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APPEAL NO. 69274-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

(Whatcom County Court Case No. 05-2-02841-2)

YOUNG S. & YONG S. KIM,

Appellants,

vs.

KYUNG-RAK & JAE SOOK KIM, ET AL,

Respondents.

Appellant Restaurant Kim's Reply Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington State Court of Appeals

Courts of Other Jurisdiction

Rules

Washington Pattern Instructions

I – ISSUES

1. Were any of Restaurant Kim's arguments too late?

2. Was there substantial evidence in the trial record of intent by Vogt, in 1978, to reserve an easement in favor of the Market parcel to the detriment of the Restaurant parcel?

3. Was there substantial evidence in the trial record to support a prescriptive easement in favor of the Market parcel over the Restaurant parcel?

II – ARGUMENT

1. Alleged Misconduct by Restaurant Kim.

On December 8, 2009, the trial court concluded trial with the following comment: "I need to digest this and come forth with a decision. I want to do so as quickly as I possibly can. Because I will never understand or recall the facts of this case as well as I do right now." RP 598. On December 15, 2009, the trial court provided counsel with a memorandum decision in this matter. CP 399. The key points of the trial court's letter were:

- I have decided to announce my decision in this case by way of this short letter . . .
- Mr. Dworkin's clients have carried their burden of proof and have established all elements necessary to prove an implied easement by reservation.
- Mr. Dworkin's summation accurately expressed many of my specific findings.
- I am in agreement with Mr. Dworkin's position in this regard, and that the requisite period of two full lustrums has passed, allowing his client to prevail on this theory [prescriptive easement] as well.

- I shall rely upon counsel to submit appropriate Findings, Conclusions, and Judgment.

CP 217. The trial court's 2009 letter was not filed with the court. The 2009 letter was first placed in the record on March 19, 2012, as Exhibit A to a Declaration of counsel for Market Kim. CP 217.

More than two (2) years after the trial, Market Kim presented proposed findings and conclusions. Market Kim argued their delay, in part, was because "between the issuance of the Court's letter ruling and January 2012, other than settlement discussions previously mentioned, I never received written correspondence from Plaintiffs in this case. I never received a demand that I propose any final documents." CP 215. Market Kim then asserted that no prejudice was caused by the delay, arguing two years of delay "is markedly different" from an eight year delay. Resp. Brief, p. 13. Market Kim was the prevailing party. It is "the prevailing party's duty to procure formal written findings supporting its position. Prevailing parties must fulfill that duty or abide the consequences of their failure to do so." *Peoples Bank v. Birney's Enters.*, 54 Wn.App. 668, 670, 775 P.2d 466 (Div. 2, 1989). The delay in entry of findings is much more than a mere clerical error, it should be assumed to be a tactical decision by Market Kim. Restaurant Kim, before entry of the findings and now appeal, is not aware of any facts or law that grant Market Kim an

easement based on the facts established at trial. It was the duty of Market Kim "to procure formal written findings supporting its position, and it must 'abide the consequences' of its failure to fulfill that duty." *Just Dirt, Inc. v. Knight Excavating*, 138 Wn.App. 409, 416, 157 P.3d 431 (2007).

A. Alleged refusal to provide a complete transcript.

Market Kim presented findings and conclusions after the passage of so much time that it would be difficult, if not impossible, for the trial court to remember accurately the testimony or the contents of any exhibit. Market Kim accepted the possible prejudice caused by their delay by arguing incorrectly in their Brief as follows: Restaurant Kim "refused to provide the trial transcript to the court and counsel *before* the hearing on entry of findings." Resp. Brief, p. 17. On March 19, 2012, when the findings and conclusions were offered, Restaurant Kim objected to the trial court's entry of findings or conclusions after the passage of so much time, arguing:

> MR. SHEPHERD: . . . **I have had the benefit to go back and read the transcript. I don't know if the court has had a chance to go back and read the transcript** . . . . I think the court has two choices at this point and that's to refuse to enter the Findings of Facts and order a new trial . . . . or the court can undertake, on its own, to read 800 pages of the transcript . . . or the court can assure . . . my client and I, that the court remembers the trial. . . . You could enter findings of that supported by your letter memorandum opinion, and nothing more, **or the court could perhaps read the transcripts** . . . .

3-21-12 RP 12, 14-15. (Emphasis added).

B. The alleged decision to "lie in wait."

Market Kim argues that Restaurant Kim should have raised all its objections to the entered findings and conclusions before the trial court entered written findings and at a time when it was unknown to Restaurant Kim whether the trial court could remember anything about the trial which occurred more than 2 years earlier:

> The Appellants [Restaurant Kim] approached . . . the Findings of Fact by choosing to lie in wait, raising their substantive objections only after the findings were formally entered by filing a motion to reconsider."

Resp. Brief, p. 16.

This argument is factually incorrect. Restaurant Kim, deeply concerned about the passage of time, the findings and incorrect conclusions offered by Market Kim, objected to the entry of any findings or conclusions asking for a new trial or a review of the transcript. Restaurant Kim's response included the following written objections:

> However, the unique issue presented by the passage of time, is whether this Court remembers the testimony and exhibits in sufficient detail . . . at this time to enter Findings of Fact, Conclusions of Law and any Judgment which are supported by substantial evidence. At this point in time, it is not appropriate for any proposed findings of fact or conclusions of law to expand upon the written decision of this Court.

