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Court of Appeals
Division II
State of Washington
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No. 53372-3-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

DAVID MILNER,

Appellant

vs.

CARPENTER GROUP, LLC,

Respondent

RESPONDENT'S BRIEF

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I. INTRODUCTION.

In this case, the Appellant fails to show a “distinct and positive assertion”¹ of a right hostile to Respondent to overcome the presumption of permissive use of Respondent’s property. Further, Appellant’s claim for damages to his shrubs fails because Appellant concedes Respondent trimmed on its side of the survey line. Accordingly, the Superior Court must be affirmed and Appellant’s appeal must be dismissed.

Further, the Respondent is entitled to attorney fees at trial and on appeal for successfully defending a claim for a prescriptive easement pursuant to RCW 7.28.083 and Workman v. Klinkenberg.²

II. RESPONSE TO ASSIGNMENTS OF ERROR.

The Cowlitz County Superior Court did not err when it:

a. Found the Appellant did not make a positive and distinct assertion hostile to the Respondent to overcome the presumption of permissive use, thereby dismissing the Appellant’s First Cause of Action for a prescriptive easement.

b. Relied on almost a century of Washington case law in finding the Respondent had a

¹ Gamboa v. Clark, 183 Wash. 2d 38, 45, 348 P.3d 1214 (2015).

² 6 Wash. App. 2d 291, 400 P.3d 716 (2018).

right of self-help to trim the Appellant's shrubs on its side of the boundary line without liability for the effect on the shrub, thereby dismissing the Appellant's Second Cause of Action for violation of RCW 64.12.030.

III. STATEMENT OF THE CASE.

In 2006, the Appellant purchased Lot 21 of Mt. View Tract's Subdivision in Silver Lake, Washington, with direct access to the public road through a cul-de-sac.³ At the time of purchase, a mature hedge existed along his property blocking the cul-de-sac access. Therefore, he entered his property, and later parked his boat on his property, by driving on a portion of the private driveway owned by Lot 19.⁴ Lot 18 and Lot 20 have easements to the private driveway, but Lot 21 does not.

In 2006, Lot 19 was owned by the Eatons.⁵ Lot 18 was owned by James and Jean Carpenter, principals of the Respondent. In 2015, the Respondent purchased Lot 19 from the Eatons.⁶

From 2006 until the Respondent had a survey completed in 2017, there was little to no contact between the

3 CP 111, 218.

4 CP 109.

5 CP 105.

6 CP 112.

Eatons or Respondent with Appellant.

Q. After you moved in, did you ever talk to the Eatons – the Eatons who own the property where the Carpenters now live, right?

A. I don't – I don't really know the Eatons.

Q. Did you have any discussions with the Eatons?

A. No. I don't talk to – I don't talk to the Eatons no more than I do talk to Mr. and Mrs. Carpenter.

Q. So I'm just going to follow that with one more question.

A. Okay.

Q. Did you ever talk to the Eatons about using the driveway to access your property?

A. No. I never talked to them about using it. No.⁷

Following the placement of survey stakes in 2017, the Appellant filed this case to establish a prescriptive easement over a portion of the Respondent's private driveway to drive his car and park his boat.⁸ The Respondent moved for summary judgment arguing that under Gamboa, supra, and Tiller v. Lackey,⁹ the Appellant's use of the driveway was permissive and he never made a "direct and hostile

7 CP 155-156.

8 CP 1.

9 6 Wash. App. 2d 470, 431 P.3d 524 (2018).

assertion of hostile use”¹⁰ to overcome that presumption. The Superior Court agreed and dismissed the First Cause of Action.¹¹

Following a 2017 survey, Respondent discovered that Appellant’s hedge adjacent to Lot 20, which Respondent also owns, was growing over the boundary line. There is no dispute that the roots and trunks of the shrubs are entirely on Appellant’s side of the boundary.¹² The Respondent cut the shrubs back to the boundary, but no farther.¹³ Appellant’s argument that: “...they failed to address the issue of whether they crossed the boundary, as they must have done in order to do such damage to Appellant’s hedge”, is inconsistent with Appellant’s Declaration. Appellant stated in his July 12, 2018, Declaration that “Mr. and Mrs. Carpenter hacked my hedges back to Carpenters’ new survey line”¹⁴, “prior to them hacking the hedge back to their survey line”¹⁵ and “after they hacked it [the shrubs] back to the survey line.”¹⁶ Nowhere does Appellant claim that the Respondent cut shrubs or branches on his side of the survey line.

