70649-7

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

Jeffrey HALEY,
Plaintiff & Appellant

v.

John F. PUGH,
Defendant & Respondent

No. 70649-7-1

REPLY BRIEF OF APPELLANT

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PART I – SUMMARIES OF ARGUMENTS

Summary of Argument on Easement Issue

The central issue is whether Pugh can build a fence that will block Haley's pedestrian use of the easement.

Haley bought his property in 2005 with a warranty deed specifying a 10 foot wide easement for pedestrian and other purposes all along one side of his property. Haley's property was created by a plat that subdivided a parcel into four lots. The plat included a dedication of the 10 foot wide easement for the benefit of three lots including Haley's. When Haley bought his property, the land under the easement contained a walkable garden with sparse plantings, a support for three mailboxes, a telephone pole, and a stream lined with rocks. Haley and his family members walk in the easement area from time to time.[1] No changes to the easement area have been made since Haley bought the property. None of these facts are disputed.

In January 2012, Haley's neighbor, Pugh, who owns the land under the easement, claimed for the first time that Haley has no right to walk there and that Pugh has the right to build a fence that would block Haley's pedestrian access to the easement area. To dispute this claim, Haley commenced the present action. Pugh persuaded the trial court to issue an order terminating Haley's pedestrian easement and all other easement rights except for utilities, sewage, and drainage.

How can this be right? How can Pugh claim the right to block Haley's continued pedestrian access with a fence seven years after Haley bought his property and has been using the easement area for pedestrian purposes? A

[1] Haley Declaration (second) ¶5, CP 50.

statute specifies that because the easement was created by dedication in a plat, it can only be extinguished with a deed[2], and there is no such deed.

Pugh makes two claims. First, Pugh claims that Hume, the prior owner of Haley's property from whom he bought it, "abandoned" the easement before she sold the property. But Pugh has no evidence of anything that happened before the property was sold showing any action or intent by Hume to abandon the easement. All he has is her testimony taken in 2012, after the present suit was filed, that, in her mind, in 2004, she abandoned any such easement that she had, if she had one. (Hume's deposition, CP 121-22 at page 17 line 24 to page 18 line 22, shows she did not know she ever had legal rights to use the 10 foot wide easement area.)

The law does not allow a former owner to abandon an easement solely by actions taken after selling the property, especially where the property was sold with a warranty deed specifying that the easement was transferred. The statute of frauds requires written evidence created while owning the property to convey an interest in real estate.

The 10 foot wide easement sits on Tract A, a long, 30 foot wide parcel that provides a sewer route for an adjoining subdivision. When the 10 foot wide easement was granted, it served three of the four lots created in the four lot subdivision specified by the plat in question, lots B, C, and D. The easement across Tract A was essential for lot D, owned by Pugh, and for lot C, as the only access for these two lots. The easement provided merely supplemental access and other uses for Haley's property, lot B. These facts are not disputed.

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[2] RCW 64.04.175 and RCW 64.04.020.

Pugh bought both lot D and Tract A. He then built a new road on Tract A to serve lots C and D so these two lots no longer had need for the 10 foot wide easement. The new road does not adjoin Haley's lot B and provides no benefit to it. Pugh removed the asphalt that occupied most of the 10 foot wide easement and converted the formerly paved area to a garden with sparse plantings and an open stream bounded by rocks. Pugh wrote a new easement for lot C and, in the same document, explicitly extinguished the 10 foot wide easement rights of lot C.[3] But he did not create a document to extinguish the easement rights of Haley's property, lot B. These facts are not disputed.

Pugh's second claim is that his removal of the asphalt and replacing it with sparse plantings and an open stream was a hostile act of adverse possession. Pugh testified that this change to the surface of the land occurred in 2003 and 2004.[4] The present suit to affirm the easement was commenced less than ten years after the change to the surface was made, and the adverse possession statute requires ten years. (In addition, this change was not hostile as it did not make the easement area unusable for pedestrian purposes. To the contrary, it made the location more pleasing to the eye of a pedestrian and safer for pedestrian use because no automobile traffic from lots C or D could use it.)