CP 202.

> Paragraph 9 of the Proposed Conclusions of Law states that "Defendants [Market] Kim have established all elements necessary to prove a prescriptive easement by a preponderance of the evidence as outlined herein. . . . The Court's written ruling and the proposed findings of fact and conclusions fail to address a missing essential element of prescriptive easement. Defendants failed to prove use of the plaintiffs parking lot that is: (1) adverse to the owner of the land sought to be subjected, (2) open and notorious, (3) over a uniform route, (4) continuous and uninterrupted for **ten (10)** years, and (5) with the knowledge of such owner at a time when he was able in law to assert and enforce his rights.

CP 201-02.

> Defendants' [Market Kim] proposed findings and conclusions invite further error by asking the Court to conclude as a matter of law that the period does not stop running until trial.

CP 204.

Restaurant Kim, prior to entry of written findings on the issue of implied easement, provided the court with portions of the trial transcript, which portions demonstrated that joint use of the parking lot was mutually beneficial to both the Market and the Restaurant, and that Restaurant Kim did not complain until 2003. The provided portions demonstrated that Market Kim admitted that the bigger trucks had moved their operations to the north side of the Market. CP 205-06. Before entry of the findings, Restaurant Kim, provided unrebutted testimony that since 2007, all delivery trucks to the Market had remained on the north side, except the garbage truck. CP 206-07.

The lying in wait argument is also legally incorrect. No authority is provided by Market Kim demonstrating that Restaurant Kim had a duty to prepare proposed findings or conclusions that are not supported by any evidence or findings, which even if true, do not support inconsistent legal conclusions of an intentional easement created in and existing since 1978, and an prescriptive hostile easement created by an intentional theft of property rights beginning on October 8, 1996, and running until the time of trial. Before entry of written findings and conclusions, it was inappropriate for Restaurant Kim to move for reconsideration under CR 59. Instead Restaurant Kim argued that the prejudice caused by the passage of time required a new trial. Restaurant Kim believed it was both appropriate and possible for the trial court to refuse to enter findings or conclusions after the passage of so much time.

The trial court's letter is "merely an informal expression of the court's view and forms no part of the findings or judgment." *Clifford v. State*, 20 Wn.2d 527, 531, 148 P.2d 302 (1944).

> It is said to be a commendable practice for a trial court to furnish counsel or file with the records a statement announcing the reasons for its decision. Such a statement, however, is in no way binding; its only function is to indicate the judge's opinion as to the points involved and his views as to the law applicable. The statement . . . may indeed be modified or nullified by the making of findings of fact and conclusions of law . . . .

Id. at 532. (Citing *Bancroft's Code Practices and Remedies,* Volume 2, § 1615, pp. 2082, 2082). The trial court's 2009 letter was "necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned. It has no final or binding effect, unless formally incorporated into the findings, conclusions and judgment." *Ferree v. Doric, Co.,* 62 Wn.2d 561, 566-567, 383 P.2d 900 (1963).

C. Untimely calculated litigation strategy.

Market Kim argues that Restaurant Kim should have asked the trial court to reconsider its letter decision before entry of findings and conclusions, not in an appropriate motion to reconsider.

> Appellants failed below to property raise challenges to the proposed findings of fact, other than in a motion for reconsideration *after* the findings were already entered. . . . Appellants [Restaurant Kim] did not raise the objections in a timely manner when they were raised for the first time in a motion to reconsider. This sequence of events was a calculated litigation strategy.

Resp. Brief, pp. 16 & 18. This argument ignores the scope and purpose of CR 59. Until the trial court entered findings and conclusions, Restaurant Kim, was not yet a party aggrieved by the long delay, or any decision of the trial court properly entered that allowed reconsideration.

The time for making a CR 59 motion to reconsider is not before the decision but "after the entry of the judgment, order, or other decision." CR 59. By rule, a process is outlined for drawing the court's attention to

its mistake, after the mistake is made. Market Kim's argument that a better or more timely argument by Restaurant Kim would have avoided the errors complained of in this appeal is advanced without legal authority.

2. An Implied Easement was not supported by substantial evidence.

Market Kim's Brief fails to provide reference to any substantial evidence to support a finding or series of findings allowing a court to conclude that in 1978, Vogt intended to reserve an easement for access or parking of commercial vehicles in favor of the retained market parcel on any portion of the restaurant parcel. The 1978 Deed is silent as to any parking or access easement. Ex. 13. An implied easement cannot be created unless the facts and circumstances surrounding the 1978 Deed demonstrate intent by the parties to create an easement in favor of the grantor. *Roberts v. Smith*, 41 Wn.App. 861, 864, 707 P.2d 143 (Div. 2, 1985).

Implied easements by reservation are not favored:

> There is a well-recognized distinction between an implied grant and an implied reservation and it has been recognized in Washington. . . . In the case of severance of the servient estate, an easement will, ordinarily, not be reserved since the grantor cannot derogate from his own grant.