10 Gamboa, supra, 183 Wash. 2d at 45.

11 CP 339.

12 CP 36.

13 CP 36.

14 CP 35.

15 CP 35.

16 CP 36.

The Respondent moved for summary judgment arguing that under Gostina v. Ryland,¹⁷ Washington recognizes the right of a neighbor to use self-help in trimming trespassing plants where the trunk and roots of the trees or shrubs are entirely on the adjacent property. The Superior Court granted the motion and dismissed Appellant's Second Cause of Action finding that under Gostina, supra, the Respondent is entitled to use "self-help" to remove branches on the Respondent's side of the survey line.¹⁸

The Appellant appeals both summary judgment Orders. The Respondent moved for an award of attorney fees under RCW 7.28.083 and Workman, supra. The court made no ruling because of a conflict in the judicial divisions.¹⁹ Respondent cross-appeals the Order that fails to grant attorney fees at trial, and requests attorney fees on appeal.

IV. ARGUMENT.

A. The Trial Court Correctly Determined that the Appellant did not Overcome the Presumption of Permissive Use in Dismissing Appellant's First Cause of Action.

In deciding Gamboa in 2015, the Washington Supreme Court expanded the presumption of

¹⁷ 116 Wash. 228, 199 P. 298 (1921).

¹⁸ CP 83.

¹⁹ See McColl v. Anderson, 6 Wash. App. 2d 88, 429 P.3d 1113 (2018).

permissive use to include enclosed, developed properties. Tiller makes clear that a distinct and positive assertion of a hostile right requires more than using a road or driveway as matter of right.

In Gamboa, the Gamboas and the Clarks owned adjacent parcels of land separated by a gravel road primarily on the Clarks' property. The Gamboas used the road since 1992 to access their home. The trial court found that "the Gamboas and the Clarks both used the roadway as described above without any disputes until 2008. Each party was aware of the other's use of the roadway, but no one objected to the other's use until a dispute arose in 2008."²⁰ The trial placed the burden on the Defendant to show the use was permissive. The trial court defined "adverse use" as follows: "A Claimant's use is adverse unless the property owner can show that the use was permissive."²¹

The Court of Appeals reversed holding this statement of law was incorrect. Rather, "the initial presumption is that the claimant's use is permissive and the claimant can shift the presumption from

²⁰ 183 Wash. 2d at 41.

²¹ 183 Wash. 2d at 42.

permissive use to adverse use depending on the facts.”²² The Court of Appeals found the facts supported an inference of a neighborly accommodation and denied the prescriptive easement. The Washington Supreme Court accepted review.

The Supreme Court began its analysis by recognizing that “Prescriptive rights...are not favored in the law, since they necessarily work corresponding losses or forfeitures of the rights of other persons.”²³ The issue in Gamboa was whether the initial presumption of permissive use should only apply to unenclosed land, or whether it should also apply to developed property. The court held it should also apply to developed property.

“We find that our case law, particularly our Roediger decision, and policy considerations, support applying an initial presumption of permissive use to enclosed or developed land cases in which there is a reasonable inference of neighborly sufferance or acquiescence.”²⁴

The court relied on Roediger²⁵ “where claimants sought a prescriptive easement to a

22 183 Wash. 2d at 42.

23 183 Wash. 2d at 43.

24 183 Wash. 2d at 47.

25 26 Wash. 2d 690, 175 P.2d 669 (1946).

footpath over homeowners land that existed for 30 years.” The path was created by “neighborly usage” and none of the person claiming the easement had ever asked for or received permission to cross the property of the homeowners. The court found the pathway was permissive at its inception because the use “arose out of mutual neighborly acquiescence.”²⁶ Because it was permissive at its inception, the court required the claimants “to put forth evidence that they made a positive assertion that they claimed to use the path as of right.”²⁷

Turning back to Gamboa, the Supreme Court observed that what constitutes a reasonable inference of neighborly sufferance or acquiescence is a fairly low bar.

