

No. 37655-5-II

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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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

Respondents,

vs.

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

Appellants.

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**Respondents' Brief**

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I. INTRODUCTION.

This appeal addresses two issues: First, is there substantial evidence to support the Trial Court's decision that a fence line was livestock fence of convenience and not a boundary fence? Second, is there substantial evidence to support the Trial Court's decision that the easement road should remain in its current location under the doctrines of prescriptive easement, estoppel and waiver? The Trial Court should be affirmed in all respects.

II. STATEMENT OF THE CASE.

In 1980, George Auttelet (hereinafter "Appellant") purchased 15 acres of land off Delameter Road in Castle Rock, Washington.<sup>1</sup> In 1980, he and Jan Kerby (hereinafter "Respondent") discussed the sale of five acres to Respondent.<sup>2</sup> Appellant wanted to develop the center five-acre parcel, but gave Respondent his choice of the five-acre parcel to the north or south of the center five acres.<sup>3</sup> Respondent agreed to purchase the north five-acres and agreed to draft the paperwork.<sup>4</sup>

This was, in most respects, a paper transaction. The

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1 RP 135.

2 RP 36, 136.

3 RP 36.

4 RP 136.

deed reflected the width (330.0 feet) necessary to achieve five acres.<sup>5</sup> There was no survey and no establishing of the boundary line. There was no fence between the properties.<sup>6</sup> The only concern was to achieve five acres to be a legal lot with Cowlitz County.<sup>7</sup> There was no fence at what would become Respondent's south line.<sup>8</sup>

On August 8, 1980, Appellant deeded the property to Appellant's parents who, within two years, deeded it to Appellant.<sup>9</sup> The deed includes:

"an easement for ingress, egress and utilities over, under and across the East 30.0 feet of the Northwest Quarter of the Northwest Quarter of the Southeast Quarter of Section 24, Township 9 North, Range 2 West of the W.M., except the North 330.0 feet."<sup>10</sup>

This easement was across Appellant's property for access to Respondent's five acres. Respondent lived at the property off and on until 1992, when he started living there continuously.<sup>11</sup>

In the mid-1980's, Appellant's current wife, Patsy Auttelet, moved onto the property.<sup>12</sup> Ms. Auttelet owned several horses that were, at the time, boarded in Lexington,

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5 RP 38.

6 RP 108, 236.

7 RP 39,42.

8 RP 40,145.

9 Exhibit 19, Exhibit 20.

10 Exhibit 19.

11 RP 49-50.

Washington.<sup>13</sup> In 1988, after Appellant created a path, the Auttelet family participated in constructing a horse retention fence in the woods surrounding Appellant's house.<sup>14</sup> The fence was made of horse wire on metal T-posts and was, at one point in time, electrified.<sup>15</sup> The purpose of the fence was to hold the horses.<sup>16</sup> When the fence approached the east easement road to Respondent's property, it curved to the west of the easement, eventually connecting to make a circular enclosure.<sup>17</sup> Over time, additional fences and paddocks were constructed within the circular enclosure, most with white ribbon on the top wire to alert the horses of the existence of the fence, and a water tub was installed.<sup>18</sup> Soon after the circular fence was constructed, the horses were brought to the property.<sup>19</sup>

Between the Appellant's and Respondent's property was a thick growth of trees.<sup>20</sup> The Respondent's view of the horse wire fence was limited.<sup>21</sup> From their house,

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12 RP 268.

13 RP 217.

14 RP 167, 217, 225, 256-257, 260-261, 268.

15 RP 149-150, 168, 273-274.

16 RP 160, 192, 257, 261.

17 RP 261-262.

18 RP 114, 118, 167, 219-221, 262, Exhibit 4.

19 RP 192.

20 Finding of Fact 22.

21 RP 77-78.

Respondents saw a lot of fences and white ribbon.<sup>22</sup> From the easement, Respondent saw a portion of the fence until it was obscured by a wood pile.<sup>23</sup> There was nothing about the fence that suggested it was a boundary fence.<sup>24</sup>

In 2004, Respondent logged the trees between his and the Appellant's property.<sup>25</sup> After the trees were removed, the Respondent could see the Auttelet's fence was not parallel to his north fence line.<sup>26</sup> A survey revealed that the fence was approximately 13 feet off the survey line at the east, along the easement road, but over 61 feet into Respondent's property at the west.<sup>27</sup> Following receipt of the survey, this action was filed.<sup>28</sup>

While this lawsuit was pending, Appellant began sending rent-owing letters to the Respondent for a portion of the easement that Appellant claimed was on his property.<sup>29</sup> At the time the access road over the east 30-foot easement was constructed, there was no survey.<sup>30</sup> Respondent placed the road around an existing tree and then in a northerly direction at

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22 RP 114.

