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No. 77105-1-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

JOSEPH WORKMAN, Trustee, WCT TRUST, a Washington Trust
Petitioner,

v.

JERALD F. KLINKENBERG and SANDRA LEE KLINKENBURG, husband and wife, and CITIBANK, its successors and/or assigns,
Respondents.

PETITION FOR SUPREME COURT REVIEW

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IDENTITY OF PETITIONER

The Petitioner is Joseph Workman the Trustee of the WCT Trust, a Washington Trust. ("WCT Trust") WCT Trust, through counsel Gourley Law Group, respectfully requests the Supreme Court of the State of Washington accept this Petition for Review.

CITATION TO COURT OF APPEALS DECISION

WCT Trust petitions the Supreme Court of the State of Washington to review the decision of the Court of Appeals in *Workman v. Klinkenberg*, 6 Wash.App.2d 291, Case No. 77105-1-I (filed December 3, 2018). A Motion for Reconsideration was denied on February 19, 2019.

ISSUES PRESENTED FOR REVIEW

The decision of the Court of Appeals is in conflict with published decisions of the Court of Appeals.

1.The Court of Appeals concluded that RCW 7.28.083(3) "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 situation allows recovery for fees incurred on prescriptive easement claims."[1] This conclusion, however, directly contradicts the well-reasoned opinion in *McColl v. Anderson*[2]. Should the Supreme Court of the State of Washington accept this Petition for Review to resolve this conflict?

2. WCT Trust argued it had acquired a prescriptive easement in a common area between two parcels of real property. Based on *Gamboa v. Clark*[3], the Court of Appeals concluded that WCT Trust could not overcome the presumption of permissive use. This conclusion is in direct conflict with two published opinions which establish that the presence of consideration indicates the creation of an easement.[4] Should the Supreme Court of the State of Washington accept this Petition for Review to resolve this conflict?

STATEMENT OF THE CASE

1. The Land at Issue.

WCT Trust is the owner of certain real property legally described as Lot 130, Assessor's Plat of Whidbey Island, as per plat recorded in Volume 6 of Plats,

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[1] *Workman v. Klinkenberg*, 6 Wash.App.2d 291, Case No. 77105-1-I (filed December 3, 2018) p. 15.
[2] 6 Wash.App.2d 88 (Wash. Ct. App. 2018).
[3] 183 Wash.2d 38, 348 P.3d 1214 (Wash. 2015).
[4] *Lee v. Lozier*, 88 Wash. App. 176, 945 P.2d 214 (Wash. Ct. App. 1997); *Washburn v. Esser*, 9 Wash. App. 169 511 P.2d 1387 (Wash. Ct. App. 1973).

page 85, records of Island County, Washington, located in the County of Island, State of Washington (Hereinafter "Lot 130"). In 1982, Carolyn and Marvel Workman purchased Lot 130.[5] Carolyn and Marvel Workman are the parents of the beneficiaries of WCT Trust ("The Workmans").[6]

Respondents Jerald F. and Sandra Lee Klinkenberg ("The Klinkenbergs") are the owners of certain real property legally described as Lot 129, Assessor's Plat of Whidbey Island, as per plat recorded in Volume 6 of Plats, pages 85 and 86, records of Island County, Washington, located in the County of Island, State of Washington (Hereinafter "Lot 129"). In 1992, Lot 129 was sold to Whidbey Property Trust, a trust David McClinton set up for his children.[7] Mr. McClinton was Mr. Workman's business partner.[8] In 1999, David McClinton via the Whidbey Property Trust sold Lot 129 to The Klinkenbergs and/or an entity owned, at least in part, by The Klinkenbergs.[9]

2. The Agreement

In the early 1990s, Marv Workman and Dave McClinton agreed the area between their respective decks would be a shared recreational space or Common

[5] CP 388, 390-392.
[6] CP 393, 398.
[7] CP 407.
[8] CP 407.
[9] CP 389, 403-406.

Area.[10] Accordingly, they shared the cost to build a brick patio and fire pit.[11] Marv and Dave along with their kids and Dave's brother built the patio and fire pit.[12] They also built a set of railroad tie stairs descending down to the concrete bulkhead.[13]

As they agreed, both Marv Workman and Dave McClinton used the Common Area.[14] So did Dave's kids and Marv's kids.

Also as agreed, both families worked to maintain the Common Area.[15] This maintenance largely consisted of power washing, weeding, cleaning out the fire pit and the like.[16] When Dave McClinton decided to sell Lot 129, Marv requested that because of the agreed Common Area that Dave sell to of their friends who would continue to honor the agreement.[17]

3. Usage By The Workmans

Marv's children think of their property as a vacation home.[18] Jennifer Norberg testified that she goes there at least once a month.[19] Joseph Workman

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[10] CP 387, 408, 409, 411-412, 420.
[11] CP 387, 408, 409.
[12] CP 387, 408-409, 415.
[13] CP 415.
[14] CP 387, 408-409.
[15] CP 387, 396-397, 409.
[16] CP 387, 409.
[17] CP 387, 410.
[18] CP 384.

frequents the property eight to ten time a year.[20] He uses the patio for gatherings, boats and just sitting out.[21]

Heidi Workman testified that in years past she would take her kids to the house and stay for weeks.[22] Andrew Workman goes up to the property one weekend a month.[23] None of Marv's children ever felt the need to seek permission from the Klinkenbergs to use the Common Area.[24] In fact Joseph testified that, "We have never needed permission. It's always been a community space."[25]

The nature of their usage is well documented. Attached as Exhibits to a Declaration of Jennifer Norberg, a beneficiary, are photographs depicting usage of the Common Area.

4. Usage By The Klinkenbergs

In 2002 or 2003, Mr. Klinkenberg proposed the owners of Lot 130 and Lot 129 share the cost of replacing the stairs made of railroad ties with concrete.[26]

The Workmans agreed. At his deposition on September 9, 2016, Jerald

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[19] CP 384.
[20] CP 394.
[21] CP 401.
[22] CP 414.
[23] CP 417.
[24] CP 396, 402.
[25] CP 402.
[26] CP 395, 422.

Klinkenberg testified that he only goes to the property once or twice a year.[27] In the summertime, Mr. Klinkenberg has only been to the property four or five times to check on it.[28]

Mr. Klinkenberg testified he is not acquainted with Andy Workman, Heidi Workman, Joseph Workman, Seth Norberg or Jennifer Norberg.[29] He further testified:

Q. Do you have any knowledge of any agreements regarding the use of the bulkhead between the owners of Lot 129 and Lot 130?

A. The owners of Lot 130 used the stairs on concreate bulkhead steps going to the beach.

Q. And is there any written agreement regarding the use of the stairs?

A. No.

Q. Is there any verbal agreement regarding the use of the stairs?

A. I didn't stop them from using it. They had been using it when they moved in. And my brother-in-law told me that he knew Marvin real well and if they could use the stairs…[30]

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[27] CP 415.
[28] CP 415.
[29] CP 423.
[30] CP 424.

ARGUMENT

I. The Opinion of the Court of Appeals Directly Contradicts a Well-Reasoned Opinion of Division 2 of the Court of Appeals of the State of Washington.

WCT Trust argued that Respondent should not have been awarded attorney fees for defense of the easements claims.[31] The Court of Appeals concluded that RCW 7.28.083(3) "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 situation allows recovery for fees incurred on prescriptive easement claims."[32] This conclusion, however, directly contradicts a well-reasoned opinion of The Court of Appeals of the State of Washington, Division II.

In *McColl v. Anderson*,[33] the Appellant had filed a declaratory judgment action against respondent seeking a declaration that Appellant had prescriptive easements regarding a water distribution system.[34] The trial court granted summary judgment in favor of Respondent and awarded attorney fees pursuant to

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[31] Brief of Appellant filed December 18, 2017 p. 24.
[32] *Workman v. Klinkenberg*, Case No. 77105-1-I (filed December 3, 2018) p. 15.
[33] 6 Wash.App.2d 88, Case No. 50998-9-II (Filed November 14, 2018).
[34] *Id.*

RCW 7.28.083(3).[35] The *McColl* Court reversed the trial court's attorney fee award.[36]

The *McColl* Court states, "RCW 7.28.083(3) gives the trial court discretion to award attorney fees to the prevailing party 'in an action asserting title to real property by adverse possession."[37] Further, "[a]n easement is an interest in real property. However, that interest involves the use of property and does not grant title to the property.... Unlike adverse possession, a prescriptive easement does not quiet title to land.... The plain language of RCW 7.28.083(3) allows an award of attorney fees only in an action asserting title to property, not in an action asserting a property interest but no title. We cannot rewrite the statute by disregarding this language."[38]

Because the opinion of the Court of Appeals directly contradicts *McColl v. Anderson*,[39] the Supreme Court of the State of Washington should accept this Petition for Review.

2. The Opinion of the Court of Appeals Directly Contradicts Two Previous Opinions of the Court of Appeals of the State of Washington.

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[35] *Id.*
[36] *Id.*
[37] *Id.* at p.3.
[38] *Id.* at p. 4 (citations omitted.)
[39] Case No. 50998-9-II (Filed November 14, 2018).

To establish a prescriptive easement, a claimant must prove: (1) use adverse to the title owner; (2) open, notorious, continuous and uninterrupted use for 10 years; and (3) that the owner knew of the adverse use when he was able to enforce his rights.[40] These requirements are all satisfied.

The two adjoining lots at issue, Lot 130 and Lot 129, were previously owned by Marv Workman and Dave McClinton, respectively. They made an agreement that the area between their respective decks would be a shared recreational space or 'common area.'[41] Workman and McClinton therefore shared the cost and labor of constructing a brick patio and fire pit within the common area, and also a set of railroad tie stairs descending to a concrete bulkhead. [42] They and their family members all worked to maintain the common area. [43] This state of affairs continued for more than the ten-year prescriptive period.

Respondents assert that the Workmans' use of the area in dispute was 'permissive' rather than adverse, and therefore cannot ripen into a prescriptive easement. What Respondents fail to appreciate, however, is evidence that the actual intent of McClinton and Workman was to create an area for joint or

[40] *Lee v. Lozier*, 88 Wash. App. 176, 945 P.2d 214 (Wash. Ct. App. 1997).
[41] CP 387, 406, 409, 411-412, 420
[42]CP 387, 408-409.
[43] CP 387, 396-387, 399-401, 413, 415-416, 419

common use, and to construct improvements in the area consistent with such joint or common use.[44]

Because the Workmans paid their share of the costs of the improvements, performed labor to construct them and thereafter labored to maintain the improved area, their claim to a prescriptive easement is supported by consideration, a critical factor in a prescriptive easement analysis. Indeed, the element of consideration distinguishes the case from *Gamboa v. Clark*[45], the case on which the Court of Appeals based its opinion.

As the court noted in *Lee v. Lozier*:[46]

> [C]aimants who were granted permission to use land . . . are not automatically precluded from claiming that they are entitled to a prescriptive easement. "The important question is whether the landowner permitted the use as a mere revocable license or whether an oral grant of a permanent right to use the property was intended."[47]

The question posed by the *Lee* court, whether a permissive use was intended to grant a revocable license or a permanent right to use the property, turns on whether consideration was present. The court in *Washburn v. Esser,*[48] states:

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[44] CP 387, 408-409, 411-412, 420

[45] 183 Wash.2d 38, 348 P.3d 1214 (Wash. 2015).

[46] 88 Wash. App. 176, 945 P.2d 214 (Wash. Ct. App. 1997).

[47] *Id.* at 182, citations omitted.

[48] 9 Wash. App. 169 511 P.2d 1387 (Wash. Ct. App. 1973).

> Where there has been an oral permission of use, the presence of consideration is helpful in determining whether the parties intended to grant a permanent right or merely a revocable license to use the land. ***The presence of consideration indicates the creation of an easement . . .***[49]

In *Washburn,* consideration was established where the four property owners shared the costs of constructing and repairing a road that crossed each of their lots.[50] The court concluded that, because the use in question was supported by consideration in the form of construction and repair costs, and such use continued for the ten-year prescriptive period, a prescriptive easement had been established. Similarly, *in Lee v. Lozier*[51]:

> [T]he neighbors divided the cost of constructing a dock equally among themselves and [original owner] Fogleman. The neighbors' expenditures were for the purpose of improving the dock ***to make it accessible to all the parties***. The court found that the neighbors' belief that they could use the entire dock was not dependent on Fogleman's permission; they believed they were entitled to do so ***because the dock was a community dock, paid for equally by themselves and Fogleman. Given the consideration paid, we are satisfied that the neighbors were operating under a permanent right to use the Lot 10 portions of the dock when they did so during the prescriptive period.***[52]

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[49] *Id.* at 172, 173 (Emphasis added.)

[50] *Id.* at 173, 511 P.2d 1387.
[51] 88 Wash. App. 176, 945 P.2d 214 (Wash. Ct. App. 1997).
[52] *Id.* at 183, 184 (Emphasis added.)

The evidence in the present case is analogous. Workman and McClinton shared the costs and labor to construct and maintain a brick patio and fire pit within the 'common area,' as well as the railroad tie stairway descending to the concrete bulkhead. Consideration is therefore present, just as it was in *Lee* and *Washburn,* where the courts found that prescriptive easement had been established.

The presence of consideration distinguishes the present case from the case on which the Court of Appeals primarily relied, *Gamboa v. Clark*[53]. *Gamboa* involved Plaintiff Gamboa's use of an existing roadway situated on land owned by his neighbor. There was no evidence that Gamboa shared in the cost of constructing the road, and no claim (or finding) that his occasional 'blading' of the road or placing gravel on it on a single occasion constituted consideration like that present in *Washburn, Lee* and the present case.

Simply stated, consideration was absent in *Gamboa,* but present in *Washburn, Lee* and this case. Accordingly, a prescriptive easement should have been found in the present case.

CONCLUSION

[53] 183 Wash.2d 38, 348 P.3d 1214 (Wash. 2015).

The opinion of the Court of Appeals directly contradicts at least three opinions of the Court of Appeals of the State of Washington. For this reason, Petitioner WCT Trust respectfully requests the Supreme Court of the State of Washington accept its Petition for Review.

DATED this 15 day of March 2019.

