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NO. 98299-6

NO. 51995-0-II

SUPREME COURT FOR THE STATE OF WASHINGTON
COURT OF APPEALS DIVISION II

DAN THOMSON and TIM THOMSON,

Appellants,

v.

R AND H FAMILY, LLC and BARRY THOMAS,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

R&H Family, LLC and Barry Thomas (collectively “R&H”) are the Respondents and ask that the Court deny Tim and Dan Thomsons’ Petition for Review.

II. COURT OF APPEALS’ DECISION

The Thomsons seek review of the decision of the Court of Appeals entered on February 19, 2020, a copy of which is attached to the Appendix to the Petition for Review.

III. ISSUE PRESENTED FOR REVIEW

Have the Thomsons met their burden of demonstrating a substantial public interest, pursuant to RAP 13.4(b)(4), as a basis for review by the Supreme Court, when the unpublished decision of the Court of Appeals was based on the unique facts of this case?

IV. STATEMENT OF THE CASE

R&H Family, LLC and Barry Thomas (collectively “R&H”) own several contiguous parcels along the Sol Duc River in Forks, Washington. (RP 108) These parcels are collectively referred to herein as the “R&H Properties.” The R&H Properties were purchased by Russell and Helen Thomas in the 1960s (RP 109, 111), and remained in their ownership until such time as one small parcel was conveyed to Barry Thomas in 1991 and

the remaining parcels were conveyed to R&H Family, LLC in 1998 (Exhibits 19, 20).

Barry Thomas lived in what was referred to as the farm house from 1973 until he built a new house east of a stand of trees ten years later. (RP 109-110) The farm area was enclosed by barbed wire fencing when the Thomas family acquired the R&H Properties in the 1960s. (RP 114-115, 116) The historic fence line has been maintained and repaired in place during the Thomas family's farm ownership. (RP 117-118) The western edge of the clearing, which is a half-moon shape, extends over the boundary line of the R&H Properties ("Disputed Farm Area"). (RP 116, Exhibits 2, 4, 23, 25-27, 29, 32-33, 36)

Rayonier Forest Resources, L.P. ("Rayonier") owned the property adjacent and to the north and west of the R&H Properties at all relevant times during the Thomas family's ownership of the R&H Properties.

In the late 1970's, Russell Thomas hired workers to build a gravel road, 1,200 to 1,500 feet in length, across land located partially on Rayonier's property ("Road"). (RP 119, Exhibits 2, 23, 25, 30-31, 42-44) Russell Thomas never asked for permission to build the road. (RP 126) The Road was surfaced with gravel from the Thomas family's gravel pit. (RP 119) Since the construction of the Road, the Thomas family and R&H have regularly and consistently used the Road for their farming operations.

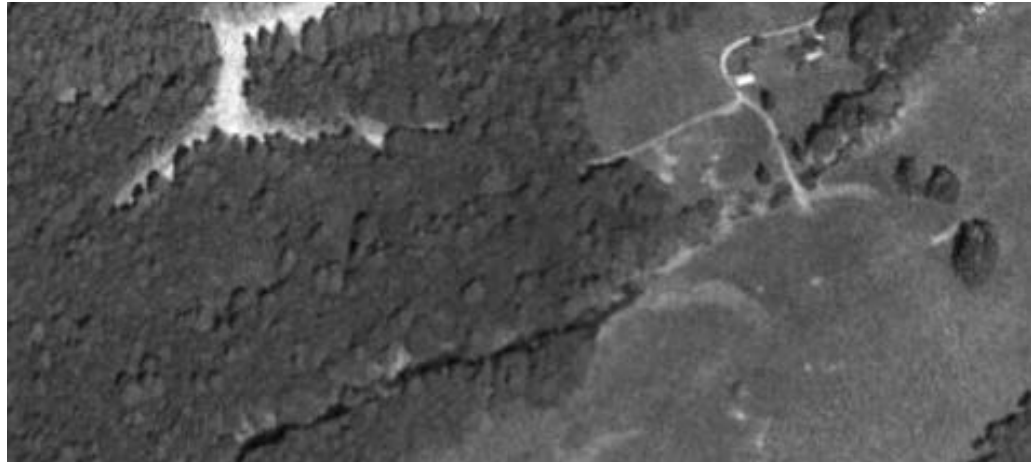
(RP 123-125) The Road was resurfaced by the Thomas family sometime in the 1980s when alder trees were logged on the R&H Properties. (RP 126-127) The Road bisects the corner of the property owned by Rayonier (“Disputed Triangle Area”). (Exhibit 2) However, the Road does not provide access to the Rayonier property. (RP 137)

