

No. 49308-0-II

COURT OF APPEALS – DIVISION II
OF THE STATE OF WASHINGTON

ZONNEBLOEM, LLC and MANDL HOLDINGS, LLC,

Respondents and Cross-Appellants,

v.

BLUE BAY HOLDINGS, LLC,

Appellant and Cross-Respondent.

CROSS-APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

At issue is whether the mere existence of Blue Bay's utility lines, running in tandem with the Sluys, was an adverse use. The undisputed evidence shows Blue Bay's power line was installed decades ago – prior to 1971. But there is no evidence regarding the circumstances when it was installed – whether it was permissive or adverse. The only evidence shows the utility lines' configuration.

Blue Bay's utility lines ran along with, in tandem, the Sluys' lines from the street and connected to the Sluys' building. From a common strike on the Sluys building, the Blue Bay line went down a wall and connected to the old Blue Bay building. Until Blue Bay sought to move the lines, they had no impact of the Sluys property. Blue Bay argues these facts show the use was adverse, or that adversity should be presumed.

But the trial court made no findings regarding adversity, and none of the Court's findings support a finding of adversity. There is no evidence of adversity. Nevertheless, the trial court concluded Blue Bay had proven a prescriptive utility easement. Because the burden to establish a prescriptive

use rests with Blue Bay,¹ and because there is no finding, or evidence, that support an inference or presumption, the trial court's conclusion is error.

II. ARGUMENT

A. The trial court made no findings of adversity.

Prescriptive rights are not favored.² The claimant bears the burden of proving the elements of a prescriptive easement.³ This includes proof of adversity.⁴

Blue Bay argues that “the Superior Court found adversity.”⁵ For this conclusion it cites four conclusions of law.⁶ Two of the “findings” Blue Bay relies on are properly labelled Conclusions of Law by the trial court.⁷ Two others are labelled “findings” by the trial court.⁸ But that label is not

¹ *Nw. Cities Gas Co. v. W. Fuel Co.*, 13 Wn.2d 75, 84, 123 P.2d 771, 776 (1942).

² *Id* at 83.

³ *Gamboa v. Clark*, 183 Wn.2d 38, 43, 348 P.3d 1214 (2015).

⁴ *Id*.

⁵ Appellant/Cross Respondent Blue Bay Holdings, LLC's Reply and Cross Respondent's Brief at 19.

⁶ *Id* at 19-20.

⁷ Appellant/Cross Respondent Blue Bay Holdings, LLC's Reply and Cross Respondent's Brief at 19 citing CP 467 at CL 6; and CP 467 at CL 8.

⁸ *Id* citing CP 463 at FF6.G and CP 464 at FF 6.I.

determinative.⁹ An appellate court will treat a conclusion labelled as a finding as a conclusion. “If a term carries legal implications, a determination of whether it has been established in a case is a conclusion of law.”¹⁰

Referring to the power and cable lines, the trial court stated that “Blue Bay has established that it is entitled to a prescriptive easement....”¹¹ These were labeled as findings. But these “findings” are conclusions because they are determining whether a claim has been established.

There is nothing in the trial court’s findings or conclusions that say what evidence supports these conclusions. Because there is no finding of adversity the trial court’s conclusions are error.

B. No finding or evidence supports an inference of adversity.

Blue Bay correctly notes that if a use is “inconsistent with an owner’s rights, it supports an inference of adversity.”¹² But Blue Bay’s

⁹ *Para-Med. Leasing, Inc. v. Hangen*, 48 Wn. App. 389, 397, 739 P.2d 717, 722 (1987).

¹⁰ *Id* citing *Miebach v. Colasurdo*, 35 Wn. App. 803, 814, 670 P.2d 276 (1983), overruled in part on other grounds, 102 Wn.2d 170, 685 P.2d 1074 (1984).

¹¹ Appellant/Cross Respondent Blue Bay Holdings, LLC’s Reply and Cross Respondent’s Brief citing CP 463 at FF6.G and CP 464 at FF 6.I.