Respectfully submitted,

Thomas L. Hause, WSBA #35245
Attorney for Appellant

APPENDIX

ORDER DENYING MOTION FOR RECONSIDERATION

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JOSEPH WORKMAN, trustee, WCT TRUST, a Washington trust, Appellant, v. JERALD F. KLINKENBERG and SANDRA LEE KLINKENBERG, husband and wife; and CITIBANK, or its successors and/or assigns, Respondents.	No. 77105-1-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Joseph Workman has filed a motion for reconsideration of the opinion filed on December 3, 2018. Respondents Jerald and Sandra Klinkenberg have filed an answer to appellant's motion. The court has determined that appellant's motion for reconsideration should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

FOR THE COURT:

Judge

Award of Attorney's Fees & Costs

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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February 19, 2019

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CASE #: 77105-1-I
Joseph Workman, Appellant vs. Jerald F. Klinkenberg, et al., Respondents

Counsel:

The following ruling by Commissioner Masako Kanazawa of the Court was entered on February 19, 2019, regarding attorney fees and cost:

On December 3, 2018, this Court issued a published opinion affirming the trial court's summary judgment dismissal of appellant Joseph Workman's prescriptive easement claim and award of attorney fees to respondents Jerald and Sandra Klinkenberg. This Court awarded attorney fees on appeal to the Klinkenbergs under RCW 7.28.083(3). On February 19, 2019, this Court denied Workman's motion for reconsideration.

The Klinkenbergs filed a declaration of counsel and a cost bill, requesting an award of attorney fees in the amount of $52,007 and costs in the amount of $141.41, in the total amount of $52,148.41. Workman filed an objection to the attorney fee request, and the Klinkenbergs filed a reply.

Reasonable attorney fees are based on the number of hours reasonably spent, multiplied by a reasonable hourly rate. Berryman v. Metcalf, 177 Wn. App. 644, 660, 312 P.3d 745 (2013). This calculation does not turn solely on what the prevailing party's firm can bill. See Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 744, 733 P.2d 208 (1987). "Courts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel." Berryman, 177 Wn. App. at 657 (quoting Mahler v. Szucs, 135 Wn.2d 398, 434-35, 957 P.2d 632, 966 P.2d 305 (1998)). An attorney's reasonable hourly rate reflects the attorney's "ability to produce results in the minimum time." Berryman, 177 Wn. App. at 664. Hours spent on duplicated effort, such as "overstaffing" should be discounted. Id. at 662.

Workman argues that the attorney fees requested by the Klinkenbergs are excessive. He points out that the Klinkenbergs' counsel incurred $18,420 in preparing their brief of respondent and $27,203 in reviewing his reply brief and preparing for oral argument. He argues that the arguments in the Klinkenbergs' brief are "substantial identical" to those made in the trial court, with several pages of arguments appearing to be cut and pasted from their trial court brief, and relied on a single reported case.

I have reviewed the declaration of counsel. Although the amount of the requested attorney fees is not low, the time spent on this appeal at four attorneys' varied hourly rates is within the reasonable bounds of appellate practice. Although two attorneys worked at high hourly rates of $420 and $440 (for 52.7 hours) and $475 (for 0.3 hours), the attorney who spent the majority of the hours on this appeal did so at reasonable rates of $240 (79 hours), $275 (27.3 hours), and $285 (6.3 hours). I decline to reduce the amount of the requested attorney fees.

However, the Klinkenbergs' cost bill includes costs for preparing their motion to strike and a reply in support of that motion. RAP 14.3(a)(3) allows costs for preparing "a brief or other original document to be reproduced by the clerk." RAP 14.3(a)(3) (emphasis added). This rule does not extend to motions documents because they are not reproduced by the clerk. The Klinkenbergs may recover $100 for preparing their brief of respondent, not $130. A I indicated in my January 12, 2018 ruling, a brief (not a separate motion to strike) is a more appropriate mechanism to point out allegedly extraneous matters cited or included in opposing party's brief, and a panel of judges considering this case can decide whether to consider them. See Engstrom v. Goodman, 166 Wn. App. 905, 909 n.2, 271 P.3d 959 (2012) ("So long as there is an opportunity (as there was here) to include argument in the party's brief, the brief is the appropriate vehicle for pointing out allegedly extraneous materials - not a separate motion to strike.").

Accordingly, attorney fees in the amount of $52,007 and costs in the amount of $111.41, in the total amount of $52,118.41 are awarded to the Klinkenbergs.

Therefore, it is

ORDERED that attorney fees and costs in the total amount of **$52,118.41** are awarded to respondents Jerald and Sandra Klinkenberg. Appellant Joseph Workman shall pay this amount.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

12/2/18 Opinion

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOSEPH WORKMAN, trustee, WCT TRUST, a Washington trust,	)	No. 77105-1-I
Appellant,	)	DIVISION ONE
v.	)	
JERALD F. KLINKENBERG and SANDRA LEE KLINKENBURG,† husband and wife; and CITIBANK, or its successors and/or assigns,	)	PUBLISHED OPINION
Respondents.	)	FILED: December 3, 2018

SMITH, J. — Where use of another's property begins as a neighborly accommodation, the party seeking a prescriptive easement must overcome the presumption that the use was permissive and must show when and how the use became adverse. Under Gamboa v. Clark, 183 Wn.2d 38, 348 P.3d 1214 (2015), in order to overcome the presumption of permissive use, a litigant must either demonstrate a use that was adverse and hostile to the rights of the opposing party or show that the opposing party indicated that an easement was granted. Because Joseph Workman[1] did not present evidence raising a genuine

† The true and correct spelling, "Klinkenberg," will be used in this opinion.

[1] We refer to each member of the Workman family by their first name to avoid confusion.

issue of material fact that either of these circumstances happened, summary judgment dismissal of his prescriptive easement claims was proper. Additionally, the trial court did not abuse its discretion in awarding the Klinkenbergs attorney fees. We affirm and also grant the Klinkenbergs their attorney fees on appeal.

FACTS

In the late 1970s and early 1980s, Carolyn and Marvel (Marv) Workman, together with Clarence and Patricia Young, owned lot 129 of the Whidbey Shores development on Whidbey Island. In July 1982, the Workmans purchased the lot next door (lot 130) and sold their interest in lot 129 but continued to use a patio and stairway on lot 129 as guests of the Youngs. In 1990 and 1991, the Workmans transferred their interest in lot 130 to WCT Trust.

In 1992, David McClinton purchased lot 129 through a trust. McClinton and Marv were business partners and close friends. In about 1994, they agreed that the patio and stairway on lot 129, between their respective decks, would be a shared recreational space. Together, they paid for and built a brick patio, fire pit, and railroad tie stairs descending to the concrete bulkhead (the disputed area).

When McClinton decided to sell lot 129, Marv requested that he have a "first crack" at trying to find a friend to buy it "because of . . . the joint area" and in order to "kind of continue this open concept . . . between the two properties." Clerk's Papers (CP) at 359, 491.

In 1999, Marv's friends, Jill and Lydell Knudson, decided to buy lot 129 with their family, Jerald and Sandra Lee Klinkenberg. When the Klinkenbergs

bought lot 129, Lydell Knudson informed them "that the Workmans occasionally used the Lot 129 brick patio and fire pit, and asked whether [they] would permit that use to continue." CP at 817. They agreed to give the Workmans permission to use the area. In 2009, the Knudsons transferred their interest in lot 129 to the Klinkenbergs.

In 2013, Joseph, as trustee of WCT Trust, sent the Klinkenbergs a letter regarding the boundary and placement of a wooden planter box on the patio. In 2014, he sent another letter to the Klinkenbergs asking them to move the planter box "pending clarification of the property lines." CP at 842.

In 2015, Joseph, on behalf of the trust, filed a complaint in Island County Superior Court, alleging adverse possession, acquiescence, estoppel in pais, common grantor doctrine, and seeking adjustment of the boundary line. In October 2016, the Klinkenbergs moved for summary judgment to dismiss all four claims. Joseph amended his complaint to add claims for a prescriptive easement and easement by estoppel over the disputed area. At the hearing on summary judgment, the trial court summarily dismissed Joseph's claims on adverse possession (with the exception of a small area encompassed by a railroad tie planter), estoppel in pais, acquiescence, and the common grantor doctrine because there was no genuine issue of material fact that the Workmans' use of lot 129 was adverse rather than permissive. While not ruling on the added easement claims, the trial court did note that "it seems fairly obvious that these claims have no merit," especially in light of the Supreme Court's recent decision on prescriptive easements in Gamboa. Report of Proceedings (RP) (Nov. 10,

2016) at 42. In that case, the Supreme Court held that there was no prescriptive easement where a presumption of permissive use existed and the claimant did not rebut that presumption by demonstrating a use that was adverse and hostile to the rights of the owners or that the owners granted the claimants an easement. Gamboa, 183 Wn.2d at 52.

The Klinkenbergs, relying on Gamboa, moved for summary judgment, arguing that the Workmans' use of the disputed area was permissive in its inception and permitted as a neighborly accommodation. They further argued that the Workmans did not make a distinct and positive assertion of a right hostile to their rights and that they did not give the Workmans an easement.

In opposition to summary judgment, Joseph argued that the agreement between Marv and McClinton created "an area for joint or common use." CP at 450. In doing so, he cited McClinton's declaration, McClinton's deposition, and Andrew Workman's deposition. The trial court granted the Klinkenbergs' motion for summary judgment, explaining that "there is no evidence that any such agreement was intended to be a permanent, irrevocable right to use the disputed area." RP (Apr. 28, 2017) at 64.

Joseph moved for reconsideration, arguing that McClinton's testimony as to McClinton's agreement with Marv inferred that their agreement was intended to be permanent when viewed in the light most favorable to Joseph. In doing so, he cited a new declaration by McClinton that stated the "agreement was continuing and permanent" and that they "would never have invested the substantial amounts of money, time and effort to construct the patio, fire pit, and

stairs for an agreement for temporary use." CP at 195. On the Klinkenbergs' motion, the trial court struck this declaration because it was not newly discovered evidence. The trial court also denied Joseph's motion for reconsideration. In doing so, it entered a very detailed memorandum decision that outlined its evidentiary rulings and thoroughly explained its ultimate decision. The court concluded that "it would not be reasonable to construe McClinton's general reference to 'an agreement' with [Marv] Workman to use the disputed area as giving [Marv] Workman a permanent, irrevocable right to use the disputed area." CP at 160.

The Klinkenbergs then moved for an award of attorney fees and expenses. The trial court issued detailed findings and conclusions in support of its award of attorney fees, which totaled $131,749, and entered judgment in the same amount.

Joseph appeals.

ANALYSIS

Prescriptive Easement

Joseph argues that the trial court erred in concluding that there is no genuine issue of material fact whether a prescriptive easement exists over lot 129. We disagree.

We review summary judgment orders de novo. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). "[S]ummary judgment is appropriate where there is 'no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" Elcon Constr., Inc. v. E. Wash.

Univ., 174 Wn.2d 157, 164, 273 P.3d 965 (2012) (alteration in original) (quoting CR 56(c)). Although the evidence is viewed in the light most favorable to the nonmoving party, if that party is the plaintiff and he fails to make a factual showing sufficient to establish an element essential to his case, summary judgment is warranted. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Once the moving party shows there are no genuine issues of material fact, the nonmoving party must bring forth specific facts to rebut the moving party's contentions. Elcon Const., Inc., 174 Wn.2d at 169.

Additionally, we review a decision on reconsideration for abuse of discretion. In re Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997). The trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons. King County v. Vinci Constr. Grands Projets/Parsons RCI/Frontier-Kemper, JV, 188 Wn.2d 618, 632, 398 P.3d 1093 (2017).

Prescriptive rights are not favored in the law because they necessarily work corresponding losses or forfeitures of the rights of other persons. Gamboa, 183 Wn.2d at 43 (citing Nw. Cities Gas Co. v. W. Fuel Co., 13 Wn.2d 75, 85, 123 P.2d 771 (1942)). "To establish a prescriptive easement, the person claiming the easement must use another person's land for a period of 10 years and show that (1) he or she used the land in an 'open' and 'notorious' manner, (2) the use was 'continuous' or 'uninterrupted,' (3) the use occurred over 'a uniform route,' (4) the use was 'adverse' to the landowner, and (5) the use occurred 'with the knowledge of such owner at a time when he was able in law to assert and

enforce his rights.'" Id. (citing Nw. Cities, 13 Wn.2d at 83, 85). "For a claimant to show that land use is 'adverse and hostile to the rights of the owner' in this context, the claimant must put forth evidence that he or she interfered with the owner's use of the land in some manner." Id. at 52 (citing Nw. Cities, 13 Wn.2d at 90-91). "The claimant bears the burden of proving the elements of a prescriptive easement." Id. at 43 (citing Nw. Cities, 13 Wn.2d at 84).

Here, the issue is whether or not the Workmans' use of the disputed area was adverse. "Permissive use is not adverse and does not commence the running of the prescriptive period." Lee v. Lozier, 88 Wn. App. 176, 182, 945 P.2d 214 (1997) (citing Washburn v. Esser, 9 Wn. App. 169, 171, 511 P.2d 1387 (1973)). There is "an initial presumption of permissive use to enclosed or developed land cases in which there is a reasonable inference of neighborly sufferance or acquiescence." Gamboa, 183 Wn.2d at 47. "What constitutes a reasonable inference of neighborly sufferance or acquiescence is a fairly low bar." Id. at 51. Where use is "'permissive in its inception,'" there is a presumption of permissive use that "'cannot ripen into a prescriptive right, no matter how long it may continue, unless there has been a distinct and positive assertion by the dominant owner of a right hostile to the owner of the servient estate.'" Id. at 45 (quoting Nw. Cities, 13 Wn.2d at 84).

Gamboa controls the outcome of this case. There, the Supreme Court considered whether claimants in a prescriptive easement case presented sufficient evidence to rebut the presumption of permissive use. There, a gravel road separated parcels of land owned by the Gamboas and the Clarks. Id. at 40.

For more than 10 years, the Gamboas used the gravel road, the majority of which was on the Clarks' property, to obtain access to their house and some of their farmland. Id. at 41. The Supreme Court held that the evidence supported a reasonable inference of neighborly sufferance or acquiescence because both parties used the road without any disputes for many years and each was aware of the other's use, but no one objected to it. Id. at 51. It also held that "the Gamboas failed to overcome the presumption of permissive use because they did not demonstrate a use that was adverse and hostile to the rights of the Clarks, and they did not demonstrate that the Clarks indicated that they had an easement." Id. at 52.

Here, Joseph did not provide evidence of a distinct and positive assertion of a hostile right. Rather, he argued that the agreement between Marv and McClinton to create "an area for joint or common use" raised a genuine issue of material fact that the McClintons gave the Workmans an easement. CP at 450. He presented several pieces of evidence supporting this theory. The first was testimony from McClinton's deposition in which McClinton stated:

> Marv and I talked about what to do with that area between the houses. And we ultimately came up with the brick idea. So we just split the cost, and he would work on it on the weekend, and then I might come up the next weekend or – so we just – we worked on it together.

