90291-7

No. 308260-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MAGDALENO GAMBOA and MARY J. GAMBOA,
Husband and wife,

Plaintiffs/Respondents,

v.

JOHN M. CLARK and DEBORAH C. CLARK,
Husband and wife,

Defendants/Appellants.

APPEAL FROM THE SUPERIOR COURT FOR YAKIMA COUNTY
THE HONORABLE RODNEY NELSON, JUDGE PRO TEMPORE,
PRESIDING

APPELLANTS' REPLY TO PETITION FOR REVIEW (Answer)

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I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

State Cases

III. RESPONSE TO ISSUES PRESENTED FOR REVIEW.

Appellants object to Respondents' first issue, as it mischaracterizes the record in this case. Respondents argue incorrectly that there is no credible evidence in the record to support an inference of permissive use. Petition, p. 1. To the contrary, the Court of Appeals found such evidence in the record: "*Its finding that Mr. Clark did not give the Gamboas implied permission to use the road is not supported by substantial evidence; instead, the evidence and the trial court's other findings support a presumption of permissive use that the Gamboas failed to overcome.*" 321 P. 3d 1248.

Appellants object to Respondents' third issue in that Respondents incorrectly state that there is no credible evidence of neighborly accommodation. Petition, p. 2. To the contrary, abundant evidence of neighborly accommodation exists in the record. Mr. Gamboa and Mrs. Clark had discussions about growing grapes. RP I p. 25.-26. Until 2008, Mr. Clark never voiced any objection to the Gamboas use of the road. RP I p. 26. Prior to 2008, the Gamboas had no arguments with the Clarks. RP I p. 28. Mr. Gamboa observed Mr. Clark using the road with his farming equipment. RP I p. 36. Mr. Gamboa has seen Mr. Clark using the road since 1995. RP I p. 52. When Mr. Clark asked Mr. Gamboa to move his

vehicles from the road, Mr. Gamboa complied. RP I p. 44. Mr. Gamboa complied with Mr. Clark's request to move his vehicles, as Mr. Gamboa did not want to interfere with Mr. Clark's farming and Mr. Gamboa wanted to be a good neighbor. RP I p. 75. The Clarks did not exclude the Gamboas from using the road. RP II p. 168. The Clarks and the Gamboas had a friendly relationship for years. RP II p. 168. The Clarks decided not to charge the Gamboas rent to use the road. RP II p. 169. Mr. Clark has not seen Mr. Gamboa blade the road, but if he had he would not have objected, and he would have interpreted such an act as a neighborly gesture. RP II p. 170. In 2001, during a dry spell, Mr. Gamboa loaned his tractor with a front loader. RP II p. 242. Mr. Gamboa tried to be as neighborly as he could. RP II p. 242. Further, in unchallenged Finding of Fact 8, the trial court found that the parties both used the road and were aware of each other's use of the road, but neither objected to the other's use until a dispute arose in 2008. CP 214.

IV. ARGUMENT

A. Respondents fail to establish grounds for review by this Court.

Respondents endeavor to create a conflict between the decision of the Court of Appeals in this case and the decision in *Drake v. Smersh*, 122 Wn. App. 147, 89 P. 3d 726 (2004). In so doing, Respondents overlook

significant factual distinctions between this case and *Drake*. In *Drake*, unlike the facts of this case, the court emphasized that there was no evidence that the plaintiff's use of the road was permitted by neighborly sufferance or acquiescence. 122 Wn. App. 154-55. Here, in contrast, the record is replete with evidence that the Gamboas' use of the road was the result of neighborly accommodation by the Clarks. In *Drake*, the court found adversity in actions of the plaintiff's predecessor in using a bulldozer to construct a driveway from his house to the road on the defendants' property. 122 Wn. App. 155. The Gamboas did not construct such a driveway to gain access to the road on the Clarks' property. In *Drake*, the record did not show any relationship between the parties' predecessors to support an inference of permissive use. 122 Wn. App. 154-55. Here, in contrast, the parties maintained a friendly relationship for years prior to 2008. Thus, the facts in *Drake* do not remotely resemble the facts of this case.

In *Drake,* the court's citation to four other appellate decisions reveals the court's implicit recognition that a finding of permissive use is appropriate where there is evidence of a close personal relationship, neighborly sufferance, or a custom of neighborly courtesy between farmers. 122 Wn. App. 154-55 n. 20, 21, 22. (Citing *Kunkel v. Fisher,* 106 Wn. App. 599, 602, 23 P. 3d 1128, *review denied*, 145 Wn. 2d 1010

(2001), *Granston v. Callahan*, 52 Wn. App. 288, 294, 759 P. 2d 1005 (1987), *Miller v. Jarman*, 2 Wn. App. 994, 997, 471 P. 2d 704, *review denied*, 78 Wn. 2d 995 (1970), and *Crites v. Koch*, 49 Wn. App. 171, 741 P. 2d 1005 (1987). Thus, the conflict suggested by Respondent between *Drake* and the decision in this case is more imagined than real.