For purposes of the law of adverse possession, Pugh claims that he can also tack on the period of time from when he gave notice that he was planning to make this change to the surface of the land until he actually made the change. He gave notice in 2001 by serving on all neighbors a Public Notice of an application under the State Environmental Policy Act and a local environmental ordinance requesting approval for physical alterations to the

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[3] Exhibit 12 attached to Haley's opening brief.
[4] Pugh declaration, CP 14.

location of a watercourse by removing a culvert and allowing a stream to flow in the open.

But the law of adverse possession requires more than merely giving notice of a plan or intent to adversely possess property – it requires an act of actual possession that is inconsistent with the rights of the owner of record. Talk is cheap – actions speak louder than words. The law of adverse possession does not require a person to start a lawsuit within 10 years after verbal notice is given that another intends to act adversely in the future.

Conclusion on Easement Issue:

The easement issue was presented to the Superior Court on cross motions for summary judgment. The Superior Court granted the wrong motion. The record shows no dispute as to the facts recited above which support Haley's motion. This court should reverse the trial court on this issue and grant Haley's motion to dismiss Pugh's claim that the easement is partially terminated, leaving the status of the easement as it is recorded in the title of Haley's property. No remand for trial is necessary.

The law should allow parties to rely on legal title documents for real estate. If a plat document says there is an easement, overcoming a high hurdle should be required to prove adverse possession or abandonment. Otherwise, titles are uncertain and litigation is encouraged. This is what was intended by the legislature when, in 1991, it passed RCW 64.04.175 which provides:

> "Easements established by a dedication are property rights that cannot be extinguished or altered without the approval of the easement owner or owners, unless the plat or other document creating the dedicated

easement provides for an alternative method or methods to extinguish or alter the easement."

Summary of Argument on Boatlift Issue

> **The central issue is whether a neighbor can compel removal of a boatlift placed in public waters in a location that violates the law where a challenge was brought promptly after discovery of the illegal location but more than seven years after the boatlift was placed in that location.**

Private parties cannot be allowed to appropriate public waters to their exclusive use by acting outside the law.

The law allows covered moorages in the form of a covered boatlift to be placed in certain locations, provided one properly obtains a permit and puts the boatlift it in the permitted location. If a person obtains a permit to place a boatlift in a particular location and then places the boatlift in a different location where a boatlift cannot be allowed, an aggrieved neighbor can compel removal of the boatlift from that different location no matter how many years go by. The boatlift owner cannot acquire a right of exclusive use of the public waters by prescription (adverse possession) when the neighbors fail to take action within a period of time. The illegality is a continuing violation that effectively gives a new cause of action every day and starts a new limitations period every day. Furthermore, prescriptive rights cannot be acquired against public property.

Pugh obtained a permit to have a covered boatlift located 48 feet from the nearest property owned by a neighbor, a pier and piling. Pugh's permit application specified that he would leave 48 feet of open water for navigation by the public and by users of a five-way shared beach that sits between the boatlift and the preexisting pier and piling.

But Pugh placed the boatlift 34 feet from the neighbor's pier and piling, reducing by 29% the width of open water to be left for use by the five shoreline property rights holders and the public. Thus, he appropriated 14 feet of public water access from the five neighbors and from the public for his own exclusive use. This appropriation is a continuing violation.

Not only does the placement of the boatlift illegally narrow access to the waters by 14 feet, but it also illegally obstructs views from neighboring properties by being a "covered moorage" in a location that violates two separate rules about where such view obstructing structures are permitted by the law. These rules require that the covered moorage be at least 10 feet from a lateral line (extension of the property line on the land) and within a triangle directly in front of the owner's property. Both of these violations cause the boatlift to obstruct views from neighbor properties. This view obstruction is a continuing violation.

Not only is the boatlift located in a place other than the place permitted and other than a permissible place, but the permit was obtained by Pugh presenting to the city false information but for which the permit would not have been issued. Use of false representations to obtain a permit should be punished by the courts. This court action was commenced within 95 days after discovery of the false statements and the boatlift's illegal location.

The cost to move the boatlift would be small. One simply positions a float, jacks up the boatlift with the float, floats the assembly to a new location, readjusts the legs that rest on the lake floor, and removes the float. If Pugh were to reposition the boatlift in this manner to the other side of his pier, it would be in a permissible location.