CP at 408. He also explained that the "joint area" between the properties was "just common area" that both parties and their children used and there was "no specific division between our properties on that area." CP at 411. McClinton's declaration stated, in relevant part:

4. As I testified during my deposition, in the early 1990s Marv Workman and I agreed the area between our decks would be a shared recreational space or Common Area. Accordingly, we shared the cost to build a brick patio and fire pit.

5. Marv and I along with our kids and my brother built the patio and fire pit. We also built a set of railroad tie stairs descending down to the concrete bulkhead.

6. As we agreed both Marv and I used the Common Area. So did my kids and Marv's kids. I understand Marv's kids continue to use the Common Area to this day.

7. Also as agreed, both families worked to maintain the Common Area. This maintenance largely consisted of power washing, weeding, cleaning out the fire pit and the like.

8. When I decided to sell Lot 129, Marv requested that because of the agreed Common Area that I sell to one of our friends who would continue to honor the agreement.

CP at 387. Finally, Joseph presented testimony from the deposition of Andrew Workman. In that testimony, the Klinkenbergs' counsel asked Andrew whether he "had permission to use the patio as guests [of] Lot 129, including the fireplace?" CP at 420. He responded, "It's always been a common area. For years and years we always used the fire pit." Id. When asked whether lot 129 owners have "permission" to use the area on the Workmans' side, he responded, "Yeah." Id. Again, counsel asked whether he had "permission to use the part on 129" and he responded, "Dave McClinton when he – we used it as a common area with Dave McClinton. I haven't had any discussions with the Klinkenbergs." Id.

Based on this evidence, the trial court did not err in granting summary judgment because Joseph failed to present evidence to rebut the presumption of permissive use as required by Gamboa. The evidence presented by Joseph

does not raise a genuine issue of material fact that McClinton or the Klinkenbergs intended to give the Workmans a prescriptive easement over the disputed area. Nothing in the testimony cited above indicates that the "joint" or "common" use agreement was intended to be permanent. Therefore, summary judgment was proper and the trial court did not abuse its discretion by denying Joseph's motion for reconsideration.

Joseph argues that Gamboa is distinguishable because there is evidence that the Workmans provided consideration and no such evidence existed in Gamboa. But, while the presence of consideration can be relevant in a prescriptive easement case, it is not determinative. The real issue is whether Joseph provided evidence that the agreement granted his family a permanent right to use the disputed area, not whether there was consideration supporting that agreement. In Gamboa, a prescriptive easement was not warranted because there was no evidence that the Clarks granted the Gamboas a right of easement. Gamboa, 183 Wn.2d at 52. The same is true here. None of the evidence provided establishes that McClinton or the Klinkenbergs granted the Workmans a permanent right to use the disputed area.

Joseph relies on two pre-Gamboa Court of Appeals decisions to argue that consideration is determinative: Lee and Washburn. But in both Lee and Washburn, there was direct evidence that consideration was given in exchange for a right of easement. Because no evidence exists in this case that the agreement was for a permanent right to use the disputed area, the presence of consideration alone does not require reversal.

In Washburn, four neighbors shared the costs to construct a road through their properties to obtain access to a beach. 9 Wn. App. at 170. The trial court granted a prescriptive easement, finding that the original lot owners orally agreed to put in the road to provide beach access, shared in the cost of the road, and after the road was put in, used the road as a "'matter of right.'" Id. at 171-72 (emphasis omitted). On appeal, the court explained that the "important question is whether the landowner permitted the use as a mere revocable license or whether an oral grant of a permanent right to use the property was intended." Id. at 172. It held that, based on the testimony presented, "the original owners agreed upon and jointly constructed a roadway that was to benefit and burden each other's land. They were each to use the road as a matter of right. Consideration was established." Id. at 173.

In Lee, a group of neighbors equally divided the cost of building a community dock that was, in part, on property owned by William Fogleman. Lee, 88 Wn. App. at 179. Jon Lozier later purchased the property from Fogleman and began restricting community access to the portion of the dock on his property. Id. at 179-80. The neighbors sued, and at trial, one testified that during a homeowners' association meeting, Fogleman promised to write a "letter" that would appear on the title of his property, granting an easement for the neighbors to use the dock. Id. at 180. Another neighbor testified that when he asked Fogleman whether he had recorded the easement, Fogleman stated he had "'taken care of'" it "'a long time ago.'" Id. at 181. The trial court found that the elements of a prescriptive easement were met. Id. On appeal, the court held

that "Fogleman's promise of filing a 'letter' against his title indicated an intent to grant a permanent, irrevocable right to the neighbors to use the dock." Id. at 183. Additionally, citing Washburn, the court noted that the fact that the neighbors contributed to the cost of the dock also indicated that they were operating under a permanent right to use it. Id. at 184.

Here, unlike in Lee or Washburn, there is no evidence that McClinton agreed to grant a permanent right to the Workmans to use the disputed area. The fact that the Workmans shared the cost to construct and maintain the patio, in and of itself, is not evidence that a permanent agreement existed. In the absence of evidence indicating that a permanent right was granted, there is no genuine issue of material fact.

Joseph relies on McClinton's second declaration, filed after the motion for summary judgment was granted, to argue that a genuine issue of material fact existed whether the agreement was intended to be permanent. But, the trial court granted the Klinkenbergs' motion to strike this declaration because the testimony was not newly discovered evidence.[2] Although Joseph appealed the order denying his motion for reconsideration, he did not assign error to the court's decision to strike this declaration nor did he argue that the trial court abused its discretion in striking it. "Appellate courts will only review a claimed

[2] The court also noted that the new testimony was inadmissible because without personal knowledge, it speculates as to the motivations and desires of Marv. Furthermore, the court noted McClinton's testimony that there was an "agreement" between McClinton and Marv that contradicted McClinton's deposition testimony that "he did *not* have any sort of formal agreement with the Workmans regarding the use of the (so-called) joint area." CP at 150.

error that is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto and is supported by argument and citations to legal authority." Vern Sims Ford, Inc. v. Hagel, 42 Wn. App. 675, 683, 713 P.2d 736 (1986) (citing RAP 10.3(a)(5); 10.3(g); Bender v. Seattle, 99 Wn.2d 582, 599, 664 P.2d 492 (1983); Lassila v. Wenatchee, 89 Wn.2d 804, 809, 576 P.2d 54 (1978)). Because Joseph did not challenge the trial court's decision to strike the declaration, we will not consider it on appeal.[3]

Joseph also argues that summary judgment was not proper because his family's use of the property was "joint," not "permissive." This distinction, based on McClinton's testimony, does not resolve the key issue: whether that use was intended to be permanent or temporary. Because Joseph has not presented evidence that the agreement was permanent, this argument fails.

In his reply brief, Joseph argues that the Workmans used the term "permission" in their deposition testimony because they did not understand the legal implication of that term. Even so, it is likely that the Workmans understood the difference between a permanent right and a temporary right. None of the testimony cited by Joseph raises a genuine issue of material fact that the parties understood the agreement for joint use to be permanent.

For the first time on appeal, Joseph argues that he did assert a claim of right in accordance with Gamboa by sending two letters to the Klinkenbergs in 2015 asking them to remove their large planter from the disputed area. But,

[3] Because we do not consider this declaration on appeal, we deny the Klinkenbergs' motion to strike references to it in Joseph's appellate briefing.

because this argument was not raised below, we do not consider it on appeal. RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court.").

Finally, Joseph argues that the other elements of a prescriptive easement were met. But because he cannot show that there is a genuine issue of material fact as to the adverse use element, it is immaterial whether he presented evidence satisfying the other elements.

Attorney Fees at the Trial Court

Joseph argues that the trial court abused its discretion in awarding the Klinkenbergs $131,749 in attorney fees. We disagree.

"The general rule in Washington is that attorney fees will not be awarded for costs of litigation unless authorized by contract, statute, or recognized ground of equity." Durland v. San Juan County, 182 Wn.2d 55, 76, 340 P.3d 191 (2014). Whether a trial court is authorized to award attorney fees is a question of law, which we review de novo. Gander v. Yeager, 167 Wn. App. 638, 646, 282 P.3d 1100 (2012). When attorney fees are authorized, we will uphold an attorney fee award unless we find the trial court manifestly abused its discretion. Chuong Van Pham v. Seattle City Light, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). The trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons. King County, 188 Wn.2d at 632. The Supreme Court has held that the use of lodestar methodology is proper in the determination of a reasonable fee. Mahler v. Szucs, 135 Wn.2d 398, 434, 957 P.2d 632, 966 P.2d 305 (1998).

RCW 7.28.083(3) 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.

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. Kunkel v. Fisher, 106 Wn. App. 599, 602-03, 23 P.3d 1128 (2001); accord 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 2.7, at 99 (2d ed. 2004).

Here, the trial court entered thorough findings of facts and conclusions of law regarding the Klinkenbergs' motion for attorney fees and expenses. It found that under RCW 7.28.083(3), the Klinkenbergs, as prevailing parties, were eligible for attorney fees on the adverse possession claim and its related legal theories that were dismissed in the first order on summary judgment. The trial court also found that they were entitled to fees for the easement claims that were dismissed in the second order on summary judgment because they were also the prevailing party on those claims. The court then applied the lodestar method for calculating attorney fees. First, it determined whether the hourly rates of each attorney and paralegal were reasonable. Some of the rates charged exceeded $400 per hour, and the court adjusted those down to $350, finding that rate to be

justified in the locality, given the attorneys' experience. It then reviewed a breakdown of the hours spent per attorney, per category and included that breakdown in its findings. Although the number of hours charged was significant, the trial court found that several reasons justified the additional time, including the number of depositions needed; the time required to respond to Joseph's discovery requests; the fact that Joseph moved to amend his complaint shortly before the first summary judgment motion so that a second separate motion for summary judgment was necessary; and the fact that the Klinkenbergs had to respond to Joseph's motions for reconsideration on both summary judgment orders. The trial court also found that Joseph failed to "identify a single billing entry . . . as excessive" or "argue that the number of hours expended in any particular category of work was unreasonable." CP at 1127. The court did delete claims for time spent unsuccessfully opposing Joseph's motion to amend his complaint (totaling $7,003), and it deducted the overall award by five percent "in light of the fact that [Joseph] prevailed on the minor issue of adverse possession of the small area occupied by the railroad tie planter box," which it found encompassed 22 feet of the over 310 foot boundary. CP at 1125, 1129. In total, the trial court awarded $118,481 in fees expended on the litigation and $13,268 in fees for the fee petition, for a total of $131,749. CP at 1129, 1132.

Although the total amount of fees awarded is high, the trial court did not abuse its discretion. The trial court properly calculated the lodestar, and its decision was based on carefully reasoned findings and included a substantial amount of detail.

Joseph argues that the award is excessive in comparison to the assessed value of the property of $428,503. In doing so, he relies on Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 859 P.2d 1210 (1993), where the Supreme Court held that an attorney fee award was unreasonable when "a total of 481.89 hours—the equivalent of almost 3 months of uninterrupted legal work by one attorney—was awarded, with no examination of the actual reasonableness of these hours." Id. at 152. But here, unlike Scott Fetzer, the trial court engaged in a very careful and well documented examination of the reasonableness of the hours claimed. Additionally, where Scott Fetzer involved "an uncomplicated dispute over 120 vacuum cleaners worth less than $20,000," this case involved six claims to waterfront property valued at more than $400,000 where the use at issue occurred over a period of more than 20 years. Id. at 156. The trial court found that had Joseph prevailed, "the Klinkenbergs would have lost seven feet of their fifty feet of water frontage, a substantial loss of valuable property." CP at 1120. Scott Fetzer is not controlling.

Joseph also argues that the trial court should have capped all attorney fees at a rate of $255 per hour, the rate as his expert testified was reasonable for the locality. In its findings, the trial court explained that, based on Brown v. State Farm Fire & Casualty Co., 66 Wn. App. 273, 831 P.2d 1122 (1992), it could "'consider its own knowledge and experience concerning reasonable and proper fees, and . . . form an independent judgment either with or without the aid of testimony of witnesses as to value.'" CP at 1114 (quoting Brown, 66 Wn. App. at 283). The trial court was well within its discretion to find that $350 per hour was

justified in the locality for attorneys with the legal knowledge, education, and experience of the Klinkenbergs' attorneys.

Finally, Joseph argues that the trial court abused its discretion in awarding the Klinkenbergs attorney fees for defending the two easement claims on summary judgment because the trial court previously advised the parties that it believed Gamboa would be controlling on those claims. Regardless of whether the Klinkenbergs' attorneys knew what case would likely be controlling, they still had to spend time to draft and defend the motion for summary judgment. The trial court specifically found that "the time spent by defense counsel preparing and arguing the second summary judgment pleadings was reasonable." CP at 1126. Furthermore, the trial court explained that it did direct the parties to Gamboa during the first summary judgment hearing and Joseph "should have been on notice of the distinct possibility [he] may not prevail on the easement claims." CP at 1126. Although Joseph argues that the hours spent were not reasonable he does not take issue with any specific billing entry. Joseph has not demonstrated that the trial court abused its discretion in finding the amount of time spent on the second summary judgment motion was reasonable.

Attorney Fees on Appeal

The Klinkenbergs request attorney fees on appeal under RAP 18.1 and RCW 7.28.083(3). Attorney fees may be awarded at the appellate level only when authorized by a contract, a statute, or a recognized ground of equity. Labriola v. Pollard Grp., Inc., 152 Wn.2d 828, 839, 100 P.3d 791 (2004). As described above, RCW 7.28.083(3) provides such a basis. Because the

Klinkenbergs are the prevailing party on appeal, we grant the Klinkenbergs their reasonable appellate attorney fees, subject to their compliance with RAP 18.1.

In conclusion, we affirm the dismissal of the prescriptive easement claims on summary judgment, affirm the trial court's award of attorney fees to the Klinkenbergs, and grant the Klinkenbergs their request for attorney fees on appeal.

WE CONCUR:

Cases Cited

9 Wash.App. 169
Court of Appeals of Washington, Division 2.

Jackie L. WASHBURN and Mary W. Washburn, husband and wife, Appellants.
v.
Gordon ESSER et al., Respondents.

No. 779-II.
|
June 22, 1973.

Synopsis
Property owners brought action against adjacent owners seeking to quiet title to portion of property used as road to provide automobile access to lake. The Superior Court, Mason County, Robert J. Doran, J., established easement by prescription in favor of defendants, and plaintiffs appealed. The Court of Appeals, Armstrong, J., held that where owners of four adjacent, undeveloped lots constructed private road across all the lots, all four original owners orally agreed to and did share costs of construction, repair and use, with one owner performing most road maintenance, building house at highest location on his property and substantially improving his beach property, the original owners had acquired prescriptive easement for ingress and egress by open, notorious, continuous and adverse use for a period in excess of ten years, with no objection being raised by any owner during such period; use was not a matter of license but a grant as a matter of right.

