

NO. 41952-I-II

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

TY HAND

A single person, respondent

v.

CHLOE E. PARR

A single person, appellant

11 SEP 12 AM 8:39
STATE OF WASHINGTON
BY _____
DEPT. _____
COURT OF APPEALS
DIVISION II

BRIEF OF APPELLANT

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IN THE COURT OF APPEALS STATE OF WASHINGTON

WILLIAM TY HAND)	
)	
Plaintiff/Respondent)	NO. 41952-I-II
)	Kitsap No. 09-2-02242-1
)	
)	APPELLANT'S
)	BRIEF
v.)	
)	
CHLOE E. PARR,)	
)	
A single woman,)	
)	
Defendant/Appellant)	
)	
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Assignments of Error:

1. Finding of fact 7 is not supported by substantial evidence in the record.
2. Finding of fact 11 is not supported by substantial evidence in the record.
3. Finding of fact 12 is not supported by substantial evidence in the record.
4. Conclusion of Law No. 3 is erroneous for lack of substantial evidence in the record.
5. The trial court erred in barring the defendant from testifying to giving a member of the plaintiff's family, permission to use any portion of the path that was on her side of the boundary line
6. The trial court erred by barring the testimony of Lyle Muller, the surveyor, because of a failure to disclose his use as a witness during discovery.

Issues pertaining to the assignments of Error.

1. Whether the court properly determined that the plaintiff had acquired a prescriptive easement?
2. Whether the court properly ordered the plaintiff to restore part of a path in the width and length shown in a photograph incorporated in the findings?
3. Whether a unilateral statement of permission or oral license is a transaction under the Dead Man's statute?
4. Whether the Dead Man's statute was waived by the plaintiff.
5. Whether barring a witnesses' testimony was an abuse of discretion for a discovery violation?

STATEMENT OF THE CASE

Plaintiff brought this action against the defendant on August 28, 2009, for a declaration as to complaint of an alleged prescriptive easement. Plaintiff later amended his report to allege adverse possession as well as a prescriptive easement.

Defendant was restrained from doing any further work on an embankment on which she was redoing the landscaping.

The plaintiff had acquired his parcel from Roger and Ethel Declements in 2000. Mr. and Mrs. Declements had built their home in 1955, as well as a carport which was later enclosed and referred to as a garage. At the time of purchase, only Mr. Declements was still alive. R.P. 20-33 EX .1

There was a path running along the side of the garage. The boundary line of the Parr/Hand parcels was at the top of a steep embankment, approximately eight feet in height at a 45 degree angle, and was originally planted in ground cover plants with a large hedge on top of the embankment(R.P. 106). The hedge was bisected by a stairway as shown in EX. 23, this stairway and railing was removed by the defendant in 2009. The area depicted in Plaintiff's EX. 2 , is one half of the former hedge from the stairway east to the east corner of the garage. Plaintiff testified that, at the widest point, the distance to the edge of the hedge was 8 feet (RP. 46). The distance from the garage to the hedge was disputed by Mr. Sindt, who testified that he measured from the garage to the boundary of the Parr/Hand properties, a distance of 4.7 feet, and that the surveyed boundary was 6 inches or less from the hedge. (RP 115)

At Mrs. Parr's direction, Marvin Sindt uprooted the entire hedge in 2009, and later in 2009, began to dig into the bank to create a series of terraces where the hedge row had formerly been, and lower terraces, on down the bank. (RP. 110) At that point, plaintiff filed suit against the defendant claiming that he had a prescriptive easement over an alleged 8ft wide pathway that was eroded by her actions. Marvin Sindt testified that he began digging at the point where the hedge row formerly was, but on the Parr side of the property line. (R.P.112) (EX.23).

There were two claims by the plaintiff, one for adverse possession, based on his belief that he purchased the area covered by the hedge, based on oral representations of the late Roger Declements, as to the boundary line between the

parties property. The court in its Findings and Conclusions, denies this claim and it has not been appealed.

The second claim of the plaintiff, that they had a prescriptive easement over the defendant's property, was granted, and defendant was ordered to restore the pathway at her expense to the location, width, dimensions, and conditions, set forth in Exhibit 2.