Aerial photographs support the existence of the Road in the disputed area since the 1970s:



(Exhibit 23) (7/16/1971)

The Road remained in place through the 1980s and 1990s and is still present in the same location today. Aerial photographs depict the Road in the 1990s:



(Exhibit 30) (7/19/1994)



(Exhibit 31) (7/19/1994)

In 1981, Gerry Keck, an employee of Rayonier, surveyed Rayonier's property, including the Disputed Property. (Exhibit 17, 18) In addition to creating a survey, Gerry Keck also blazed the property line, which involved physically walking the property line and marking the property line through "blaze" marks on the trees. (Exhibit 17) In the

course of blazing the property line in the disputed area, Mr. Keck would have had to cross the Road constructed by R&H and walk along the existing fence of the Disputed Farm Area. (RP 136) Barry Thomas testified that “you’d have to cross [the Road] four times. Twice going in and twice going out.” (RP 136) The Road would have led Mr. Keck directly to the R&H farm. (RP 137)

In the early 1980s, the Thomas family built a three-wire barbed fence starting from the northwest corner of the farm east along the north boundary line of the Disputed Triangle Area. (RP 127-29) This fence line intersected the Road, and then followed the northern edge of the Road connecting to another section of the historic fence to the east, which is the Disputed Farm Area. R&H maintained and repaired the fence as needed. (RP 128, 153)

Rayonier logged its property north of the Disputed Triangle Area in 1994. (RP 137) Rayonier cut the timber and stopped at the fence line along the boundary of the Disputed Triangle Area. (RP 137-138, 140) Following removal of the timber, Rayonier inspected the boundary line near the Disputed Triangle Area and Disputed Farm Area. (RP 58-59, Exhibit 15) During such inspection, the Road, the fence along the northern border of the Disputed Triangle Area, and the fence on the western border

of the Disputed Farm Area would have been seen by employees of Rayonier. (RP 59)

In approximately 1996, the Thomas family granted permission for WDFW and later the Pacific Coast Salmon Coalition ("Salmon Coalition") to study a salmon pond located partially within the Disputed Triangle Area. (RP 130-32, 175-176) The site was named "Thomas Springs." (RP 132, Exhibit 52) WDFW and the Salmon Coalition accessed the "Thomas Springs" pond through the Road along the northern boundary of the Disputed Triangle Area. (RP 132, 178, Exhibits 51, 52) The Road was resurfaced by WDFW, in connection with their work in the 1990s. (RP 133, 157)

The Thomsons entered a purchase and sale agreement with Rayonier on or about January 21, 2010. The Thomsons closed the purchase transaction on February 17, 2010.

The Thomsons later filed this lawsuit on July 1, 2016, seeking quiet title and ejectment. (CP 577-580) R&H counterclaimed for adverse possession. (CP 570-76)

Trial was conducted on January 22 and 23, 2018, and the Court orally ruled in favor of R&H. (RP 1, 219-223) Subsequently, the trial court entered its final Findings of Fact and Conclusions of Law on April

18, 2018. (CP 20-29) The trial court also entered an award of attorneys' fees and costs, pursuant to RCW 7.28.083, on April 6, 2018. (CP 33-37)

On February 19, 2020, the Court of Appeals issued its Unpublished Opinion affirming the trial court's decision and awarding attorneys' fees to R&H on appeal (the "Decision").