Judgment affirmed.

West Headnotes (4)

[1] **Easements**
⇐Use by Permission or Agreement

A mere permissive use does not commence running of the period of prescription; a use which is permissive in its inception cannot ripen into prescriptive easement unless the user makes a distinct and positive assertion of a right adverse to owner of the property.

10 Cases that cite this headnote

[2] **Easements**
⇐Claim or Color of Right

Use of an easement under claim of right by virtue of an oral grant may be adverse so as to give a title by prescription although the oral grant itself is void under the statute of frauds; if use of the easement acquired by oral grant continues for prescriptive period of ten years in a manner that is open, notorious, or continuous and adverse to the owner of the land, the oral grant then ripens into a prescriptive easement of permanent use.

8 Cases that cite this headnote

[3] **Easements**
⇐Express Grant
Licenses
⇐Easement

Where there has been an oral permission of use, the presence of consideration is helpful in determining whether the parties intended to grant a permanent right or merely a revocable license to use the land; presence of consideration indicates the creation of an easement but the lack of it does not necessarily create merely a license.

3 Cases that cite this headnote

[4] **Easements**
⇐Prescription
Licenses
⇐Easement

Where owners of four adjacent, undeveloped

lots constructed private road across all the lots to provide automobile access to lake, all four original owners orally agreed to and did share costs of construction, repair and use, with one owner performing most road maintenance, building house at highest location on his property and substantially improving his beach property, the original owners and their successors, who considered use of road to be matter of right, had acquired prescriptive easement for ingress and egress by open, notorious, continuous and adverse use for a period in excess of ten years, with no objection being raised by any owner during such period; use was not a matter of license but a grant as a matter of right.

9 Cases that cite this headnote

Attorneys and Law Firms

***169** ****1388** Don W. Taylor, Fristoe, Taylor & Schultz, Olympia, for appellants.

Leonard W. Kruse, Shiers, Kruse & Roper, Port Orchard, for respondents, Esser and Bond.

James B. Sanchez, Sanchez, Martin & Armstrong, Bremerton, for respondent, Herrick.

Opinion

ARMSTRONG, Judge.

The plaintiffs have appealed from a judgment in a quiet title action establishing an easement by prescription in favor of the defendants. The sole issue ***170** raised by the appeal is: Does the use of a roadway for ten years pursuant to an oral grant establish a prescriptive easement? We hold that it does.

In May, 1946, the owners of four adjacent, undeveloped lots on Tiger Lake, in Mason County, constructed a private road to provide automobile access to the lake. Because of the steep grade from the beach to the upper portions of the lots the road was constructed to cross all four lots. A few years later a curve in the road was widened to provide better automobile access to the beach. All four original owners agreed to and did share in the cost of construction, repair and use of the road. Their agreement was never reduced to writing. Following construction of the road the lot owners considered that they had a right to use it.

In 1959 one of the original owners sold a portion of his lot to plaintiffs. In 1968 defendant Herrick, an original owner, sold portions of his property to defendants Esser and Bond. Other property changed hands but the present owners are not parties to this action.

The road was used by the original four lot owners, and their successors in interest, until May, 1971. At that time the plaintiffs posted 'road closed' signs and blockaded the road where it crossed their property. This quiet title action followed the dispute over the road closure.

The suit was tried to the court. The trial court specifically found that 'following construction of the road, the original lot owners considered they had a Right to use the road. That none of the four or their successors in interest ever asked permission of anyone to use the road.' (Italics ours.) Accordingly, the court held that the defendants or their predecessors had acquired an easement by prescription for ingress and egress after ten years from the ****1389** date the original four lot owners began using the road.

The plaintiffs contend that the evidence established mere permission to use the road and that a permissive use cannot ripen into a prescriptive easement.

[1] The plaintiffs are correct in their assertion that a ***171** mere permissive use does not commence the running of the period of prescription. A use which is permissive in its inception cannot ripen into a prescriptive easement unless the user makes a distinct and positive assertion of a right adverse to the owner of the property. State ex rel. Shorett v. Blue Ridge Club, Inc., 22 **Wash**.2d 487, 156 **P.2d** 667 (1945); Northwest Cities Gas Co. v. Western Fuel Co., 13 **Wash**.2d 75, 123 **P.2d** 771 (1942), (modified on other grounds by Cuillier v. Coffin, 57 **Wash**.2d 624, 358 **P.2d** 958 (1961)).[1]

Plaintiffs contend that no prescriptive right can come into existence if there is any communication of assent between adjoining landowners prior to use of the road in question. Defendants correctly point out that plaintiffs fail to make a distinction between a license of use, which is revocable by the landowner, and a grant of use as a matter of right.

In its carefully prepared memorandum opinion, the trial court addressed itself to this issue:
In the instant case the court finds the use of the road was

not Permitted as neighborly courtesy. The four original lot owners made an Oral agreement to put in the *172 road crossing the four lots so as to provide access to the beach portion of the four lots. They agreed to and did in fact share the cost. After the road was put in it was used by each considering such use to be a Matter of right. No permission was asked and none was granted. The road was used for over twenty years by the lot owners and their successors in interest as the means of reaching the beach. No attempt was made by any owner to challenge the use until the plaintiffs sought to block the access in May, 1971.

Since the four lot owners agreed to the construction of the road across their respective lots, shared in the cost, and thereafter used it to reach the beach portion of their lots for a length of time beyond the period of prescription, this court finds the mutual use of the entire road by each under a claim of right was essentially adverse to the separate and exclusive right of each other lot owner.

[2] We believe the circumstances in the instant case establish the exceptional situation in which a use of another's land is adverse even though the landowner agreed to the use of his property. The important question is whether the landowner permitted the use as a mere revocable license or whether an oral grant of a permanent right to use the property was intended. It is generally agreed that use of an easement under claim of right by virtue of **1390 an oral grant may be adverse so as to give a title by prescription, although the parol grant itself is void under the statute of frauds. If the use of the easement acquired by the oral grant continues for the prescriptive period of ten years in a manner that is open, notorious, continuous and adverse to the owner of the land, the oral grant then ripens into a prescriptive easement to permanently use the road. Lechman v. Mills, 46 **Wash**. 624, 91 P. 11 (1907); See Miller v. Jarman, 2 Wash.App. 994, 471 **P.2d** 704 (1970), and See Cuillier v. Coffin, Supra; 2 G. Thompson, Real Property, s 345, 257 (repl. 1961); 5 Restatement of Property, Servitudes s 458(f) (1944); 28 C.J.S. Easements s 18(j) (1941); Annot. 27 A.L.R.2d 332, 339 (1953).

[3] Where there has been an oral permission of use, the presence of consideration is helpful in determining whether *173 the parties intended to grant a permanent right or merely a revocable license to use the land. The presence of consideration indicates the creation of an easement but the lack of it does not necessarily create merely a license. 2 G. Thompson, Real Property, Supra, s 341 at page 222. We will, therefore, review the evidence to ascertain whether there was consideration to support a grant of a permanent right to use the road.

All four owners agreed to the construction of the road which crossed each of the properties. It is interesting to note that the crossing of the properties to obtain a more feasible access to the beach, the widening of a curve to improve the road and the initial planning were suggested by the original owner who conveyed property to the plaintiff. The evidence would also indicate that defendant Herrick, an original owner, performed most of the work in road maintenance, built a house at the highest location on his property and substantially improved his beach property.

[4] An analysis of all of the testimony establishes that the original owners agreed upon and jointly constructed a roadway that was to benefit and burden each other's land. They were each to use the road as a matter of right. Consideration was established. No objection to the use of the roadway by the original owners or their successors in interest was voiced by any of the owners or their successors in interest during the ten year prescription period. The original owners and their successors in interest used the roadway in a manner that was open, notorious, continuous and adverse to the other owners of the respective lots for a period in excess of ten years. From all of the facts and circumstances the trial court was clearly warranted in finding that the original owners and their successors in interest had acquired an easement by prescription for ingress and egress on the existing road.

Judgment affirmed.

PEARSON, C.J., and PETRIE, J., concur.

All Citations

9 Wash.App. 169, 511 P.2d 1387

Footnotes

1 Northwest Cities Gas Co. v. Western Fuel Co., 13 **Wash**.2d 75, 123 **P.2d** 771 (1942), written by Justice Steinert, contains a comprehensive discussion of the law relating to acquisition of easements by prescription. While it does not dispose of the issue presented in this case, it does present a helpful analysis of related law. It must be remembered, however, that Northwest Cities was modified by Cuillier v. Coffin, 57 **Wash**.2d 624, 358 **P.2d** 958 (1961). Cuillier modified the cases which held that use of

another's land for the prescriptive period creates a Presumption that the use was adverse and that the burden was then upon the owner to show that the use was permissive. The Cuillier court then stated the Washington rule at page 627, 358 **P.2d** at page 959:

We think, however, a more accurate statement, based on the results and holdings in all of our cases, would be that such unchallenged use for the prescriptive period is a circumstance from which an inference may be drawn that the use was adverse. Such unchallenged use is but one circumstance, and there may well be a combination of circumstances from which the trier of the facts could determine that such use was permitted as neighborly courtesy and was not adverse. Roediger v. Cullen, 1946, 26 **Wash.**2d 690, 175 **P.2d** 669, State ex rel. Shorett v. Blue Ridge Club, 1945, 22 **Wash.**2d 487, 156 **P.2d** 667.

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88 Wash.App. 176
Court of Appeals of Washington,
Division 1.

Frances LEE, a single person; Charles Folkner and Marian Folkner, husband and wife; Randall Wallis and Nancy Wallis, husband and wife; Bruce Sarpola and Teresa Sarpola, husband and wife; Bruce Brown and Trish Brown, husband and wife; Frans Koning and Nancy Koning, husband and wife, Respondents,
v.
Jon LOZIER and Patricia Lochwood, husband and wife, Appellants.

No. 38115–6–I.
|
Sept. 2, 1997.
|
Publication Ordered Sept. 29, 1997.

Synopsis
Subdivision residents brought action seeking establishment of prescriptive easement over dock which was located in part on lot of property owner in subdivision. The Superior Court, King County, Peter Jarvis, J., entered order granting easement allowing use without limitation, for recreational activities listed in order. Owner of servient lot appealed, and the Court of Appeals, Kennedy, Acting C.J., held that: (1) use of dock, which originated from oral grant of permission by lot's predecessor in interest, was adverse; (2) evidence supported finding that seasonally variable use of dock was continuous and uninterrupted; and (3) order's listing of permissible activities on dock consistent with general outlines of activity leading to prescriptive easement and did not exceed its scope.

Affirmed.

West Headnotes (18)

[1] **Easements**
Prescription

To establish prescriptive easement, claimant must prove (1) use adverse to title owner, (2) open, notorious, continuous and uninterrupted use for 10 years, and (3) that owner knew of adverse use when he was able to enforce his rights.

11 Cases that cite this headnote

[2] **Easements**
Questions for jury

Whether elements of prescriptive easement are met is a mixed question of fact and law.

18 Cases that cite this headnote

[3] **Appeal and Error**
Easements

Trial court's factual findings with respect to claim of prescriptive easement will be upheld if supported by record, while court's conclusion as to whether facts, as found, constitute a prescriptive easement is reviewed for errors of law.

15 Cases that cite this headnote

[4] **Easements**
Adverse Character of Use

Claimant makes "adverse possession" of property, which may give rise to prescriptive easement, if claimant uses property as if it were his own, entirely disregards claims of others, asks permission from nobody, and uses property under claim of right.

5 Cases that cite this headnote

[5] **Easements**
Presumptions and burden of proof

Use of property by prospective claimant is rebuttably presumed to be permissive and thus incapable of establishing prescriptive easement.

1 Cases that cite this headnote

[6] **Easements**
Use by permission or agreement

Permissive use of property by claimant is not adverse, and thus does not commence running of prescriptive period for establishing an easement.

3 Cases that cite this headnote

[7] **Easements**
Use by permission or agreement

Use of dock located on lot in subdivision by other tenants in subdivision, who had originally received oral permission to use dock from former owner, was adverse and could potentially provide basis for prescriptive easement; while subdivision tenants never received legal right to enter property, because former owner never filed easement against his property, his promise to file such an easement indicated intent to grant permanent, irrevocable right to use of property, and neighbors had paid for construction of dock, which was built as community dock.

3 Cases that cite this headnote

[8] **Easements**
Use by permission or agreement

Claimants who were granted permission to use land or who believe that they hold express easement are not automatically precluded from claiming that their use is adverse and that they are thus entitled to prescriptive easement, as important question is whether landowner permitted use as a mere revocable license or whether instead an oral grant of permanent right to use property was intended.

3 Cases that cite this headnote

[9] **Easements**
Claim or Color of Right

Use of easement under claim of right by virtue of oral grant may be adverse so as to give title by prescription even though parol grant itself is void under statute of frauds, and if use of easement acquired by oral grant continues for prescriptive period of 10 years in manner that is open, notorious, continuous, and adverse to owner of land, oral grant then ripens into prescriptive easement.

2 Cases that cite this headnote

[10] **Easements**
Use by permission or agreement
Easements
Claim or Color of Right

When owner of servient estate confers upon another right to use that property as if it had been legally conveyed, resultant use is made under claim of right, rather than by permission, and thus may form basis of prescriptive easement.

3 Cases that cite this headnote

[11] **Easements**
Use by permission or agreement

Presence of consideration is helpful in

determining whether property owner intended to grant a permanent right to use of property, which may form basis for prescriptive easement, or merely revocable license to use property.

1 Cases that cite this headnote

[12] **Easements**
Presumptions and burden of proof

Party who seeks to establish prescriptive easement bears burden of establishing by clear proof that they or their predecessors in interest used property continuously and in an uninterrupted fashion for at least 10 years.

4 Cases that cite this headnote

[13] **Easements**
Continuity of use

"Continuous and uninterrupted use" of property sufficient to establish prescriptive easement does not require proof of constant use of property, and instead, claimant need only demonstrate use of the same character that a true owner might make of property, considering its nature and location.

12 Cases that cite this headnote

[14] **Easements**
Weight and sufficiency

Evidence supported determination that residents of subdivision had made continuous and uninterrupted use of dock which was located in part on property of lot owner for period of ten years, as required to establish prescriptive easement; while use of dock was more extensive in summer months, such use was consistent with use generally given such docks, given water and air temperatures in area during winter, and residents used portions of dock located both on community beach lot and on owner's lot and did not differentiate use.