Wreggitt v. Porterfield, 36 Wn.2d 638, 640, 219 P.2d 589 (1950). Market Kim argues that reliance upon the above language in *Wreggitt* is misplaced. However, there is a "higher degree of necessity . . . for an

easement by implied reservation than is needed for an easement by implied grant." *Adams v. Cullen*, 44 Wn.2d 502, 508, 268 P.2d 451 (1954). This higher degree is referred to in *Adams* as strict necessity.

> It is not difficult to state that there must be 'reasonable' necessity for the existence of an easement by implied grant and 'strict' necessity for the existence of an easement by implied reservation. The difficulty arises when the trier of the facts must determine whether the facts satisfy the corresponding degree of necessity required by the rule.

Id. at 508. The *Adams* Court did not hold that strict necessity was not required as argued by Market Kim.

The necessity must have existed in 1978 at the time of the unity of title. *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 668, 404 P.2d 770 (1965). Market Kim's proposed findings incorrectly focused on the current use of the parking lot, not the use or need in 1978. Findings 20, 32 and 33 were not assigned error. These findings did address Market Kim testimony of present use and need, which was the heart of Market Kim's case. However, the testimony purported to support the findings do not provide any evidence of a necessity that existed at the time of the trial.

> FINDING OF FACT NO. 32.
> Testimony by Sung-Soo Kim, the son of Joined Defendants Kim [Market Kim] and who operates and is familiar with the market, testified to the importance of the use of the parking lot on the Restaurant Parcel. The Court finds his testimony credible. He described how merchandise is brought into the market, how the market operates and that use of the loading

dock is important to an efficient business. He described the importance of garbage and recycling services accessing this area. He described the importance of customers using this area to access parking and to park on the Restaurant side.

FINDING OF FACT NO. 33.
Sung-Soo Kim testified and this Court finds that switching deliveries of merchandise and services to the other side of the market would be cost prohibitive and an unsatisfactory substitute for the historical use of the loading dock area. It would require a large structural remodel of the building which would be very expensive. It also would require the Market Parcel to change its primary commercial access, which permitting agencies may not allow. Requiring the owners of the Market Parcel to use options other than the historical use would be substantially less convenient, both logistically and financially.

CP 275-76.

FINDING OF FACT NO. 20.
Evidence at trial established that this loading dock and the storage bays were routinely used by market vendors and services to deliver goods and services to the Market Parcel. Evidence further established that to do so, vehicles using the loading dock and storage bays were required to cross over portions of the parking lot located on the Restaurant parcel.

CP 273.

The parties to the 1978 Deed did not testify. Contrary to the Market Kim analysis, the above undisputed "irrelevant" findings were incorrectly used by the trial court to enter its erroneous conclusions of law 1, 6 and 8.

Conclusions of Law:
1. The elements for establishing an implied easement by reservation enunciated by the Supreme Court in *Adams v. Cullen,* 44 Wn.2d 502, 268 P.2d 451 (1954) and its progeny govern this case, and are satisfied herein by a preponderance of the evidence. The Court concludes Joined Defendants Kim

are entitled to an implied easement by reservation, the dominant estate being the Market Parcel and the servient estate being the Restaurant Parcel.

. . . .

6. The use of the Restaurant Parcel by the Market Parcel is reasonably "necessary" to the use of the Market Parcel, as it had been during common ownership by William and Blanche Vogt.

. . . .

8. Joined Defendants Kim are entitled to a judgment holding that the Market Parcel is the dominant estate of an implied appurtenant easement running with the land to which the Restaurant Parcel is servient. The proper scope and location of this easement is as described and depicted in the above Findings of Fact and herein incorporated by reference.

CP 278-79.

The only witness at trial, on the condition of the property around 1978, was Blair Beebe. His relevant testimony, at trial, was as follows:

Q. Now, I want to jump back in time a little bit to or maybe it's forward we have been jumping around a little bit. At some point the restaurant parcel was conveyed to Penny Beebe; is that right?
A. Uh-huh.
Q. When did that happen to the best of your recollection, I understand you don't have deeds in front of you and --
A. Well, 1979 I, you know --
Q. I don't want you to guess.
A. I am guessing.
Q. I don't want you to guess.
A. I am not sure then, I am not sure of the date.

RP 95-6.

Q. And at the time the property was given to Penny if you would look behind you on 8A you can see this line and I can tell you testimony has established that that's the property line between the market parcel and the restaurant parcel. With reference to that line, tell me how you would, what you would

see vehicles, how you would see vehicles using that parking lot in your personal experience?
A. Well, I saw vehicles that were patrons of the grocery store use the parking on the restaurant side of the property and I saw vice versa. I saw people that parked on the store side would use the restaurant side.

RP 97.

Q. (BY MR. DWORKIN) Did you ever tell Bill or Blanche Vogt that they couldn't use the parking lot that Penny owned for their patrons or delivery trucks?
A. I never did, no.

RP 103.

Q. Did you ever deal with Mr. Kim, that is the now owner of the restaurant parcel during the due diligence process or the time that he was looking at potentially buying the property, did you ever walk around the property with him?
A. Yes, we did.
Q. Do you recall if he observed any of those activities that we talked about?
A. I don't recall, no.

RP 104.

