

ORIGINAL

COURT OF APPEALS
DIVISION II

No. 37760-8-II

09 JUN 29 PM 2:25

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

VICTOR ERICKSON and LARRY ERICKSON

Plaintiffs / Appellants

v.

CHARLES W. CHASE and NANCY CHASE, husband and wife,

Defendants and Third Party Plaintiffs / Respondents

LLOYD COMBS and DORIS COMBS

Third Party Defendants and Fourth Party Plaintiffs,

JAMES ROBSON

Fourth Party Defendant

APPELLANT ERICKSONS REPLY BRIEF TO
RESPONDENT CHASES' RESPONSE BRIEF

Robert D. Michelson, WSBA # 4595
Attorney at Law
PO Box 87096
Vancouver, WA 98687-0096
(360) 260-0925 Fax (360) 944-1947
Email: rmitchelson@msn.com

11/11 10/20/09

I. TABLE OF CONTENTS

A. Reply to Introduction.....1

B. Reply to Statement of the Case3

C. Erickson’s Reply to Chases’ Response to Erickson’s
Appeal Concerning The Upper Road6

D. Erickson’s Reply to Chases’ Cross-Appeal Concerning
The Lower Road14

E. Conclusion19

II. TABLE OF AUTHORITIES

Cases

Lee v. Lozier, 88 Wn App 176, 945 P2d 214 1997).....9

Huff v. Northern Pac . Ry. Co., 38 Wn 2d 103, 228 P 2d 121(1951).11

Tatum v. R & R Cable Inc., 30 Wn App 580, 636 P2d 508 (1981)....12

Granite Beach v. Natural Resources, 103 Wn App 186, 11 P.3d 847
(2000).....15

Todd v. Sterling, 45 Wn 2d 40, 273 P 2d 245 (1954).....16

Roediger v. Cullen, 26 Wn 2d 690, 175 P 2d 669 (1946).....16

A. Reply to Introduction

Chase's Response is correct in stating Erickson's initial action was to establish both a prescriptive easement across the Upper Road, which Erickson argues is far more than the horse trail description as frequently referred to by Chase and Erickson also asked the court to confirm the establishment of a prescriptive easement across the Lower Road, which is sometimes referred to as Lower Bear Prairie Road.

The trial court found Ericksons had not met their burden regarding the establishment of an easement by prescription on the Upper Road primarily for lack of continuous use, FF 32 through 34.

The trial court also found Ericksons should respond in damages for allegedly skinning the Upper Road beyond what Erickson thought was their prescriptive easement, FF 37 through 43.

Erickson has appealed the assessment of timber trespass damages as a result of the skinning incident referred to. They raise an evidentiary issue arguing the court made a finding of monetary damages without the basis of substantial or legally admissible evidence, relying solely on hearsay evidence of Chase as to the value and cost of replacement of the trees in question. Inherent in that argument is Erickson's argument they were within their prescriptive easement when any clearing occurred.

This Reply is not intended to address Chase's argument against the Cross-Appeal of Combs except where arguments used in the Combs' Response may be contradictory to the arguments used against Erickson in Chases' Response.

B. Reply to Statement of the Case

It should be noted that the Fulsher Deed to Catholic Archdiocese for the Central Catholic High School, while mentioned at FF 5, was not provided by any party as an exhibit. Erickson respectfully requests they be allowed to supplement the record to provide the actual Deed, this oversight was not noticed until preparation of the Reply.

Also, the actual Deed from Fulsher to Albertina Kerr is E 40 and the Albertina Kerr to Buck Mt. Timber is Ex 6. The Zumstein to Read Deed is Ex 4 and 5. Ex 4 being the Real Estate Contract to Buck Mt. Timber and Ex 5 being the Fulfillment Deed.

The transfer from Erickson and Sons occurred by way of Land Sales Contract on November 18, 1986 as recited in Ex 19, the Wilson to Erickson & Sons Warranty Fulfillment Deed.

On July 11, 1988, Mr. & Mrs. Fulsher transferred the sixteen acres to Albertina Kerr Centers, Ex 14. This Deed contained significant references to easements as to present and future uses.

The Catholic Archdiocese Deed was executed on November 10, 1994, Ex 23, and the so-called cross-easements being the Robson easement is dated April 28, 1995, Ex 24a and so-called cross-easement from Robson to Buck Mt. is dated April 28, 1995, Ex 24b.