“As discussed above, we have cited the following as an example of a neighborly accommodation ‘Persons traveling the private road of a neighbor in conjunction with such neighbor and other person, nothing further appearing.’”²⁸

Applying this rule, the court found neighborly sufferance in Gamboa.

“Here there is a similar reasonable

26 183 Wash. 2d at 48.

27 183 Wash. 2d at 48.

28 183 Wash. 2d at 51.

inference of the usual accommodation between neighbors. The trial court found that the Gamboas used the road as a driveway to access their home and that the Clarks used it to farm grapes. Both the Gamboas and Clarks 'used the roadway as described above without any disputes until 2008. Each party was aware of the other's use of the roadway, but no one objected to the other's use until a dispute arose in 2008.' Like the example in Roediger, here the Gamboas and Clarks are neighbors and they used the road for their own purposes in conjunction with each other without incident. Thus, we find a reasonable inference of neighborly sufferance or acquiescence."²⁹

Further, the Gamboas could not overcome the presumption of permissive use. To overcome the presumption, the claimant must put forth evidence that he or she interfered with the owner's use of the land. The court found no interference relying on the finding that both parties "used the roadway without any disputes until 2008. Each party was aware of the other's use until a dispute arose in 2008."³⁰

In Tiller, the Plaintiffs owned property beyond the platted lots. For many years, the Plaintiffs and Plaintiffs' predecessors used the private street known as Lakeview Street to access their lot even though Lakeview Street was established to serve only the platted lots. Access through Lakeview Street was the

29 183 Wash. 2d at 51.

30 183 Wash. 2d at 52.

only means of access to the Plaintiff's lot.

When the platted lot owners objected to Tiller's use of the private road, the Tillers sued for a prescriptive easement and/or an implied easement. The trial court found the Tillers and their predecessors had established a prescriptive easement because they rebutted the presumption of permissive use. But, the Court of Appeals reversed, finding that permissive use was not rebutted.

The Court of Appeals agreed with the trial court's application of the Gamboa permissive use presumption. But, the Court of Appeals determined the trial court erred in concluding the presumption of permissive use was rebutted, stating:

"Once a presumption of permissive use is established, it can be defeated 'when the facts and circumstances are such as to show that the user was adverse and hostile to the rights of the owner, or that the owner has indicated by some act his admission that the claimant has a right of easement. For a claimant to show that land use is 'adverse and hostile to the rights of the owner' in this contest, the claimant must put forth evidence he or she interfered with the owner's use of the land in some manner."³¹

Turning to the facts, the Court of Appeals found:

"Here...there was no finding that Tillers

31 6 Wash. App. 2d at 489.

or any of Tillers' predecessors ever made a positive assertion to the owners within the plat that they claim to use Lakeview Street as a matter of right. Additionally, the trial court made no finding that Tillers interfered with the true owner's use of the street parcel..."³²

Moreover, the court found that merely using the property as a true owner would be insufficient to rebut the presumption of permissive use.

"...Kunke confirms that where, as here, a presumption of permissive use applies in the context of prescriptive easements, a showing that the claimant used the disputed property as the true owner is not enough to rebut the presumption."³³

Like the parties in Gamboa, Appellant, Respondent, and the Eatons traveled the driveway in conjunction with the other "nothing further appearing", giving rise to the presumption of permissive use. Moreover, Appellant has not shown that he made a positive assertion of a hostile right to either the Eatons or the Carpenters. Using the road as a true owner is not enough. Appellant conceded in deposition that he had no contact regarding the road with either the Eatons or the Carpenters prior to the 2017 survey.

Appellant argues that the evidence of hostile

32 6 Wash. App. 2d at 491.

33 6 Wash. App. 2d at 494.

use is that he is forced to use the Respondent's driveway because the location and age of the hedge make it impossible for him to access his property in another manner. Therefore, anyone observing his use would know he claimed permanent rights over the driveway.

This is similar to the argument in Tiller. In Tiller, the road to the claimant's property was the only access, and had been used for years. Nonetheless, that did not create a positive assertion of hostile use. Even assuming the existence of the hedge creates one route to the Appellant's house that alone does not overcome the presumption of permissive use.

