ORIGINAL

No. 37760-8-II

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

COURT OF APPEALS
DIVISION II
2007 OCT 27 AM 9:03
STATE OF WASHINGTON
BY
DEPUTY

VICTOR ERICKSON and LARRY ERICKSON

Plaintiffs / Appellants

v.

CHARLES W. CHASE and NANCY CHASE, husband and wife,

Defendants and Third Party Plaintiffs / Respondents

LLOYD COMBS and DORIS COMBS

Third Party Defendants and Fourth Party Plaintiffs,

JAMES ROBSON

Fourth Party Defendant

AMENDED OPENING BRIEF FOR APPELLANT'S ERICKSONS

Robert D. Michelson, WSBA # 4595
Attorney at Law
PO Box 87096
Vancouver, WA 98687-0096
(360) 260-0925 Fax (360) 944-1947
Email: rmitchelson@msn.com

original

I. TABLE OF CONTENTS

A. Introduction.....1

B. Assignments of Error.....1

1. The trial court properly granted a prescriptive easement over the lower road.

2. The trial court erred when it failed to grant a prescriptive easement over the Upper Road.

3. The trial court erred when it found plaintiffs liable for timber trespass.

4. The trial court erred when it failed to take into account mitigation under RCW 64.12.040.

5. The trial court erred when it allowed only hearsay evidence to establish damages.

C. Issues Pertaining to Assignments of Error.....2

D. Statement of the Case.....3

E. Summary of Argument.....6

F. Argument.....7

a. The Lower Road.....8
b. The Upper Road.....15
c. Timber Trespass.....30
d. Timber Trespass Damages.....33

G. Conclusion.....38

II. TABLE OF AUTHORITIES

Cases

Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984) 8, 14

Crites v. Koch, 49 Wash.App. 171, 176, 741 P.2d 1005 (1987)..... 8

Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wash.2d 1, 9, 43 P.3d 4 (2002)..... 31

Faubion v. Elder, 49 Wn. 2d 300, 301 P 2d. 153 (1956).....29

Lee v. Lozier, 88 Wash. App. 176, 945 P.2d 214 (1997)..... 27

Malnati v. Ramstead, 50 Wash.2d 105, 108, 309 P.2d 754 (1957) 8, 12, 18, 27

Mood v. Banchero, 67 Wash.2d 835, 841, 410 P.2d 776 (1966);..... 8

Mountaineers v. Wymer, 56 Wash.2d 721, 722, 355 P.2d 341 (1960)..... 8

Port of Seattle v. Equitable Capital 203, 127 Wn.2d 202, 898 P.2d 275 (1995)..... 36

Statutes

RCW 64.12.030 ..... 1, 2, 5, 7, 30, 31

RCW 64.12.040 ..... 1, 2, 7, 31, 34

Rules

ER 801 ..... 35, 37

A. Introduction

This appeal challenges certain findings of facts and conclusions of law regarding whether two prescriptive easements were established across real property located in Skamania County. It also challenges findings of fact and conclusions of law regarding damages for the removal of trees under RCW 64.12.030 and circumstances which mitigate those damages pursuant to RCW 64.12.040 and contends there was a failure of proof on Defendant/Respondent's part regarding the amount of the claimed damages.

B. Assignments of Error

1. The trial court erred when it failed to grant a prescriptive easement in favor of the plaintiffs / appellants over property known as the Upper Road.

2. The trial court erred when it found that plaintiffs / appellants were liable for timber trespass under RCW 64.12.030 and awarded defendants treble damages.

3. The trial court erred when it failed to take into account mitigating circumstances pursuant to RCW 64.12.040 when determining defendants' damages.

4. The trial court erred when it allowed hearsay only evidence from Defendant/Respondent to establish the amount of timber trespass damages.

C. Issues Pertaining to Assignments of Error

1. Did plaintiffs / appellants obtain prescriptive rights over property known as the Upper Road?

2. Did the court correctly apply the timber trespass statutes RCW 64.12.030 and R.C.W. 64.12.040?

3. Did the court correctly apply RCW 64.12.030 when it determined the amount of damages, by allowing non-expert and hearsay testimony and failed to consider mitigation evidence under RCW 64.12.040?

D. Statement of the Case

This appeal arises out of a dispute concerning three parcels of land located in Skamania County. A twenty acre parcel was purchased by James Robson in 1994, Exhibit 23, R.P. 304 at 6-15, and later subdivided into five acre lots, one of which was later purchased by defendant, Combs who sold to Charles and Nancy Chase, Exhibit 16. A sixteen acre parcel of land lying to the east and south of the Chase property was purchased by Buck Mountain Timber owned by Joseph Zumstein (Zumstein) from the Albertina Kerr Foundation in 1994, Exhibit 6. After logging and removing surface rock from a portion of the sixteen acres, R. P. 210 at 5-15, Zumstein sold the property to sisters, Susan and Patricia Read, being The Read Family Trust, in 1997, Exhibit 4 & 5. The Read sisters sold the sixteen acres to the plaintiffs, Victor and Larry Erickson, operating as L & V Logging, in 2003, Exhibit 2 & 3. L & V also owns a nine acre parcel that is situated directly south of the sixteen acre parcel. In 1986 the nine acres was purchased under the name of Erickson and Sons by the father of Appellants and continuously used

to move rock off the nine acres from 1986 to the time of trial, Exhibit 19 R.P. 9 at 8-10.

