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COURT OF APPEALS
STATE OF WASHINGTON
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No. 66247-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GEORGE AUTTELET and PATSY AUTTELET, husband and wife,

Appellants,

vs.

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

Respondents.

APPELLANTS' BRIEF

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I. INTRODUCTION

In *Kerby v. Auttelet*, 152 Wn. App. 1064 (Div 1. 2009), this Court directed the trial court to determine whether Appellants AUTTELET gave Respondents KERBY permission to locate a road outside of the express roadway easement (and thus defeat a claim by KERBY for a prescriptive easement for the excess). On remand, the trial court ruled that there was “no permission,” but also ruled that Mr. AUTTELET “acquiesced” to the location of the road. Appellants respectively submit that the trial court’s finding of “no permission” is clearly erroneous or an erroneous conclusion of law and that the trial court erred when it applied a novel theory--prescriptive easement by acquiescence--not previously raised.

II. ASSIGNMENT OF ERRORS

A. Whether the trial court was clearly erroneous in finding that Appellants AUTTELET did not give permission to Respondents KERBY to locate their road outside of the express easement in light of the trial court’s explanation that Mr. AUTTELET acquiesced or consented to the location of the road outside of the express easement.

B. Whether the trial court erred in the legal conclusion that Appellants AUTTELET did not give permission to Respondents KERBY to locate their

road outside of the express easement in light of the trial court's explanation that Mr. AUTTELET acquiesced or consented to the location of the road outside of the express easement.

C. Whether the trial court erred when it applied the novel theory of "prescriptive easement by acquiescence" on remand.

III. STATEMENT OF THE CASE

A. This case was previously before this Court, *Kerby v. Auttelet*, No. 63822-0-1, Unpublished opinion, filed November 9, 2009 ("2009 Decision").

B. Appellants GEORGE and PATSY AUTTELET ("AUTTELET") own real property in Castle Rock, Washington. Respondents JAN and ILONA KERBY ("KERBY") own real property, whose southern boundary adjoins AUTTELET's northern boundary line. A 30-foot easement along the east side of the AUTTELET property provides the KERBYs ingress/egress to their property. KERBY installed a road in 1980, which exceeded the limits of the express easement, along the length of the easement, by up to nine feet outside the 30-foot easement. (2009 Decision, page 2.)

C. This case was originally tried on December 20, 2007. The trial court found that KERBY proved a prescriptive easement of that portion of the road which lay outside of the 30-foot easement. This portion of the trial court decision was reversed and remanded in the 2009 Decision, with direction to

the trial court to determine, by a preponderance of the evidence, whether AUTTELET gave KERBY permission to expand the easement past the 30-foot express easement. (2009 Decision, pages 3, 4-8.)

D. On remand, the trial court made the following, apparently conflicting, “findings of fact”:

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

31. To further assist the court of appeal, to determine the question of acquiescence, the court makes the following findings: The parties mutually located an existing fence, they thought with the thirty foot fence line, and based, upon the location of the fence, they acquiesced in the location of the road. Later, when they realized by survey that part of the road was outside the line, a complaint was made.

(Emphasis added.) Trial Exhibit 82, Amended Findings of Fact and Conclusions of Law, pages 4-5. Therefore, the trial court found that “[t]here was no permission” by Mr. AUTTELET for Mr. KERBY to locate his road outside the easement, which would seem to meet the “hostile” requirement for a prescriptive easement. However, the Court explained its decision, to this court, by stating that Mr. AUTTELET “acquiesced in the location of the road.” This second finding or conclusion would seem to defeat the “hostile” requirement.

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IV. SUMMARY OF ARGUMENT

A. On remand, the trial court found that AUTTELET acquiesced or consented to KERBY locating the road outside of the express easement. Accordingly, its finding of “no permission” for the location of the road outside of the easement is either a clearly erroneous finding of fact or an error of law.

B. The trial court erred when it applied the novel doctrine of “prescriptive easement by acquiescence” for the first time on remand.

V. ARGUMENT

A. “No Permission” Clearly Erroneous. Webster’s New World Dictionary and Thesaurus (1996, Simon & Schuster, Inc.) defines “acquiesce” to mean “to consent without protest.” As this appears to be the actual finding of the trial court--that AUTTELET consented to the current location of the road--the Appellants ask the appeals court to remand the case, with the direction to deny Defendants’ claim of “prescriptive easement” over the disputed area.

