

No. 39273-9-II

FILED
COURT OF APPEALS
10 JUN 7 AM 9:52
STATE OF WASHINGTON
BY C
CLERK

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SUZANNE VAUGHAN,

Respondent,

v.

STILES and POKI MOORE,

Appellants.

REPLY BRIEF

Allen T. Miller
The Law Offices of Allen T. Miller, PLLC
1801 West bay Dr. NW, Suite 205
Olympia, WA 98502
(360) 754-9156
Attorney for Appellant

01/14/10

TABLE OF CONTENTS

I.	REBUTTAL.....	1
II.	ARGUMENT AND ANALYSIS	2
III.	CONCLUSION	5

TABLE OF AUTHORITIES

Case

<i>Chaplin v. Sanders</i> , 100 Wn.2d 853, 857, 676 P.2d 431 (1984).....	4
<i>Granston v. Callahan</i> , 52 Wash.App 288, 292, 759 P.2d 462 (1988).....	4
<i>Logan v. Brodrick</i> , 29 Wn.App. 796, 800, 631 P.2d 429 (1981)	2
<i>Seattle v. Nazaremus</i> , 60 Wn.2d 657, 670, 374 P.2d 1014 (1962).....	3
<i>Zobrist v. Culp</i> , 95 Wn.2d 556, 561, 627 P.2d 1308 (1981).....	2

Codes, Statutes, and Manuals3, 5

E.g., 28 *C.J.S. Easements* § 92, at 772-73 (1941).....3

RAP 18.15

I. REBUTTAL

The superior court committed error in entering Finding of Fact No. 4 which states:

Plaintiff and her predecessors in interest have enjoyed uninterrupted use without interference of anyone of the described easement area for the uses and purposes therein described in said easement agreement. Beginning in the fall 2007, defendants began interfering with plaintiff's use of said easement area by parking his motor vehicle in the 15' by 30' described easement area thereby preventing plaintiff from maneuvering and parking in said easement area. Defendants have also parked their vehicle just outside of the described easement area in such a manner as to interfere and block plaintiff's enjoyment and use of the 15' by 30' easement area, thereby causing her actual and substantial injury. Defendants have been parking in a triangular area commencing on the party's common boundary line on the uphill corner of the 15' by 30' easement area extending uphill 30 feet and running downhill to the most uphill corner of the above described easement 15' onto the defendant's property.

The Moores bought the 3806 Sunset Beach Drive property in July 1987 from the Waldbridges by Statutory Warranty Deed. (Ex. 14). (CP 25-26). (Appendix 3). This was thirteen years before the Plaintiff, Suzanne Vaughan, bought the 3808 Sunset Beach property. The Montgomerys sold 3808 Sunset Beach Drive to Elisabeth Frey in October 1987. (RP 128). Ms. Frey used the easement area to park a camper and store a sail boat in the northwest corner, and did not use it as a turnaround. (ROP 129-130). The property was then sold in 1994 to Mr. and Mrs. Anderson, who used the turnaround for a short time but discontinued its use and used the Moore's driveway, with the Moore's

permission, as a turnaround. (RP 125-126). The Moore's have parked in the northeast corner of the easement area since 1987. (RP 132-134). (Appendix 6). Finding of Fact No. 4 is not supported by the evidence.

II. ARGUMENT AND ANALYSIS

The easement in this case was created by an express grant. Accordingly, the extent of the easement right acquired is determined from the terms of the grant to give effect to the intention of the parties. *Zobrist v. Culp*, 95 Wn.2d 556, 561, 627 P.2d 1308 (1981). The intention of the parties in the 1985 easement document was threefold. First the easement involved the use and maintenance of the common driveway the Waldbridges and Montgomerys were already sharing. Second, the 15' x 30' area was for the maneuvering and parking of vehicles from the Montgomery's garages over the Waldbridge property. The third part of the easement was for the eave overhang of the Montgomery's waterfront garage over the Waldbridge property. CP 102.

When Plaintiff Vaughan bought the 3808 Sunset Beach property in 2000, she remodeled the garages into living space and restricted access by constructing planting areas along the driveway. Thereby the easement uses changed by Vaughan's own actions. These changes legally affected the easement area. *Logan v. Brodrick*, 29 Wn.App. 796, 31 P.2d 429 (1981).

When Ms. Vaughan turned her garages into living space and constructed planting areas, she restricted her own access to and her use of the vehicle turnaround easement. In addition, the use of the northeast area by the Moores since 1987 for storage of their boat and parking their car was adverse to the dominant tenant, and therefore that small area of the easement has been lost through adverse possession. An easement appurtenant to one parcel of land may be reduced by the owner of the dominant estate by changing the use. *E.g.*, 28 C.J.S. *Easements* § 92, at 772-73 (1941).