Not only do the findings fail to establish the time of use by commercial vehicles or the degree of necessity, the trial testimony is similarly vague. The trial court found, in finding number 28, that service providers of the market, apparently the garbage collector, continued to use portions of the parking lot ". . . for ingress, egress, access, parking and delivery of services and goods." CP 274. However, at trial, during his direct examination, Beebe testified regarding garbage collection as follows:

Q. Okay. Did you ever have occasion to observe the garbage trucks picking up garbage from the Bay Center Market during your ownership of the (restaurant) property?

A. Yes, we, we had our, in the early days we had our own garbage truck. We owned our own garbage truck.
Q. The market did?
A. My father-in-law did. Prior to leasing out the store he had his own truck. We used that truck for the garbage and the store as well as the cottages and then when the truck got filled we would take it up to the Birch Bay dump and then we would discard it. So, yes, that's how the, you know, that's how the garbage was taken care of when he had it. Now when he sold the business, he sold the truck or he leased the truck out to the business owner. The business owner continued to use it.
Q. The business owner?
A. There was several business owners Don and Faith were the last ones. There was probably two or three others before them.

RP 107-08.

On the issue of necessity and the use of the parking areas, on cross-examination, Beebe provided the only relevant testimony as follows:

Q. I want to see if I understood your testimony directly. During the 21 years that you were in the property in the south here and your in-laws owned the property to the north, you saw people drive either from the south or the north on to these properties and park on either side, correct?
A. Uh-huh.
Q. You need to say "yes or no."
A. Yes, I did.
Q. And sometimes they would park to the north and come and use the restaurant, correct?
A. That's correct.
Q. And sometimes park on the south and use Bay Center Market?
A. That's correct.
Q. And that happened every day, didn't it?
A. It happened a lot.
Q. And that's because it was mutually beneficial to both of you to allow people that were using the two businesses for parking, correct?

A. That's correct.

RP 116.

Other than Beebe, the only witness who provided any testimony as to the conditions or use of the property in 1978 was Jim Perry. Restaurant Kim objected to the relevancy of any testimony by Perry as he had not delivered to the Market since 1990. RP 141. His "relevant" trial testimony was that he parked on the Market property right next to the sidewalk and half the time he would deliver to the north side of the market.

Q. Whenever you remember?
A. We used to come in down here and then get in here and I would unload, there is a door right here.
Q. So you would park your truck near that door?
A. Right parallel to that sidewalk there.

RP 142.

Q. Great. And the description you just gave us is that fair to say that, if you can estimate you said sometimes you would drive around on the other side, how frequently that would happen say during a regular month of deliveries?
A. Maybe half, possibly.

RP 143.

A second commercial driver, Brackinreed, testified as to his deliveries to the Market parcel between 1985 and 2006. Similar to Perry, his deliveries were not during a period relevant to the claimed implied easement or during the alleged prescriptive period. RP 149; 152-53. On cross examination, Brackinreed was asked about the ability to deliver on the north side of the Market.

Q. I am not talking about a receiving area. I'm talking about would it be easier to drive and would it be easier to drive and maneuver a truck on that side?
A. It would appear to be.
Q. Would it appear to be much easier to maneuver a truck on the north side than the south side?
A. It's hard from the picture to describe the scale or area that is presented. But it looks pretty wide open.
Q. Well, let's look at N. Look at N, please.
A. Okay.
Q. It's pretty wide open, isn't it?
A. That appears to be.
Q. Like it would be easier to maneuver a truck for delivery there than it would be on the south side of the market?
A. I would have to agree.

RP 165.

In Washington, the fact finder is invited to review the circumstances surrounding the events to determine intent. In this case, the trial court had no testimony from Vogt as to his intent. The 1978 Deed reveals a contrary intent:

> The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term circumstantial evidence refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.
>
> The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

WPI 1.03

The trial court not only ignored the vague testimony of the few witnesses, it obviously gave no weight to the numerous documents

demonstrating that a reservation of an easement was never intended by Vogt. In 1982, Vogt gave Mariner Development Co. (Mariner), a utilities and driveway easement over the southerly 11 feet of the Market parcel. Exhibit 16. In 1982, Beebe gave Mariner a utilities and driveway easement over the northerly 21 feet of the Restaurant parcel. These documents, make no reference to any existing easement in favor of the Market parcel. Exhibit 17. If the northerly portion of the restaurant parking lot was necessary for appropriate access to the Market property, why did Vogt allow his daughter to grant it to Mariner and why did Vogt grant an easement for utilities and travel over his south 11 feet, to Mariner? These documents make it more likely a reservation was not intended or necessary.

In 1983, Vogt again deeded the Restaurant parcel to his daughter, as her separate property. Exhibit 18. In that second Deed, Vogt made no attempt to reserve an easement over the Restaurant parcel. Similarly, the 1983 "Correction" Deed makes it more likely a reservation was not intended or necessary.

In 1984, Vogt leased the Market Parcel to Wolten & Montfort (Wolten). Exhibit 20. The finding of fact entered by the trial court regarding this lease is clearly unsupported by a reading of the lease.

> FINDING OF FACT 23.
> In 1984, a lease was recorded (Exhibit 32-18) wherein William and Blanche Vogt leased the market business to Wolten & Montfort, Inc. This lease demonstrates that the use of the Restaurant Parcel parking lot to access parking, the loading dock, and storage bays, was essential to the operations of the market on the Market Parcel.

