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No. 66247-3-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

GEORGE AUTTELET and PATSY,
AUTTELET, husband and wife, and
the marital community thereof,

Appellants.

vs.

JAN K. KERBY AND ILONA A. KERBY,
husband and wife,

Respondents,

RESPONDENTS' BRIEF

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I. INTRODUCTION.

The Court of Appeals, Division I, remanded this case to the trial court for a specific finding on whether the owner, Mr. Auttelet, gave Mr. Kerby permission to place a portion of the easement road outside the designated 30-foot easement. On remand, the trial court entered Finding of Fact 30, indicating there was no permission.

“30. There was no permission requested or granted relating to the placement of the easement road across the Auttelet property to the Kerby property.”

The Auttelets filed this appeal claiming the court’s finding was “clearly erroneous.”¹ As set forth below, the Appellants have failed to show that Finding No. 30 is not supported by substantial evidence. Therefore, the finding that there was no permission requested or given must stand and the conclusion of law that the Respondents established a prescriptive easement must be upheld.

II. RESPONSE TO ASSIGNMENTS OF ERROR.

1. Appellants fail to show that the Superior Court’s finding that no permission was requested or granted is not supported by substantial evidence.

Further, Appellants incorrectly rely on the “clearly

¹ Appellant’s Brief, page 1.

erroneous” standard, when the correct standard is the “substantial evidence” test.

2. The Court’s legal conclusion that the Respondents have established a prescriptive easement is supported by Finding of Fact 30.

3. The trial court did not apply a novel theory of “prescriptive easement by acquiescence” but merely showed that at the time the road was located both parties believed it was within the 30-foot express easement.

III. STATEMENT OF FACTS.

In 1980, Mr. Kerby built a road to property that he recently purchased from George Auttelet.² Measuring from an existing fence that both Mr. Auttelet and Mr. Kerby believed was the boundary line, the road was placed within an area 30 feet from the fence. Both parties believed the road was within the 30-foot express easement that was granted with the property.³ Around the same time, Mr. Kerby installed permanent utility lines along the road, also within the 30-foot corridor as measured from the fence.⁴ Mr. Kerby did not ask permission as to where he installed the road or

² Findings of Fact 1 and 7.

³ Finding of Fact 31.

⁴ Finding of Fact 10.

utility lines, nor was any permission granted by Mr. Auttelet.⁵

The road installed by Kerby in 1980⁶ was the sole access to his property.⁷ He maintained and improved the road.⁸ Some years later, he built a new house on his property at the end of the road.⁹

In 2006, a survey requested by the Respondents showed a portion of the road was up to nine feet outside of the designated easement.¹⁰ In 2006, for the first time since the road was installed, Mr. Auttelet objected to Mr. Kerby's use of the road and demanded he move it within the 30-foot easement.¹¹

On December 20, 2007, the parties tried the issue of whether the Kerbys had a prescriptive easement to the portion of the road located outside of the 30-foot easement. The Auttelets appealed the decision of the trial court finding Kerby had established a prescriptive easement. The court of appeal found that the trial court had not made a finding on the issue of permission and remanded to the trial court for a finding on that issue, stating:

5 Finding of Fact 30.

6 Finding of Fact 7.

7 RP 54:13-14; 62:18-20.

8 RP 60:17-20.

9 Finding of Fact 21.

10 Finding of Fact 28.

11 Finding of Fact 9 and 28.

The ultimate determination of whether a prescriptive easement has been established in this case turns on whether the trial court finds that permission was or was not, given to build the road outside the easement. On remand, the trial court must weigh the conflicting evidence, apply the preponderance standard, and enter a finding about whether Auttelet gave permission to Kerby.¹²

On remand, the trial court made the following additional finding:

30. There was no permission requested or granted relating to the placement of the easement road across the Auttelet property to the Kerby property.

Appellant appeals the trial court's decision arguing the finding is clearly erroneous¹³ in light Finding of Fact 31, that explains that both parties believed the road was within the 30-foot easement when the road was installed.

As set forth below, this Appeal should be dismissed and the trial court's ruling that Respondents have established a prescriptive easement over the portions of the road outside of the easement must be upheld. First, Appellants have failed to show that Findings of Fact 30 is not supported by substantial evidence. Second, the facts surrounding the installation and use of the easement establish evidence of adversity that the Appellants have not

¹² Kerby v. Auttelet, No 63822-0-1, Unpublished opinion filed November 9, 2009.

