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No. II-52227-6

Court of Appeals
DIVISION II
STATE OF WASHINGTON

THOMAS G. BOWDISH and CHARLENE P. BOWDISH LIVING TRUST,

APPELLANTS,

v.

KAREN K. DECARUFEL, as Trustee of the R&J FAMILY TRUST; and

ROGER RICKER and JEANNETTE RICKER, husband and wife,

RESPONDENTS.

**APPELLANTS THOMAS G. BOWDISH and CHARLENE P. BOWDISH
LIVING TRUST'S REPLY BRIEF**

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I.
REPLY TO RICKERS RESTATEMENT OF THE CASE

When Pettit owned both lots 11 and 12, they had a driveway coming up lot 11 and then across to lot 12. RP 63, 64, 70, 71, 74. After Bowdishes purchased Lot 11, they paved the area leading to their house. RP 70-73. Going west from there was the gravel driveway to the Pettit mobile home. EX 46.

The Pettits and the Rickers never used any other means of access, particularly the plat easement. RP 377. The only owners that Ricker ever claimed used this plat easement were Lots 7 and 8. RP 377.

The Bowdish fence did not block the existing asphalt driveway, nor any access used by the Rickers. EX 17A. The asphalt driveway never touched the Ricker Property. EX 36, 91.

The point regarding the Bowdish fence blocking the easement is not relevant as the fence is on the Bowdish property and there is nothing in the record that indicates Rickers ever asked for its removal. The trial court recognized the Rickers right to use their property in the westerly area of their property on the Bowdish easement (CP 35, at page 12), citing to Colwell v. Etzell, 119 Wash. App. 432, 439, 81 P.3d 895 (2003). It would seem the same should be true for the Bowdishes use of their property.

The county did not approve the platted easement. RP 87. Mr. Bowdish discussed the issue of the plat easement with the county. RP 374-375.

Ricker asserts the Bowdishes did not use the area west of the fence after its construction. This is not correct. See further discussion below and citations to the record therein.

Ricker asserts if he had better access to the northeast corner of his lot, he would have sited his house differently. This is probably not relevant in that there is no cause of action related to this. CP 4.

Ricker claims Bowdish never objected to the Rickers placement of his location of his patio or manor stone wall. Bowdish did not know where the line was until Holman surveyed. CP 4. Thereafter, he did object. EX 4, 6, 37, 38, 39.

ARGUMENT

II. ASSIGNMENTS OF ERROR

Ricker argues that the failure to make specific assignments of error to a trial court's findings of fact render them verities on appeal, citing Standing Rock Homeowners Assn. v. Misich, 106 Wash. App. 231, 23 P. 3d 520 (2001), rev denied 145 Wash. 2d 1008. That is not the rule.

State v. Olson, 126 Wash 2d 315, 893 P. 2d 629, (1995), and numerous other cases (Hornes v. Urell, 133 Wash. App. 130, 135 P. 3d 530 (2006) rev. denied 160 Wash. 2d 1012, Viereck v. Fibreboard Corp., 81 Wash. App. 579, 915 P.2d 581, (1996), rev denied 130 Wash. 2d 1009, Green River Community College, Dist. No. 10, v. Higher Education Personal Board, 107 Wash. 2d 427. 730 P.2d 653 (1986), Lewis vs. Estate of Lewis, 45 Wash. App. 387, 725 P.2d 644 (1986), State v. Clark, 53 Wash. App 120, 765 P.2d 916 (1989), rev. denied, 112 Wash. 2d 1018, Daughtry v. Jet Aeration Company, 91 Wash.2d 704, 592 P.2d 631 (1929), National Federation of Retired Persons, 120 Wash. 2d 101, 838 P.2d 680 (1992)) hold that a technical violation of the rule will not preclude review where the nature of the challenge is perfectly clear and there is no prejudice to the opposing party. The Rickers claim no prejudice and they have been able to fully address the issues.

III. ESTOPPEL AS TO THE BOUNDARY CLAIM OF RICKERS

The parties agree on the elements of estoppel to change a boundary.

The Rickers do not dispute the burden of proof is on them by clear and convincing evidence. Thomas v. Harlan, 27 Wash.2d 512, 178 P.2d 965 (1947).