In Market Kim's Brief, they argue that paragraphs 25 and 30 of the 1984 lease provide substantial circumstantial evidence of intent to create an implied easement over the Restaurant parcel in favor of the Market parcel for deliveries by commercial vehicles to the Market. However, paragraph 25 and 30 of the lease support Restaurant Kim's claim. "All commercial vehicles . . . are to be parked on lease property." Exhibit 20, ¶ 25. "Parking on the . . . Gift Shop [now restaurant] property is to be allowed only for store customers." *Id.* at ¶ 30. Neither of these sections provide substantial evidence that Vogt conveyed to Wolten, in 1984, an easement for commercial vehicles over the Restaurant parcel.

In 1996, Beebe deeded the Restaurant parcel to Restaurant Kim by Statutory Warranty Deed. Exhibit 26. In 1997, Vogt deeded the Market parcel to Market Kim by Statutory Warranty Deed. Exhibit 28. Again, neither of these documents demonstrates any intent to reserve, convey, or the need for an easement.

3. There was no substantial evidence supporting a conclusion that a prescriptive easement was created.

A. Burden of Proof for Prescriptive Easement is Clear, Cogent and Convincing

Market Kim argues that their burden of proof with regard to the prescriptive easement is a preponderance of the evidence. However, Market Kim fails to cite any authority stating that "preponderance" is the burden of proof for prescriptive easement claims. Instead, they argue that in *Lee v. Lozier*, 88 Wn.App. 176, 185, 945 P.2d 214 (Div. 1, 1997), the "clear proof" standard is dictum. The *Lee* Court stated, "Lozier correctly contends that each of the neighbors bore the **burden of establishing by clear proof** that they or their predecessors in interest used the Lot 10 portions of the dock continuously and in an uninterrupted fashion for at least 10 years." *Id.* (Emphasis added.) The *Lee* Court analyzed whether there was sufficient evidence to support the trial court's finding of a prescriptive easement. *Id.* at 181. In that analysis, it was necessary for the Court to apply the "clear proof" standard to the evidence presented to determine whether that evidence was sufficient to establish a prescriptive easement. The "clear proof" standard was not dictum; it was the standard used by the Court when analyzing the evidence of prescriptive easement.

B. Permissive Use

Market Kim argues that the permissive use of the parking lot that existed between the Beebes and Vogts ended by operation of law upon the

transfer of title to the Restaurant Parcel from the Beebes to Restaurant Kim on September 24, 1996. Resp. Brief, p. 43. The Deed was actually recorded on October 8, 1996. Exhibit 26. More importantly, Market Kim's argument fails to take into account permissive use of Restaurant Kim's parking lot that continued after October 8, 1996.

At trial, Market Kim called three witnesses regarding the use of the parking lot; two delivery drivers and one garbage truck driver. Koch, a garbage truck driver, picked up garbage from the properties beginning in 1982, and continued until the time of trial in 2009. RP 175-76. Perry delivered milk and ice cream to the Market for Darigold from 1953 until 1990. RP 139-40. Brackinreed was employed by Darigold from 1985 until 1996 or 1997 and delivered to the Bay Center Market during that time. RP 148. The three above witnesses all testified that they believed or assumed that the use of the parking lot was permissive; at the permission of the owners, not adverse. RP 145; RP 168; RP 192. That belief was shared by Market Kim. At trial, the son of Market Kim, testified as follows:

> Q. **Until 2003** it was clear to you it was a mutual benefit to both of you to agree on how to use that parking lot, isn't that correct? **Mutual benefit to both of you?**
> **A. Yes, it's a mutual benefit to both parties.**
> Q. Okay. And there was little or no problem because it was perceived by both of you that it was a mutual

benefit to both parties to get along on that parking lot?
A. **Yes**, it is.

RP 303. (Emphasis added.)

Q. (BY MR. SHEPHERD) I don't want to put words in your mouth but up until 2003 as neighbors you had cooperated on the use of this parking lot, correct?
A. Yes.

RP 304.

Restaurant Kim revoked the permissive use of the Restaurant parcel by Market Kim for commercial vehicles in 2003, after the Mariner easement on the Restaurant parcel was extinguished by the Whatcom County Superior Court on July 8, 2003. Exhibits 17, 21, 30. In 2003, the Whatcom County Superior Court determined that the Restaurant parcel was no longer encumbered by the Mariner 21 foot easement. *Id.*

In 2003, Restaurant Kim notified Market Kim that the permission previously given to Market Kim to use the northern 21 feet or eastern 32 feet of the Restaurant parking lot for deliveries was terminated.[1] RP 302-04; RP 452.

Use of property is presumed to be permissive. *Petersen v. Port of Seattle*, 94 Wn.2d 479, 486, 618 P.2d 67 (1980). Permissive use is not

[1] MR. SHEPHERD: My understanding from the testimony and clearly our position is the use of the parking lot by everybody was permissive and joint to a certain extent with the Market Kims and the other third parties of this lawsuit and once things started to integrate there was changes and actions taken by my client to make it clear he no longer gave permission. I want to give the background.

MR. DWORKIN: We'll stipulate there was definitely no permission from 2003. In fact, we'll stipulate there was never permission. I don't think Mr. Shepherd wants that. . . .