There appears to be nothing in the record to substantiate Chase's statement under section b page 8 of their Statement of the Case, that the twenty acre property was held in unity of ownership by the Catholic Church until the properties were conveyed to Robson and Zumstein in November 1994. The best evidence appears to be they were always held as separate parcels after Fulsher deeded to

Albertina Kerr, and it would appear the sixteen acres had been held as a separate parcel at least as early as July 11, 1988 from reading the Corrective Quit Claim Deed, Ex 14.

Chase offers in their Statement of the Case that there is no evidence Erickson ever had a mining permit. Likewise, there is no evidence that Erickson ever needed a mining permit.

Chases argues that notification to adjoining land owners in 1994 put those adjoining owners on notice that the older Erickson was contemplating a subdivision on the nine acres with access from the subdivision to the south. However nothing in the plat application indicated Erickson would not continue to haul rock from the nine acres prior to development and sale of subdivision lots up the Upper Road. In fact, when questioned about the ability of the applicant to use other roads, Mark Mazeski, from Skamania County, admitted that as far as the County was concerned, if an

applicant goes out and acquires other access, either legally, by deed, negotiation, adverse possession, or prescriptive rights, the County has no interest in that process. RP 457 20-25, RP 458 1 & 2.

The balance of Chase's Statement of the Case beginning on page 9, appears to be argument and will be replied to in Argument Re: the Upper and Lower Road (C and D below).

C. Erickson's Reply to Chases' Response to Erickson's Appeal Concerning The Upper Road

Chase suggests the Ericksons did not challenge the Findings where Ericksons claim the trial court erroneously denied Erickson a prescriptive easement for use of the Upper Road. This is incorrect. Counsel for Erickson vigorously challenged the trial court's findings during its oral ruling, RP 41 @ 1 & 2, the Chases fenced off the road in late 2005, not 2003 as the court insisted. When the Findings

were presented, counsel for Erickson vigorously argued that the court's notes were incorrect as to when the road was fenced off, pointing out in a Motion for Reconsideration heard May 15, 2008, and in closing argument, that Chase did not put up the fence until September or October of 2005, RP 790. Counsel argued the transcript of Mr. Chase's testimony, indicates he admitted the fence did not go up until September or October of 2005. Erickson's Opening Brief incorrectly cites to RP 425 as to Chase's admission as to when he actually put up the fence. The correct page is RP 424 lines 10 through 17.

Furthermore, in Erickson's Amended Statement of Arrangements filed November 3, 2008, they specifically pointed out they intended to argue on review Findings of Fact 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, and 43. Therefore both this review court and the Chases were well aware of those Findings being challenged.

Chase obviously felt the need to fence the Ericksons out of the roadway because Ericksons continued to adversely use it up until

September of 2005, Chase noted that after Ericksons were warned off in December of 2003, RP 394, they returned in December of 2004, and in Chase's opinion, skinned the road, and then again continued to use the road after it had been skinned, contrary to Chase's objections, RP 410 @ 3 & 4, and continued to park log trucks and other heavy equipment on the road even after Chase put up no trespass signs as depicted in Ex 64, on what he testified was May 7, 2005, RP 422.

Therefore it is obvious that even if Zumsteins' use of the road did not commence until December of 1995, the Reads and Ericksons continued to possess it in a manner consistent to put a true owner on notice Ericksons were acting in a manner adverse to the true owner's interest.

These activities were occurring in conjunction with the fact that Chase apparently did not even know for sure where his property line was until he had it surveyed in May of 2005, RP 423 @ 17.

As noted in Ericksons' Opening Brief, the term 'continuous use' is relative in terms of the type of property. Ericksons needed to keep the road open but they did not use it on say a daily, or even monthly basis which was consistent with the nature of what they needed it for, i.e. access to the upper portion of the sixteen once they intended to develop the upper portion of the sixteen.

The test and definition for whether a use is continuous or uninterrupted does not necessarily mean constant use. It is sufficient for continuity of use if established by use of the same character that its true owner might make of the property considering its nature and location, *Lee v. Lozier*, 88 Wn App 176, 945 P2d 214 (1997). In *Lozier* the dispute was over a dock which had been built by one homeowner but used seasonally over a period of more than ten (10) years by other recreational homeowners. There the court held that such seasonal use fell within the definition of continuous and uninterrupted use even though much of the year the dock obviously was not used.

Chase urges the court to make an unfounded assumption that because Zumstein did not make final payment on his Deed of Trust obligation and receive a Deed until the end of 1994, he therefore did not use the property prior to that date. That is an unfounded assumption and contrary to testimony by Zumstein. He almost certainly was on the property because roads were built by July of 1994 which were not there before he began to prepare for logging of the property. Zumstein testimony at RP 228 @ 18-22 and Ex 1.