Appellants seek to establish the existence of two separate prescriptive easements that run across portions of the Chase's five acre parcel.

THE LOWER ROAD

The first easement claimed, known as the Lower Road or the Bear Prairie Extension, runs north along the western side of Appellants' nine acres crosses into both their sixteen acre parcel to the north and the five acre Chase parcel to the northwest, Exhibit 8.

The trial court granted the Lower Road prescriptive easement finding substantial evidence to establish the Ericksons use of the Lower Road for commercial rock and rock removal purposes was actual, continuous, open, and notorious, C.P. 107 at 9 and 108 at 2. Appellant agrees with this portion of the court's decision.

THE UPPER ROAD

The second easement claimed or Upper Road runs from a cul-de-sac at the end of a paved county road known as Bear Prairie Road

near the northeast corner of the Chase's five acre parcel then runs south along Chases' east line and onto the northern portion (upper) of the sixteen acre parcel now owned by the Ericksons, Exhibit 10.

The trial court denied the Ericksons' claim of an Upper Road prescriptive easement, C.P. 108 at 5, C.P. 107 at 32, 33, and 34, despite being presented with substantial evidence by the Ericksons' that their use of the Upper Road showed actual, continuous, open and notorious use, for the necessary ten year period when tacked onto their predecessors in title use.

DAMAGES

The trial court also held the Ericksons wrongfully and intentionally skinned an area of the Chase's property approximately 300 feet long by at least 50 to 60 feet wide, C.P. 107 at 35, and 37. The court held the Ericksons caused waste or injury to the Chase land by removing fifteen trees Ericksons knew, or had reason to know, were not part of the claimed prescriptive easement and awarded the Chases damages for timber trespass in the amount of

$5,061.75, which were then trebled to $15,185.25 pursuant to RCW 64.12.030, C.P. 107 at 38, 40, 41, 42, and 43.

E. Summary of Argument

The trial court correctly concluded that appellants established a prescriptive easement over portions of the respondents' property known as the Lower Road. Appellants and their predecessors used the road in an open and notorious manner continuously for a period exceeding ten years, without permission and at a time when the land owner previous to Chase (Robson) had knowledge of the use.

The trial court failed to recognize the Ericksons also established a prescriptive easement over portions of respondents' property known as the Upper Road. As with the Lower Road, plaintiffs and their predecessors used the Upper Road in a manner that was open, notorious and continuous for a period that exceeded ten years and did so in a manner consistent with the character of a rural property. The servient land owners were aware of plaintiffs and their predecessors use of the Upper Road and at no time did Appellant or their predecessors obtain or seek permission to use the

Upper Road. Chases on two occasions told Appellants to get off of the road and posted no trespassing signs but Appellants still used the road as if it were theirs until fenced off in late 2005. Chase acquired their property in 2003.

Appellants are not liable for timber trespass as found by the lower court because the trees they removed from defendants / respondents' property were either within the boundaries of the prescriptive easement or believed to be by Ericksons because they had acquired an easement over the Upper Road and the court completely misunderstood that a large portion of the Upper Road was actually on Appellants' sixteen acres not Chases. Furthermore, the court wrongfully relied upon non-expert and hearsay testimony when determining the amount of damages pursuant to RCW 64.12.030 and 64.12.040.

The court also failed to properly consider mitigation under RCW 64.12.040.

F. Argument

1. Prescriptive Easements

A person seeking to establish a prescriptive right must prove: (1) use adverse to the owner of the servient land; (2) use that is open, notorious, continuous, and uninterrupted for 10 years; and (3) knowledge of such use by the owner or an owner's predecessor at a time when he was able to assert and enforce his rights. *Mood v. Banchero, 67 Wash. 2d 835, 841, 410 P.2d 776 (1966)*; *Mountaineers v. Wymer, 56 Wash. 2d 721, 722, 355 P.2d 341 (1960)*. A trial court's findings on the elements of prescriptive easements are mixed questions of law and fact. *Crites v. Koch, 49 Wash. App. 171, 176, 741 P.2d 1005 (1987)*.

Possession is adverse if the claimant uses the property as if it were his own, without regard to the claims of others, without asking permission, and under a claim of right. *Malnati v. Ramstead, 50 Wash. 2d 105, 108, 309 P.2d 754 (1957).* "Hostile use of real property by an occupant or user does not import ill will, and only requires that the claimant is objectively using it as if it were his own, *Chaplin v. Sanders, 100 Wn 2d 853, 676 P 2d 431 (1984).*

a. The Lower Road

With respect to the Lower Road, the trial court granted the Ericksons a prescriptive easement across the Chase's five acres in favor of the Ericksons' nine acres for non-exclusive ingress and egress that is seventeen feet wide running along the center line of the existing Lower Road. The court limited the easement to commercial rock and gravel removal purposes and stated that the easement could not be used for other purposes, such as residential ingress and egress. CL 2.