THE COURT: First of all, I'll accept the stipulation. RP 452-453.

adverse and does not commence the running of the prescriptive period. *Lee v. Lozier*, 88 Wn.App. at 182; *see also Washburn v. Esser,* 9 Wn.App. 169, 171, 511 P.2d 1387 (1973). Until permission was revoked by Restaurant Kim in 2003, the use of Restaurant Kim's parking lot by Market Kim was permissive, not adverse. Therefore, from the time Market Kim purchased the Market property until at least 2003 when permission was revoked, there could not have been any prescriptive use.

C. 10 Year Prescriptive Period

Market Kim erroneously argues that the date upon which the ten (10) year prescriptive period began to run was September 24, 1996, when the Beebes sold the Restaurant Parcel to Restaurant Kim. Even if this argument were correct, the purchase was recorded on October 8, 1996. Exhibit 26. However, the prescriptive period could not have begun in 1996. Even if there wasn't permissive use of the property, there were two other hurdles to the commencement of a prescriptive period beginning. First, in 1984, Vogt executed the Wolten lease. Exhibit 20; CP 356. The Wolten lease specifically addressed parking:

> "The parties agree that during the entire term of this lease agreement **customers of the Lessees shall be entitled to use the above in connection with grocery store patronate**
> . . . .
> **All commercial vehicles should be encouraged not to block traffic to the condos, the cabins or gift shop. They are to be parked on leased property**."

CP 359-360 and 366. (Emphasis added).

Any prescriptive use of the Restaurant Parcel could not have commenced during the Wolten lease, which terminated by its terms on September 30, 2004. CP 356. Obviously, the Wolten lease terminated upon the sale of the Market Parcel on December 17, 1997. Market Kim could not have begun using the Restaurant parcel without permission until they purchased the property. There is no evidence that the operators of the Market, from 1984 until the December 17, 1997 sale to Market Kim, occupied the restaurant parcel contrary to the permission granted by Restaurant Kim.

Second, the Mariner easement, in favor of Mariner, over the northern 21 feet of Parcel 2, was not extinguished until 2003. Exhibit 30. Prior to that date, Restaurant Kim did not have the legal right to control who could travel over that portion of the property. As such, Market Kim's use of portions of the Restaurant parking lot could not have been prescriptive against Restaurant Kim, who did not have title nor control over those portions of the parking lot until the Mariner easement was extinguished in 2003.

D. Tolling of Prescriptive Period

Regardless of when the prescriptive period would have begun, whether the Court finds that it was October 8, 1996, December 17, 2007 or

July 8, 2003, the prescriptive period would have been tolled on October 3, 2006, when Market Kim, by pleadings, was made a joined Defendant in this matter. CP 54.

> In a suit to quiet title by one in possession of real property under an adverse claim, an answer by the defendant disputing the plaintiff's title will suspend the plaintiff's possession from the date of the answer, provided the answer is successfully prosecuted in action. 3 Am.Jur.2d, Adverse Possession § 109, p. 176.

Crone v. Nuss, 46 Kan.App.2d 436, 447, 263 P.3d 809 (2011).

> It is true that ordinarily the filing of an action, either by the person asserting a prescriptive right, or by a person against whom the statute of limitations is running, will interrupt the running of the prescriptive period, and the statute will be tolled while the action is actively pending. (Citations omitted.)

Welsher v. Glickman, 272 Cal.App.2d 134, 137-38, 77 Cal.Rptr. 141 (1969). The better rule, not addressed in any Washington case, is that the period is tolled by the filing of an action within the 10 years, when the action is contesting rights to the property. The filing of the action interrupts the continuous and uninterrupted possession element of adverse possession. *California Maryland Funding, Inc. v. Lowe*, 37 Cal.App.4th 1798, 1803-04, 44 Cal.Rptr.2d 784 (1995).

4. Argument in Opening Brief related to erroneous findings of fact.

Market Kim correctly points out that Restaurant Kim should have provided the Court with the copies of the objected to findings of fact, in

their opening brief, by way of an appendix. Restaurant Kim apologizes for that oversight and the findings and conclusions are attached hereto as Exhibit "A." Market Kim incorrectly argues that the objected to findings are not properly argued in the Opening Brief. Finding No. 5 is addressed at page 24 of the Opening Brief:

> Exhibit 32 is not an accurate survey of existing conditions on Parcels land 2 in September 2008. It does not demonstrate the parking or access to the north of the Market.

Findings 7 and 8 were addressed at page 9, with the following argument demonstrating where they had more than 150 feet of land accessible by a public road, more than 100 feet of open lot to the north of the Market, parking and access on the north and west side of the Market. Finding 10 was addressed at pages 15 and 16 of the Opening Brief, where, Restaurant Kim discussed in detail the actual testimony of the witnesses. Findings 18 and 23 were addressed at pages 15-16 and 24 of the Opening Brief. At page 12 of their Opening Brief, Restaurant Kim, demonstrated that the sale of the Market parcel to Market Kim was October 8, 1996, not September 24, 1996 as found in Finding 25. Finding 31 is addressed specifically in the Opening Brief at pages 13 and 14.

Admittedly, Finding 30 was not addressed specifically, but that finding is rebutted and repeatedly addressed throughout the Opening Brief. It cannot be seriously argued that Restaurant Kim, failed in its Opening

Brief to argue that there was no long-term (10 year), apparent, obvious, visible, continuous, open and notorious adverse use of the Restaurant parcel.