¹³ Appellants' Brief, page 1.

challenged. Third, prior courts' use of the term "acquiescence" to find implied permission only applies where the person seeking the prescriptive easement knows that other persons have rights in the road. But, here the Respondents "used the property as the true owner would, under a claim of right, disregarding the claims of others and asking no permission for such use."¹⁴

IV. ARGUMENT.

A. The Appellants Have Failed to Show Finding of Fact No. 30 is Not Supported by Substantial Evidence.

On appeal, the Court reviews solely whether the trial court's findings are supported by substantial evidence and, if so, whether the findings support the trial court's conclusion of law."¹⁵ In this case, the Appellant has the burden to show Finding of Fact 30 is not supported by substantial evidence.

"The party challenging a finding of fact bears the burden of demonstrating the finding is not supported by substantial evidence."¹⁶

Appellant makes no attempt to cite to

¹⁴ Kunkel v. Fisher, 106 Wash. App. 599, 602, 23 P.3d 1128 (2001).

¹⁵ Nordstrom Credit, Inc v. The Department of Revenue, 120 Wash.2d 935, 939, 845 P.2d 1331 (1993).

¹⁶ Nordstrom Credit, Inc., *supra*, 120 Wash.2d at 939-940.

the record to show Finding of Fact 30 is not supported by substantial evidence. Rather, Appellant argues that Finding of Fact No. 30 is “clearly erroneous.”¹⁷ But, the clearly erroneous standard does not apply in this case.

The “clearly erroneous” standard is usually applied to an appeal of an administrative decision where the appellant must show the administrative agency’s decision was clearly erroneous.¹⁸ The clearly erroneous standard allows the Appellate Court to subjectively review the evidence.

“Before a court may hold findings, conclusions or decisions of an administrative agency clearly erroneous, it must determine that even though there may be substantial evidence to support the agency’s action, or substantial evidence to the contrary, the court is, on the entire evidence, ‘left with the definite and firm conviction that a mistake has been committed.’”¹⁹

But, Nordstrom Credit limits the court on this appeal to determine if Finding of Fact 30 is supported by

¹⁷ Appellant’s Brief, page 1.

¹⁸ See, for example, Farm Supply Distributors, Inc. v. Washington Utilities & Transportation Commission, 83 Wash.2d 446, 518 P.2d 1237 (1974).

¹⁹ Farm Supply Distributors, Inc., *supra*, 83 Wash.2d at 449.

substantial evidence.

Respondent has found only one non-administrative case that applies the clearly erroneous standard. In State v. Evans,²⁰ a criminal appeal, the court observed:

Our focus here is on whether the record supports the trial court's reasons for this ultimate finding. We apply the clearly erroneous standard in our review of the trial court's findings.²¹

The court then defined clearly erroneous.

"Findings are clearly erroneous 'only if no substantial evidence supports [the trial court's] conclusions.'²²

Thus, when applied in a non-administrative appeal, the clearly erroneous standard is identical to the substantial evidence test in Nordstrom. But, Appellants do not cite to the record to show that Finding of Fact 30 is not supported by substantial evidence.

"If we were to ignore the rule requiring counsel to direct argument to specific findings of fact which are assailed and to cite to relevant parts of the record as support for that argument, we would be assuming an obligation to comb the record with a view towards constructing arguments for counsel as to what

20 80 Wash. App. 806, 911 P.2d 1344 (1996).

21 State v. Evans, *supra*, 80 Wash. App. at 811-812.

22 State v. Evans, *supra*, 80 Wash. App. at 812.

findings are to be assailed and why the evidence does not support these findings. This we will not and should not do.”²³

Because the Appellant has failed to show Finding of Fact No. 30 is not supported by substantial evidence, the finding that there was no permission to place the road outside of the designated easement must stand.

B. The Facts Surrounding the Installation, Maintenance and Use of the Road Establish Adverse Use.

“A court may determine adversity from the actions of the claimant and the property owner.”²⁴ In Washington, a claimant’s use is adverse when he “uses the property as the true owner would, under a claim of right, disregarding the claims of others, and asking no permission for such use.”²⁵

In Drake, the court relied on the following facts to find there was sufficient evidence to establish the driveway use was adverse.