Chase argues that comments by he and his wife continuously through 2003, 2004 and 2005 somehow interrupted Ericksons' use. The hard evidence indicates otherwise being that Erickson repeatedly ignored the Chases and returned to the property, storing equipment, skinning etc. The argument is interesting in itself. The core of adverse possession is that the party adversely possessing objectively uses property, either knowing it is not his and does so deliberately and adversely in derogation of the true owner's rights or objectively uses it after being told not to. Had Chase put his fence

up in 2003, as the court erroneously determined, that would have interrupted Ericksons' use prior to the running of the ten years.

The law does not support Chases' contention that merely telling Ericksons to get off the road was sufficient to constitute interruption of use terminating the running of the prescriptive period.

Chase cites *Huff v. Northern Pac . Ry. Co.*, 38 Wn 2d 103, 228 P 2d 121 (1951) apparently for the proposition that verbal protests about adverse use somehow cause the adverse use to cease. The *Huff* holding does not support their argument. The activities of the true owner in the *Huff* case were much like the actions of Mr. Chase and his wife. The property owner apparently told the adverse user to stop using the property and the court held the protest by the property owner was not sufficient to interrupt the adverse use and prescriptive right from accruing. The court further observed that letters written by the property owner did not stop the adverse nature of the use and if an adverse user remained silent after being told to

stop it would estop him from asserting his continued use as being adverse, *Huff Supra at 113 and 115*.

Regarding the timber trespass damage appeal by Erickson, the court should take note that Chases' Brief, while discussing the timber trespass damage issue at page 20 and top of page 21, cite absolute no authority for the proposition that pure hearsay testimony and documents can be admitted to support a damage award. There is one case which could lead one to conclude that proof of damages for loss of buffer trees, such as Chase contends, must be proven through use of an expert. *Tatum v. R & R Cable Inc., 30 Wn App 580, 636 P2d 508 (1981)*. The court noted in section two of its analysis that the Tatums called a nurseryman to testify who submitted an estimate for their damages. The court went on to say that the Tatums expert testified as to the difficulty of uprooting native shrubbery and replanting and therefore concluded the judge's assessment of damages was not an abuse of discretion. No case can be found that allows hearsay evidence as defined in ER 801 and provided at ER 802.

The exceptions at ER 803 does not encompass the type of testimony offered by Mr. Chase.

The court's general observation that people can sometimes testify as to the value of their property is generally limited to common items such as real estate, vehicles, furniture or home furnishings where the witness would have some personal background information about the value of the item often based on costs of purchase and length of ownership. None of those factors exist when one is testifying as to the value of native species of trees or the cost of replacing those trees without parroting information gained from outside sources not available to be cross examined by the adverse party.

////

**D. Erickson's Reply to Chases' Cross-Appeal Concerning
The Lower Road**

The court, for ample and good reason, found Ericksons had established a prescriptive easement to haul gravel and conduct other conforming commercial uses over the road by using the road in a manner that was open, notorious, hostile and continuous for a period of more than ten years commencing sometime in 1986 when the senior Erickson acquired the nine acres.

Chase cites three reasons why this review court should ignore the court's findings in that regard.

First, they say the land was vacant and open and therefore a presumption arises the use is permissive. There was ample evidence that no one gave anyone permission to use the road. Looking back as far as 1988 it is clear that even Dr. Fulsher considered this to be property that would be residential in nature and was careful in the Corrective Quit Claim Deed, Ex 14, to establish detailed instructions

as to what uses the roadway would be given to service both the twenty acres and the sixteen acres.

The cases cited by Chase in support of their proposition that where one has open and vacant land there is a presumption those crossing the land do so with permission are quite distinguishable on their facts. Here we have a constant use by Ericksons with dump trucks and other equipment going up and down the road which was found to be at a rate of 700 trips per year, FF 7.

Chase cites *Granite Beach v. Natural Resources*, 103 Wn App 186, 11 P.3d 847 (2000). The facts of Granite Beach tell us the two parties claiming prescriptive easement rights admitted in their testimony they used a road that a subsequent owner was attempting to establish a prescriptive right in two to three times over a twenty-year period. The next party claiming prescriptive rights testified he used the road three times during nine years of ownership, *Granite Beach Supra* 192 Obviously that would not seem to any rational person to be a continuous use.

