing evidence of peaceable. The attempts by the Albisus to retain their land, and Mr. Wilkinson's attempts to access it, were hostile by any definition.

iv. The District Court Erred in Finding that Respondent's Use of the Albisu Property was Open.

The district court stated that Respondent's use of the Albisu Property was

open and notorious since 2018. The district court found that the Albisus did not have actual notice of the use prior to 2018, but that they had constructive notice. In so holding, the district court found that prior to 2018, the Albisus should have noticed the trampling of grass and movement of hundreds of cattle in plain sight. This analysis ignores the fact that the Albisu Property was subject to a leasehold with the Wilkinson family for nearly a decade, and thus Appellants did not have possession of the property over which the district court states they should have had constructive notice. *Dieterich International Truck Sales, Inc., supra.* This finding is not supported by the facts revealed at trial. It was only after the leasehold expired that Ty Albisu discovered the cattle drives. It was error for the district court to find that Respondent's use of the Albisu Property was open and notorious for the statutory period.

IV. CONCLUSION

The judgment of the district court cannot stand. It was undisputed by the parties that all owners, trustees and beneficiaries of the Wilkinson Property and the Wilkinson Article 5 Trust should have been joined as necessary parties. Linda Walker Albisu is also an indispensable party as co-owner of the Albisu Property. Further, the district court erred in determining that Respondent met each required element of a prescriptive easement to drive his cattle across the Albisu Property and

to utilize portions of the Albisu Property by his farm equipment. The judgment must be reversed.

V. CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32 (a) (4), the typeface requirements of NRAP 32 (a) (5) and the typeface requirements of NRAP 32 (a) (6) in that this brief is prepared with proportionately spaced typeface using Times New Roman in 14-point font. This brief complies with the page/type volume limitations set forth in NRAP 32 (a) (7), because it is proportionately spaced, utilizing a 14-point typeface and contains a total of 4295 words.

I hereby certify that I have prepared this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable NRAP procedures, including NRAP 28 (e) (1), which requires every assertion in the brief regarding matters on the record be supported by reference to the page of the appendix where the matter relied upon may be found. I understand that I may be subject to sanctions if this brief is not in conformity with the requirements of the NRAP.

DATED this 16th day of July, 2021.

/s/ Carolyn E. Tanner

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 16th day of July, 2021. Electronic service of the foregoing document was made in accordance with the Master Service List as follows:

Tammy Cowden, Esq.
Jacob Bundick, Esq.
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DATED this 16th day of July, 2021.

/s/ Carolyn E. Tanner

CAROLYN E. TANNER