Conclusion on Boatlift Issue:

The court below dismissed on summary judgment Haley's action to compel relocation of the boatlift. Therefore, for purposes of this appeal, all of Haley's presented evidence summarized above must be accepted as true. This court should reverse and remand for trial.

PART II – REFUTATION OF FALSE ASSERTIONS IN PUGH's BRIEF

A - FALSE ASSERTIONS ON EASEMENT ISSUE

Page 2: The trial court did not merely terminate the easement as to any use inconsistent with the water course. It also terminated all uses other than utilities, drainage, and sewage, particularly including the pedestrian uses that had been on-going by Haley and his family for years. This ruling allows Pugh to build a fence on the property line, reducing the value and uses that Haley has enjoyed since 2005.

Pages 6, 9, 10, 16 and 17: The watercourse area is not a place where no development can occur, and pedestrian use does not violate the Mercer Island Code. Development would merely require a permit and may require a variance, and Mr. Steirer said nothing to the contrary. Pedestrian use requires no change to the easement area, and modifying shrub placement to improve pedestrian uses would require no permit. Even if Pugh's statements were

true, this would not permanently terminate the easement because environmental restrictions can change while easements last forever.

Pages 6, 10, 12 and 15: There is no evidence of a statement made in 2001 by Hume, Haley's predecessor in interest, that shows an abandonment. The statements by Haley's predecessor were made in 2012, seven years after she sold the property to Haley. When she made the statements, she owned no interest that she could abandon. There is no evidence from prior to 2012 that Hume consented to any changes within the easement area. Such statements were made in 2012, and are self-serving. There is no evidence that Hume took any actions to support changes within the easement area prior to 2012, other than recent self-serving statements which are disputed.

Page 8: The 2001 land use decision by the City of Mercer Island is not at all relevant to any issue before this court or the trial court. It was a permit to repair and not expand a pier. There was no mention of adding a boatlift.

Page 11: The statement that no traffic use was made of the former road in the easement area after 2001 is disputed and wrong. The record includes a letter from Pugh dated January 2002 wherein he promises that no work will begin until after April 1, 2002. CP 393 Thus, the former road was used for traffic at least through mid-2002. Pugh testified that the work to build a new road and tear up the old road was done in 2003 and 2004. CP 14. The replacement easement for the new road was granted in 2004. Exhibit 12 attached to Haley's opening brief.

Pages 14 - 15: The statement that Pugh's obtaining a permit to modify the easement area was adverse to the interests of the dominant estate is disputed and wrong. Removing from the easement area vehicle traffic to

Lots C and D would benefit the dominant estate, Lot B, with respect to pedestrian uses. Removing the asphalt paving to allow garden plantings would benefit Lot B with respect to pedestrian uses. Neither of these modifications when they were made 2-3 years later than 2001 blocked usage of the easement area for pedestrian purposes.

Pages 14 - 15: The statement that Pugh's obtaining a permit to modify the easement area was "continuous" is disputed and wrong. A permit application is not "continuous". Nor is an issued permit.

Page 15: The statement that "the owner to the south of Pugh", Lot C, had rights in the easement area prior to 2001 is correct. That owner expressly gave up those rights by signing in 2004 a deed prepared by Pugh. That deed was attached as an exhibit to Haley's opening brief. The deed shows that Pugh knew he needed to use a written instrument to extinguish rights in the easement area and Pugh chose to not obtain such an extinguishment from Haley's predecessor, Hume.

B - FALSE ASSERTIONS ON BOATLIFT ISSUE

Page 18: Haley did not allege that Pugh placed the boatlift beside his dock in 2001. The record shows that Pugh claimed it was placed before he filed in 2005 an application for a permit to cover the boatlift. The record contains no allegation by any party of the year in which the boatlift was placed.