The court found the Ericksons had used the Lower Road for commercial rock hauling with dump trucks their from rock and gravel extraction facility located in the nine acres since approximately 1987. FF 7. The court found that Ericksons' use of the Lower Road was actual, continuous, open, and notorious, and for the purpose of removal of rock from the nine acres. FF 18. The court also found there was a general custom or practice in the area of landowners permitting others to traverse across the roads as a "friendly neighbor practice" FF 12. However, the court did not find Ericksons were granted permission at any time to use the Lower Road for commercial rock hauling purposes or sought permission to

do so or that allowing hunters to pass over the road occasionally defeated Ericksons' rights.

Substantial evidence exists to support the court's findings of fact and conclusions of law regarding the Lower Road. Accordingly, the granting of the easement over the Chase property in favor of the Erickson nine acres should be affirmed. To hopefully make matters somewhat less confusing on review it should be noted that the Lower Road emerges from a cul-de-sac at the end of the paved public Bear Prairie Road, turns into a non-public rock gravel road that crosses Chases' five acres and then onto a portion of Erickson's sixteen then into Erickson's nine at its south end point. This road is referred to as the Bear Prairie Extension.

Permissive Use

There is nothing in the record that suggests the Ericksons' use of the Lower Road was done with permission of the servient land owners. At trial Victor Erickson testified that during the roughly twenty year period the Ericksons family had used the Lower Road no one had granted them permission or asked them to stop using the

road. R.P. 20 at 4-10. Victor Erickson further testified they did not feel that there was any reason to ask for permission as it was their access and they treated it as their road. *Id.* R.P. 20

Joe Zumstein, who purchased the sixteen acres in 1994 for logging purposes, testified that when he first saw the property in 1994 the Lower Road was in existence and appeared to be used on a fairly regular basis. R.P. 213 at 10. He went on to testify he used the Lower Road for his logging and rock removal from part of the sixteen acres despite the fact he was never given permission to use the Lower Road by anyone. R.P. 217 at 21-22. In his testimony, he disputed the idea that there was some sort of a custom of "neighborly courtesy," which allowed neighbors and others to use the roads, R.P. 231 at 21-23, and further testified he thought, albeit erroneously, the Lower Road was a county road. R.P. 233 at 4.

James Robson, who owned the twenty acre parcel before he divided it into five acre parcels, including the Chase parcel, testified no one had ever asked him for permission to use the Lower Road and he was well aware of the fact that both the Ericksons and Joe

Zumstein were using the road for excavating and logging purposes. R.P. 308 at 11-23.

Accordingly, the Erickson's use of the Lower Road was not a "permissive use" as no testimony from any witness suggested they had given the Erickson permission to use the road at any time during the twenty plus years they had used the Lower Road.

Use Adverse to the Owner of the Servient Land

Use of another's property or a part of another's property is adverse if the person claiming the prescriptive easement uses the property as if it were his own without regard for the claims of others, without asking permission, and under a claim of right. *Malnati v. Ramstead, 50 Wash.2d 105, 108, 309 P.2d 754 (1957).*

The Ericksons used the Lower Road in a manner that is adverse to the owners of the sixteen acre parcel and five acre parcel. Victor Erickson testified the Erickson family began excavating the nine acres in 1986. R.P. 10 at 25 and 11 at 1. He went on to state the annual production from the nine acres for the last twenty years

averaged approximately 5000 – 7000 cubic yards per year. R.P. 12 at 7. He further testified to the various types of vehicles that used the Lower Road throughout the period when the Ericksons were excavating the nine acres. *Id.* R.P. 12. He also testified they felt the Lower Road was their access and that they treated it as their own. He testified they did all the maintenance of the Lower Road since 1986, with the exception of Joe Zumstein doing some brief maintenance. *Id.* R.P. 12. Joe Zumstein testified he was aware the Ericksons were using the Lower Road several times per week and that it was obvious they were reclaiming the nine acres for some time based on the equipment on the property. R.P. 224 at 15.

At the time the Ericksons first began using the road for excavation of the nine acres, James Robson owned the twenty acre parcel to the Ericksons west, he divided it and sold Chase the northeast 5 acre parcel. Mr. Robson testified he first traveled the lower road in the 1960's and recalled it had not changed much since that time. R.P. at 5, 6-17-20. He stated he thought the Ericksons had a right to use the Lower Road on account of their excavating activities. R.P. 309 at 5-8.

The record clearly indicates both Joe Zumstein and James Robson support the Ericksons' contention they used the Lower Road without regard for the claims of the owners of the adjacent sixteen and twenty acre parcels, without seeking permission, and without regard as to who the owner of the underlying property was.

Open, Notorious, Continuous, and Uninterrupted Use for Ten Years; Knowledge of the Owner of the Servient Land

The Ericksons' use of the Lower Road was open, notorious, continuous and uninterrupted since 1986 and was done so at a time when the servient land owners had knowledge of the Ericksons' use. Victor Erickson stated it would have been obvious to anyone who might live west of the Lower Road during the last twenty years that the Ericksons' trucks and equipment were going up and down the road. R.P. 19 at 25, R.P. 20 at 103.. He further testified that Joe Zumstein widened the Lower Road in 1994 so that dump trucks with pup trailers could negotiate the road. R.P. 653.