B. This Court is not bound by the trial court’s finding of fact that “there was no permission requested or granted.” As stated by the Washington Supreme Court:

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While this court will always hesitate to disturb the findings of the trial court upon the facts, yet it is our duty so to do if we feel convinced that that court fell into error.

(Emphasis added.) *Swift v. Starrett*, 117 Wash. 188, 188, 200 P. 1108, 1108 (1921). See also *W. Hill, LLC v. City of Olympia*, 115 Wn. App. 444, 449, 63 P.3d 160, 163 (Div. 2, 2003) (“A decision is clearly erroneous when the reviewing court is ‘left with the definite and firm conviction that a mistake has been committed.’” quoting *Norway Hill Preservation and Prot. Ass’n v. King County Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976)). This is true in adverse possession cases:

The character of the respondent’s possession over the statutory period is one of fact, and the trial court’s finding in that regard is to be given great weight and will not be overturned unless this court is convinced that the evidence preponderates against that finding.

Krona v. Brett, 72 Wn.2d 535, 542, 433 P.2d 858, 862 (1967), reversed on other grounds by *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984).

C. “No Permission” Erroneous Conclusion of Law. Given that the trial court found that Mr. AUTTELET “acquiesced” in or consented to the location of the road, the Court’s finding of “no permission” would appear to be, in this case, an erroneous conclusion of law instead of a finding of fact. Conclusions of law that are mistakenly characterized as findings of fact are reviewed de novo on appeal. *In re Welfare of L.N.B.-L.*, 157 Wn. App. 215, 243, 237 P.3d 944, 959 (Wash. Ct. App. 2010).

D. “Prescriptive Easement by Acquiescence” Novel Theory on Remand.

Furthermore, new theories cannot be raised on appeal. *Brown v. Labor Ready NW., Inc.*, 113 Wn. App. 643, 655, 54 P.3d 166, 173 (Div 1 2002).

The trial court, in 2007, found that the Defendants-Respondents established a prescriptive easement to the present location of the access road (2009 Decision, page 3):¹ This Court, in 2009, analyzed the claim for prescriptive easement (2009 Decision, pages 4-8) and specifically held:

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

(2009 Decision, page 7).

E. It appears that on remand, the trial court found that “permission was . . . given to build the road outside of the easement,” but then applied the novel doctrine of “prescriptive easement by acquiescence” to grant the Defendants the expanded easement. Acquiescence is actually a doctrine for

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As stated in this Court’s 2009 Decision, “to establish a prescriptive easement, a claimant must prove ‘use of the servient land that is: (1) open and notorious, (2) over a uniform rate, (3) continuous and uninterrupted for ten years, (4) adverse to the owner of the land sought to be subjected, and (5) with the knowledge of such owner of a time when he was able in law to consent and enforce his rights.’” *Kinkel*, 106 Wn. App. at 602. (Emphasis added.) (2009 Decision, pages 4-5.)

adjusting boundary lines, not the width of an easement. The elements of acquiescence are:

(1) The line must be certain, well defined, and in some fashion physically designated upon the ground, e.g., by monuments, roadways, fence lines, etc.; (2) in the absence of an express agreement establishing the designated line as the boundary line, the adjoining landowners, or their predecessors in interest, must have in good faith manifested, by their acts, occupancy, and improvements with respect to their respective properties, a mutual recognition and acceptance of the designated line as the true boundary line; and (3) the requisite mutual recognition and acquiescence in the line must have continued for that period of time required to secure property by adverse possession.

Lamm v. McTighe, 72 Wn.2d 587, 593, 434 P.2d 565, 569 (1967). This doctrine is irrelevant to the location of an easement, was not raised in the 2007 trial and was not what this Court directed to be applied on remand.

VI. CONCLUSION

Appellants request that this Court direct the trial court to find that AUTTELET did give permission for KERBY to locate his road outside of the express easement and to deny KERBY's claim for a prescriptive easement for the excess area covered by his road.

DATED: February 8, 2011.

Respectfully submitted,



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