

No. 45596-0-II

Jefferson County Cause No. 11-2-00206-2

IN THE COURT OF APPEALS, DIVISION II

FOR THE STATE OF WASHINGTON

BRAD A. CLINEFELTER and **SUSAN CLINEFELTER**, husband and wife,

Appellants

v.

DENNIS SEVERSON, a single person, and **KENNETH D. UPHOFF** and

CHRISTINE S. BURNELL, husband and wife,

Respondents

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

The Appellants, Brad and Susan Clinefelter (herein “Clinefelter”), appeal the trial court’s award to the Respondents of the fee title to Clinefelters’ portion of vacated Swan Street.

The Clinefelters argue that the trial Court erred when it did so because:

(1) As to Respondents Kenneth Uphoff and Christine Burnell (herein Uphoff):

(a) The Uphoffs are bound by the 1983 Stipulation in settlement of a law suit by the respective parties’ predecessors in interest; and

(b) Even if they are not bound by the 1983 Stipulation, they failed to show that they adversely possessed the Clinefelters’ portion of vacated Swan Street for the required period of time.

(2) As to Respondent Dennis Severson (herein Severson), Clinefelters argue that Severson did not possess the Clinefelters’ portion of vacated Swan Street in a manner adversely to its normal use as a private right of way.

II. THE 1983 STIPULATION

A. The Prior Court Action and Stipulation

The Estate of Ted Thompson (Clinefelters' predecessor in interest)brought suit in Jefferson Superior Court against James and Florence Hubbard (Uphoffs' predecessor in interest)over the exact same subject matter and issue as is at dispute in this lawsuit between Clinefelters and Uphoffs, that is, title to the Thompson's portion of Swan Street. The parties settled the lawsuit by stipulation (the Stipulation is attached as Exhibit A in Appellants' Brief and is also attached here as Appendix A).

The Stipulation officially recognized, and the parties accepted, that each party owned the fee of the half of the vacated street which abutted their property, subject to an easement in favor of the other party. The Stipulation merely stated and recognized what each party already had title to by law, and the easement rights of each. When a street has been vacated by operation of law, each party owns fee to the property abutting the vacated street to the center of the street. *D.V. Finley v. Blanche Jordan et al*, 8 Wn.App. 607; 508 P.2d 636 (1973). And each party retains private easement rights in the other parties' half of the vacated street. *Turner v. Davisson*, 42 Wn.2d 375, 385; 287 P.2d 726 (1995).

B. The Stipulation required neither Recording nor Notice

Contrary to the Respondents claim on page 22 of Respondents' Brief, the Appellants do not claim the 1983 Stipulation conveyed an

interest in real property. The Appellants point of law is that because the Stipulation did not convey any interest in real property, it required neither notarization nor recording. RCW 65.08.070 referred to in the Respondents brief, applies only to a conveyance of real property. The Stipulation conveyed no real property; it did not change title ownership; rather by it the parties agreed to honor and recognize and accept that title ownership to the vacated street was equally divided between the parties as per the parties' respective deeds. Where a street has been vacated by operation of law, a conveyance by lot or block of property abutting the vacated street carries with it the fee to the center of the street. *Finley v. Jordan*, 8 Wn.App.607, 608; 508 P.2d 636 (1973).

The trial court and Respondent allege the Stipulation is not binding upon successors in interest because it was not recorded and therefore did not provide notice to subsequent owners. But this argument has no basis. There was no change in title, so there is no notice to give.

C. Florence Hubbard Cannot Be Heard To Claim Adverse Possession

Florence Hubbard, as a signer of the Stipulation, cannot be thereafter heard to claim adverse possession. Yet, as she was the only prior owner of the Uphoff property who testified, the Uphoffs sought to claim adverse possession by tacking onto her possession. However, evidently the Respondents have now conceded this point as Respondents brief on page

45reads, "... witness Hubbard had been a party to the 1983 Stipulation to a prior lawsuit and had agreed individually to be bound by it."