Furthermore, the Appellant's claim that the hedge creates only one access route is factually wrong. The hedge can be cut to provide direct access to the cul-de-sac and public road. Given that prescriptive rights are not favored, the Appellant should not be granted a prescriptive easement encumbering the Respondent's property when the Appellant is capable of creating access by modifying his own property. The court should require the Appellant utilize the cul-de-sac access rather than

extract a property right from the adjacent property.

Finally, the undisputed evidence shows that the Appellant already has 11 feet of unobstructed access to his parking area without the need to use the Respondent's road.³⁴

B. The Trial Court Correctly Determined That the Respondent May Engage in Self-Help to Remove Infringing Shrubs without Liability.

For almost 100 years, Washington has recognized the right of a property owner to trim the over-hanging branches of a shrub from the adjacent property. In Gostina v. Ryland,³⁵ the Supreme Court recognized that branches may be cut to the extent they overhang the property.

"It is generally the rule that – 'one adjoining owner cannot maintain an action against another for intrusion of roots and branches of a tree which is not poisonous or noxious in nature. His remedy in such cases is to clip or lob off the branches or cut the roots at the line'."³⁶

In Mustoe v. Ma,³⁷ Ma removed a portion of a tree root growing on her property. When Ma removed the root, Mustoe, the owner of the tree, sued for

34 CP 149

35 116 Wash. 228, 199 P. 298 (1921).

36 116 Wash. at 232.

37 193 Wash. App. 161, 371 P. 3d 544 (2016).

nuisance. Mustoe argued that Gostina should be limited.

“But Mustoe argues that the Gostina court ‘also acknowledged that the right of self-help does not extend to removing the tree itself.’ From this, she reasons that Gostina ‘does not immunize a landowner against liability for damages to the trimmed trees’ and argues that, as a matter of first impression, we should hold that in exercising self-help, a ‘landowner owes a duty of care to prevent damage to the trees themselves.’ We disagree and decline to extend Washington law as Mustoe proposes.”³⁸

The holding in Mustoe is distinguishable from Herring v. Pelayo,³⁹ decided two years ago. In Herring, the Defendant’s tree trimmer removed branches from a boundary tree causing it to die. The Herrings sued for trespass, and the court found in their favor.

But, the court recognized the viability of Mustoe and Gostina.

“And it has long been established in this state that a landowner has the legal authority to ‘engage in self-help and trim the branches and roots of an neighbor’s tree that encroach onto his or her property.’”⁴⁰

The issue in Herring was whether an adjacent owner is liable for “trimming the branches of

38 193 Wash. App. at 164-165.

39 198 Wash. App. 828, 397 P.3d 125 (2017).

40 198 Wash. App. at 835.

a tree standing on a common property line, and in a manner that a Defendant knows will kill the tree..."(Emphasis in original).⁴¹

The court found the Defendants were liable, based on the co-tenant ownership of the tree. The court distinguished its conclusion from the case where the tree is entirely on the adjacent parcel.

"Therefore, unlike a landowner engaging in self-help to trim branches overhanging his or her property from a tree situated entirely on the property of another, a co-tenant to a boundary tree has a duty not to destroy the common property and thereby interfere with the rights of the other co-tenants."⁴²

Turning to this case, the Respondents had lawful authority to remove branches up to the boundary line. Appellant concedes the Respondent did not cross the boundary line. Under Mustoe the Respondents do not owe the Appellant a duty of care to protect the health of the shrub. Because the Respondent was exercising its lawful authority, there is no liability under RCW 64.12.030.

At the hearing, the Appellant argued that he had adverse possession to the area the shrub occupied over the survey line. The Appellant never

41 198 Wash. App. at 835.

42 198 Wash. App. at 837.

pled this theory and it should be rejected on that basis alone. The court correctly rejected the adverse possession claim finding, as a matter of law, there could be no hostility as the act of trimming the shrub by Appellant, if it ever occurred, would be "expected conduct, consistent with a deference to the other party's property rights."⁴³

The trial court's decision to dismiss Appellant's Second Cause of action must be affirmed.

V. THE RESPONDENT IS ENTITLED TO ATTORNEY FEES FOR DEFENDING THE CLAIM FOR A PRESCRIPTIVE EASEMENT.

The Respondent cross-appealed the Superior Court's failure to grant its motion for attorney fees in successfully defending the claim for a prescriptive easement. RCW 7.28.083 provides:

The prevailing party in an action asserting title to real property by adverse possession may request the court to award costs and reasonable attorneys' fees. The court may award all or a portion of costs and reasonable attorneys' fees to the prevailing party if, after considering all the facts, the court determines such an award is equitable and just.