4 Cases that cite this headnote

[15] **Easements**
By prescription

Extent of rights acquired through prescriptive use is determined by uses through which right giving rise to easement originated.

4 Cases that cite this headnote

[16] **Easements**
Purposes of use

Easement acquired through prescription extends only to uses necessary to accomplish purpose for which easement was claimed.

5 Cases that cite this headnote

[17] **Easements**
Purposes of use

Specific recreational activities listed in trial court order establishing prescriptive easement over dock, which included, without limitation, waterskiing, swimming, fishing, sunbathing, and other activities, were consistent with general outlines of activity leading to prescriptive easement and did not exceed its scope, even though not all neighbors testified that they had engaged in all types of uses listed; purpose for which easement was claimed was recreation, and easement granted no more rights than claimants already believed they enjoyed.

3 Cases that cite this headnote

[18] **Easements**
Purposes of use

In ascertaining whether particular use is permissible under prescriptive easement, court should compare that use with uses leading to prescriptive easement in regard to (1) their physical character, (2) their purpose, and (3) relative burden caused by them upon servient tenement. Restatement of Property § 478.

5 Cases that cite this headnote

Attorneys and Law Firms

****216 *178** David James Lawyer, Bellevue, for Appellants.

G. Michael Zeno, Kirkland, for Respondents.

Opinion

KENNEDY, Acting Chief Judge.

Jon Lozier and Patricia Lochwood (collectively, Lozier) appeal the trial court's grant of a prescriptive easement to several of their neighbors in portions of a community dock lying within Lozier's property line. Lozier contends that the trial court erred in finding that the neighbors' use of the dock was adverse and continuous. They also contend that the easement granted by the court was overly broad. We affirm.

FACTS

Fogleman's Lake Washington Tracts is an 11–lot subdivision on the banks of Lake Washington. Lots 7 through 11 ***179** of the development border the lake; Lots 1 through 6 are inland lots. Lot 9 is a community beach lot, of which each lot owner holds an undivided one-tenth interest. The respondents in this case are the owners of the inland lots, Lots 1–6, and will be hereinafter referred to as "the neighbors".

In 1981, the neighbors equally divided the cost of building a community dock extending into the lake from the shore of Lot 9 with William Fogleman, who owned and lived on Lot 10, which borders Lot 9 to the south. As constructed, the dock generally follows the border dividing Lots 9 and 10 and widens at its end into an 80–foot long "T"-shaped water ski pier. Approximately one foot of the width of the dock stem, and half of the width of the water ski pier, lie within Lot 10; the remainder of the dock lies entirely within Lot 9. The dock has five moorage slips: three community slips that lie within Lot 9, and two that lie within Lot 10 to be used exclusively by the owner of Lot 10.

At the time the dock was built, Fogleman agreed to allow the neighbors to use the portions of the dock that extend onto Lot 10, apart from the two moorage slips. Minutes of a March 1981 homeowners meeting between the neighbors and Fogleman state that "Bill Fogleman agreed to give [the neighbors] a letter that he [would] never deny lot owners access to the water ski pier that crosses his property line." According to the meeting minutes, Fogleman stated that "as soon as the dock was completed, [the letter] w[ould] appear ... on [Lot 10's] title[.]" *Id.* Fogleman never recorded an easement against the title to Lot 10.

In the years following the completion of the dock, the neighbors used it for various activities including fishing, sailing, waterskiing, strolling, picnicking, temporarily tying up boats to unload goods and passengers, and mooring boats. During the warm summer months, the neighbors also used the dock for sunbathing and swimming.

Lozier purchased Lot 10 from Fogleman in 1989 and ***180** began extensive renovations on the home that stood on the lot. Prior to purchasing the lot, Lozier became aware of restrictive covenants and bylaws appearing on the title search. The covenants and bylaws prescribed rules for use of the community dock, but did not define "community dock" and did not differentiate between the uses made of the portions of the dock lying on Lot 9 and the portions lying on Lot 10. Lozier did not review the homeowners' association meeting minutes nor speak with any of the neighbors about the dock before purchasing the property.

Lozier took up residence on Lot 10 in 1992. From that time forward, Lozier occasionally noticed people, including the neighbors, using ****217** the Lot 10 portions of the dock. On several occasions, Lozier requested that the persons using the dock move to the Lot 9 portions of

the dock. Eventually, Lozier drew a chalk line on the dock separating Lot 10 from Lot 9 and put up a "private property" sign advising others to stay off the Lot 10 portions of the dock. The neighbors confronted Lozier and insisted they were entitled to use the entire dock, including the portions lying within Lot 10. The parties were unable to come to a resolution, and the neighbors filed suit in 1994.

In their complaint, the neighbors requested an order establishing their entitlement to a prescriptive easement to use the entire dock, including the portions extending onto Lot 10. Lozier filed a counterclaim requesting a permanent injunction preventing the neighbors from entering the Lot 10 portions of the dock.

At trial, neighbors who had attended the March 1981 homeowners' association meeting with Fogleman testified that the "letter" promised by Fogleman was understood to mean an easement by which Fogleman would grant the neighbors unrestricted use of the Lot 10 portions of the dock. None of the neighbors checked the title to Lot 10 to see whether an easement was ever recorded. Instead, they testified that they relied on Fogleman's promise that he would record the easement. One neighbor testified that Fogleman, when asked, years after the homeowners' association ***181** meeting, whether he had ever recorded the easement, stated that the easement had been "taken care of ... a long time ago." Fogleman denied at trial that he had promised to give the neighbors a permanent right to use the Lot 10 portions of the dock or to record an easement to that effect.

The trial judge found that the neighbors had openly used the Lot 10 portions of the dock for at least 10 years; that their use began under a claim of right in a fashion adverse to Fogleman; that Fogleman was aware of the adverse use by the neighbors at a time when he could have asserted his rights but did not do so; and that the neighbors' seasonal use was "continuous" given that the "use of a dock inevitably has a seasonal character." Concluding that the neighbors had satisfied the elements necessary for a prescriptive easement to use portions of the dock stem and waterski pier lying on Lot 10, the court entered judgment accordingly.

Lozier appeals.

DISCUSSION

I

[1] [2] [3] To establish a prescriptive easement, a claimant must prove: (1) use adverse to the title owner; (2) open, notorious, continuous and uninterrupted use for 10 years; and (3) that the owner knew of the adverse use when he was able to enforce his rights. *Bradley v. American Smelting & Refining Co.*, 104 **Wash**.2d 677, 693, 709 **P.2d** 782 (1985) (citing *Dunbar v. Heinrich*, 95 **Wash**.2d 20, 22, 622 **P.2d** 812 (1980)). Whether the elements of a prescriptive easement are met is a mixed question of fact and law. *Petersen v. Port of Seattle*, 94 **Wash**.2d 479, 485, 618 **P.2d** 67 (1980). A trial court's factual findings will be upheld if supported by the record; the court's conclusion that the facts, as found, constitute a prescriptive easement is reviewed for errors of law. *Stokes v. Kummer*, 85 Wash.App. 682, 689–90, 936 **P.2d** 4 (1997).

[4] [5] [6] Lozier first contends that the trial court erred in ***182** ruling that the neighbors' use of the Lot 10 portions of the dock was adverse. Possession is adverse if a claimant uses property as if it were his own, entirely disregards the claims of others, asks permission from nobody, and uses the property under a claim of right. *Crescent Harbor Water Co., Inc. v. Lyseng*, 51 Wash.App. 337, 341, 753 **P.2d** 555 (1988) (quoting *Malnati v. Ramstead*, 50 **Wash**.2d 105, 108, 309 **P.2d** 754 (1957)). Use of property is rebuttably presumed to be permissive. *Petersen*, 94 **Wash**.2d at 486, 618 **P.2d** 67. Permissive use is not adverse and does not commence the running of the prescriptive period. *Washburn v. Esser*, 9 Wash.App. 169, 171, 511 **P.2d** 1387 (1973).

[7] Lozier contends that the neighbors' use of the dock could not have been "hostile and adverse" because it was a permissive use ****218** granted by Fogleman as a neighborly courtesy. Lozier argues that because Fogleman did not revoke his permission until 1988,[1] no "adverse and hostile" use took place until that time. Lozier also contends that a prescriptive easement cannot be established where the claimants thought they held an express easement.

[8] [9] Contrary to Lozier's contention, claimants who were granted permission to use land or who believe that they hold an express easement are not automatically precluded from claiming that they are entitled to a prescriptive easement. "The important question is whether the landowner permitted the use as a mere revocable license or whether an oral grant of a permanent right to use the

property was intended." *Washburn,* 9 Wash.App. at 172, 511 **P.2d** 1387. As was stated in *Washburn:*

> It is generally agreed that use of an easement under claim of right by virtue of an oral grant may be adverse so as to give a title by prescription, although the parol grant itself is void under the statute of frauds. If the use of the easement ***183** acquired by the oral grant continues for the prescriptive period of 10 years in a manner that is open, notorious, continuous and adverse to the owner of the land, the oral grant then ripens into a prescriptive easement[.]

Id. at 172, 511 **P.2d** 1387 (citations omitted). Thus, even if Fogleman granted permission to the neighbors to use the Lot 10 portions of the dock, their use will still be "adverse" as long as they can demonstrate that they were operating under an oral grant of a permanent right to use the dock and not a temporary, revocable license to do so. We are satisfied that they have met this burden.

[10] It is undisputed that the neighbors never acquired a legal right to enter on Lot 10 because no easement was ever actually filed against that property. However, Fogleman's promise of filing a "letter" against his title indicated an intent to grant a permanent, irrevocable right to the neighbors to use the dock as if it were their own. The neighbors operated under that assumption for more than 10 years, an assumption which for at least one neighbor was reinforced by Fogleman's express assurance that the easement had been "taken care of." "When the owner of a servient estate confers upon another the right to use that property as if it had been legally conveyed, the resultant use is made under a claim of right, rather than by permission." *Crescent Harbor,* 51 Wash.App. at 342, 753 **P.2d** 555 (citations omitted).

[11] The *Washburn* court noted that the presence of consideration is helpful in determining whether the property owner intended to grant a permanent right or merely a revocable license to use the property. *Washburn,* 9 Wash.App. at 172–73, 511 **P.2d** 1387. In *Washburn,* consideration was established where the four property owners shared the costs of constructing and repairing a road that crossed each of their lots. *Id.* at 173, 511 **P.2d** 1387. Here, as in *Washburn,* the neighbors divided the cost of constructing the dock evenly among themselves and Fogleman. In addition, here, as in *Washburn,* the neighbors' expenditures were for the purpose of improving the dock to make it accessible to all the parties. ***184** Contrary to Lozier's contention, the neighbors' belief that they could use the entire dock was not dependent on Fogleman's permission; they believed they were entitled to do so because the dock was a community dock, paid for equally by themselves and Fogleman.[2] Given the consideration ****219** paid, we are satisfied that the neighbors were operating under a permanent right to use the Lot 10 portions of the dock when they did so during the prescriptive period.

The cases cited by Lozier are not to the contrary.[3] None of those cases involved the ineffective oral grant of a right to use property, which is the issue in this case and which was specifically addressed in *Washburn.* Nor are Lozier's attempts to distinguish *Washburn* persuasive. Contrary to Lozier's contention, *Washburn* does not require that the permanent right to use property be silently implied. Indeed, the *Washburn* court explicitly observed that an *oral* grant of a use as a matter of right may be adverse in nature even though such a grant is void under the statute of frauds. *See Washburn,* 9 Wash.App. at 171, 511 **P.2d** 1387 ("It is generally agreed that use of an easement under claim of right by virtue of an oral grant may be adverse so as to give a title by prescription, *although the parol grant itself is void under the statute of frauds* ") (emphasis added). In addition, nowhere did the *Washburn* court rest its holding on any element of necessity or mutuality, as Lozier implies. ***185** The trial court was correct in holding that the neighbors' use of the property was adverse.

II

[12] [13] [14] Lozier contends that the trial court erred in finding that the neighbors' use of the Lot 10 portions of the dock during the prescriptive period was continuous and uninterrupted. Lozier argues that because the neighbors' uses of the dock were sporadic and seasonal, taking place mostly during the summer months and on the weekends, the uses were not continuous or uninterrupted. Lozier correctly contends that each of the neighbors bore the burden of establishing by clear proof that they or their predecessors in interest used the Lot 10 portions of the dock continuously and in an uninterrupted fashion for at least 10 years. *See Howard v. Kunto,* 3 Wash.App. 393, 398, 477 **P.2d** 210 (1970) (overruled on other grounds by

Chaplin, 100 **Wash**.2d at 862, 676 **P.2d** 431). "Continuous and uninterrupted use" does not, however, require the neighbors to prove constant use of the dock. Instead, "the claimant need only demonstrate use of the same character that a true owner might make of the property considering its nature and location." *Double L. Properties, Inc. v. Crandall,* 51 Wash.App. 149, 158, 751 **P.2d** 1208 (1988) (citation omitted); *Howard,* 3 Wash.App. at 398, 477 **P.2d** 210 (continuous possession is established where the claimant uses the property in the way that an owner of property of like nature and condition would hold, manage, and care for the property). Thus, in *Howard,* occupancy only during the summer months of a beach home did not destroy the continuity of the claimants' use, where the surrounding homes were also used as summer recreational retreats. *Howard,* 3 Wash.App. at 398, 477 **P.2d** 210. *See also Reymore v. Tharp,* 16 Wash.App. 150, 153, 553 **P.2d** 456 (1976) (same).

The testimony at trial established not that that the neighbors used the dock only during the summer, but that they used it more frequently in the summer than any other time of year. The nature of the dock's use was ***186** recreational: it was used for typical recreational activities. Lozier presented no evidence to indicate that the neighbors' use of the dock—more in the summertime, less in the wintertime—was inconsistent with the uses made by other owners of similarly-situated docks. Given the water and air temperatures in the wintertime on Lake Washington, we can only conclude that use of the dock more frequently in summer than winter was entirely consistent with the uses most likely made of similar docks.

Lozier also contends that the neighbors failed to prove continuous use because some ****220** of the neighbors did not, in their testimony, differentiate between their uses of the Lot 9 and Lot 10 portions of the dock, in terms of quantification. We reject this contention. Lozier cites no authority for the proposition that such an accounting was required, and we know of none. Extensive testimony established that each of the six lot owners or their predecessors used both the Lot 9 *and* the Lot 10 portions of the dock, year after year, for at least 10 years. That testimony demonstrated that the neighbors or their predecessors in interest used the entire dock from the time it was built. Contrary to Lozier's contention, the fact that the neighbors did not heed the invisible line dividing Lot 9 from Lot 10 does not detract from but instead supports the neighbors' case, because it indicates that they viewed the dock as an undivided whole and used it as such. We hold that the neighbors produced sufficient evidence to support the trial court's finding of continuous and uninterrupted use of the entire dock, including those portions lying within Lot 10.