Vaughn is solely responsible for changing the use of the easement because of the remodeling of her garages into living space and constructing planters which restricted her own access to the easement. *Seattle v. Nazarenes*, 60 Wn.2d 657, 670, 374 P.2d 1014 (1962).

The testimony of Jay Anderson who owned the property before selling it to Ms. Vaughan is key. He recalls the sailboat being parked in the easement area on the Moore's property. RP 114. Mr. Anderson also testified that he used the easement area to drive in and out of the garages. RP 115-116. Once Ms. Vaughan remodeled the garages, she changed and restricted the use of the easement.

The trial court's analysis reflects a failure to weigh the equities and inattention to the appropriateness of its chosen remedy. The superior court's

judgment failed to recognize the Moore's interest in continuing their use of the driveway and easement since 1987 and the lack of burdens imposed on the Vaughn property interests. The superior court should have selected a remedy that was sufficient to allow the Moore's continued use of the small corner of the easement for parking while continuing to allow Vaughan her use of the easement. Such joint use had been successfully juggled by the neighbors until Vaughan bought the property and remodeled the garages and built the planting areas. It is appropriate for a superior court to consider costs and benefits when fashioning an equitable remedy and to seek a remedy that is efficient and just to both neighbors.

A prescriptive easement may be acquired by proof of an adverse use known to the owner or conducted in an open, notorious and continuous manner for 10 years. *Granston v. Callahan*, 52 Wash. App. 288, 292, 759 P.2d 462 (1988). Adverse use requires only that the claimant treat the land as his own as against the world throughout the statutory period. The nature of possession will be determined solely on the basis of the manner in which the property is treated. *Chaplin v. Sanders*, 100 Wash. 2d 853, 861, 676 P.2d 431 (1984). A party's subjective belief regarding his true interest in the land is irrelevant. *Chaplin*, 100 Wash. 2d at 86.

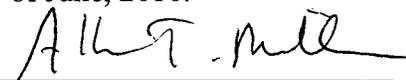
The preponderance of the evidence showed that the Moore's had used the small corner of the easement for boat storage and parking for the 10 years from 1987 to 1997 and thereby had adversely possessed the area prior to Vaughan's acquiring ownership of the property next door in 2000 and changing the use of the easement by remodeling her garages into living space.

V. CONCLUSION

The Moores have the right to continue to park in the area of the easement they have been using for twenty-two years because (1) the use does not materially interfere with the easement and (2) the Moores use of the area since 1987 extinguished that portion of the Vaughan easement by adverse possession.

Accordingly, the Court of Appeals should reverse the Permanent Injunction/Judgment for Attorney's Fees & Costs entered in Thurston County Superior Court on May 1, 2009 and the Order on Show Cause re Contempt/Judgment entered in Thurston County Superior Court on August 21, 2009. The Court of Appeals should award attorney's fees to the Moores under RAP 18.1 since the Superior Court erred in finding them in contempt.

DATED this 3rd day of June, 2010.


Allen T. Miller, WSBA # 12936
Attorney for Stiles and Poki Moore

FILED
COURT OF APPEALS
10 JUN -7 AM 9:52
STATE OF WASHINGTON
BY _____
DEPUTY

No. 39273-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SUZANNE VAUGHAN,)	
)	DECLARATION OF SERVICE
)	
Respondent,)	
)	
v.)	
)	
)	
STILES and POKI MOORE,)	
)	
Appellants.)	
)	
_____)	

Danielle Herrmann declares:

I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

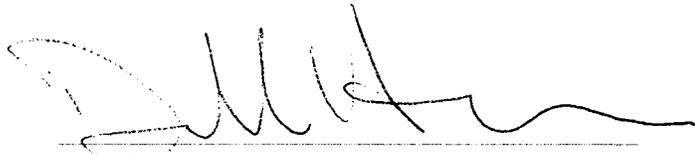
That on June 4, 2010, I caused a copy of the Appellant's Brief and this Declaration of Service to be served to David Ponzoha, Court Clerk for the Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402, and Martin D. Meyer, U.S. Bank Building,

Suite 12, 402 South Capitol Way, Olympia, WA 98501 via US Mail, Postage

Prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 4th day of June, 2010.

A handwritten signature in black ink, appearing to read 'Danielle Herrmann', written over a horizontal dotted line.

Danielle Herrmann
Paralegal to Allen T. Miller
The Law Offices of Allen T. Miller, PLLC
1801 West Bay Dr. NW, Suite 205
Olympia, WA 98502
Phone: (360) 754-9156
Fax: (360) 754-9472