The Bowdishes cited in their opening brief to Leonard v. Washington Employers, Inc., 77 Wash. 271; 461 P.2d 538 (1969), indicating that when both parties have convenient and available means of ascertaining the truth, there can be no reliance, and therefore no estoppel. The Rickers have not disputed this, either legally, or factually.

Bowdishes have cited to the record that, in fact, the acts of the Rickers were not in relation to any line but were in total disregard of any line. EX 3, 52, 91. A review of the Rickers' exhibits, 17A-G, shows no distinction in the area south of the fence, west or east of the projected fence line. While Mr. Ricker attempted to distinguish between these two areas (RP 489-490), he admitted to the use of the area on both sides of the claimed line as being shared. RP 382. The record is replete with references to the use of both sides of the fence by both parties. EX 36, 91, 95. CP 52, 83-85, 91, 180, 382, 489-491. Mr. Ricker admitted that the Bowdishes maintained plantings west of the fence line and that the area east and west of the fence was shared. RP 386.

The citation to the record above is equally applicable to the adverse possession discussion below.

Mr. Ricker also, curiously, stated he didn't know where the line was, other than the fence, when asked about cutting down a tree. RP 489. This is inconsistent with a claim to a certain line.

IV. ADVERSE POSSESSION

Rickers assert that adverse possession was proven simply because there was a fence over a portion of the claimed line, citing Merriman v. Cokeley, 168 Wash. 2d 627, 230 P3d 162 (2010). That case, in fact, held that a fence that did not "clearly" divide two parcels did not establish adverse possession. Cited by that court was Green v. Hooper, 149 Wash.App. 627, 205 P.3d 782 (2009), that held a short railroad tie retaining wall was not a sufficiently well-defined line. In the present case, it would seem a short fence and a short railroad tie retaining wall would have the same lack of legal effect.

While a fence can establish a line, that is not necessarily so. See Muench v. Oxley, 90 Wash. 2d 637, 584 P.2d 939, reversed on other grounds by Chaplin, v. Sanders, 100 Wash. 2d 853, 676 P.2d 431 (1984).

In the present case, the fence was nine feet long, the common line is 87.70 feet, or roughly about 10% of the area claimed. EX 36, 91. The fence was constructed by Bowdish and therefore was not an act of occupancy by Ricker. RP 78, 180, 184, 279. The area immediately south of the fence was used by both parties. See above citations to the record relating to the estoppel issue.

Further, Bowdishes, in their opening brief discussed the burden of proof and presumptions to be applied. The relationship between the Bowdishes' and the Rickers' predecessor, the Pettits, was extremely friendly, and later was friendly with the Rickers for a period of time. RP 63, 64, 67, 72. This is not disputed. Mr. Ricker acknowledges that he and Mr. Bowdish discussed Rickers activity in the disputed area and everything was done with permission. RP 384-388.

It needs to be recognized that what was, or was not, specifically the claimed area at trial was unclear as the pleadings and other evidence never claimed to a specific line. See Pages 29-35 of Bowdishes' opening brief. Also, CP 4.

However, what is fatal to the adverse possession claim is the Rickers failed to prove occupation for ten years. This issue was raised by Bowdishes in their opening brief and Rickers did not dispute this.

The activity of Rickers in the disputed area started when they built their new home. RP 42, 47, 73-75, 82-85, 87-111, 175-176, 185. Both Ricker and Bowdish testified Ricker got his building permit in 2007. Ricker indicated he started construction in 2007. Bowdish indicated it was 2008. RP 73-74, 390-391. Mr. Ricker testified he put in the manor wall and patio “well after” he began work on the home (which logic would also indicate). RP 394-395. The law suit was commenced on September 7, 2016. CP 1.

**V.
EASEMENT BY PRESCRIPTION**

The focus of the discussion as to an easement by prescription has been Gamboa v. Clark, 183 Wash. 2d App. 38, 348 P.3d 1214 (2015).

The Rickers were obligated to prove there was a distinct and positive assertion of a right to use the roadway since the undisputed proof is the initial use was permissive. RP 63, 64, 70, 71, 74. The Rickers do not draw this court’s attention to any such proof. In fact, the proof was to the contrary. RP 63, 64, 67, 72.

Under Gamboa, supra., the Rickers were also obliged to show that the Bowdishes did not maintain the road and that their use

interfered with the Bowdishes' use. As to the latter, they submitted no proof whatsoever.