In *Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984)* the Washington Supreme Court held that when the true title owner

knows of the possessor's adverse use throughout the duration of the statutory period, the element of open and notorious is satisfied.

Plaintiffs presented sufficient evidence which demonstrated that no one had ever given the Ericksons permission to use the lower road; that the Ericksons' use of the Lower Road was adverse to the owners of the servient property, and that the Ericksons' use of the property was open, notorious, continuous and uninterrupted since 1986 and was done so at a time when the servient land owners had knowledge of the Ericksons' use of the Lower Road. Consequently, the trial court correctly granted the Ericksons' request for a prescriptive easement over a portion of defendant Chase's five acre parcel known as the Lower Road.

b. The Upper Road

The trial court erroneously denied a prescriptive easement for use of the Upper Road to the Ericksons, granted the Chases' timber trespass claim and awarded $15,185.25 in damages to the Chases. The court found that first prescriptive use of the Upper Road began with Joe Zumstein through Buck Mountain Timber when logging

operations commenced on or after January 1995. FF 27. The record does not support this finding. The court found the Reed sisters used the Upper Road sporadically between 1997 and 2003. FF 29. The court held that use of the Upper Road during the Reed Trust ownership period was sporadic, and was not continuous nor open and notorious. The court further found that in December 2003 Wayne Chase expressly instructed the Ericksons not to use the Upper Road because they did not have a legal right to do so. FF 34. And that sometime around November or December 2004 a skinning incident occurred, at which time Nancy Chase instructed Victor Erickson to get off the Upper Road. FF 35.

The court found the area skinned by the Ericksons substantially exceeded any area needed for the claimed prescriptive easement right to the Upper Road and was therefore wrongful and intentional. FF 38. The court ordered that fifteen trees removed by the Ericksons should be replaced at a cost of $5,061.75. FF 40. The court determined that treble damages should be awarded the Chases pursuant to WRC 64.12.030 and awarded the Chases damages totaling $15,185.25.

Despite the fact that sufficient evidence supporting the prescriptive easement for the Upper Road was presented, the trial court incorrectly found the Ericksons failed to establish a prescriptive easement right in the Upper Road. As a consequence of this error, the court then went on to find that the Ericksons were liable for timber trespass as a result of the skinning incident. The court then compounded that error by awarding the Chases treble damages for the timber trespass even though the Ericksons' had a good faith belief that they had acquired a prescriptive easement over the area which was cleared and were clearing within the easement area and a strip of their own land east of Chases' east line.

History of Establishment and Use as Access to the Sixteen Acres

Joe Zumstein testified when he purchased the sixteen acres in 1994, the Upper Road was passable, and he could drive in but he added gravel so that big equipment could use the road. R.P. 217. He stated he never asked for permission from anyone to use the road. Id 217. James Robson testified Joe Zumstein used the road for various purposes and never asked him if he could use the Upper

Road. R.P. 308 12-16. Victor Erickson testified he never asked anyone permission to use the Upper Road at any time and that no one had ever told him he could not use the road. He further testified that there was a historical use of the Upper Road as it was the road that everybody used, including P.U.D. personnel to service an important fuse pole at the south end of the road. R.P. 39 at 3-9.

Use Adverse to the Owner of the Servient Land

Use of another's property or a part of another's property is adverse if the person claiming the prescriptive easement uses the property as if it were his own without regard for the claims of others, without asking permission, and under a claim of right. *Malnati v. Ramstead, 50 Wash.2d 105, 108, 309 P.2d 754 (1957)*. Beginning with Joe Zumstein's use of the Upper Road in 1994, the owners of the sixteen acre parcel used the Upper Road in a manner that was adverse to the owner of the twenty acre parcel, which was later subdivided into the Chase five acre parcel.

Joe Zumstein testified that the Upper Road was in existence when he first looked at the property in 1994 and that it never

disappeared during the time he owned the sixteen acres. R.P. 214 at 21-23. He further testified that he parked logging equipment on the Upper Road and would have objected to anyone using the road because he thought it was part of his property. R.P. 250 at 4, 5.

Consistent with Joe Zumstein's testimony, Victor Erickson testified that the Upper Road was a well-traveled road that Joe Zumstein used for logging since 1994. He stated he observed the Reed Sisters use the Upper Road some twenty to thirty times per year during the period in which they owned the sixteen acres. R.P. at 11/12-16/17. He further testified they gained access with typical 4-wheel drive SUV's and he testified they maintained the road for the Reeds and cleared it several times during 1998 to 2003. R.P. 86/87. He also stated they cleared the road at the request of the PUD in 1996 and 1998. R.P. 39.

As above, use of the Upper Road by owners of the sixteen acre parcel was done in a manner without regard for the claims of others, without asking permission, and under a claim of right

The Ten Year Period Mistake

The crux of the trial court error in this case probably arose because of the bifurcated proceedings and the fact that testimony and arguments were made over a period starting October 8, 2007 and ending with the court's decision in April of 2008, the last day of trial.