ARGUMENT

Assignment of Error No. 1-4: In order to prove the existence of a prescriptive easement, the plaintiff had to establish:

- (1) A use adverse to the rights of the servient owner. (2) Open, notorious, continuous, and uninterrupted use for use for the entire prescriptive period.
- (3) Knowledge of such use by the owner at a time he was able to assert and enforce his rights, measured by objective standards. Dunbar v. Heinrich, 95 Wn.2d 20,622 P.2d 812 (1980)

Findings of fact on these issues will normally be upheld, if supported by substantial evidence.

The evidence produced by both parties indicates that the entire path along the edge of Mr.Hand's garage was on his property. The survey shows the distance between the garage and the surveyed boundary line, is 2.9 ft, at the west end and 4.7 ft, at the east end (EX 23). The area depicted in EX.2 is 4.7

ft. The hedge was planted parallel, and about 2ft from the boundary line. The edge of the garage is not parallel with the boundary line.

Finding of Fact 11 is not supported by substantial evidence since there was not testimony that Mr. Declements or any member of his family, walked over the width of a path, 8 ft wide, continuously for one year before plaintiff's possession of the property. Mrs. Parr testified that she used the path to trim the hedge and rarely saw the Declements in the area depicted in EX.2. The only area relevant to the case is land owned by Mrs. Parr. There is no allegation, that in constructing a terrace, Mr. Sindt dug into Plaintiff's land.

The surveyed distance from the east end of the garage to Ms. Parr's driveway is 14.22 ft (EX. 23). If the pathway was 8ft wide before the hedge, it would be half way down the embankment. (EX. 23). Instead, as shown in EX.21, the hedge was at the top of the embankment. The eight foot measurement in conclusion 3, would give the plaintiff a prescriptive easement over an area where no one could pass for ten years because of the hedge, which was approximately 6 feet wide and situated entirely on Ms.Parr's property.(R.P. 110)

Assignment of Error No. 2-5: As part of the defendant's case, the defendant was called as a witness and was asked if she ever told Mrs. Declements, that she could walk over any portion of her property. (RP .92) Plaintiff's attorney objected on the basis of the Dead Man's statute. RCW 5.60.030, the court sustained the objection, based on its conclusion that testimony was about a transaction that a decedent could contradict. The courts have construed the term transaction quite

broadly, but no prior case has dealt with permission given unilaterally. How in this case, would the statute protect the interest the deceased Declements?

Secondly, the provisions of the statutes, can be waived by the introduction of similar evidence by the opposite parties, who are deceased in the same case, Johnston v. Medina Improvement Club 10 Wn.2d 44, 116 P.2d 272 (1941).

In this case, plaintiff and John Lyall testified about the location of the boundary in the area. In EX.2 at time of trial, Mr. Declements was also deceased. (RP 031-33).

Assignment of Error No. 3-6: As part of the defense case, defendant intended to call Lyle Muller, a licensed surveyor, primarily to identify a survey he had done for defendant in 1971.

Plaintiff objected because Mr. Muller was not disclosed in the interrogatories. It is our contention that the exclusion of the witness for sanction of non-discovery was an abuse of discretion.

Normally witnesses are excluded from testifying when there was a willful breach of discovery. Alpine Industries v. Gohl 30 Wn. App 750, 637 P. 28 998 (1981) and Hampson v. Romer 47 Wn.app 806, 737 P.2d 298 (1987). The court's ruling prevented admission of survey into the record, and we contend that there wasn't a willful non-disclosure of the survey. (RP 94-98).

CONCLUSION

The Appellant asks this court for reversal of the trial courts judgment, granting Respondent's claim for a prescriptive easement.

Respectfully submitted,

Walter M. Hackett Jr.

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WSBA . 1055
ATTORNEY FOR DEFENDANT

DECLARATION OF MAILING

Walter M. Hackett Jr. hereby declares under the pains and penalties of perjury under the laws of the State of Washington that on September 9, 2011 he deposited in the U.S. Mail, corrected copies of the APPELLANT'S BRIEF AND REPLY BRIEF addressed to Jeff Tolman, attorney for respondent.

Walter M. Hackett Jr.
WALTER M. HACKETT JR
Attorney At Law

FILED
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DIVISION II
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STATE OF WASHINGTON
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