III

[15] [16] Lozier contends that the prescriptive easement granted by the trial court was overly broad because it allowed all of the neighbors to engage in "recreational uses" of the dock even though not all of the neighbors testified that they had engaged in all types of recreational uses in the past. The order provided:

> ***187** The recreational uses permitted under this easement shall include, without limitation, waterskiing, swimming, fishing, strolling, sunbathing, picnicking, and the temporary moorage of boats as permitted by the covenants and bylaws of the Homeowners' Association on the outer (western) portion of the "T-shaped" end of the dock.

Clerk's Papers at 74. The extent of the rights acquired through prescriptive use is determined by the uses through which the right originated. *Northwest Cities Gas Co. v. Western Fuel Co.,* 17 **Wash**.2d 482, 486, 135 **P.2d** 867 (1943); Restatement of Property § 477, at 2992 (1944). The easement acquired extends only to the uses necessary to accomplish the purpose for which the easement was claimed. *Yakima Valley Canal Co. v. Walker,* 76 **Wash**.2d 90, 94, 455 **P.2d** 372 (1969).

[17] [18] The "purpose" for which the easement was claimed by the neighbors was that of recreation. Lozier cites no authority for the proposition that an easement must be specifically limited to the individual activities that each of the claimants proved they engaged in in the past, and we know of none. Instead, as stated in the *Yakima Valley* case, the easement extends to uses necessary to achieve the *purpose* of the easement. The untenability of Lozier's position is recognized by the Restatement:

> No use can be justified under a

> prescriptive easement unless it can fairly be regarded as within the range of the privileges asserted by the adverse user and acquiesced in by the owner of the servient tenement. Yet, no use can ever be exactly duplicated. If any practically useful easement is ever to arise by prescription, the use permitted under it must vary in some degree from the use by which it was created. *Hence, the use under which a prescriptive interest arises determines the general outlines rather than the minute details of the interest.*

Restatement of Property § 477 comment b, at 2992 (emphasis added). In ascertaining whether a particular use is permissible under a prescriptive easement the court ***188** should compare that use with the uses leading to the prescriptive easement in regard to: (a) their physical character, (b) their purpose, and (c) the relative burden caused by them upon the servient tenement. Restatement, § 478 at 2994. Here, the physical character of the uses that led to the creation of the prescriptive easement in this case is very similar to the character of the uses permitted by the trial court's order: all are activities that take place on a dock. The purpose of the uses is the same: recreation. Lozier has not contended that the prescriptive easement granted will lead to increased or overburdening use of the dock. Such a contention would not be reasonable in the circumstances of this case, because the easement as ordered by the court granted no more rights than the neighbors believed they already enjoyed. We hold ****221** that the specific recreational activities set out in the trial court's order are consistent with the "general outlines" of the activity that led to the prescriptive easement, and do not exceed its scope.

The decision of the trial court is affirmed.

BAKER and COX, JJ., concur.

All Citations

88 Wash.App. 176, 945 P.2d 214

Footnotes

1 Lozier contends that Fogleman rescinded all agreements he had with the neighbors with regard to Lot 9 in a 1988 letter. Lozier failed to designate that letter for the appellate record, however. Accordingly, we can only consider the record that we have before us: the testimony of neighbor Trish Brown and of Fogleman that the 1988 letter did not relate in any way to the neighbors' use of the Lot 10 portions of the dock.

2 The neighbors' subjective beliefs regarding the specifics of their arrangement with Fogleman are irrelevant in any event—it is only important that uses they made of the dock were inconsistent with Fogelman's rights:

> The "hostility/claim of right" element of adverse possession requires only that the claimant treat the land as his own as against the world throughout the statutory period. The nature of his possession will be determined solely on the basis of the manner in which he treats the property. His subjective belief regarding his true interest in the land and his intent to dispossess or not dispossess another is irrelevant to this determination.

Chaplin v. Sanders, 100 **Wash**.2d 853, 860–61, 676 **P.2d** 431 (1984) (citations omitted).

3 *See, e.g., Millard v. Granger,* 46 **Wash**.2d 163, 279 **P.2d** 438 (1955); *Roediger v. Cullen,* 26 **Wash**.2d 690, 175 **P.2d** 669 (1946); *Crites v. Koch,* 49 Wash.App. 171, 741 **P.2d** 1005 (1987); *Granston v. Callahan,* 52 Wash.App. 288, 759 **P.2d** 462 (1988); *Ormiston v. Boast,* 68 **Wash**.2d 548, 413 **P.2d** 969 (1966).

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183 Wash.2d 38
Supreme Court of Washington,
En Banc.

Magdaleno GAMBOA and Mary J. Gamboa, husband and wife, Petitioners,
v.
John M. CLARK and Deborah C. Clark, husband and wife, Respondents.

No. 90291–7.
|
Argued Feb. 10, 2015.
|
Decided April 16, 2015.

Synopsis
Background: Claimants brought action against holders of title to roadway, alleging existence of a prescriptive easement. The Superior Court, Yakima County, Rodney K. Nelson, J., entered judgment awarding claimants a nonexclusive easement over title holders' roadway. Title holders appealed. The Court of Appeals, 180 Wash.App. 256, 321 **P.3d** 1236, affirmed in part and reversed in part. Claimants appealed.

Holdings: The Supreme Court, Owens, J., held that:

[1] an initial presumption of permissive use applies to enclosed or developed land cases in which there is a reasonable inference of neighborly sufferance or acquiescence, abrogating *Drake v. Smersh,* 122 Wash.App. 147, 89 **P.3d** 726;

[2] evidence supported reasonable inference of neighborly accommodation and thus title holders were entitled to rely on presumption of permissive use; and

[3] claimants failed to overcome presumption of permissive use as would support a finding of prescriptive easement.

Affirmed.

West Headnotes (15)

[1] **Easements**
Prescription

Prescriptive easement rights are not favored in the law, since they necessarily work corresponding losses or forfeitures of the rights of other persons.

Cases that cite this headnote

[2] **Easements**
Prescription

To establish a prescriptive easement, the person claiming the easement must use another person's land for a period of 10 years and show that (1) he or she used the land in an "open" and "notorious" manner, (2) the use was "continuous" or "uninterrupted," (3) the use occurred over "a uniform route," (4) the use was "adverse" to the landowner, and (5) the use occurred with the knowledge of such owner at a time when he was able in law to assert and enforce his rights.

3 Cases that cite this headnote

[3] **Easements**
Presumptions and burden of proof

The claimant bears the burden of proving the elements of a prescriptive easement.

Cases that cite this headnote

[4] **Easements**
Questions for jury

Whether a claimant has established the elements of a prescriptive easement is a mixed question of law and fact.

Cases that cite this headnote

[5] **Appeal and Error**
Discretion of lower court; abuse of discretion

A trial court's factual findings are reviewed for abuse of discretion.

1 Cases that cite this headnote

[6] **Appeal and Error**
Easements

A trial court's conclusion that the facts, as found, constitute a prescriptive easement is reviewed de novo.

3 Cases that cite this headnote

[7] **Easements**
Adverse Character of Use

Supreme Court generally interprets the term adverse use, in the context of a prescriptive easement, as meaning that the land use was without the landowner's permission.

Cases that cite this headnote

[8] **Easements**
Prescription

There is no requirement that a prescriptive easement claimant believe he or she owns the property to establish adverse use, as a claimant's subjective intent is irrelevant.

Cases that cite this headnote

[9] **Easements**
Presumptions and burden of proof

The prescriptive easement claimant may defeat the presumption of permissive use when the facts demonstrate 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.

2 Cases that cite this headnote

[10] **Easements**
Use by permission or agreement

When a court finds a land use is permissive in its inception, it cannot ripen into a prescriptive easement right, no matter how long it may continue, unless there has been a distinct and positive assertion by the dominant owner of a right hostile to the owner of the servient estate.

1 Cases that cite this headnote

[11] **Easements**
Use by permission or agreement

A land use is "permissive in its inception" when a landowner actually gives a claimant permission to use the land, and the claimant's license to use the land can never ripen into a prescriptive easement right unless the user distinctly asserts that he or she is using the land as of right.

Cases that cite this headnote

[12] **Easements**
Presumptions and burden of proof

An initial presumption of permissive use, whereby a person entering onto another's land does so with the true owner's permission and in subordination to the latter's title, applies to enclosed or developed land cases in which there is a reasonable inference of neighborly sufferance or acquiescence, in prescriptive easement cases; abrogating *Drake v. Smersh,* 122 Wash.App. 147, 89 **P.3d** 726.

8 Cases that cite this headnote

[13] **Easements**
Presumptions and burden of proof

Evidence supported a reasonable inference of neighborly accommodation by holders of title to roadway, and demonstrated claimants' noninterfering use, in common, of a roadway that was constructed by the title holders' predecessor, which the claimants did not improve, and thus title holders were entitled to rely on a presumption of permissive use in claimants' action alleging prescriptive easement over roadway; parties were neighbors, both used the roadway for years without any disputes and were aware of the other's use of the roadway, and neither party objected to the other's use until a recent dispute arose.

1 Cases that cite this headnote

[14] **Easements**
Adverse Character of Use

For a prescriptive easement claimant to show that land use is "adverse and hostile to the rights of the owner," the claimant must put forth evidence that he or she interfered with the owner's use of the land in some manner.

3 Cases that cite this headnote

[15] **Easements**
Weight and sufficiency

Claimants, who used gravel road adjacent to their property as a driveway to access their home, failed to overcome presumption of permissive use, and thus, failed to establish a prescriptive easement over the road, where claimants' occasional blading of the road did not interfere with road's title holders' use of the road, and title holders had not indicated that the claimants had an easement over the road.

Cases that cite this headnote

Attorneys and Law Firms

****1215** Kevan Tino Montoya, Tyler Michael Hinckley, Montoya Hinckley PLLC, Yakima, WA, for Petitioners.

Christopher Martin Constantine of Counsel Inc. PS, Tacoma, WA, for Respondents.

Opinion

OWENS, J.

***40** ¶ 1 For many years, Magdaleno and Mary Gamboa have used a gravel road adjacent to their property as a driveway to access their home. The road is primarily on the property of their neighbors, John and Deborah Clark. The Gamboas and Clarks used the road for their respective purposes for many years without an objection from either family. After disputes arose between them, the Gamboas filed suit to obtain a legal right to use the road.

¶ 2 This case requires us to determine whether the Gamboas met one of the requirements of the rule that would allow them to continue using the road. Specifically, the Gamboas must show that their use of the road was adverse to the Clarks (i.e., without the Clarks' permission). Since the evidence shows a reasonable inference that the Clarks let the Gamboas use the road out of neighborly acquiescence, we hold that the Gamboas did not show that their use of the road was adverse to the Clarks. Therefore, the Gamboas may not continue using the road, and we affirm the Court of Appeals.

**1216 FACTS

¶ 3 The Gamboas and Clarks own adjoining parcels of land separated by a gravel road in a rural area in Yakima County. The Gamboas own a 17–acre western parcel to farm alfalfa, and the Clarks own a 25–acre eastern parcel to farm grapes. The parcels were created in 1964 when the original co-owners, the Padghams and McConnells, split up the 42–acre parent parcel into the 17– and 25–acre parcels described above. The Padghams and McConnells sold the 25–acre eastern parcel (which included the road) to the Slouin family, the family preceding the Clarks to that parcel. The Padghams and McConnells retained the 17–acre western parcel. The Padghams and McConnells sold their parcel to the Gamboas *41 in 1992, and the Slouins sold their parcel to the Clarks in 1995.

¶ 4 Since coming to the parcel in 1992, the Gamboas used the gravel road as a driveway to access their home and some of their alfalfa crop. The Gamboas have occasionally bladed the road and on one occasion applied gravel to maintain its condition. When the Clarks came to their parcel in 1995, they used the road to farm grapes, including watering the grape plants and spraying for weeds. 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 no one objected to the other's use until a dispute arose in 2008." Clerk's Papers (CP) at 195.

¶ 5 A dispute arose in 2008 over the Gamboas' dogs and the Clarks' irrigation practices, and "it eventually escalated into a dispute over which of them owned the land on which the roadway was situated." *Id.* Land surveys revealed that a small portion of the gravel road (the portion where it connects with East Allen Road) is on the Gamboas' property, but that the rest of the gravel road is on the Clarks' property until the road reaches an area where the Gamboas have an express easement over the Clarks' property (the express easement dating back to 1964 when the parent parcel was split).

¶ 6 At trial, the trial court listed the elements for a prescriptive easement as follows:

> that the claimaint's use must be adverse to the right of the owner of the servient parcel; that the use by the claimant be open, notorious, continuous, hostile and uninterrupted over the prescriptive period of ten years, and that the servient owner has knowledge of such use at the time when he or she would be able at law to assert and enforce his or her rights.

Id. at 196. The trial court noted that "the primary element in dispute ... is whether the use by the Plaintiffs Gamboa was 'adverse' to the rights of the Defendants Clark over a *42 period of at least ten years." *Id.* at 196–97. The court defined "adverse use" as follows: "A claimant's use is adverse unless the property owner can show that the use was permissive." *Id.* at 197. It found "that Mr. Clark did not give the Gamboas [ ] express or implied permission to use the road, and therefore, the use of the road was adverse." *Id.* Additionally, the court concluded that the Gamboas' land use was adverse "[i]n view of the fact that the use made of the roadway ... by the Plaintiffs Gamboa was 'open, notorious, continuous, uninterrupted,' and in a fashion that a true owner would use his own land, all for more than a ten-year period." *Id.* at 198 (quoting *Nw. Cities Gas Co. v. W. Fuel Co.*, 13 **Wash.2d** 75, 85, 123 P.2d 771 (1942)).