The commencement date for Ericksons' prescriptive right arose when Joe Zumstein first began using the property for logging what is referred to as the upper portion of the sixteen acres.

The exact dating on that point was often disguised by Respondent's counsel's argument in lieu of actual testimony.

The most probable starting date is July 1994.. Mr. Zumstein on behalf of his company, signed a Deed of Trust with the Albertina Kerr's Center for Children on November 23, 1994. Exhibit "56". He received his Warranty Deed November 14, 1994. However, Mr. Zumstein testified he probably started logging in July of 1994, R.P. 210 at 1-3. On cross, Mr. Zumstein states he probably began

logging in July because he had a contract and there were no restrictions on it. No contract was ever produced, but that was Mr. Zumstein's testimony. R.P. 229 at 8-12.

This proposition is heavily supported by the court's Exhibit "1", which is a US Geological Survey overhead, apparently taken on July 19, 1994. It shows roads to the east of both the Lower Road and the Upper Road which appear in the photo. Zumstein testified on cross at R.P. 228 at 18-22 when asked if he had been in there or not in July of 1994, the answer was at line 21 "definitely because it wasn't developed like that". Furthermore, even though the Deed of Trust, court's Exhibit "56", was signed November 23, 1994, Mr. Zumstein received his statutory warranty deed on November 14, 1994, court's Exhibit "6". It is logical to assume his testimony was correct and he was doing preparation work while making payments on what he calls a contract in his testimony at page 227 line 23 RAP. Therefore the court's FF 27 dating the commencement of logging to January of 1995 is not supported by the evidence. Even if that date were to be accepted by this court on review, Mr. Zumstein's testimony at various places on the record would indicate he came in

prior to logging and did roadwork, which would still place us back somewhere at the end or middle of 1994.

The next problem with the argument over whether at ten-year period elapsed with continuous use in a legal sense by the Ericksons and their predecessors in interest, centers around the trial court's error at FF 34 and 35 by concluding that Wayne Chase, in December of 2003 and Nancy Chase, sometime at the end of 2004, told Ericksons to get off the easement road with the trial judge holding that was sufficient to make Ericksons' use of the road non-continuous or interrupted. This however is contrary to further evidence that the Ericksons quickly returned to the road and continued to use it as if they had prescriptive right. One trial exhibit, Exhibit "64", shows one of the Ericksons' log trucks parked on the upper road, obviously after it had been cleared in late 2004. It also shows a no trespassing sign beside the truck which is obviously being ignored by the Ericksons.

Finally, Mr. Chase testified that Erickson continued to use the upper road through September of 2005 when the Chases put up a fence blocking the upper road, court's exhibit "64".

The court however insisted the fence went up in 2003 based on a review of the Judge's notes. Although no actual date of a fence going up is reflected in the Findings. Appellant's counsel argued vigorously that the court's notes were incorrect as to the date the fence went up and that date should be considered the date the Ericksons use and occupation of the road was finally blocked. See Court's Oral Opinion, page 841 line 1-3.

The best evidence in this case is that Mr. Zumstein's reopening of an old road, improving it and using it commenced sometime in the middle of 1994. Thereafter Patricia Read and her sister used the road to access the upper portion of the sixteen acres and kept it reasonably cleared with the assistance of the Ericksons. The Ericksons then used it to access the upper portion of the sixteen.

One of the problems with understanding the case on review is that of topography. The sixteen acres has an upper flat portion that

drops off dramatically at its southern end, so that one cannot reasonably access the upper portion without going across the Chase property on Chase's east line and down the small strip owned by Ericksons between Chase and Teeters. Victor Erickson testified as to the topography problem on several occasions RAP 111 at 6, 14-20; RAP 112 at 15-25; and RAP 113 at 1-15.

Open, Notorious, Continuous, and Uninterrupted Use Elements

In addition to the testimony of Mr. Zumstein, Victor Erickson, and evidence of the Read's use of up to twenty times a year that Victor Erickson and his brother kept it open both for the Reads and during the period of their ownership. There was significant testimony from two other witnesses in the dispute, neither of whom had any interest in the outcome of the case.

A Mr. Teeters, a long time neighbor due east of Chase's east line, testified the Upper Road was not just a horse trail, as Chase would refer to it, but was rather a road the PUD used three to four times per year from the 1980's on, and was rocked from time to time. R.P. 260 at 19-25 and R.P. 261. He testified the Upper Road

could be seen from the top of Bear Prairie Road (the public portion) and t it would have been obvious to anyone living west of the Upper Road. R.P. 261. He also testified he considered the Upper Road to be access to the sixteen acres, that Joe Zumstein had equipment in and out of the area frequently and that he thought Zumstein's actions were those of an owner of the Upper Road, and that the Ericksons used the road for equipment on occasion as well. R.P. 266-268.

Mr. Teeters also testified that, despite the Chases accusations, he had never moved his fence to the west, but he had taken it down for a period in 2002 or 2003 to allow the PUD to do some work. R.P. 626-627. He also stated the Upper Road had never moved to the west and he believed the area the Ericksons cleared was mostly on their own property. R.P. 628-630.