23 RP 80, 114.

24 RP 81.

25 RP 51.

26 RP 52.

27 Exhibit 16.

28 CP. 1.

29 Exhibits 24, 25, 26 and 27.

30 RP 42.

the east side of the Appellant's property. The south portion of the access road is up to nine feet outside of the 30.0 foot easement and is the subject of Appellant's complaint.<sup>31</sup> Respondent never asked Appellant for permission to place the road in this location.<sup>32</sup> In response to the rent letters about the easement, Respondent amended his answer to include a quiet title action to the existing location of the easement.<sup>33</sup>

Following a one-day trial, the Court first ruled that the use of the fence was as a livestock fence of convenience and not as a boundary fence. The Court relied on the evidence of the nature and construction of the fence and the fact it curved to the west side of the east easement road rather than proceeding straight to a property corner.

Further, the court held that the location of the east easement road should not be disturbed.

The Appellant appealed the Court's decision claiming generally that the trial judge abused his discretion in reaching his decision.<sup>34</sup> Appellant does not challenge any of the specific findings of fact and they should be considered verities on appeal.<sup>35</sup>

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31 RP 57, 205, Finding of Fact 8.  
32 RP 64.  
33 CP. 27.  
34 CP. 53  
35 Appellants' Brief.

As set forth below, substantial evidence supports the Court's decisions. The Court's ruling and judgment should be affirmed in all respects.

III. ARGUMENT.

A. Standard of Review.

The Appellate Court must uphold the Trial Court's decision if it is supported by substantial evidence.

"When a trial court bases its findings of fact on conflicting evidence and there is substantial evidence to support them, an appellate court will not substitute its judgment even though it might have resolved the factual dispute differently."<sup>36</sup>

Substantial evidence exists if the evidence is sufficient to persuade a fair-minded, rational person of the truth of the declared premise."<sup>37</sup> The Appellate Court's examination of the record goes no further than to determine whether there is substantial evidence to sustain the Trial Court's findings.<sup>38</sup>

B. The Trial Court's Decision is Supported by Substantial Evidence.

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<sup>36</sup> Brown v. Superior Underwriters, 30 Wash. App. 303, 632 P. 2d 887 (1980).

<sup>37</sup> Brown v. Superior Underwriters, 30 Wash. App. at 306.

<sup>38</sup> Throughout their brief, Appellants erroneously refer to an "abuse of discretion" standard. See, for example, Appellants' Brief, pages 2, 42, 43, 44, 45, 48 and 49. Because Appellants have failed to show why the findings of fact were not supported by substantial evidence, the Appellate Court should not disturb the Trial Court's findings in this case.

1. The Trial Court's Decision that the Fence was a Livestock Fence of Convenience and Not a Boundary Fence is Supported by Substantial Evidence.

The Court should first consider that the Appellants have not assigned error to any specific finding of fact. Therefore, they should be considered verities on appeal.<sup>39</sup> Even if the Court finds the Appellants assigned error to one or more of the findings, Appellants have not shown nor argued that any specific finding is not supported by substantial evidence. Accordingly, the Appellate Court should not disturb the Trial Court.

A review of the record establishes that the Trial Court's findings are supported by substantial evidence. Appellants argue that the boundary line should be a fence line under theories of adverse possession, acquiescence and estoppel. The focus of the Trial Court was on the use of the fence. Appellant's attorney conceded at trial that a livestock fence would not

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<sup>39</sup> S.D.S. Lumber Co. v. Berger, 61 Wash.2d 429, 431, 378 P.2d 451 (1963).

support a claim for adverse possession.<sup>40</sup> Thus, the Court's determination came down to whether the fence was a boundary fence or a livestock fence of convenience. The Court concluded it was merely a livestock fence of convenience based on the following evidence:

- a. The construction of the fence was made of round horse wire and metal posts.<sup>41</sup>
- b. The fence was constructed so that Mrs. Auttelet could move her horses from Lexington, Washington to the Auttelet's property in Castle Rock, Washington.<sup>42</sup>
- c. The fence was constructed in the woods and not easily seen.<sup>43</sup>
- d. The fence curved around the west side of the easement road and connected with a parallel fence to create a complete enclosure.<sup>44</sup>
- e. The Appellants constructed many similar fences in the area with horse wire and ribbons, including several paddock fences.<sup>45</sup>
- f. The property maintenance of spraying weeds, removing dead trees and maintaining fences were

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40 RP 408.

41 RP 149-150, 168, 273-274.

42 RP 160, 192, 257 and 261.

43 RP 167, 217, 356-257, 260-261.

44 RP 261-262.

45 RP 114, 118, 167, 219-221, 262, Exhibit 4.

all consistent with the use of the property as an enclosure for livestock.<sup>46</sup>

Although the use of the fence was disputed, there was substantial evidence for the Court to conclude the use of the fence at issue was merely a livestock fence of convenience and not a boundary fence.