More recently, despite *Drake,* in *McMilian v. King County*, 161 Wn. App. 581, 601, 255 P. 3d 739 (2011), Division I of the Court of Appeals continues to adhere to the presumption of permission discussed in *Kunkel v. Fisher*. "'*Permission can be express or implied. A permissive use may be implied in 'any situation where it is reasonable to infer that the use was permitted by neighborly sufferance or acquiescence.*' " (*Quoting Kunkel,* 106 Wn. App. at 602.)

In *Drake*, the court restricted the presumption of permissive use to cases involving undeveloped land. 122 Wn. App. 154. In so doing, the court made no attempt to reconcile its restriction of the presumption of permission to the broad endorsement of the presumption of permissive use in *Roediger v. Cullen*, 26 Wn. 2d 690, 175 P. 2d 699 (1946).

Drake's restriction of the presumption of permission to cases involving undeveloped lands is also at odds with the trend of authority in other jurisdictions. Note *Gamboa v. Clark*:

> Second, while a handful of Washington cases citing *Drake* have referred to a "vacant lands doctrine," cases from other jurisdictions have not referred to any such doctrine and other authorities have not referred to such a doctrine or applied unique treatment to vacant land. *See, e.g.*, RESTATEMENT § 2.16 reporter's note at 248–52 (collecting cases in four categories as "evidence that overcomes general presumption of nonpermissive use," one being "wild, vacant and unenclosed land" and the others being a facility (generally a road) built and used by owner; a close relationship between claimant and landowner; and local custom of neighborly accommodation (formatting omitted)); JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND §§ 5:3, 5:9 & n. 8 (2013) (recognizing that presumption of adverse use does not apply to vacant and unenclosed land, to use when there is a family relationship, or, in some jurisdictions, to use of an existing road in a manner that does not interfere with usage by the landowner).

321 P. 3d 1245.

Also conspicuously absent from the decision in *Drake*, is any mention of the presumption of permission arising from a claimants' use of a road built by another. Such a presumption has long been recognized by Washington courts. *Roediger*, 26 Wn. 2d 711 (*Quoting* 2 Thompson on Real Property 106 § 521: "'...*Thus, where persons have traveled the private road of a neighbor in conjunction with such neighbor and other*

persons, nothig [sic] *further appearing, the law presumes such use was permissive, and the burden is on the party asserting a prescriptive right to show that his use was under a claim of right and adverse to the owner of the land...'"*).

Also absent from the decision in *Drake* is any mention of the decision in *Cuillier v. Coffin*, 57 Wn. 2d 624, 358 P. 2d 958 (1961). Thus, *Drake* gave no recognition to *Cullier's* presumption of permission arising from joint use of a road built by another. 57 Wn. 2d 627-28. That presumption clearly applies to the Gamboas' joint use of the farm road with the Clarks.

B. The Court of Appeals' decision does not present an issue of substantial public importance that this Court should determine.

The decision of the Court of Appeals is grounded upon the principles established in *Northwest Cities Gas Co., Roediger v. Cullen,* and *Cuillier v. Coffin.* Those principles have been applied for over 60 years by Washington courts. Those principles are adequately explained by those existing decisions and do not require further review by this Court.

C. The Court of Appeals decision does not conflict with either *Northwest Cities Gas Co. v. Western Fuel Co.* or *Cuillier v. Coffin.*

The Court of Appeals' decision does not conflict with *Northwest Cities Gas Co. v. Western Fuel Co.,* 13 Wn. 2d 75, 123 P. 2d 771 (1942).

Instead, in its decision, the Court of Appeals offers its reasonable interpretation of the "*otherwise explained*" qualifier in *Northwest Cities Gas Co.*:

> Third, from the time that *Northwest Cities* itemized the principles that had been "definitely established" by Washington prescriptive easement cases, the principle that the initial presumption of permissive use can shift to a presumption of adverse use has always been subject to a qualifier: unobjected-to use will shift the presumption "unless otherwise explained." 13 Wash.2d at 85, 123 P.2d 771. No Washington decision has ever examined the scope of unobjected-to use that is "otherwise explained" and therefore immune from the shifting presumption. But the qualifier is reasonably read as contemplating exceptions like the exception for vacant land that was relevant in *Northwest Cities.* The general nature of the qualifier also contemplated that there might be other explanations sufficient to prevent a shift in the presumption. *Roediger* and *Cuillier* are both cases in which the Supreme Court identified "other explanations" of unobjected-to use that are sufficient to prevent a shift to a presumption of adverse use.