D. Res Judicata

Whether or not the exact words 'res judicata' for the doctrine of Res Judicata were employed in the trial court, still the doctrine was argued. Clinefelters argued that the Uphoffs were bound by the Settlement from the prior lawsuit. In fact, in cross-examination testimony, not only in argument, this legal principle was demonstrated. In her testimony on cross Christine Burnell admitted that this lawsuit was over the exact same matter as the prior lawsuit in 1983. (RP II-177)

E. The Stipulation Negates Claim that the Fence Represents a Property Boundary

The 1983 Stipulation demonstrates that the parties did not recognize the fence as the property boundary. There was a fence that was put in on the Thompson side of the vacated street, which existed even prior to Severson purchasing the property. The 1983 dispute arose because after Ted Thompson died, the Estate was establishing ownership to the center of the vacated street, not just the fence line. The parties settled the lawsuit by Stipulation that ownership of each half of the vacated street would remain in title with the rightful owners. Thereafter,

any use of the Thompson portion of the vacated street was permissive only, regardless of the location of the fence.

F. The Stipulation is Evidence of Permissive Use

Any use of the Thompson area between the fence and the center line of vacated Swan Street was permissive after the date of the 1983 Stipulation. The heirs of the Thompson Estate had a right to rely upon the binding nature of the Stipulation. Therefore there would have to be some act or action that would put the heirs and successors of the Thompson Estate on notice that the use of the area had changed from permissive to adverse in order for the nature of possession to change from permissive to adverse. *Gamboa v. Clark* 180 Wn.App 256, 270; 321 P.3d 1236 (2014).

The Uphoffs produced no evidence of a change prior to their occupation. Whether the Uphoffs themselves effected by their use any notice of a change in the use of the area from permissive to adverse is doubtful, but even if they were able to do so, they could not do so for the required 10 year period, as they purchased the property in December of 2003 (FOF 2), did not move onto the property until 2004, (RP 1-173) and the lawsuit was filed in 2011.

III. ADVERSE POSSESSION

A. Elements and Burden of Proof

To successfully establish an adverse possession claim, a claimant must possess the property for at least 10 years in a manner that is “(1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile.” *Gorman v. City of Woodinville*, 175 Wn.2d 68, 71, 283 P.3d 1082 (2012) (quoting *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989)). The burden of establishing each element is on the party claiming to have adversely possessed the property. *Anderson v. Hudak*, 80 Wn. App. 398, 401; 907 P.2d 305 (1985). A party claiming title to land by adverse possession has the burden of affirmably proving such possession. *Brown v. Hubbard*, 42 Wn. 2d 867, 259 P.2d 391(1952). *Finely v. Jordan*, 89 Wn. App 607 at 610.

Adverse possession occurs only if a party uses property “as if it were his own, entirely disregards the claims of others, asks permission from nobody, and uses the property under a claim of right.” *Standing Rock Homeowners Ass’n v. Misich*, 106 Wn. App. 231, 239, 23 P.3d 520(2001)(quoting *Granit Beach Holdings, LLC v. Dep’t of Natural Res.*, 103 Wn, App. 186, 200, 11 P.3d 847(2000)). The ultimate test is whether the adverse possessor exercised such dominion over the land that the legal owner would have recognized that the adverse possessor was treating the land as would its true owner. *ITT Rayonier, Inc.*, 112 Wn. 2d at 759.

B. Permissive Use Because of the 1983 Stipulation

Respondent Severson, when he purchased his property relied upon the survey stakes for knowledge of his property boundaries (RP I-23). Severson was aware that the fence was in Swan Street (RP I-25) Severson was aware of the 1983 lawsuit and knew what it was about. (RP I-30-3). Severson always assumed the Swan Street was a right away. (RP I-125) Severson allowed Swan Street to be used a driveway for the Hubbard property. (RP 1-25) Severson always recognized Swan Street as a right of way. (RP I-96)

Because it must be presumed that the holder of legal title possesses the property, the party claiming adverse possession bears the burden of proof of each element. *ITT Rayonier*, 112 Wn. 2d at 757. Permission, express or implied, from the true owner negates the hostility element because permissive use is inconsistent with making use of property as a true owner would. *Chaplin*, 100 Wn. 2d at 861-62. *Teel v. Stading*, 155 Wn. App. 390; 228 P.3d 1293 (2009)

C. Permissive Use of an Easement

Since common grantees from the plat dedicator may not question the right of ingress and egress over a platted street, even if vacated as to the public, the parties have easement rights to Swan Street. (*Bukhard v. Bowen*, 32 Wn. 2d 613, 203 P.2d 361 (1949)). The elements required to

prove adverse possession of the fee of a vacated street in which both parties have an easement should be the same elements that must be found in order to obtain an easement thru adverse possession. To establish prescriptive rights by adverse possession, the claimant must show use that was openly notorious, continuous, uninterrupted and adverse to the owners for the statutory period. *Beebe v. Severda*, 58 Wn. App 375, at 383; 793 P.2d 442 (1990).