¶ 7 The Court of Appeals reversed, concluding that the trial court applied the wrong legal presumption and burden of proof regarding adverse use. *Gamboa v. Clark*, 180 Wash.App. 256, 280–82, 321 **P.3d** 1236 (2014). The Court of Appeals held that the trial court erred by applying a presumption that the claimant's use is adverse unless the property owner can show it was permissive. *Id.* at 280–81, 321 **P.3d** 1236. Instead, the Court of Appeals cited *Northwest Cities* for the proposition that the initial presumption is that the claimant's use is permissive and the claimant can shift the presumption from permissive use to adverse use depending on the facts. *Id.* at 267, 321 **P.3d** 1236. The Court of Appeals cited this court's decisions in *Roediger v. Cullen*, 26 **Wash.2d** 690, 175 P.2d 669 (1946), and *Cuillier v. Coffin*, 57 **Wash.2d** 624, 358 P.2d 958 (1961), however, to say that the presumption of permissive use will not **1217 shift to adverse use if the evidence supports a reasonable inference of neighborly accommodation or if the evidence demonstrates noninterfering use of a roadway constructed by the landowners' predecessor. *Gamboa*, 180 Wash.App. at 282, 321 **P.3d** 1236. Here, the Court of Appeals found the evidence supported a reasonable inference of neighborly accommodation and demonstrated noninterfering use of a roadway constructed by the Clarks' predecessor. *Id.* Thus, the court held that those inferences prevented the *43 presumption of permissive use from shifting to a presumption of adverse use. *Id.*

¶ 8 We granted discretionary review. *Gamboa v. Clark,* 181 **Wash.2d** 1001, 332 **P.3d** 984 (2014).

ISSUE

¶ 9 Is there an initial presumption that a claimant's use of land is permissive in prescriptive easement cases?

ANALYSIS

¶ 10 The seminal case on prescriptive easements is *Northwest Cities,* 13 **Wash.2d** 75, 123 P.2d 771. In that case, we articulated a set of principles about prescriptive easements by looking to both our case law and scholarly texts. *See id.* at 82–86, 123 P.2d 771. Although we did not originally intend the principles to be a "compendium of the general law of easements," *id.* at 88, 123 P.2d 771, we have reaffirmed many of those principles, calling them "fundamental propositions" that are "binding upon us." *Roediger,* 26 **Wash.2d** at 706, 175 P.2d 669. The propositions relevant to this case are as follows.

[1] [2] ¶ 11 "Prescriptive rights ... are not favored in the law, since they necessarily work corresponding losses or forfeitures of the rights of other persons." *Nw. Cities,* 13 **Wash.2d** at 83, 123 P.2d 771. To establish a prescriptive easement, the person claiming the easement must use another person's land for a period of 10 years and show that (1) he or she used the land in an "open" and "notorious" manner, (2) the use was "continuous" or "uninterrupted," (3) the use occurred over "a uniform route," (4) the use was "adverse" to the landowner, and (5) the use occurred "with the knowledge of such owner at a time when he was able in law to assert and enforce his rights." *Id.* at 83, 85, 123 P.2d 771. Whether the Gamboas' use was adverse is the sole issue in this case.

[3] [4] [5] [6] ¶ 12 The claimant bears the burden of proving the elements of a prescriptive easement. *Id.* at 84, 123 P.2d 771. We review ***44** whether a claimant has established those elements as a mixed question of law and fact. *Petersen v. Port of Seattle,* 94 **Wash.2d** 479, 485, 618 P.2d 67 (1980). A trial court's factual findings are reviewed for abuse of discretion; a trial court's "conclusion that the facts, as found, constitute a prescriptive easement" is reviewed de novo. *Lee v. Lozier,* 88 Wash.App. 176, 181, 945 P.2d 214 (1997).

1. Adverse Use and the Presumption of Permissive Use

[7] [8] [9] ¶ 13 We generally interpret adverse use as meaning that the land use was without the landowner's permission. *See, e.g., Roediger,* 26 **Wash.2d** at 707, 175 P.2d 669. There is no requirement that the claimant believe he or she owns the property to establish adverse use—a claimant's subjective intent is irrelevant. *Dunbar v. Heinrich,* 95 **Wash.2d** 20, 27, 622 P.2d 812 (1980); *see Chaplin v. Sanders,* 100 **Wash.2d** 853, 860–61, 676 P.2d 431 (1984) (abandoning a subjective intent requirement to establish hostility, i.e., adversity, in adverse possession cases). That being said, we start with the presumption that when someone enters onto another's land, the person "does so with the true owner's permission and in subordination to the latter's title." *Nw. Cities,* 13 **Wash.2d** at 84, 123 P.2d 771. However, we have limited the presumption of permissive use to three factual scenarios. First, the presumption applies to cases involving unenclosed land. *See Roediger,* 26 **Wash.2d** at 710–11, 175 P.2d 669 (saying that "[i]f it be true that the lands are un[e]nclosed, the presumption is that the use was permissive, and, therefore, that no easement was acquired"). Second, the presumption applies to enclosed or developed land cases in which "it is reasonable to infer that the use was permitted by neighborly sufferance or acquiescence." ****1218** *Id.* at 707, 175 P.2d 669. Third, the presumption applies when the evidence demonstrates that the owner of the property created or maintained a road and his or her neighbor used the road in a noninterfering manner. *Cuillier,* 57 **Wash.2d** at 627, 358 P.2d 958. The claimant may defeat the presumption of permissive use "when the facts and circumstances are such as to ***45** 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." *Nw. Cities,* 13 **Wash.2d** at 87, 123 P.2d 771.

¶ 14 Our decision in *Roediger* used the word "impl[ying]" permissive use interchangeably with the word "presumption" of permissive use, and it has caused confusion and led to a split in the Court of Appeals. 26 **Wash.2d** at 707–11, 175 P.2d 669. Division One has strictly limited the presumption of permissive use to vacant and unenclosed land cases—in all enclosed and developed land cases, it has held that courts may infer permission only if the record "support[s] a reasonable inference of permissive use." *Drake v. Smersh,* 122 Wash.App. 147, 153–54, 89 **P.3d** 726 (2004). Differently, in this case, Division Three broadly held that a

presumption of permissive use applies to all cases, regardless of whether the land is enclosed or developed. *Gamboa,* 180 Wash.App. at 268, 321 **P.3d** 1236.

[10] [11] ¶ 15 The confusion over a use being implied or presumed permissive is compounded by another presumption rule from *Northwest Cities* in which a court can find a person's land use "permissive in its inception." 13 **Wash.2d** at 84, 123 P.2d 771. When a court finds a use "is permissive in its inception," it "cannot ripen into a prescriptive right, no matter how long it may continue, unless there has been a distinct and positive assertion by the dominant owner of a right hostile to the owner of the servient estate." *Id.* A land use is "permissive in its inception" when a landowner actually gives a claimant permission to use the land—the claimant's license to use the land can never ripen into a prescriptive right unless the user distinctly asserts that he or she is using the land as of right. *Bulkley v. Dunkin,* 131 Wash. 422, 425, 230 P. 429 (1924), *affd,* 236 P. 301 (1925). Additionally, we have held that when "the use of [a] pathway [*arises*] *out* of mutual neighborly acquiescence," the use is deemed "permissive in its inception." *Roediger,* 26 **Wash.2d** at 713–14, 175 P.2d 669 (emphasis added). This presumption is more difficult for claimants to ***46** rebut because it requires them to distinctly and positively assert a claim of right.

2. The Competing Presumption of Adverse Use

¶ 16 The Court of Appeals did not limit the presumption of permissive use to the factual scenarios discussed above. Instead, it found that an initial presumption of permissive use applies in *every* case and that a competing presumption of adverse use can potentially apply in every case. *Gamboa,* 180 Wash.App. at 267–68, 321 **P.3d** 1236. In *Northwest Cities,* we said that a presumption of adverse use can be created when a claimant meets all of the elements of a prescriptive easement other than adverse use "unless otherwise explained." 13 **Wash.2d** at 85, 123 P.2d 771. The Court of Appeals interpreted that language as saying that certain "explanations" or factual scenarios will prevent the shift from a use being presumed permissive to being presumed adverse. *Gamboa,* 180 Wash.App. at 267–68, 321 **P.3d** 1236. The three scenarios that the Court of Appeals stated would prevent this shift are the same three scenarios that prescribe the presumption of permissive use, as discussed above. *See id.* at 270–72, 321 **P.3d** 1236 (listing vacant and unenclosed land cases, cases where there is a reasonable inference of neighborly accommodation, and cases where the property at issue is a road constructed by the servient owner used in common with the claimant). However, in a later case, we questioned whether this competing presumption of adverse use is actually a "presumption." *See Cuillier,* 57 **Wash.2d** at 627, 358 P.2d 958 (stating that "a more accurate statement" of the law is that there are "circumstance[s] from which an inference may be drawn that the use was adverse"). That discrepancy is an academic question in this case, and we leave it for another day. Here, we must determine whether there is a presumption ****1219** of *permissive use* under our precedent.

***47** *3. An Initial Presumption of Permissive Use Applies to Enclosed or Developed Land Cases in Which There Is a Reasonable Inference of Neighborly Sufferance or Acquiescence*

[12] ¶ 17 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. In *Roediger,* a group of claimants sought a prescriptive easement to use a footpath over the land of beachfront homeowners on Vashon Island that they had used for roughly 30 years. 26 **Wash.2d** at 691–92, 700, 175 P.2d 669. The path was located between the beach and the homes. *Id.* at 692, 175 P.2d 669. The path was created by "neighborly usage," and none of the persons claiming an easement had ever asked for or received permission to cross the property of the homeowners. *Id.* at 692, 697, 175 P.2d 669. We "suspect[ed] that all the properties involved in this case [were] un[e]nclosed," but we did "not decide the case on that theory." *Id.* at 710–11, 175 P.2d 669. We rejected a presumption of adverse use in this scenario, saying it "completely disregards the well-established rule that permissive use may be implied." *Id.* at 707, 175 P.2d 669. We said that although the rule of inferring permissive use "has been chiefly applied in cases involving un[e]nclosed lands, ... it is applicable to any situation where it is reasonable to infer that the use was permitted by neighborly sufferance or acquiescence." *Id.* That language about "inferring" or "implying" permission notwithstanding, we also said that there is a presumption of permissive use whenever there is a reasonable inference of neighborly accommodation. *Id.* at 711, 175 P.2d 669 (" 'where persons traveled the private road of a neighbor in conjunction with such neighbor and other persons, nothing 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 claim of right and adverse to the ***48** owner of

the land.' " (quoting 2 GEORGE W. THOMPSON, COMMENTARIES ON THE MODERN KAW OF REAL PROPERTY § 521, at 106 (perm. ed.1939))).

¶ 18 Considering the facts of the case, we went on to hold that the claimants' use was "permissive in its inception" because we found a reasonable inference that "the use of the pathway *arose out* of mutual neighborly acquiescence." *Id.* at 713, 175 P.2d 669 (emphasis added). Because we deemed the use permissive in its inception, we applied the stronger presumption of permissive use, requiring the claimants to put forth evidence that they made a positive assertion that they claimed to use the path as of right. *Id.* at 713–14, 175 P.2d 669. We determined that the claimants failed to provide any evidence that they "ever made a positive assertion to the [landowners] ... that [they] claimed to use the path as of right," and we therefore held that the claimants failed to show adverse use. *Id.* at 714, 175 P.2d 669.

¶ 19 We discussed policy considerations that uniformly supported applying a presumption of permissive use. We said,

> "The law should, and does encourage acts of neighborly courtesy; a landowner *who quietly acquiesces* in the use of a path, or road, across his uncultivated land, resulting in no injury to him, but in great convenience to his neighbor, ought not to be held to have thereby lost his rights. It is only when the use of the path or road is clearly adverse to the owner of the land, and not an enjoyment of neighborly courtesy, that the landowner is called upon 'to go to law' to protect his rights."

Id. at 709, 175 P.2d 669 (quoting *Weaver v. Pitts,* 191 N.C. 747, 133 S.E. 2, 3 (1926)). Applying a presumption of permissive use incentivizes landowners to allow neighbors to use their roads for the neighbors' convenience. We do not want to require a landowner "to adopt a dog-in-the-manger attitude in order to protect his title to his property." *State ex rel. Shorett v. Blue Ridge Club, Inc.,* 22 **Wash.2d** 487, 495–96, 156 P.2d 667 (1945). Not applying a presumption of permissive ***49** use in these circumstances punishes a courteous neighbor by taking away his or her property right.

****1220** *The Gamboas' Argument That the Presumption of Permissive Use Is Limited to Unenclosed Land Cases under Roediger and Cuillier Is Incorrect*

¶ 20 The Gamboas primarily rely on *Roediger* and *Cuillier* to support their argument that there is no presumption of permissive use in enclosed or developed land cases. They contend that permission or adversity is a question of fact for the trier of fact to infer from the circumstances of the case. However, they misinterpret the holdings from *Roediger* and *Cuillier.*

¶ 21 First, the Gamboas contend that *Roediger* did not apply the presumption of permissive use that is ordinarily applicable in vacant land cases, but rather held narrowly that a "use that is permissive in its inception cannot become adverse until 'a distinct and positive assertion of a right hostile to the owner' is 'brought home to [the servient owner].' " Suppl. Br. of Pet'rs at 9 (alteration in original) (quoting *Roediger,* 26 **Wash.2d** at 714, 175 P.2d 669). They fail to recognize, though, that in *Roediger,* we also stated that there is a presumption of permissive use whenever there is a reasonable inference of neighborly accommodation. 26 **Wash.2d** at 711, 175 P.2d 669 (" 'where persons traveled the private road of a neighbor in conjunction with such neighbor and other persons, nothing 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 claim of right and adverse to the owner of the land.' " (quoting THOMPSON, *supra,* § 521, at 106)). The "permissive in its inception" discussion occurred in the context of our finding that the evidence supported a reasonable inference that the land use *arose out of,* or resulted from, neighborly sufferance and acquiescence. *Id.* at 707, 713–14, 175 P.2d 669. That finding created a stronger presumption of permissive use than would be typical in neighbor accommodation cases. *See id.* ***50** Thus, the petitioners misinterpret *Roediger—Roediger* does not limit the presumption of permissive use to vacant and unenclosed land cases.

¶ 22 Second, the Gamboas' reliance on *Cuillier* is misguided. *Cuillier* does not limit the presumption of permissive use to unenclosed land cases—to the contrary, it recognizes an additional factual scenario in which the presumption of permissive use is appropriate. 57 **Wash.2d** at 627, 358 P.2d 958. *Cuillier* primarily limits the *competing presumption of adverse use,* and thus the main focus of *Cuillier* is irrelevant to this case. In *Cuillier,* the claimants wanted to use a landowner's

orchard road. *Id.* at 625, 358 P.2d 958. The claimants argued that because they used the road for the prescriptive period without permission, "there was a presumption that their use was adverse and that the burden was then upon the owner to show the use was permissive." *Id.* at 626, 358 P.2d 958. We called the rule presuming adverse use into doubt, saying, "We think, however, a more accurate statement, based on the results and holdings in all of our cases, would be that such unchallenged use for the prescriptive period is a circumstance from which an inference may be drawn that the use was adverse." *Id.* at 627, 358 P.2d 958. However, we also recognized that there is a presumption of permissive use when the evidence demonstrates that the owner of the property created or maintained a road and his or her neighbor used the road in a noninterfering manner.[1] *Id.* Thus, the core portion of *Cuillier* that is about "inferences" applies only to the competing presumption of adverse use and is irrelevant to this case. Further, *Cuillier* actually recognizes a scenario (in addition to unenclosed land cases) in which a presumption of permissive use is appropriate.