Gary Leonard, testified for Appellants. He worked for Skamania County PUD for over twenty years, and said the PUD used the Upper Road to access a fuse pole located at the south and of the Upper Road as much as six times per year through 2004. R.P. 597, 602. He stated the Upper Road was wide enough to allow the

PUD's bigger trucks access to the pole. R.P. 598. He also testified that on occasion the PUD would ask the Ericksons to clear the road when the alders starting to get as big as three to four inches in circumference, R.P. 600, and that it looked like someone else was using the road. R.P. 603.

Upon cross examination, Mr. Leonard said he stopped making regular trips over the Upper Road to access the fuse pole and could not state whether the Upper Road moved after May 2004. R.P. 621. However, he also stated that it did not seem to him that Mr. Teeters had moved his fence post or that the road had moved. R.P. 624.

The trial court incorrectly concluded plaintiffs and their predecessors in interest failed to use the Upper Road in a continuous manner. FF 32. The court based this conclusion on the fairly substantial growth of vegetation over the Upper Road that was not impeded by use and travel. However, the court in *Lee v. Lozier* held that continuous and uninterrupted use does not require the proof of constant use, rather "the claimant need only demonstrate use of the

same character that a true owner might make of the property considering its nature and location." *Lee v. Lozie, 88 Wn. App. 176, 945 P.2d 214 (1997)*, also see *Malnati v. Ramstead, 50 Wash. 2d 105, 108, 309 P.2d 754 (1957).*

In this case, we have uncontroverted testimony the original twenty acre and sixteen acre parcels were undeveloped forest land for most of the period in question. As such, Joe Zumstein's use of the Upper Road for a period of logging and mining beginning in late 1994, the Reads use of the Upper Road to visit to their property, and the Erickson's use of the Upper Road to access the sixteen acres is consistent with the use an owner of similar property might make. Accordingly, their use was open, notorious and continuous for the prescribed period beginning with Joe Zumstein's use in 1994 even though not done on a daily or even monthly basis. It was used to access the sixteen acres when necessary and cleared sporadically for that purpose.

Wayne Chase's contends he spoke with Victor Erickson in December 2003 regarding whether the Erickson's had a right to use

the road, R.P. 394; and Nancy Chase claims she asked Victor Erickson to get off the Upper Road property in 2004, R.P. 582. However Wayne Chase testified and admitted the Ericksosn continued to use the Upper Road against those warnings through September 2005 when the Chases put up a fence blocking access to the Upper Road to a portion of the easement, R.P. 425. Chases offered Exhibit "64". It clearly shows an Erickson log truck on the road after the so-called skinning and after the warnings to stay off by both Mr. and Mrs. Chase.

However, by that time the Ericksons had established their prescriptive easement as they had used the Upper Road for the requisite ten years beginning as early as July 1994 and their right would have ripened in July 2004. Even if this court accepts the Chase's theory that Joe Zumstein did not begin using the Upper Road for logging until January 1995, the prescriptive easement would have been established in January 2005, some eight months before the Chases put up their fence.

The Ericksons presented ample and credible testimony that they and their predecessors in interest had used the Upper Road to access the sixteen acres without gaining permission from anyone, that their use was adverse to the owners of the Chase property, and that their use was open, notorious, continuous, and uninterrupted given the nature of their needs and character of the land for ten years and done so with knowledge of the Chases and their predecessors. As such, the court should overturn the lower court's denial of the Ericksons' claim for a prescriptive easement over the Upper Road.

Probably it should go without saying that the Ericksons had a right to tack the periods of use and occupation of the prescriptive uses of Zumstein and Read. *Faubion v. Elder, 49 Wn. 2d 300, 301 P 2d. 153 (1956)*.

Another critical misunderstanding by the trial court was how much roadway was graded on Chase's property. Both Victor Erickson, Thomas Ray, a surveyor who was on the property, R.P. 152, 154, 164, and the neighbor, Mr. Teeters, agreed that Ericksons owned a strip of property between the Chase's east line and Teeter's

line that varied in the north from about 30 feet to as wide as 12 feet as one went south. When the grading was done, the whole area was cleared therefore creating the illusion that more of Chase's property was graded than that which was within the original easement historically used by the PUD, Zumstein, Read and Erickson.

The court's oral comment that the Ericksons had offered nothing on that issue, page R.P. 843 at 1-15 essentially shifted the burden of proof from Chase to Ericksons to prove they had not intentionally over-graded.

c. Timber Trespass

The trial court found that the Ericksons' skinned real property over Chase's line removing all brush and vegetation including fifteen trees. FF 37. The court found the skinned area exceeded any area needed for the claimed prescriptive easement to the Upper Road and that the skinning was wrongful and intentional. FF 38.

RCW 64.12.030 provides that whenever any person shall cut down, girdle or otherwise injure, or carry off any tree, timber or

shrub on the land of another person, . . . without lawful authority, . . . if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or assessed therefore, as the case may be. RCW 64.12.040 provides that if upon trial of [an action under RCW 64.12.030] it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, . . . judgment shall only be given for single damages.