On March 20, 2020, the Thomsons filed a Petition for Review (the "Petition"). The Thomsons did not move to publish the Decision

V. ARGUMENT

1. The Thomsons Fail to Establish Grounds for Review Pursuant to RAP 13.4

RAP 13.4(b) provides that a petition for review will be accepted by the Supreme Court only upon the showing of one of the following grounds:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The Thomsons make no argument on the grounds stated in RAP 13.4(b)(1) through (b)(3). Rather, the Thomsons focus exclusively on RAP 13.4(b)(4)'s substantial public interest basis for review.

The Thomsons make two superficial "substantial public interest" arguments. First, they argue that there is a substantial public interest because "Much of Washington's commercial forestland is owned by private industry." (Pet. at 8.) Second, the Thomsons argue, "this case is important because it affects any property owner who gives express or implied permission to another to use his or her property." (*Id.*)

The tangential "public" interests identified by the Thomsons do not arise to a "substantial public interest." The Court of Appeal's Decision was based on the unique facts of this case. It has no broader impact on the timber industry or property owners who give express or implied permission. Indeed, the Decision is not published, and thus has no precedential authority. RAP 10.4(h); GR 14.1 ("Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court.")

The Court of Appeals determined that its Decision will not be published in the Washington Appellate Reports. (Decision at 16.) Pursuant to RAP 12.3(d), the Court of Appeals uses the following criteria in determining whether to publish a decision:

- (1) Whether the decision determines an unsettled or new question of law or constitutional principle;
- (2) whether the decision modifies, clarifies or reverses an established principle of law;
- (3) whether a decision is of general public interest or importance; or
- (4) whether a case is in conflict with a prior opinion of the Court of Appeals.

The Court of Appeals decided that none of these criteria were present including that the decision was not “of general public interest or importance.” RAP 12.3(d)(3).

The Thomsons had the right to request that the Decision be published by demonstrating the same criterion stated above, including that the Decision was of general public interest or importance, by filing a motion to publish within 20 days after the opinion was filed. RAP 12.3(e). However, the Thomsons failed to timely file such a motion.

Furthermore, the issues stated in the Petition demonstrate that the issues are unique to these parties and the facts of this matter, not of some broader public interest or importance. For instance, Issue No. 1 is “Has Respondent R&H carried its [sic] the burden to proof [sic] the implied permission was terminated by a distinct and positive assertion?” This question narrowly affects the parties, not a broader segment of the population.

The Thomsons identify the second issue as, “In vacant, open, unenclosed, and improved property where use is permissive from the outset, is the true owner entitled to actual notice of adverse use?” In arguing that this issue is of “substantial public interest,” the Thomsons argue,

this case is important because it affects any property owner who gives express or implied permission to another to use his or her property. Where use of another’s property is initially permissive, the adverse claimant must prove that permission was terminated by a distinct and positive assertion and the true property owner had actual notice of [the] distinct and positive assertion.¹

Yet, no public interest can be furthered by the Supreme Court reviewing this issue. There is no conflicting authority on this issue. Rather, the Thomsons simply disagree with the trial court and Court of Appeal’s application of the law to the facts of this case. For instance, the Court of Appeals held that even if there was an implied permissive use at the outset, R&H presented sufficient evidence to overcome it by placing a decades-old fence enclosing this area and cutting it off from the rest of the

¹ The Thomsons misstate the law and the holdings of various opinions, including *Miller v. Anderson*, 91 Wn. App. 822, 828, 964 P.2d 965 (1998), as requiring not only a distinct and positive act ending permissive use but also that “the true owner had *actual* notice” of such act. Yet, this actual notice requirement is simply not found in the case law. *Miller* does not require actual notice, and the Thomsons fail to identify any other authority that requires such a showing. To the contrary, notice can be either actual or constructive.