¶ 23 Thus, the petitioners misinterpret *Roediger* and *Cuillier.* We hold that an initial presumption of permissive ***51** use applies to enclosed or developed land cases in which there is a reasonable inference of neighborly sufferance or acquiescence.

****1221** *4. The Evidence Supported a Reasonable Inference of Neighborly Sufferance or Acquiescence*

[13] ¶ 24 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 travel[ing] the private road of a neighbor in conjunction with such neighbor and other persons, nothing further appearing.' " *Roediger,* 26 **Wash.2d** at 711, 175 P.2d 669 (quoting THOMPSON, *supra,* § 521, at 106). Again, that case involved people using a private footpath over homeowners' beachfront property without express permission in conjunction with the homeowners. *Id.* at 691–92, 697–98, 175 P.2d 669. We inferred from those facts "no more than the usual accommodation between neighbors." *Id.* at 712, 175 P.2d 669.

¶ 25 Here, there is a similar reasonable 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." CP at 195. 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.

5. The Gamboas Failed To Overcome the Presumption of Permissive Use

[14] ¶ 26 As mentioned above, a claimant may defeat the presumption of permissive use when the facts demonstrate ***52** 1) "the user was adverse and hostile to the rights of the owner, or" (2) "the owner has indicated by some act his admission that the claimant has a right of easement." *Nw. Cities,* 13 **Wash.2d** at 87, 123 P.2d 771 (citing THOMPSON, *supra,* § 523, at 111). For a claimant to show that land use is "adverse and hostile to the rights of the owner" in this context, the claimant must put forth evidence that he or she interfered with the owner's use of the land in some manner. *See id.* at 90–91, 123 P.2d 771 (finding that the claimant's direct predecessor's acts of laying out a "definite road across the premises" and regularly improving and maintaining the road were sufficient to indicate a hostile intent to the owner's rights and use of the property).

[15] ¶ 27 Here, the Gamboas cannot demonstrate either that they interfered with the Clarks' use of the driveway or that the Clarks indicated that the Gamboas had an easement over the driveway. The Gamboas' occasional blading of the road did not interfere with the Clarks' use of the road in any manner because the Clarks used the road as a road (to access their grape plants). Indeed, the trial court found that both parties "used the roadway ... 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." CP at 195. The fact that the Gamboas thought they owned the road was irrelevant. *Dunbar,* 95 **Wash.2d** at 27, 622 P.2d 812. Thus, the Gamboas failed to overcome the presumption of permissive use because they did not demonstrate a use that was adverse and hostile to the rights of the Clarks, and they did not demonstrate that the Clarks indicated that they had an easement.

CONCLUSION

¶ 28 Regarding the "adverse use" element in prescriptive easement cases, our precedent supports applying an initial presumption of permissive use to enclosed or developed land cases in which there is a reasonable inference of *53 neighborly sufferance or acquiescence. We find that the evidence supports a reasonable inference of neighborly sufferance or acquiescence because the Gamboas and Clarks both used the road for their own purposes in conjunction with each other without incident. The Gamboas failed to overcome the presumption of permissive use. Accordingly, the Gamboas failed to establish a prescriptive easement, and we affirm the Court of Appeals.

MADSEN, C.J., and JOHNSON, FAIRHURST, STEPHENS, WIGGINS, GONZALEZ GORDON MCCLOUD, and YU, JJ., concur.

All Citations

183 Wash.2d 38, 348 P.3d 1214

Footnotes

1 Unlike the Court of Appeals below, we do not find that this presumption from *Cuillier* applies to this case. Here, the record does not demonstrate that the Clarks or their predecessor (the Slouins) created or maintained the gravel road. The road preexisted both the Clarks and Gamboas coming to the property.

End of Document

6 Wash.App.2d 88
Court of Appeals of Washington, Division 2.

Stuart F. **MCCOLL**, a Married Man Dealing with His Separate Property, Appellant,
v.
Geoffrey A. **ANDERSON**, a Married Man Dealing with His Separate Property, Respondent.

No.
50998
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9
-
II

Filed November 14, 2018

Synopsis

Background: Owner of purported dominant estate brought declaratory judgment action against owner of purported servient estate, seeking a declaration that purported dominant estate had prescriptive easements regarding a water distribution system and related water lines on purported servient estate's property. The Superior Court, Clallam County, Christopher X. Melly, J., granted summary judgment in favor of owner of purported servient estate, and awarded attorney fees. Owner of purported dominant estate appealed the attorney fee award.

[Holding:] The Court of Appeals, Maxa, C.J., held that attorney fee provision governing an award of attorney fees to a prevailing party in a dispute over title to property did not apply.

Reversed and vacated.

West Headnotes (13)

[1] **Appeal and Error**
Statutory or legislative law

Statutory interpretation is a matter of law that reviewed de novo.

Cases that cite this headnote

[2] **Statutes**
Intent

The purpose of statutory interpretation is to determine and give effect to the legislature's intent.

Cases that cite this headnote

[3] **Statutes**
Construction based on multiple factors

To determine legislative intent of a statute, the Court of Appeals first looks to the plain language of the statute, considering the text of the provision, the context of the statute, related provisions, and the statutory scheme as a whole.

Cases that cite this headnote

[4] **Statutes**
Plain Language; Plain, Ordinary, or Common Meaning

In interpreting a statute, the court gives words their usual and ordinary meaning.

Cases that cite this headnote

[5] **Constitutional Law**
Judicial rewriting or revision

In interpreting a statute, the Court of Appeals cannot rewrite plain statutory language under

the guise of construction.

Cases that cite this headnote

[6] **Appeal and Error**
Authorization, eligibility, and entitlement in general; prevailing party

Whether a trial court has authority to award attorney fees under a statute is an issue reviewed de novo.

Cases that cite this headnote

[7] **Water Law**
Costs and attorney fees

Attorney fee provision governing an award of attorney fees to a prevailing party in a dispute over an assertion of title to real property did not apply in dispute over a prescriptive easement brought by owner of purported dominant estate against owner of purported servient estate regarding a water distribution system and related water lines, in which owner of purported servient estate prevailed; easement claim was an assertion of a property interest, and not a title to property. Wash. Rev. Code Ann. § 7.28.083(3).

Cases that cite this headnote

[8] **Easements**
Prescription

A prescriptive easement arises when one person uses a portion of another person's land for a period of 10 years and that use was (1) open and notorious, (2) continuous or uninterrupted, (3) occurred over a uniform route, (4) was adverse to the property owner, and (5) occurred with the owner's knowledge at a time when the owner was able to assert and enforce his or her rights.

Cases that cite this headnote

[9] **Easements**
Nature and elements of right

An "easement" is a nonpossessory right to use the land of another.

Cases that cite this headnote

[10] **Easements**
Nature and elements of right

The easement holder has a property interest in the land subject to an easement.

Cases that cite this headnote

[11] **Easements**
Nature and elements of right

That property interest of an easement is separate from ownership of the land.

Cases that cite this headnote

[12] **Easements**
Nature and elements of right

An easement is an interest in real property; however, that interest involves the use of property and does not grant title to the property.

Cases that cite this headnote

[13] **Easements**

Prescription

Unlike adverse possession, a prescriptive easement does not quiet title to land.

Cases that cite this headnote

**1114 Appeal from Clallam Superior Court, Docket No.: 17-2-00222-7, Honorable Christopher X. Melly, Judge

Attorneys and Law Firms

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PUBLISHED OPINION

Maxa, C.J.

*89 ¶ 1 Stuart **McColl** filed a declaratory judgment action against Geoffrey **Anderson**, seeking a declaration that **McColl** had prescriptive easements regarding a water distribution system and related water lines on **Anderson**'s property. The trial court granted summary judgment in favor of **Anderson**. The court also awarded **Anderson** attorney fees under RCW 7.28.083(3), which gives the trial court discretion to award attorney fees to the prevailing party in "an action asserting title to real property by adverse possession." **McColl** appeals only the trial court's attorney fee award.

¶ 2 We hold that the trial court erred in awarding attorney fees because **McColl**'s action seeking a declaration that he had prescriptive easements on **Anderson**'s property was not "an action asserting title to real property" as required under RCW 7.28.083(3). Accordingly, we reverse the trial court's award of attorney fees to **Anderson** under RCW 7.28.083(3).

*90 FACTS

¶ 3 In March 2017, **McColl** filed a lawsuit against **Anderson** entitled, "Complaint for Declaratory Judgment for an Easement and Injunction." Clerk's Papers at 28-33. The complaint alleged that (1) **McColl** owned property in Port Angeles and that **Anderson** owned adjoining property; (2) the potable water supply for **McColl**'s property had come from a water distribution system located on **Anderson**'s property for over 10 years, (3) water lines run from the water distribution system to **McColl**'s property, and (4) the water distribution system and water lines had been in place for over 10 years.

1115 ¶ 4 **McColl's complaint further asserted that he had prescriptive easements to the water distribution system and water lines and a maintenance prescriptive easement to cross **Anderson**'s property and access the water distribution system and lines. In his prayer for relief, **McColl** requested a declaration establishing the claimed prescriptive easements. He also requested an injunction to prevent **Anderson** from having any involvement with the water distribution system.

¶ 5 **Anderson** filed a summary judgment motion, arguing that **McColl**'s complaint should be dismissed because state law prohibited the acquisition of water rights by prescriptive easement and because **McColl** could not establish all the requirements for a prescriptive easement. The trial court granted summary judgment in favor of **Anderson**, dismissed **McColl**'s complaint, and denied **McColl**'s motion for reconsideration. The court also awarded **Anderson** $35,610 in attorney fees under RCW 7.28.083(3).

¶ 6 **McColl** appeals the trial court's attorney fee award.

ANALYSIS

A. STANDARD OF REVIEW

[1] [2]¶ 7 Whether the trial court properly awarded attorney fees to **Anderson** requires us to interpret the language of *91 RCW 7.28.083(3). Statutory interpretation is a matter

of law that we review de novo. *Jametsky v. Olsen*, 179 Wash.2d 756, 761, 317 P.3d 1003 (2014). The purpose of statutory interpretation is to determine and give effect to the legislature's intent. *Gray v. Suttell & Assocs.*, 181 Wash.2d 329, 339, 334 P.3d 14 (2014).

[3] [4] [5]¶ 8 To determine legislative intent, we first look to the plain language of the statute, considering the text of the provision, the context of the statute, related provisions, and the statutory scheme as a whole. *Id.* We give words their usual and ordinary meaning. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wash.2d 516, 526, 243 P.3d 1283 (2010). And we cannot rewrite plain statutory language under the guise of construction. *Jespersen v. Clark County*, 199 Wash. App. 568, 578, 399 P.3d 1209 (2017).

[6]¶ 9 Similarly, whether a trial court has authority to award attorney fees under a statute is an issue that we review de novo. *Niccum v. Enquist*, 175 Wash.2d 441, 446, 286 P.3d 966 (2012).

B. APPLICATION OF RCW 7.28.083(3)

[7]¶ 10 **McColl** argues that the attorney fee provision of RCW 7.28.083(3) does not apply under the facts here. We agree.

¶ 11 RCW 7.28.083(3) gives the trial court discretion to award attorney fees to the prevailing party "in an action asserting title to real property by adverse possession." The question here is whether **McColl**'s lawsuit seeking a declaratory judgment that he had prescriptive easements relating to the water distribution system and the water lines on **Anderson**'s property constituted "an action asserting title to real property." RCW 7.28.083(3).

1. Prescriptive Easement

[8]¶ 12 A prescriptive easement arises when one person uses a portion of another person's land for a period of 10 ***92** years and that use was (1) open and notorious, (2) continuous or uninterrupted, (3) occurred over a uniform route, (4) was adverse to the property owner, and (5) occurred with the owner's knowledge at a time when the owner was able to assert and enforce his or her rights. *Gamboa v. Clark*, 183 Wash.2d 38, 43, 348 P.3d 1214 (2015).

[9] [10] [11]¶ 13 An easement is a nonpossessory right to use the land of another. *Zonnebloem, LLC v. Blue Bay Holdings, LLC*, 200 Wash. App. 178, 183, 401 P.3d 468 (2017). The easement holder has a property interest in the land subject to an easement. *Id.* That property interest is separate from ownership of the land. *810 Properties v. Jump*, 141 Wash. App. 688, 696, 170 P.3d 1209 (2007).

2. Easement Claim as Action Asserting Title

[12] [13]¶ 14 An easement is an interest in real property. *Zonnebloem*, 200 Wash. App. at 183, 401 P.3d 468. However, that interest involves the *use* of property and ****1116** does not grant *title* to the property. *See Kiely v. Graves*, 173 Wash.2d 926, 936, 271 P.3d 226 (2012). Similarly, an easement represents a burden on the property subject to the easement. *Zonnebloem*, 200 Wash. App. at 184, 401 P.3d 468. But again that burden does not provide *title* to the property. Unlike adverse possession, a prescriptive easement does not quiet title to land.[1] *See Kunkel v. Fisher*, 106 Wash. App. 599, 603, 23 P.3d 1128 (2001).

¶ 15 The plain language of RCW 7.28.083(3) 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. *Jespersen*, 199 Wash. App. at 578, 399 P.3d 1209. Because a prescriptive easement claim does not actually assert title to ***93** property, RCW 7.28.083(3) does not apply to **McColl**'s prescriptive easement lawsuit.[2]

CONCLUSION

¶ 16 We reverse the trial court's award of attorney fees to **Anderson** under RCW 7.28.083(3) and vacate the attorney fee judgment.

We concur:

BJORGEN, J.

LEE, J.

All Citations

6 Wash.App.2d 88, 429 P.3d 1113

Footnotes

1 Division One of this court stated (albeit in a footnote) that a judgment quieting title was not available as relief in an action to establish a prescriptive easement. *See Crescent Harbor Water Co. v. Lyseng*, 51 Wash. App. 337, 339 n.3, 753 P.2d 555 (1988).

2 **Anderson** requests an award of his attorney fees on appeal under RCW 7.28.083(3). Because we hold that RCW 7.28.083(3) is inapplicable, **Anderson** is not entitled to attorney fees on appeal.

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