As to the former, the Rickers focus on the time period when the Pettits owned both the Ricker and Bowdish lots. That time period is not relevant. What is relevant is the time period after Pettit sold to Bowdish. Bowdish did maintain the portion of the area used by them and Rickers. They paved it. RP 70-73.

The parties disputed that the area used by the Rickers was expanded in 2010. RP 75. Ricker testified that the old manor stones were removed and then put back in the same place in 2010, when they built their new house. RP 494. While Mr. Ricker tried to explain how the changed difference in the width of the gravel driveway in relation to a utility box was only a matter of the perception. RP 451, 492. The photographs in evidence show otherwise. EX 16A, 17C, 17D, 46, 95, 96.

VI. IMPLIED EASEMENT

Mr. Ricker testified there was "not any reasonable way" to construct a driveway solely on his property. RP 458. He provided no support for this assertion other than his bare conclusion.

The Bowdishes' surveyor testified, when asked if there was any impediment to the Rickers having their own driveway, "no, its accessible. It's not steep like lots 5, 6, 7 and 8." RP 54.

The Rickers surveyor never disputed Holman's conclusion.

The photographs in evidence show the Bowdish driveway was not particularly steep and a driveway solely over the Ricker property would be proximately adjacent to the existing driveway, and would be only slightly steeper. EX 17F, 17G, 46. CP 458, 459.

The trial court in its memorandum opinion (CP 36 at page 11) indicated that the cost of access on the Ricker property would be substantial. There is no testimony in the record to support that. Even Mr. Ricker never testified as to any cost.

There is a total failure of proof on the Rickers' part.

VII. ATTORNEY'S FEES TO RICKER

Where a case has multiple issues where fees might be allowed for only one issue, the issue of segregation is always present. To simply say it is difficult to segregate is inadequate. If a bare conclusion was adequate, segregation would almost never occur. The Rickers never even attempted a good faith attempt at segregating their fees despite

the fact that the trespass issue represented a fraction of the entirety of the case. CP 41.

Where a party fails to segregate, the court is required to deny fees. Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now, 119 Wash. App 665, 692, 82 P.3d 1199 (2004), rev. denied 152 Wash. 2d 1023. Instead, the court did its own segregation based upon no adequate record from the Rickers. CP 35.

Attorney's fees were legally permitted under the court's ruling on one of seven issues presented. That, in and of itself, could be a starting point for segregation. Instead of the court granting attorney's fees for one issue, it granted them for three, indicating the claims were related. CP 35.

The Rickers have cited to no authority that would allow for that. Colwell v. Etzell, 119 Wash. App. 432, 81 P.3d 895 (2003), holds that is not permissible.

The Bowdishes have asserted, and cited authority, previously, that where there is no recovery of monetary damages, or where damages are de minimus, no fees are allowed. Further, the amount of fees must be, to some extent based upon the amount of recovery. The Rickers do not dispute this.

The Bowdishes assert that Rickers are not entitled to attorney's fees for the period of time they did not own the property, that being prior to August 2, 2017. CP 42.

Rickers argue they were always the owner of the beneficial interest, so it doesn't matter. They cite to no authority to support this contention.

The Rickers property was in trust to protect it from the Rickers creditors. EX 20, 21. If this court reverses, and the Bowdishes prevail on their trespass claim, is it then true that the Bowdishes can recovery attorney's fees from the Rickers for the time period they did not own the property?

VIII. EASEMENT BY GRANT

The Rickers assert they are the dominant easement holders as to what they assert is the platted easement across lots 5-11.

In their opening brief, the Bowdishes asserted:

1. The easement is incapable of being located, whether it was intended to be north or south of the dotted line.
2. If the easement exists, the dominate interest was transferred to the association, not to any individual property. EX 40.

3. The Rickers never pled a right to the easement. CP4. Had they done so, the Bowdishes could have claimed it had terminated, in whole or in part, by the acts of the Bowdishes the Rickers complained of, that it was blocked. However, it should be noted that there is nothing in the record that indicates the Rickers ever asked or demanded that any obstruction be removed.