To establish adverse possession, the Appellant must prove possession that is exclusive, actual and uninterrupted, open and notorious, and hostile.<sup>47</sup> These elements must continue for at least 10 years.<sup>48</sup>

The character of a claimant's possession is a question of fact<sup>49</sup> and the presumption favors the holder of legal title.<sup>50</sup> The Trial Court's findings are to be given great weight.<sup>51</sup> Since the holding in Chaplin, supra, the original purpose of the fence is no longer controlling. Rather, the courts look to the nature of actual

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46 Findings of Fact 24 and 25.

47 Chaplin v. Sanders, 100 Wash. 2d 853, 676 P.2d 431 (1984).

48 RCW 4.16.020.

49 El Cerrito, Inc., v. Ryndak, 60 Wash. 2d 847, 376 P.2d 528 (1962).

50 ITT Rayonier, Inc., v. Bell, 112 Wash. 2d 754, 757, 774 P.2d 6 (1989).

51 Mesher v. Connolly, 63 Wash. 2d 552, 558, 388 P.2d 144 (1964).

use of the property.

“Taylor<sup>52</sup> framed the question as ‘whether a property fence is maintained as a matter of convenience, or under a claim of ownership.’ The nature of actual use, rather than the original purpose for constructing the fence is controlling.”<sup>53</sup>

In this case, the Trial Court found the nature and use of the fence was one of convenience and not under a claim of ownership. This conclusion was based on the location of the fence both in the woods and on the west side of the easement, the construction of the fence out of horse wire and metal posts, the existence of many other similar fences in the same area, the use of the property to hold horses and the maintenance of the disputed area being consistent with raising horses. Each of these facts support the Trial Court’s Conclusion of Law 2, that “The Auttelets failed to prove by clear, cogent and convincing evidence that their use to the north fence line was open, notorious, hostile, continuous and exclusive for a 10-year period.”

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52 Taylor v. Talmadge, 45 Wash. 2d 144, 149, 273 P.2d 506 (1954).

The Appellants also claimed ownership of the property under theories of acquiescence and estoppel. There is no evidence that the Respondents considered the fence the boundary line to support acquiescence. Further, there was no evidence of a representation made by Respondents on which the Appellants relied to support an estoppel.

The Trial Court's findings that the fence was maintained as a matter of convenience and not under a claim of right is supported by substantial evidence. The Trial Court's decision quieting title in Respondents to the survey line must be affirmed.

2. Substantial Evidence Supports the Trial Court's Conclusion that the Location of the East Easement Road Should not be Disturbed.

The Appellant claims that a portion of the Respondent's easement road across the east 30-foot easement on Appellant's property is located outside of the 30-foot easement. There was a frank factual dispute as to whether

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53 Roy v. Cunningham, 46 Wash. App. 409, 731 P.2d 526 (1986).

Appellant gave Respondent permission to locate the road outside the easement<sup>54</sup> or whether there was no permission requested.<sup>55</sup> The Trial Court resolved this dispute by determining that no permission was requested or given and that, over the past 25 years, Respondent had acquired a prescriptive easement in the property.<sup>56</sup> The Court's decision is supported by substantial evidence and must be affirmed.

1. Respondent testified that there was no permission requested nor given.<sup>57</sup>
2. Utilities were installed along the current location of the road,<sup>58</sup> suggesting that the road was intended to be permanent.
3. There was no complaint by Appellant to Respondent about the use of the road until 2006, after this litigation was started.<sup>59</sup>

These facts, taken together, would persuade a fair minded person that the current location of the easement road was intended to be permanent and was not based upon the permission of the Appellant. The Trial Court's

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54 RP 105.  
55 RP 64.  
56 Conclusion of Law No. 4.  
57 RP 64.  
58 Exhibit 16.

decision regarding the location of the easement road must be affirmed.

IV. CONCLUSION.

Substantial evidence supports the Trial Court's decision that the use of the fence was as a livestock fence of convenience rather than a boundary fence. Further, substantial evidence supports the Trial Court's decision that the easement road should remain in its current location. The Trial Court decision should be affirmed in all respects.

DATED this 20<sup>th</sup> day of May,  
2009.

NELSON LAW FIRM, PLLC

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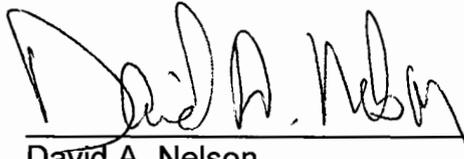
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**CERTIFICATE OF SERVICE**

I hereby certify that under penalty of perjury of laws of the State of Washington that I served the document to which this certificate is attached on the attorney for Appellants, Dennis G. Ott, by first class mail, postage prepaid on the date signed below.

DATED this 20th day of May, 2009, at Longview, Washington.



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David A. Nelson

09 MAY 21 AM 9:41  
STATE OF WASHINGTON  
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