¹² *Id* at 23.

predecessors' use was not inconsistent with the Sluys' (or their predecessor's) use. It was harmonious with the Sluys' use because it was identical to their use. Blue Bay's utility lines were co-located with the Sluys' lines. There was no interference with the Sluys' use of their property. It was not "invasive" as argued by Blue Bay.¹³

This is highlighted by what happened when Blue Bay changed he use. When Blue Bay demolished its old building, it had to change the location of the utility lines. They would no longer be co-located with the Sluys' utility lines.¹⁴ The Sluys had to relocate their line.¹⁵ Only at this point, the use became inconsistent with the Sluys rights, because the lines would not run in tandem, collocated with the Sluys' utilities.

The Sluys agree with Blue Bay these facts are analogous to "road cases."¹⁶ But they use the wrong analogy. Blue Bay cites to *Northwest Cities*. In *Northwest Cities*, the prescriptive user built a road and used it as

¹³ Id at 29.

¹⁴ CP 462-463 at FF 6; VRP 78.

¹⁵ Id.

¹⁶ Appellant/Cross Respondent Blue Bay Holdings, LLC's Reply and Cross Respondent's Brief at 24.

its own. There was no mention that the servient owner used the road. This would be analogous if Blue Bay's utility lines were independent of the Sluys' over the Sluys property.

But this case is more analogous to road cases where parties share a road and, eventually, the servient owner objects. Imagine owners of two adjacent parcels, Blackacre and Whiteacre. Both used a driveway over Blackacre for forty years. Both owners used the same driveway and Whiteacre's use of the driveway did not interfere with Blackacre's use. Both owners knew of the use but did not know of how the use began.

After forty years, the owner of Whiteacre redevelops her property and, citing her long use of Blackacre for access, claims a prescriptive easement over *another* portion of Blackacre's property to construct a new road that will interfere with Blackacre's use.

This happened here. Blue Bay claims an easement for utilities that will run in a different location than the historical use.¹⁷

¹⁷ CP 463 at FF 6.C.

In *Imrie v. Kelley*¹⁸ the Court of Appeals held, as a matter of law, that a similar fact pattern indicated permissive use and denied a claim for a prescriptive easement. In *Imrie*, the plaintiff, never asked permission to use the road, and used it continuously, with the defendant, for over fifty years.

The Court stated:

From 1951 to the present, Mr. Imrie has continuously used Gaines Road.... The Gaineses were aware of Mr. Imrie's use of Gaines Road because they lived next to the road....¹⁹

Here, the facts are the same (albeit with a power line not a road). The power lines were obvious and used by both. The *Imrie* court noted that use, without permission, may not be sufficient to establish adverse use, and that permissive use may be inferred by facts that support the conclusion that the use was by way of neighborly sufferance or accommodation. It stated:

The findings establish that Mr. Imrie used the road without permission and that the Kelleys and their predecessors were aware of this use. The court also found that the BLM property and a portion of the Imrie property were only accessible through the Gaines property.

¹⁸ 160 Wn.App. 1, 9, 250 P.3d 1045 (2011).

¹⁹ *Id* at 5.

Significantly, even though Mr. Imrie never asked permission, he used the road with the knowledge of the Gaineses. Moreover, the findings fail to establish that at any time between 1951 and 1961, Mr. Imrie acted in a manner demonstrating a right to use the property without regard to the wishes of the owner. Consequently, the findings here do not support adverse use, but, instead, support an inference of neighborly accommodation.²⁰

Here, Blue Bay alleges that the power lines were placed without permission. But there is no evidence to support this contention. And they must concede that the Sluys and their predecessors knew of this use. There are no findings, and no evidence, that any time between 1971 and 2013 that Blue Bay, or its predecessor, ever acted in a manner demonstrating a right to use the property without regard to the owners' wishes.

Only in 2013, when Blue Bay disconnected, and sought to relocate its utility lines, did Blue Bay act in a "manner demonstrating a right to use the property without regard to the wishes of the owner."²¹ Once that occurred, after Blue Bay demolished its building, the Sluys objected to unfettered use and this litigation ensued.

²⁰ *Id* at 10.

