IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 92404-A

(Court of Appeals No. 45596-0-II)

DENNIS **SEVERSON**, a single person, and

KENNETH D. **UPHOFF** and CHRISTINE S. **BURNELL**, husband and wife,

Respondents,

v.

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

Petitioners.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION AND IDENTITY OF PARTIES

Petitioners Brad A. Clinefelter and Susan Clinefelter (hereinafter "Clinefelter") seek review of the Court of Appeals decision designated in Part II of their petition and attached thereto. They own residential property in Jefferson County, Washington, lying Northerly of vacated Swan Street together with the North half of the vacated street which would attach by operation of law to their residential lots.

Respondents Dennis Severson, a single person, and Kenneth Uphoff and Christine Burnell, husband and wife, are respective owners of adjacent (to each other) residential parcels lying Southerly of vacated Swan Street, together with the South half of the vacated street which would attach by operation of law to their residential lots.

The case raises no important issues of law regarding adverse possession of the fee underlying a statutorily vacated street. Neither in the Court of Appeals, nor here, do Petitioners support necessary appellate revision or construction of the existing law applied by the trial court and the Court of Appeals, nor new or conflicting authorities on which to review the COA decision.

The trial court heard all the evidence, which consistently concerned the nature and uses of 36 years of neighbors' treatment of the fee underlying a well-discussed implied easement in a residential neighborhood.

It observed and heard all the witnesses, and applied the facts of the case to well-briefed existing law.

There are no issues for appellate resolution regarding the right of present parties to rely upon Stipulations in settlement of prior disputes. No party here was a party to prior litigation resolved by a 1983 stipulation ending civil litigation. Present parties (Clinefelter, and Uphoff/Burnell) who are descendants in title from the 1983 litigants had no knowledge, nor notice, whether actual, implied or from recorded documents, of the existence of the prior litigation and Stipulation, until 2013.

Respondent Severson was not a party to the 1983 Stipulation, and although he may have heard of it, was not bound by it nor shown to know the details of it between the parties to it. The trial court was absolutely correct that no party in this case was bound by the 1983 Stipulation, which simply is not in issue in the present litigation. The Court of Appeals affirmed that decision on the facts, and on the law of notice.

Petitioners complain that Respondents Uphoff/Burnells' remote ancestor in title, (Hubbard), breached the 1983 Stipulation as to the easement agreement, to which she had been a party. They did not join her here, so she had no part in this litigation except as an historical witness. Hubbard had never been the subject of action for her admitted breach of

the 1983 Stipulation, so her actions could be considered as tacking for purposes of determining the period of hostile use of another's land, as the Court of Appeals chose to do. She had no claim in the present action, and neither the trial court nor the Court of Appeals rewarded her in any manner for her continued trespass against what is now Petitioners' property.

The decision of the Court of Appeals is not in conflict with the prior court rulings that trial courts, in determining adverse possession, will consider the nature of the possession in light of the nature of the property.

It is also not in conflict with prior rulings that stipulated settlements of court disputes will be enforced among the parties to them and among their successors in title with actual or record notice of them, but not against third parties with no notice of them (here, some thirty years later).

Petitioners raise no issues deserving or in need of this Court's review.

II. RESPONSE TO ISSUES PRESENTED FOR REVIEW

1. Petitioner states its first issue for review as: "Does the mowing of part of a portion of a vacated street and occasional parking a boat on the area, while keeping the area open for neighbors to use for ingress and egress, constitute sufficient evidence to show adverse possession of the vacated street?" That is a misleading understatement, and in part a mis-

statement, of the record as found by the trial court and the Court of Appeals as to Respondents' use of the disputed area for 36 years.

2. Petitioner states its second issue for review as: "May a party who signed an agreed Stipulation in resolution of a court dispute over the use of a vacated street, be awarded by the Court under the doctrine of adverse possession the very same property they agreed by Stipulation not to claim?" This is an inapplicable issue, as no party to the 1983 Stipulation was also a party to this action, and no relief nor award was granted to any party to the 1983 Stipulation.

III. STATEMENT OF THE CASE

The lawsuit concerned adverse possession claims to the underlying fee of a portion of a statutorily vacated street, which remains subject to the undefined implied easement rights of ingress and egress by adjacent property owners, based on 36 years of occupation of a portion of the vacated street by Respondents.