321 P. 3d 1245-46.

By interpreting the "*otherwise explained*" qualifier in *Northwest Cities Gas Co.,* the Court of Appeals' decision in no way conflicts with that decision.

The Court of Appeals' decision does not conflict with *Cuillier v. Coffin*. Instead, in footnote 9, the Court of Appeals recognized that where disputed evidence of adverse versus permissive use, the issue will be one for the trier of fact, regardless of whether a presumption arises:

> ...Where there is disputed evidence on the issue of adverse versus permissive use, as there was in *Cuillier,* the decision will always be one for the trier of fact. Under our analysis, a servient owner who presents evidence from which to infer neighborly accommodation prevents a presumption of adverse use from arising and preserves the initial presumption of permissive use. But the presumption of permissive use is still a rebuttable presumption, not a conclusive one.

321 P. 3d 1246 n.9.

Contrary to Respondents' argument, the Court of Appeals decision in this case does not prevent an inference of adverse use from ever arising. Instead, the Court of Appeals recognizes that, if a presumption of permissive use arises, it is at most rebuttable, and can be defeated as any other rebuttable presumption by contrary evidence, or the inferences arising therefrom.

Also contrary to respondent's argument, the Court of Appeals decision does nothing to erode the deference given to the fact finder. As noted in its decision, where competing evidence of adverse versus

permissive use is present, "*the decision will always be one for the trier of fact.*" 321 P. 3d 1246 n. 9.

Nor, contrary to Respondents' argument, does the Court of Appeals' recognition of the presumption of permissive use require a claimant to prove adverse use with direct evidence of adverse and hostile use 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. Instead, the decision in this case makes clear that the presumption of permissive use can be overcome by a wide array of evidence:

> We therefore apply what we believe to be the principles established by *Roediger* and *Cuillier.* Evidence that supports a reasonable inference of neighborly accommodation or that demonstrates no more than a claimant's noninterfering use in common of a road constructed by his neighbor (or the neighbor's predecessor) will prevent a shift from the initial presumption of permissive to adverse use. This does not mean that the property owner necessarily prevails. *Northwest Cities* makes clear that notwithstanding a presumption of permissive use, a claimant may still establish a prescriptive right "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." *Id.* at 87, 123 P.2d 771. A use is adverse when the claimant "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." *Kunkel v. Fisher,* 106 Wash. App. 599, 602, 23 P.3d 1128 (2001).

321 P. 3d 1247.

Under the Court of Appeals decision, an adverse claimant will still be entitled upon proper proof to an inference of adverse use, which, if sufficiently strong, may overcome the presumption of permissive use. Respondents' attempt to create a conflict with *Cuillier* therefore fails.

D. Appellants offer additional reasons to affirm the Court of Appeals' decision.

The Supreme Court may affirm the Court of Appeals on any grounds supported in the record. *Marriage of Rideout,* 150 Wn. 2d 337, 358, 77 P. 3d 1174 (2003). Therefore, appellants offer the following additional arguments in support of the Court of Appeals' decision:

In order to commence the running of the prescriptive period, it was incumbent upon Respondents to make a distinct, positive assertion of a right adverse to the property owner. *Kunkel v. Fisher*, 106 Wn. App. 604 n. 14; *Roediger v. Cullen*, 26 Wn. 2d 706; *Northwest Cities Gas Co. v. Western Fuel Co.,* 13 Wn. 2d 84. However, in unchallenged Finding of Fact 8, the trial court found that "[*t*]*he 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 neither objected to the other's use until a dispute arose in 2008."* CP 214. Since they made

no positive assertion of their claim to use the road, it follows that the Gamboas' prescriptive use, if any, of the road did not commence until 2008. Therefore, Respondents cannot establish that the required elements of their claim for a prescriptive easement have been present for 10 years. *See Northwest Cities Gas Co.,* 13 Wn. 2d 775. It is essential that all of the elements necessary to constitute a permanent valid claim by adverse user amounting to a prescriptive right to be shown to be present. *Ibid.*

IV. Conclusion.

The Court of Appeals' decision is well grounded in the principles announced in *Northwest Cities Gas Co. v. Western Fuel Co., Roediger v. Cullen,* and *Cuillier v. Coffin.* Respondents have failed to establish grounds for review by this Court of the decision of the Court of Appeals in this case.

Respectfully submitted,

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V. Certificate of Mailing

The undersigned does hereby certify that on June 9, 2014, he served a copy of the Appellants' Reply to Petition for Review, by depositing the same in the United States mail, first class postage prepaid, addressed to the following:

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Dated this 9th day of June, 2014 at Tacoma, WA.