Had this been pled, the Bowdishes could have asserted it was abandoned. Heg v. Alldredge, 157 Wash. 2d 154, 137, P.3d 9 (2008). While Ricker attempted to suggest he used this easement (RP 377, 378), Bowdishes' surveyor, Holman, testified there was no evidence of its usage across the Bowdish lots. RP 54, 87, 88. Ricker did not rebut this. This suggestion of use by Rickers, when Pettit clearly used a different access and the record being replete with references to their use of the Bowdish driveway for access, defies any reasonable interpretation of the facts.

4. The testimony of the Seamount Estates Community Club as to what it thought is totally irrelevant as any testimony regarding intent must relate to the time of formation, not

later, subjective interpretations. See opening brief. Rickers do not cite to any authority to the contrary.

5. The plat easement was not approved by Jefferson County. RP 87. While Rickers say it was, they point to nothing in the record to support it.
6. The trial court, without any basis for distinction, determined the Rickers were a beneficiary of this purported platted easement, yet the Bowdishes were not the beneficiary of the five feet (2.5 feet on either side of the common lines) utility easement. CP 35. There is no fact or law in the record to differentiate the treatment of the beneficial interest to these two easements noted on the plat.

The Rickers do not address or dispute any of this.

Rather, they simply point to the plat and the property report reference to lots 5-12. The property report is not a recorded document and does not overcome the deed to the association. EX 40.

The association is the dominate estate with enforcement rights. The fact that lot owners may have to pay for upkeep is not inconsistent with that.

IX.
INTERFERENCE WITH BOWDISH TWELVE FOOT EASEMENT

While the Bowdishes disagree with the trial court's determination as to this issue, they have not appealed that determination. Therefore, there is no need to respond to the Rickers' briefing on that issue.

X.
RICKERS TRESPASSING UPON BOWDISH PROPERTY

This issue is partially dependent upon the resolution of the adverse possession and estoppel issues. However, the record is clear that the Rickers admitted conducting activities east of the surveyed line (see citations to the record relating to estoppel and adverse possession above) and the line adopted by the court, and upon demand, failed to remove these improvements. EX 37, 38, 39. This is undisputed in the record.

XI.
BOWDISH COVENANT EASEMENT OVER RICKERS

The Rickers, again, rely on testimony of the Seamount Estates Community Club. The Bowishes indicated that this contemporaneous

“intent” is irrelevant, that it is the intent of the original parties which controls. The Rickers cite to no authority that what was cited to in the opening brief is not correct.

Rickers also, interestingly, cite to the deed from the developer to the association as a basis that the Bowdishes do not have a utility easement across Rickers. EX 40. However, prior to the litigation, the Rickers did not dispute this easement existed for Bowdishes’ benefit. EX 4, 5. Also, the deed does not reference the covenants, only the plat. EX 40.

The Rickers state that the covenants were originally recorded September 6, 1997. That appears to be a typographical error. They were recorded September 6, 1977. EX 24.

It is not logical, in looking at intent, that a developer would create two separate utility easements, one five feet and one ten feet, that were both designed to benefit the association and not individuals.

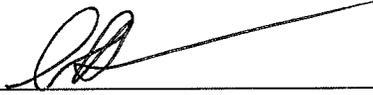
XII. CONCLUSION

Bowdishes request that this court reverse, or remand to, the trial court and hold:

1. That the boundary between Bowdish is unchanged either by estoppel or adverse possession.
2. That Ricker does not have an easement over the Bowdish property, either by prescription implication, or by virtue of the Replat of Seamount Estates.
3. That Ricker is not entitled to any attorney's fees, or, in the alternative, determining the calculation thereof was in error.
4. That the Bowdish property is benefitted by a ten foot utility easement, five feet on either side of the common line with Ricker, by virtue of the Seamount covenants.
5. That the Bowdish property be quieted in title free and clear of any claim of Ricker (it being recognized that the covenant easement also benefits Ricker, although they have not made a claim for that relief).
6. That Bowdish be awarded \$2,100.00 in damages for the Ricker trespass, to be treble pursuant to RCW 4.24.630.
7. That the matter be remandd for a determination of attorney's fees under RCW 4.24.630, both at trial and before this court.

Respectfully submitted this 5th day of December, 2018.

WHITEHOUSE & NICHOLS, LLP

A handwritten signature in black ink, appearing to be 'S. Whitehouse', written over a horizontal line.

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