²¹ *Id.*

This is not a case, as argued by Blue Bay, where a utility line was placed on another's property and it limits that property owners' use of the property. Until they sought to relocate it, Blue Bay's utility line was irrelevant to the Sluys because it was collocated with their lines. Consequently, the facts here do not support adverse use, but, instead, support an inference of neighborly accommodation.

C. There is no evidence to support a presumption of adversity.

Blue Bay is correct that in certain circumstances, if the use of another's land has been open, notorious, continuous, uninterrupted, and for the required time "a presumption that the use was adverse may be found, *unless otherwise explained.*"²² Here, the use is explained because the Sluys and Blue Bay power lines co-existed, in tandem, with no impact on the Sluys' rights. The first time the Sluys' rights were affected were when Blue Bay tore down its building and the utility lines for the two buildings could no longer run in tandem.

²² *Nw. Cities Gas Co. v. W. Fuel Co.*, 13 Wn.2d 75, 85. (Emphasis added).

D. If a presumption applies, it was rebutted by the evidence.

Assuming, *arguendo*, that a presumption applies as a matter of law because the other elements were met, it was rebutted. Once the presumption applies, the burden is then “upon the owner of the servient estate to rebut the presumption by showing that the use was permissive.”²³

Presumptions “are the bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts.”²⁴ “A presumption is not evidence and its efficacy is lost when the other party adduces credible evidence to the contrary.”²⁵ A presumption serves in the place of evidence “only until prima facie evidence has been adduced by the opposite party”; but “the presumption should never be placed in the scale of evidence.”²⁶

²³ *Id.*

²⁴ *In re Indian Trail Trunk Sewer*, 35 Wn. App. 840, 843, 670 P.2d 675 (1983) (internal quotes and citation omitted).

²⁵ *In re Marriage of Akon*, 160 Wn. App. 48, 62, 248 P.3d 94 (2011) (quoting *Indian Trail*, 35 Wn. App. at 843).

²⁶ *Bradley v. S.L. Savidge, Inc.*, 13 Wn. 2d 28, 41, 123 P.2d 780, 786 (1942) (citing *Scarpelli v. Wash. Water Power Co.*, 63 Wn. 18, 114 Pac. 870 (1911)) (emphasis original).

Here, the Sluys introduced evidence that the Sluys and Blue Bay utility lines ran in tandem with no impact on the Sluys property rights for decades.²⁷ Because this evidence shows the use was not inconsistent with the Sluys rights, the burden shifted to Blue Bay.

E. Because the burden rests on Blue Bay, and there is no evidence of adversity, the trial court erred.

Here, the facts are undisputed. No evidence was presented regarding the historical use of the utility lines other than they existed prior to anyone's memory. The trial court's findings do not support a prescriptive easement. The court made no findings to support a finding of adversity because there is no evidence in the record supporting a prescriptive easement.

"Where there is no dispute of fact, remanding a case for formal findings is a useless and unnecessary act in which this court will not engage."²⁸ There are no disputed facts. Remanding the case for findings would be a useless act.

²⁷ CP 462-463 at FF 6; VRP 78.

²⁸ *State v. Mecca Twin Theater & Film Exch., Inc.*, 82 Wn. 2d 87, 93, 507 P.2d 1165, 1169 (1973) citing *Cogswell v. Cogswell*, 50 Wn.2d 597,

III. CONCLUSION

There was no evidence to support a presumption, or finding, that Blue Bay's utility lines were adverse to the Sluys' interests. Because there was no evidence to support such a finding, no finding was made. The trial court erred in granting Blue Bay a prescriptive easement. This case should be remanded to the trial court with instructions to dismiss the prescriptive easement claim.

Respectfully submitted this 9th day of March, 2017.

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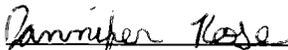
313 P.2d 364 (1957); See also *LaHue v. Keystone Inv. Co.*, 6 Wn.App. 765, 496 P.2d 343 (1972).

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on March 10, 2017, a true and accurate copy of the document to which this Certificate is affixed was sent via electronic mail and was deposited in the mails of the United States of America, by regular mail, postage prepaid, a properly stamped and addressed envelope directed to:

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