The court reviews questions of statutory interpretation and claimed errors of law de novo. *Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wash.2d 1, 9, 43 P.3d 4 (2002).* In this case, the court concluded that the Ericksons committed timber trespass and awarded the Chases damages for the loss of fifteen trees in the amount of $5,061.75 which was trebled to $15,185.25. The court's conclusions regarding the timber trespass and the amount of damages were both incorrect. Furthermore the court without a finding apparently shifted the burden from Chase to Erickson to show Erickson cleared over the west edge of the easement.

The Chases have failed to establish the grading incident occurred on their property. The court was presented with ample testimony supporting the Ericksons' claim that a prescriptive easement existed over the Upper Road for access to the sixteen acres in more or less the same condition for years. Victor Erickson testified that the Upper Road was a well-traveled wide road as wide as twenty feet before Joe Zumstein purchased the sixteen acre property in 1994. He testified they cut back the vegetation on a yearly basis for the purposes of keeping it passable. R.P. 34, 39, 86. He testified further that if there were any marketable trees on the property Joe Zumstein would have removed them. R.P. 360. Joe Zumstein testified the Upper Road existed at the time he purchased the sixteen acres in 1994 and the he used it for access to the sixteen acres since that time and at no time during his ownership did the road disappear. R.P. 213-214.

Jason Teeters, whose property is situated north of the sixteen acre parcel and who has lived in the area since 1981, testified that the Upper Road had been a road used for suitable access to the sixteen acres and by the PUD and that he considered it as access to

the sixteen acre parcel. R.P. 258, 260, 266. He stated the Upper Road was rocked from time to time. R.P. 261, 266. He also testified that during the alleged skinning incident the Ericksons took out some small trees, left the large ones, but did not substantially change the road from the way it was constructed many years ago. R.P. 266, 301. Nancy Chase claims the skinning incident where she told Victor Erickson to get off the Upper Road occurred in December 2004. R.P. 582. However, it was not until September 2005 that Wayne Chase put up the fence which prevented the Ericksons from accessing the Upper Road. As such, the Chases failed to establish that any timber trespass took place on their property. They had the burden.

d. Timber Trespass Damages

Even if this court were to uphold the lower court's determination that the Ericksons are liable for timber trespass, this court should reduce the damages awarded the Chases because the Ericksons have shown they had probable cause to believe the Upper Road was their land - acquired via prescriptive easement – and thus

any timber trespass was casual or involuntary pursuant to RCW 64.12.040.

The trial court found the area skinned exceeded any area needed for the claimed prescriptive easement. However, as demonstrated above, all testimony from anyone who was in the area for the period prior to the skinning incident agreed the Upper Road had existed in more or less the same location and condition for the entire time.

The Chases hypothesize that Mr. Teeters moved his fence at some point thus pushing the Upper Road onto the Chase property before the ten year period had expired. R.P. 466. However, Victor Erickson testified that when he cleared the Upper Road area in 2005 he cleared an area no larger than the area Joe Zumstein cleared in 1994. R.P. 664. Nancy Chase testified that Mr. Teeters moved his fence after the skinning incident. R.P. 584. However, Mr. Teeters, who does not stand to benefit from the outcome of this case, testified he did not make any changes to the fence after 1995. R.P. 281. Furthermore, Nancy Chase admitted she could not attest to the use of

the Upper Road before she and her husband moved to the area in 2003.

The Ericksons had a reasonable belief they had acquired a prescriptive easement to the Upper Road and that any vegetation they removed in December 2005 was situated on property they had a right to use for access to their sixteen acres. Accordingly, the trial court committed error when it awarded treble damaged on the Chase timber trespass claim.

Measure of damages not supported by the testimony.

The trial, court found that the fifteen trees that were wrongfully removed from the Chase property provided natural screening for their property and should be replaced for a minimum cost of $5,061.75. FF 39, 40. However, the court abused its discretion and committed error pursuant to ER 801 by allowing Wayne Chase to testify to matters that where beyond his realm of expertise and based solely on conversations and documents from experts who were not called to testify. See Exhibit "29".

At trial Wayne Chase testified he spoke with a nursery regarding the value of the fifteen trees. R.P. 426-429. At no point however, did he claim he had any expertise regarding tree valuation not did he offer any expert testimony regarding the value of the trees. Although landowners have the right to testify concerning the fair market value of their property, this right is not absolute. *Port of Seattle v. Equitable Capital 203, 127 Wn.2d 202, 898 P.2d 275 (1995)*. The rationale behind this right is that one who has owned property is presumed to be sufficiently acquainted with its value and the value of surrounding lands to give an intelligent estimate of the value of his property. *Id. 210 & 212.*

Here, Wayne Chase did not testify to the value of his land, rather he testified to the value of the trees that were at one time upon his land. This testimony goes beyond the presumed knowledge a property owner would have simply by knowing the value of surrounding property. In this case, the Chases should have been required to offer expert testimony to testify as to the value of the trees.

It was also an abuse of discretion for the court to allow Wayne Chase to testify as to his opinion regarding the value of the fifteen trees because that opinion was based on inadmissible hearsay. Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. ER 801. Here, Wayne Chase admitted that he arrived at his opinion regarding the value of the fifteen trees by speaking with third party nurseries, etc. R.P. 426-429. Apparently, someone at the nursery told Wayne Chase what the value of the fifteen trees would be. Counsel for the Ericksons objected to this testimony at trial and through a motion to reconsider after trial, however the court nevertheless allowed the improper hearsay testimony. R.P. 431-432.