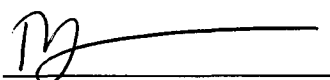
Also, admittedly, Finding 36 is not addressed specifically in the Opening Brief, but what is necessary in 2009 for commercial vehicles to turn around in the Restaurant Parcel, was not relevant to any issue decided by the court and its irrelevancy of the present conditions on the site is argued in the Opening Brief and herein. Findings 38, 39, and 40 become irrelevant if this Court finds no easement.

III – CONCLUSION

This Court should determine that as a matter of law, Market Kim has no easement, implied or prescriptive, on or over the Restaurant parcel, and return the matter to the trial court with instructions to enter a judgment consistent with this Court's determination.

RESPECTFULLY SUBMITTED this 25th day of April 2013.

SHEPHERD and ABBOTT



Douglas R. Shepherd, WSBA #9514
Bethany C. Allen, WSBA #41180
Of Attorneys for Restaurant Kim

APPENDIX A

Findings of Fact:

5. Exhibit 32, Tab 24, is an accurate survey of existing conditions of the Restaurant Parcel and Market Parcel in September 2008, showing the location of the property line, buildings, parking spaces, other improvements.

7. The loading dock for the grocery business operated on the Market Parcel is located on the southeast side of the market building, making the only access to the loading dock through the "shared" parking lot.

8. Due to the size of the parking lot, location of the entry, location of the structures surrounding the parking lot, and the location of the property line, the only feasible way for patrons of the market to access the parking spots on the Market Parcel is to drive over a portion of the parking lot located on the Restaurant Parcel.

10. The above witness testimony also establishes by a preponderance of the evidence that grocery and market vendors, grocery and market deliveries and services including but not limited to such as garbage and recycling currently use, and have for decades used, that portion of the parking lot located on the Restaurant Parcel to maneuver, deliver items, park and/or temporarily park to deliver items or perform services.

18. Testimony, photographic exhibits, and other evidence admitted at trial show that during the period of common ownership from 1966 to 1978, the Market Parcel and Restaurant Parcel were used in a manner that is similar to how they are used now, to-wit: the parking lot was paved and patrons would park at the market building by nosing their cars to the southerly wall of the market building. In order to do so, these cars would drive over the Restaurant Parcel's portion of the parking lot.

23. In 1984, a lease was recorded (Exhibit 32-18) wherein William and Blanche Vogt leased the market business to Wolten & Montfort, Inc. This lease demonstrates that the use of the Restaurant Parcel parking lot to access parking, the loading dock, and storage bays, was essential to the operations of the market on the Market Parcel.

25. On September 24, 1996, Penny and Blair Beebe transferred their interest in the Restaurant Parcel to Plaintiffs Kim (Exhibit 32-19). No easement was recorded reflecting the right of the Market Parcel to use that portion of the parking lot located on the Restaurant Parcel.

30. Plaintiffs Kim had sufficient information available to them to put them, or any other person, on notice of this use. This use was long-term, apparent, obvious, visible, continuous, open and notorious.

31. Plaintiff Kim, by his testimony and by descriptions of his actions, demonstrated that he did not give permission for the use as described herein, by the Market Parcel and such use was adverse. This adversity is further established by operation of law, that any permission granted by a predecessor such as Beebe is automatically revoked upon transfer of title.

34. If no easement existed in favor of the Market Parcel, the Market Parcel would use all practical use of parking lot on the south side of the building, which would become useful for parking not much more than bicycles. Delivery vehicles and automobiles would be almost completely unable to make any use of the south side of the building.

36. Jeff Vanderyacht, a Professional Engineer with expertise in traffic planning, testified as to the established turning radii of various types of trucks and cars. This testimony demonstrated that historical use of the Restaurant Parcel parking lot was reasonable and necessary to access and use the Market Parcel. Mr. Vanderyacht's testimony is credible and supported by demonstrative and admitted exhibits on the record, including but not limited to Exhibits 35, 36, 37, and 38. The Court finds Mr. Vanderyacht's testimony of what is a reasonable and necessary easement area as reflected in his testimony and markings on Exhibit 35 is a reasonable area for the easement to be located.

38. The Court finds that granting an easement as depicted and legally described in Exhibits "A" and "B" to these findings is commensurate with the evidence presented at trial. Further, granting such an easement represents nothing more than what was well-established at trial as the long-term use of the Market and Restaurant Parcels.

39. At some point after Plaintiff came into title to the Restaurant Parcel, they constructed a six foot wood privacy fence on the eastern portion of the Restaurant Parcel and metal bollards on eastern portion of the property line abutting the Market Parcel. These improvements are accurately depicted and located in Trial Exhibit 32 Tab 24. They are located within the Easement Area established herein in an area historically used for vehicle and truck turnaround. This Court finds that the fence and bollards will obstruct the use and enjoyment of the Easement and frustrate the Easement's purpose if allowed to remain, and therefore, they must be removed.

40. The Court reaffirms its findings and rulings made in this case on the record in the issuance of the preliminary injunction and granting of partial summary judgment to the extent they apply to the adjudication of the merits of the case between Plaintiffs Kim and Joined Defendants Kim.