There is a split within the Divisions as to whether attorney fees are available under RCW 7.28.083 in

43 Verbatim Report of Proceedings, Page 9:6-10.

prescriptive easement cases. In Workman v. Klinkenberg,⁴⁴

Division I determined that fees were available observing:

“The statute uses the term ‘adverse possession’ and this case involves both adverse possession and prescriptive easements. Because these doctrines are often treated as equivalent(s) and the elements required to establish adverse possession and prescriptive easements are the same, this statute allows recovery for fees incurred on prescriptive easement claims.”⁴⁵

One month earlier, Division II reached the opposite conclusion, holding:

“The plain language of RCW 7.28.083(2) allows an award of attorney fees only in an action asserting title to real property, not in an action asserting a property interest but no title. We cannot rewrite the statute by disregarding this language. Because a prescriptive easement claim does not actually assert title to property, RCW 7.28.083(3) does not apply to McColl’s prescriptive easement lawsuit.”⁴⁶

McColl’s focus on “title” to property is more restrictive than supported by prior case law. A property’s title is affected by the existence of a prescriptive easement. In Leichman v. Mills,⁴⁷ the Supreme Court observed that:

“It is generally agreed that use of an easement under claim of right by virtue of a parol grant may be adverse so as to give it title by prescription, although the parol grant itself is void under the statute of frauds.”⁴⁸

44 6 Wash. App. 2d 291, 400 P.3d 716 (2018).

45 6 Wash. App. 2d at 305.

46 McColl v. Anderson, 6 Wash. App. 2d 88, 429 P.3d 1113 (2018).

47 46 Wash. 624, 91 P.11 (1907).

48 46 Wash. at 629.

Similarly, the Supreme Court in Long v. Leonard,⁴⁹

stated:

“If the use of the easement for 20 years is unexplained, it will be presumed to be under a claim of right, and adverse, and be sufficient to establish title by prescription.”⁵⁰

Further, in 2010, Division II recognized that the failure to defend against a claim for a prescriptive easement breached the warranty of title contained in the deed⁵¹.

The finding of a prescriptive easement creates an appurtenant, permanent limitation on the title of the servient estate. The easement will be reflected in title reports, will pass to the heirs and assignees, and may diminish the value of servient estate. An action for a prescriptive easement does assert title, or, at least a portion of the title, to real property. Therefore, attorneys’ fees should be available under RCW 7.28.083.

VI. CONCLUSION.

Under Gamboa v. Clark, supra, the Appellant’s use of the Respondent’s road is presumed permissive. Because the Appellant has not shown a distinct and positive assertion of hostile use, the trial court’s dismissal of Appellant’s First

49 191 Wash. 284, 71 P.2d 1 (1937).

50 191 Wash. at 295.

51 See Erickson v. Chase, 156 Wash. App. 151, 231 P.3d 1261 (2010).

Cause of Action must be affirmed.

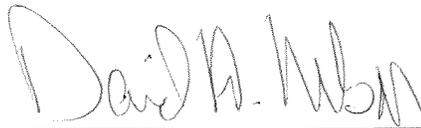
Under Gostina, supra, and Mustoe, supra, the Respondent had a right of self-help to trim shrubs on its side of the boundary line with the Appellant. Further, Mustoe holds that in exercising self-help, the Respondent does not owe the Appellant a duty of care to prevent damage to his shrubs. Therefore, the trial court's dismissal of Appellant's Second Cause of Action must be affirmed.

Finally, because a claim for a prescriptive easement affects the title to a parcel of property, attorney fees at trial and on appeal should be awarded under RCW 7.28.083.

DATED this 10th day of October,

2019.

NELSON LAW FIRM, PLLC

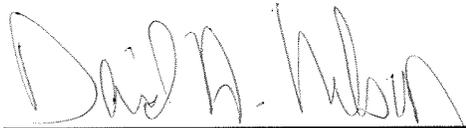


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 10, 2019, a copy of the foregoing was sent via first-class mail, to the following:

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