The Granite Beach court decided the case on the issue that the use was not continuous use not on the principal of open and vacant land and permissive use. Likewise in *Todd v. Sterling*, 45 Wn 2d 40, 273 P 2d 245 (1954), **the facts were** the land being passed over by the claimant was 3500 acres which was occupied only sporadically by settlers who abandoned the area and nomadic types such as sheepmen, hunters and fisherman. The court also noted the wild nature of the area, *Todd Supra at 41 and 43*. Here there is no evidence this is a remote wild area. The Ericksons were there thirty plus years as were parties to the south, the Wilsons.

Chase cites *Roediger v. Cullen*, 26 Wn 2d 690, 175 P 2d 669 (1946). There the Supreme Court found the party claiming adverse possession was one of many users of a path of which there was proof the right of parties to pass was initially by permission and the permission had never been withdrawn. The path was used by numerous parties by adjoining recreational parcels and the court essentially concluded that the path had become a public right of way.

It is also involved the issue of whether a way of necessity had been established by the various surrounding owners.

The giving of the so-called cross-easements by Zumstein and Robson appears to have arisen because neither knew exactly what rights they had in the road and wished to solidify those rights and apparently Robson needed an additional easement and road extension to reach a lot he was planning in the south east corner of his subdivision, RP 310 at 5 & 6.

Robson testified his twenty acres had been logged long before he divided it and it was classified as forest land for tax purposes only, RP 337 & 338, and we know that Zumstein began immediately logging and taking rock off the sixteen acres either in July of 1994 or not later than June of 1995.

Chase's argument that the short plat application somehow lulled the true owners of the twenty and the sixteen into believing the Ericksons would not continue to use the road as their primary

access to the pit has no support in the record. It is merely a theory. Mr. Robson never testified as to anything of that nature, nor did Mr. Zumstein or Mr. Combs.

Chase argues the exchange of the easements somehow had a legal effect ending Ericksons prescriptive use. It should be remembered there is a difference between adverse possession, i.e. taking property from the true owner through adverse possession and establishing a prescriptive right in which the true owner of the property remains the owner but the prescriptive user establishes a right.

The argument that the short plat application somehow ended Ericksons' prescriptive use of the road is not supported by the record. Mark Mazeski testified the county had no concern as to whether or not other roads are being used, only that a road be established as an access road and approved by the county. Testimony of Mazeski at RP 457 20-25, RP 458 1 & 2.

It is interesting to note that the court, in the Chase v. Combs matter, disregarded Combs hearsay testimony regarding his theory of diminution in value of his five acres as a result of the Ericksons' commercial use of the Lower Road. It appears the court accepted Combs' argument that Chases' damage theory about diminution in the value of his property was unacceptable and yet allowed pure hearsay to establish damages against Ericksons.

E. Conclusion

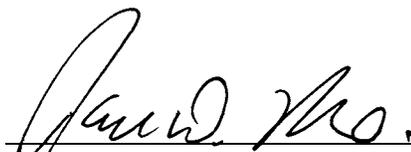
The court should reverse its holding that Ericksons failed to establish prescriptive rights in the Upper Road and remand simply to determine the width of the road, although the record may have sufficient evidence for the Court of Appeals to determine that issue as well.

The court should reverse the damage award as being founded solely on hearsay and not grant Chase additional time. He could have brought in proper evidence in a timely fashion, during trial,

unless the remand contains sanctions for the extra costs Ericksons would be put through if the case were re-opened.

The court should uphold the Findings of the Trial Court concerning the prescriptive easement for the Lower Road and deny Chases' Cross-Appeal on that issue.

Respectfully submitted this 24th day of June 2009.


Robert D. Mitchelson, WSBA #4595
Attorney for Plaintiffs / Appellants

1 **Ericksons Reply Brief to Respondent Chases' Responsive Brief** to be placed
2 in a sealed first class postage prepaid envelope addressed to each attorney
3 listed below and mailed in the United States Postal Service.
4

5 Dated this 26th day of June, 2009.
6

7
8 

9
10 Sherri Farr, assistant to
11 Robert D. Mitchelson WSBA#4595
12 Attorney for Appellants, Ericksons

13
14 Washington State Court of Appeals
15 Division Two
16 950 Broadway, Suite 300
Tacoma, WA 98402-4454

17 Charles Wiggins (attorney for Chase)
18 WIGGINS & MASTERS PLLC
19 241 Madison Ave. North
20 Bainbridge Island, WA 98110

21
22 Gideon Caron (attorney for Combs)
23 CARON, COLVEN, ROBISON
& SHAFTON, P.S.
24 900 Washington #1000
25 Vancouver, WA 98660

26
27 Mike Simon (attorney for Robson)
28 Landerholm, Memovich,
29 Lansverk & Whitesides, P.S.
30 805 Broadway #1000
Vancouver, WA 98666-1086
31
32