Conclusions of Law:

1. The elements for establishing an implied easement by reservation enunciated by the Supreme Court in *Adams v. Cullen,* 44 Wn.2d 502, 268 P.2d 451 (1954) and its progeny govern this case, and are satisfied herein by a preponderance of the evidence. The Court concludes Joined Defendants Kim are entitled to an implied easement by reservation, the dominant estate being the Market Parcel and the servient estate being the Restaurant Parcel.

5. Prior to the quitclaim deed transfer of the Restaurant Parcel to Penny Beebe, the usage existing between the Restaurant Parcel and the Market Parcel could have been an easement appurtenant to the Market Parcel, had they been separately owned.

6. The use of the Restaurant Parcel by the Market Parcel is reasonably "necessary" to the use of the Market Parcel, as it had been during common ownership by William and Blanche Vogt.

7. The use of the Restaurant Parcel by the Market Parcel was apparent to anyone who would have observed the properties and their use.

8. Joined Defendants Kim are entitled to a judgment holding that the Market Parcel is the dominant estate of an implied appurtenant easement running with the land to which the Restaurant Parcel is servient. The proper scope and location of this easement is as described and depicted in the above Findings of Fact and herein incorporated by reference.

9. Joined Defendants Kim have established all elements necessary to prove a prescriptive easement by a preponderance of the evidence as outlined herein.

10. September 24, 1996, is the date Plaintiffs Kim took ownership to the Restaurant parcel, and as such, is the date the time period to establish a prescriptive easement began to run.

11. Plaintiffs Kim never addressed or denied Joined Defendants Kim's claim for a prescriptive easement in this lawsuit until actual trial, which commenced more than 10 years after September 24, 1996, and as such, the 10 year prescriptive period has been proven by Joined Defendants Kim.

12. Joined Defendants Kim have proven that their predecessors' guests and invitees as well as their guests and invitees' actual and historical use was over a uniform route on the Restaurant Parcel and was used for the uniform purposes of access, ingress, egress, parking and delivery of goods and services.

13. The use of the Restaurant Parcel by the Market Parcel during the period of prescription was open and notorious.

14. The use of the Restaurant Parcel by the Market Parcel during the period of prescription was hostile.

15. The use of the Restaurant Parcel by the Market Parcel during the period of prescription was continuous.

16. The use of the Restaurant Parcel by the Market Parcel during the period of prescription was exclusive as required by the law of prescriptive easements.

17. Joined Defendants Kim are entitled to a judgment holding that the Market Parcel is the dominant estate of a prescriptive easement which is appurtenant and runs with the land to which the Restaurant Parcel is servient. The proper scope and location of this easement is as described and depicted in the above Findings of Fact and herein incorporated by reference.

18. The Court concludes that Joined Defendants Kim are entitled to judgment quieting title and granting easements over the Restaurant Parcel as dictated by these Findings and Conclusions.

19. The Previous Preliminary Injunction entered by this Court shall be converted into a Final and Permanent Injunction so that Plaintiffs Kim or their successors are prohibited from constructing or erecting any structure or obstacle which would in any way unreasonably interfere with Joined Defendants Kim's use of the easements established in this case.

20. A Permanent Injunction shall be entered which requires the Plaintiffs to immediately remove the 6' tall privacy fence and metal bollards that are located in the Easement as there is no adequate remedy at law to compensate Joined Defendants Kim for the inability to use this portion of the Easement established herein.

APPENDIX B

RULE CR 59
NEW TRIAL, RECONSIDERATION, AND AMENDMENT OF JUDGMENTS

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be
granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

(5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;

(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or

(9) That substantial justice has not been done.

(b) Time for Motion; Contents of Motion. A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise. A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.

(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment, the court on its own initiative may order a hearing on its proposed order for a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(e) Hearing on Motion. When a motion for reconsideration or for a new trial is filed, the judge by whom it is to be heard may on the judge's own motion or on application determine:

(1) Time of Hearing. Whether the motion shall be heard before the entry of judgment;

(2) Consolidation of Hearings. Whether the motion shall be heard before
or at the same time as the presentation of the findings and conclusions and/or judgment, and the hearing on any other pending motion; and/or

(3) Nature of Hearing. Whether the motion or motions and presentation shall be heard on oral argument or submitted on briefs, and if on briefs, shall fix the time within which the briefs shall be served and filed.

(f) Statement of Reasons. In all cases where the trial court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances
outside the record that cannot be made a part thereof. If the order is based upon the record, the court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the court shall state the facts and circumstances upon which it relied.

(g) Reopening Judgment. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or
make new findings and conclusions, and direct the entry of a new judgment.

(h) Motion To Alter or Amend Judgment. A motion to alter or amend the
judgment shall be filed not later than 10 days after entry of the judgment.

(i) Alternative Motions, etc. Alternative motions for judgment as a matter of law and for a new trial may be made in accordance with rule 50(c).

(j) Limit on Motions. If a motion for reconsideration, or for a new trial, or for judgment as a matter of law, is made and heard before the entry of the judgment, no further motion may be made without leave of the court first obtained for good cause shown: (1) for a new trial, (2) pursuant to sections (g), (h), and (i) of this rule, or (3) under rule 52(b).

APPENDIX C

WPI 1.03 Direct and Circumstantial Evidence

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.