Even though Swan Street was vacated, still each abutting landowner had easement rights in each other's half of Swan Street. Private easement rights acquired by taking title to a lot referred to in a plat cannot be adversely defeated by common grantees. *Bukhard v. Bowen*, 32 Wn. 2d 613, 623; 203 P.2d 361(1949). *Capitol Hill Methodist Church v. City of Seattle*, 52 Wn. 2d 359, 324 P.2d 113(1958).

Severson recognized vacated Swan Street as a right of way and what maintenance he did was in the nature of the maintenance of an easement. The hostility of adverse possession requires that the claimant treat the land as his own against the world throughout the statutory period. *Chaplin v. Sanders*, 100 Wash. 2d 853, 676 P.2 431 (1984).

Severson maintained it only as an easement, not as his exclusive property. He allowed the neighbors to come and go on it. (RP I-88) He built no permanent structures on it. (RP I-96) He left the area pretty much untouched (RP I-95), with the exception of mowing some of the area,

there is no evidence that Severson held the property out as his own against all the world. He often allowed access through his property to the Uphoff property on Swan Street. No permanent structures were ever placed in Swan Street by him or anyone else (RP I- 97). Severson's response in the negative to his counsel's question, "... has anyone ever interrupted or challenged your free use of the vacated Swan Street ..." (RP I-84) does not meet the burden of showing hostile and exclusive adverse possession.

Respondents go to some effort to show that the area was relatively unused by the Clinefelters, but the mere nonuse of a recorded easement does not support a finding of abandonment of an easement, nor does it support adverse possession of the opposing party. *Heg v. Alldredge*, 157 Wash. 2d 154, 137 P.3d 9 (2006). The adverse use must be shown to be clearly inconsistent with the future use of the easement. *Edmonds v. Williams*, 54 Wn. App 632, 636; 774 P.2d 1241(1989).

Severson's and Uphoffs' use of the platted street was not adverse to the nature of Clinefelters' ownership of half a vacated street in which all retained easements. They built no permanent structures; nor made any permanent changes to the area.

D. Adverse Possession: Outdated Doctrine

It has been pointed out that in today's world to award titled to real property on the basis of adverse possession is adverse to justice. As stated

by William Stoebuck [(35 Wash. L. Rev. & St. B.J. 53 1960) “Law of Adverse Possession in Washington, The; Stoebuck, William B.] “Adverse Possession is an anomaly in the law in that it is a system whereby a legal right is obtained through conduct which must be wrongful.”

Judge Barbara A. Madsen in her concurring opinion in *Gorman v. City of Woodinville*, 175 Wn. 2d 68, 75, 283 P.3d 1082 (2012); stated; “the doctrine’s basic premise is legalization of wrongful acquisition of land by “theft”, conduct that in our time we should discourage. Judge Madsen goes on to demonstrate that the original purpose of allowing such injustice was in order to make use of unused land which no longer exist and the land is already overused. *Gorman v. City of Woodinville*, 175 Wn. 2d 68, @ 76-78. Judge Madsen also points out the doctrine of adverse possession discourages neighborly conduct and accommodation. (*Gorman v. City of Woodinville*, 175 Wn. 2d 68 at 79) Given the increase in population and density and use of land neighborly conduct and accommodation should be an ever more increasing goal of a lawful society.

IV. PROCEDURAL ISSUES

Respondents raise a threshold issues, arguing that Clinefelters did not make a correct official record of challenging the trial court’s Findings of Facts and Conclusions of Law and therefore did not preserve the right to appeal. However, CR 46, entitled “Exceptions Unnecessary”, provides “Formal exceptions to rulings or orders of the court are unnecessary; ...it

is sufficient that a party, at the time of the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor.” Clinefelters have taken no position on appeal that they did not clearly communicate to the Court thru briefing, argument and presentation during the bench trial. *Gamboa v. Clark* 180 Wn.App 256 @ 266.