Page 18: Haley provided full support for his assertion that the records of the City of Mercer Island contain no application for a permit and no issuance of a permit to place the boatlift in question. Haley's second declaration, CP 53, states in paragraph 18: "I contacted the Mercer Island building records department to obtain permit records for the boat lift and

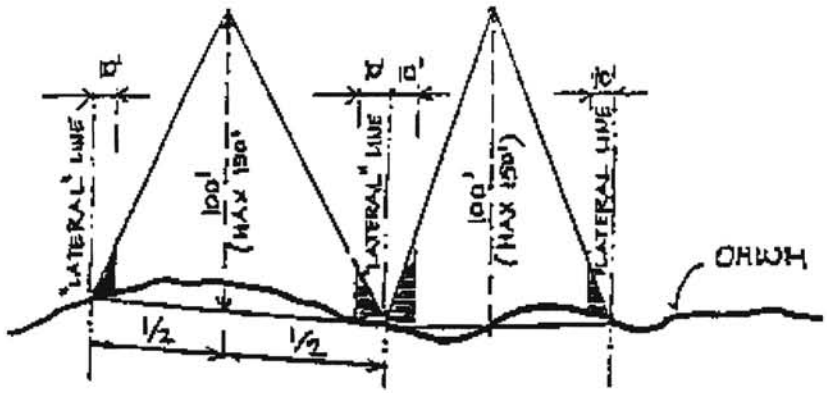
Pugh pier. I received the requested records one week later on April 6, 2012. Upon studying the records, I saw that no permit for the boat lift was ever applied for." Pugh has not disputed that he never applied for a permit to place the boatlift. If this statement were not true, Pugh could simply produce the permit. The permit that issued in 2005 was to put a cover on a preexisting boatlift, not to place a boatlift, and it specified that the boatlift was to be 14 feet farther away from a nearby pier and piling than where the boatlift now sits.

Page 18: Haley provided full support for his assertion that Mercer Island law prohibits placing a boatlift where the boatlift in question sits. His opening brief cited, on page 19, the Mercer Island ordinance, MICC 19.07.110 D, which was in force before the lift was built and still is in force today, and further cited his second declaration, CP 53, which, in paragraphs 19 and 20, quoted the ordinance as follows:

2. Table B. Requirements for Moorage Facilities and Development Located Waterward from the OHWM

Setbacks for All Moorage Facilities, Covered Moorage, Lift Stations and Floating Platforms	A* B	10 feet from the lateral line 35 feet from adjoining moorage structures

Table 1: Figure A: Area of Permitted Covered Moorage, Individual Lots



The covered portion of a moorage shall be restricted to the area lying within a triangle. The base of the triangle shall be a line drawn between the points of intersection of the property sidelines with the ordinary high water mark. The location of the covered moorage shall not extend more than 100 feet from the center of the base line of such triangle. In cases where water depth is less than 10 feet from the mean low water, the location of the covered moorage may extend up to 150 from the center of the base line or to the point where water depth is 10 feet at mean low water, whichever is less. The required 10 foot setbacks from the side property lines shall be deducted from the triangle area.

Page 20: As stated above, the Mercer Island ordinance that is violated by the current placement of the boatlift is MICC 19.07.110 D. This ordinance specifies locations ("zones") where boatlifts can be placed (with a permit) and locations ("zones") where such structures may not be placed. In this sense, this case is a "zoning case".

C. There are no grounds for an award of fees to Pugh.

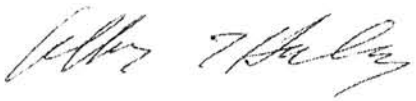
Page 29: There is no issue under the Shoreline Management Act (SMA) before this court. On May 8, 2013, when the trial court made its ruling on the boatlift issue that is the subject of this appeal, CP 521-22, there was no issue under the Shoreline Management Act (SMA) before the trial

court. Haley withdrew the SMA claims from the case seven months earlier on October 14, 2012, CP 336, with these words:

> "I hereby clarify that I am not seeking an award of damages under the Shoreline Act. I am seeking common law damages for fraud, negligence, damage to property, and damage to enjoyment of property. I hereby disclaim my request stated in the complaint for an award of costs and fees under the Shoreline Management Act, as the Act is not applicable to any claim in this case."

There are no grounds for an award of attorney fees to Pugh on appeal no matter how this court rules.

Dated this 6th day of February, 2014



Jeffrey T. Haley

COURT OF APPEALS,
DIVISION ONE
OF THE STATE OF WASHINGTON

Jeffrey HALEY, Appellant,
v.
John F. PUGH,
Respondent

No. 70649-7-I

Superior Court No. 12-2-23528-7 SEA

Proof of Service

I certify that, on 2-7-14, I served a copy of this document on:

Frank R Siderius, counsel for Respondent

by mail or by e-mail of a pdf as agreed.

DATED this 7th day of February, 2014

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