Thomsons' property.² The Court of Appeals correctly held that such action, "firmly establishes hostility." (Decision at 9) Additionally, the trial court's unchallenged findings that R&H maintained the fence since the 1960s and never received permission from Rayonier to enclose this area were verities on appeal and supported that the use of this area was not permissive. (*Id.* at 9-10)

The same is true with respect to the Disputed Triangle Area. The Court of Appeals correctly ruled that even assuming the use of this area was initially permissive, R&H presented sufficient evidence to establish hostility. The Court of Appeals again noted that the Thomsons failed to challenge, and thus they are verities on appeal, the trial court's findings that R&H treated this area as their own, that any reasonable person would have thought R&H owned it, and R&H's use interfered with Rayonier's

² The Thomsons incorrectly state that the Court of Appeals found that R&H's use of the disputed areas was initially permissive. This is incorrect. In their briefing, the Thomsons argued that the presumptions of permissive use in the prescriptive easement context should be applied to adverse possession claims. R&H submitted in their brief that there are different policy considerations that justify such a presumption in prescriptive easement cases that simply do not apply in adverse possession cases. However, the Court of Appeals did not feel it needed to address this question because even assuming such a presumption was applied, the presumption was overcome by the evidence. Thus, contrary to the Thomsons' argument, the Court of Appeals did not find that R&H's uses were initially permissive. Rather, the Court of Appeals held that it simply did not matter if a presumption was applied under the facts of the case.

and the Thomsons' use of this area. (Decision at 10.) Such unchallenged findings include that R&H build a road across this disputed area for access to the lower part of the R&H property without asking permission from Rayonier, and R&H build a fence along the road that excluded others from using this area. (Decision at 10-11.)

In short, the unchallenged findings of the trial court are verities on appeal and they establish that any initial implied permissive use (assuming *arguendo* that a presumption applies at all) became hostile by distinct and positive acts. The Court of Appeals correctly applied the law to the uncontested facts on appeal. The Thomsons' disagreement with the result does not raise any public interest, let alone a substantial public interest.

2. Request for Attorneys' Fees

Pursuant to RCW 7.28.083 and RAP 18.1(j), R&H requests an award of fees and costs incurred in answering this Petition for Review. The trial court entered specific findings and conclusions that an award of fees to R&H was "just and equitable" pursuant to RCW 7.28.083. The Court of Appeals affirmed the trial court's fee award and awarded R&H attorneys' fees associated with the appeal. (Decision at 16.) Pursuant to RAP 18.1(j), "If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and

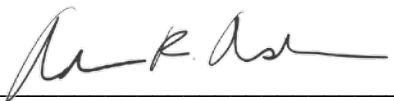
expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review.”

V. CONCLUSION

The Thomsons have failed to demonstrate a substantial public interest, pursuant to RAP 13.4(b)(4), as a basis for the Supreme Court to accept review of the Decision. The Supreme Court should therefore deny the Petition, and award R&H attorneys’ fees incurred in preparing this Answer.

Respectfully submitted this 10th day of April, 2020.

SOCIUS LAW GROUP, PLLC

By 

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Attorneys for R and H Family, LLC and
Barry Thomas, Respondents

VI. CERTIFICATE OF SERVICE

I certify that on the 6th day of April 10, 2020, I caused a true and correct copy of Respondents' Answer to Petition for Review to be served on the following in the manner indicated below:

Counsel for Appellants:
Kenneth J. Wolfley
Wolfley Law Office, P.S.
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Port Angeles, WA 98362

- | | |
|-------------------------------------|-----------------|
| <input checked="" type="checkbox"/> | U.S. Mail |
| <input checked="" type="checkbox"/> | Electronic Mail |
| <input type="checkbox"/> | Legal Messenger |
| <input type="checkbox"/> | Hand Delivery |

/s/ Linda McKenzie
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