Respondents also argue that the Clinefelters should have set out the challenged Findings Verbatim in accordance with RAP 10.4(c). But RAP 10.4(c) provides that if a party presents an issue which requires study of a statute, rule, regulation, jury instruction, Findings of Fact, exhibit or the like, the parties should type up portions of the text out verbatim or include them by copy of the text or in the Appendix to the brief. The Findings of Facts and Conclusions of Law are part of the record and the Appellants have pointed out the particular portion of, or the issue in, the Findings of Fact and Conclusions of Law that the Appellants take issue with. *Jamison V. Dep't of Labor & Indus.*, 65 Wn.App. 125,: 827 P.2d 1085 (1992).

V. CONCLUSION

The Respondent Uphoffs are bound by the 1983 Stipulation.

And neither Respondents Uphoffs' nor Respondent Severson's claims to the disputed portion of Swan Street by adverse possession are supported by the evidence.

Respectfully submitted this 24th day of September, 2014.

A handwritten signature in black ink that reads "Ted Knauss". The signature is written in a cursive style with a horizontal line underneath it.

Ted Knauss, WSBA # 9668
203 A West Patison Street
Port Hadlock, WA 98339

Appendix A

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NOTICE: IF THE DOCUMENT IN THIS FRAME IS LESS CLEAR THAN THIS NOTICE IT IS DUE TO THE QUALITY OF THE DOCUMENT.

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

RAYMOND D. THOMPSON, Executor of the
Estate of Ted Thompson, Deceased,

Plaintiffs,

vs.

JAMES HUBBARD and FLORENCE S. HUBBARD,
(formerly Grabinski), husband and wife,
et al.,

Defendants.

NO. 10880

STIPULATION

Come now the parties to this action and herein set forth the following agreement by stipulation in settlement of all their respective rights and liabilities herein, to wit:

1. Plaintiff is the owner of Lots 3, 4, 5 and 6 in Block 5 and Lots 15 and 16 in Block of Nolton's East Port Townsend Addition, as per plat recorded in Volume 2 of Plats, page 46, Jefferson County, Washington.
2. Defendants are the owners of Lots 3, 4, 13 and 14 in Block 6 of Nolton's East Port Townsend Addition as per plat recorded in Volume 2 of Plats, page 36, Jefferson County, Washington.
3. Separating the property of the parties is a street known as Swan Street, also part of Nolton's East Port Townsend Addition. Swan Street was vacated by operation of law pursuant to Section 32, Chapter 19 of the Laws of 1891 at page 603.
4. As a result of the vacation of Swan Street both the plaintiff and defendants are owners of the one-half of Swan Street abutting their respective properties.
5. Both plaintiff and defendants each grant to the other a permanent easement for drainage, ingress, egress and utilities over, across and under that portion of Swan Street owned by each party.

///

STIPULATION

EXHIBIT	
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DEPONENT NAME:	DATE:
D. Severson	5/13/12

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6. Both parties agree that the roadway presently in existence on a portion of Swan Street shall remain in its present location but any future utilities shall be put in on the side of the roadway owned by the party obtaining the utilities and that any roads constructed in the future shall be constructed down the center line of Swan Street and an equal distance on each side of the center line.

7. The parties agree that neither shall use the other parties' half of vacated Swan Street or the open part of Swan Street for parking or storage or in any other manner not reasonably related to the exercise of the parties' rights to drainage, ingress, egress and utilities.

8. Plaintiff shall pay to defendants the sum of \$500.00


All other claims and counterclaims of the parties herein are dismissed with prejudice.


10. This agreement shall be binding upon the heirs, successors and assigns of the parties hereto.

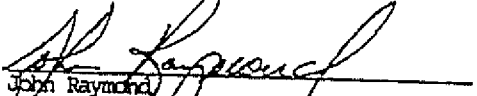
Dated this 27 day of July, 1983.


Raymond D. Thompson

Executor of the Estate of Ted Thompson
under Jefferson County Cause No.


James Hubbard


Florence S. Hubbard


John Raymond
Prosecuting Attorney for Jefferson
County

PENINSULA LAW FIRM PLLC

September 24, 2014 - 3:26 PM

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