“Massey extended the driveway to his property and maintained it, used the driveway to bring in materials and equipment to build his home and garage, and he and his tenants used the driveway as the sole access to the property

²³ Estate of Lint v. Lint, 135 Wash.2d 518, 532, 957 P.2d 755 (1998).

²⁴ Drake v. Smersh, 122 Wash. App. 147, 89 P.3d 726 (2004).

²⁵ Drake, supra, 122 Wash. App. at 152.

until he sold it to Drake in 1984.”²⁶

The unchallenged findings and record in this case show that Respondents installed the road²⁷ and that it was the exclusive access to his property.²⁸ At the time of the road construction, Respondents also installed permanent utilities along the road.²⁹ Mr. Auttelet made no objection to the Respondents’ use of the road until 2006.³⁰ Respondents maintained and improved the road.³¹ Some years later, Respondents built a new house at the end of the road.³² In 2004, the Kerbys removed logs from the property using the road.³³

Similar to Drake, these acts, done without requesting permission, were done under a claim of right, disregarding the claims of others. The record and undisputed findings establish adverse use of the property outside the easement.

26 Drake, supra, 122 Wash. App. at 155.

27 Finding of Fact 7.

28 RP 54:13-14; 62:18-20.

29 Finding of Fact 10.

30 Finding of Fact 9.

31 RP 60:17-20.

32 Finding of Fact 21.

33 Finding of Fact 26.

C. There Was No Implied Permission To Locate the Road Outside of the Easement.

Appellant argues that Finding of Fact 31, stating there was acquiescence to the location of the road, vitiates the finding that no permission was given or requested. Appellants essentially argue that there was implied permission to place portions of the road outside of the 30 foot express easement.

In certain circumstances, the courts have implied permissive use. This occurs where there is a family relationship between the parties, where there is a mutual use of a driveway or where the use occurred on neighboring parcels of property.³⁴ The courts have utilized the term “acquiescence” only in the context of establishing implied permission where there is “neighborly sufferance or acquiescence.”³⁵ But, neighborly sufferance or acquiescence has only been used where the person claiming the prescriptive easement recognized other persons’ right to use the easement. For example, in Crites v. Koch,³⁶ the court found that the Plaintiffs’ use of a neighboring field as

³⁴ Lingvall v. Bartmess, 97 Wash. App. 245, 250-251, 982 P.2d 690 (1999).

³⁵ Drake, supra, 122 Wash. App. at 155.

³⁶ 49 Wash. App. 171, 741 P.2d 1005 (1987).

an equipment turnaround area was a neighborly sufferance because:

“All of the parties agreed that it was common for farmers to cross and park equipment on their neighbors’ fields. Such use was recognized as a neighborly courtesy.”³⁷

In commenting on Crites, the court in 810 Properties v. Jump³⁸ observed:

“In that case [Crites], a farmer’s use of a field near his own land for farming was deemed a ‘neighborly accommodation’ and not hostile because the farmer acted in ways that indicated he recognized others’ right to use the field.”³⁹

In contrast to Crites, Respondents herein used the road as would a true owner. They installed and maintained the road. They installed permanent utilities along the road. The road is the exclusive access to their property and is not shared with Appellants. As established in Finding of Fact No. 30, Respondents never asked for permission to use the portion of the road outside of the easement. These facts establish that there was no implied permission in this case. Respondents used the road as an owner to

37 Crites, supra, 49 Wash. App. at 177.

38 141 Wash. App. 688, 170 P.3d 1209 (2007).

39 810 Properties, supra, 141 Wash. App. at 701.

the exclusion of any claims or rights in others. Accordingly, the Appellants' claim of implied permission must be denied and their appeal must be dismissed.

V. CONCLUSION.

The Appellants have failed to show that Finding of Fact No. 30 is not supported by substantial evidence. Moreover, the unchallenged findings and record support the trial court's finding of adverse use. Finally, this is not an appropriate case to imply permissive use. For these reasons, the Respondents request that this appeal be dismissed.

DATED this 9th day of March,

2011.

NELSON LAW FIRM, PLLC



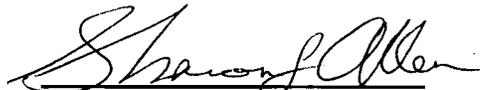
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th
day of March 2011, she deposited in the United
States Post Office in Longview, Washington, in a first-class
sealed envelope postage prepaid a copy of Respondent's
Brief, addressed to:

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