The Court of Appeals quite adequately, and accurately, summarized the controlling facts of the case, which we do not need to repeat here. There was disputed testimony in open court to the appearance, maintenance and uses of the disputed strip of Petitioners' portion of vacated Swan Street, from 1977 to 2013. The trial court exercised its

sound discretion in determining the controlling facts upon which base its decision.

IV. ARGUMENT AND AUTHORITIES

In their statement of the issues presented for review, Petitioners contend that Respondent Severson kept "the area open for neighbors to use for ingress and egress", which we contend is a mis-statement. Division II noted that Severson "put in a driveway on the eastern, undisputed half of Swan Street side to provide access to Uphoff's parcel" (Severson et.al. V. Clinefelter, p. 2, Court of Appeals No. 45596-0-II, unpublished decision, 2015). That is, the driveway which Mr. Severson put in on his own property, for ingress and egress by himself and his adjacent neighbors, was not kept open for the general public nor for Petitioners or their ancestors in title. The statement of issue, as worded, is misleading.

Petitioners also again contend that the trial court improperly rewarded trial witness Florence Hubbard by granting her adverse possession title to a portion of the disputed strip of vacated Swan Street despite her admitted violation of the 1983 Stipulation to which she had been a party. Florence Hubbard was not a party to the present litigation. She was awarded nothing. There is no evidence that she gained or benefitted from this litigation at all. While the Defendants were willing to

concede that her admitted violation of the 1983 Stipulation (from 1983 to 1990) need not be considered for the "tacking" element of Respondents Uphoff/Burnells' adverse possession (in addition to the 1990-2013 acts of her successors in title), the Court of Appeals properly declined our concession, as Hubbard's breach of the Stipulation was hostile in the purest legal sense, and remains unnecessary to the trial court's determination of more than ten years of adverse possession. This argument of Petitioner is quite irrelevant to the facts and legal issues of the case.

In Petitioners' Petition for Review, Section V. Argument, subsection A., they repeat their argument that Respondent Severson's possession of the disputed area did not rise to the level of adverse possession, as the nature of the property was as an easement, a right of way.

They seriously under-state the nature, extent and consistency of the facts as found by the trial court and the Court of Appeals, and there is no basis for an argument that the trial court did not consider the nature of the occupied property as an implied private easement.

In Petitioners' Petition for Review, page 7, they cite authority for the proposition that their relative disuse of the easement could not support a finding of abandonment of a recorded easement, nor to support adverse

possession by an opposing party. (Cf. Heg v. Aldredge, 157 Wn.2nd 154, 137 P.3d 9 (2006). This citation and theory was not presented to the trial court, nor to the Court of Appeals, and is novel in this context, as Respondents never contended for an abandonment of an easement, nor was there a recorded or express easement involved as the result here might have been different had it been a recorded easement. This Court should disregard that new argument.

And, as to their argument that a claimant who shares a disputed property with the title owner cannot establish the first element of "exclusive" possession (Pet. For Review, page 9), there is absolutely no evidence in the record that Respondent Severson shared the use of the disputed property with Petitioners or their ancestors in title.

And, again, in their Pet. For Review, page 9 *et. Seq*, Petitioners repeat their arguments to the trial court and the Court of Appeals that the law favors enforcement of stipulations among parties to them, for which there is ample authority which Respondents have never challenged. But those rules and citations of authority have no relevance here. The Court of Appeals properly disposed of this argument based on the clear record that the 1983 Stipulation was not recorded, no judgment of court was entered based upon it, and no one in the present litigation had notice of it,

so were not bound by it.

As Petitioners curiously state, at Pet. For Review page 11: "There is nothing in the Stipulation that would affect title so it is required that the Stipulation or reduced to a Judgment." It was not, so it provided no record notice, nor actual notice, to anyone of the successors in title to either party, as the Court of Appeals found.

Petitioners' claim that the trial court somehow improperly rewarded trial witness Florence Hubbard by granting her adverse possession, when the record is clear that it did not, illustrates the illogical desperation of their argument, having lost on the facts and the existing caselaw of adverse possession.

V. CONCLUSION

There is no merit to the issues presented for review, and this Court should decline the Petition for Review.

Respectfully submitted this 19th day of November, 2015.

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