Wayne Chase's opinion regarding the value of the trees was not based on his ownership of the property. If that were the case, he would not have had to make inquiries with the nurseries as to the value of the trees. Rather, his testimony was made on the basis of statements made by one or more unidentified people who informed him regarding the value of the trees, but did not testify at trial. As such, what Wayne Chase was told by the folks at the nursery was

inadmissible hearsay which was provided to prove the value of the trees and should not have been allowed by the court. The court's abuse of its discretion by allowing such testimony, requires this court to strike the damages awarded for timber trespass or remand the matter, if necessary, for a proper determination of the value of the trees.

G. **Conclusion**

The Ericksons respectfully ask the Court to:

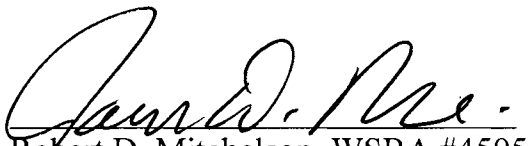
1. Affirm the lower court ruling granting the Ericksons a prescriptive easement over the Lower Road.

2. Reverse the lower court ruling that found that the Ericksons did not establish a prescriptive easement over the Upper Road.

3. Reverse the lower court's ruling finding the Ericksons liable for timber trespass.

4. Reverse the lower court's ruling granting the defendants treble damages for the Ericksons' timber trespass.

Respectfully submitted this 23rd day of April 2009.



Robert D. Mitchelson, WSBA #4595
Attorney for Plaintiffs / Appellants

ORIGINAL

FILED
COURT OF APPEALS
DIVISION II
09 APR 27 AM 9:23
STATE OF WASHINGTON
BY DEPUTY

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

VICTOR ERICKSON, and LARRY ERICKSON, Plaintiffs / Appellants, vs. CHARLES W. CHASE, and NANCY CHASE, husband and wife, Defendants and Third Party Plaintiffs, LLOYD COMBS & DORIS COMBS Third Party Defendants and Fourth Party Plaintiffs, JAMES ROBSON, Fourth Party Defendant.	**APPEALS CASE NO. 37760-8-II** **SKAMANIA CASE NO. 06-2-00083-0** **CERTIFICATE OF SERVICE**

STATE OF WASHINGTON)
ss.
COUNTY OF CLARK)

I state under penalty of perjury under the laws of the State of Washington that I am competent to be a witness and over the age of twenty-one (21) years;

ROBERT D. MITCHELSON LAW OFFICE, P.S.
P.O. BOX 87096
VANCOUVER, WA 98687-0096
(360) 260-0925 (360) 944-1947 Fax

Mike Simon (attorney for Robson)
Landerholm, Memovich,
Lansverk & Whitesides, P.S.
805 Broadway #1000
Vancouver, WA 98666-1086

ROBERT D. MITCHELSON LAW OFFICE, P.S.
P.O. BOX 87096
VANCOUVER, WA 98687-0096
(360) 260-0925 (360) 944-1947 Fax

ORIGINAL

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

VICTOR ERICKSON, and LARRY ERICKSON, Plaintiffs / Appellants, vs. CHARLES W. CHASE, and NANCY CHASE, husband and wife, Defendants and Third Party Plaintiffs, LLOYD COMBS & DORIS COMBS Third Party Defendants and Fourth Party Plaintiffs, JAMES ROBSON, Fourth Party Defendant.	**APPEALS CASE NO. 37760-8-II** **SKAMANIA CASE NO. 06-2-00083-0** **CERTIFICATE OF SERVICE**

STATE OF WASHINGTON)
ss.
COUNTY OF CLARK)

I state under penalty of perjury under the laws of the State of Washington that I am competent to be a witness and over the age of twenty-one (21) years;

ROBERT D. MITCHELSON LAW OFFICE, P.S.
P.O. BOX 87096
VANCOUVER, WA 98687-0096
(360) 260-0925 (360) 944-1947 Fax

that on **April 28, 2009**, I caused a **Corrected page 20 to the AMENDED OPENING BRIEF FOR APPELLANT'S ERICKSONS** to be placed in a sealed first class postage prepaid envelope addressed to each attorney listed below and mailed in the United States Postal Service.

Dated this 28rd day of April, 2009.

Sherri Farr, assistant to
Robert D. Mitchelson WSBA#4595
Attorney for Appellants, Ericksons

Washington State Court of Appeals
Division Two
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Charles Wiggins (attorney for Chase)
WIGGINS & MASTERS PLLC
241 Madison Ave. North
Bainbridge Island, WA 98110

Gideon Caron (attorney for Combs)
CARON, COLVEN, ROBISON
& SHAFTON, P.S.
900 Washington #1000
Vancouver, WA 98660

ROBERT D. MITCHELSON LAW OFFICE, P.S.
P.O. BOX 87096
VANCOUVER, WA 98687-0096
(360) 260-0925 (360) 944-1947 Fax

Mike Simon (attorney for Robson)
Landerholm, Memovich,
Lansverk & Whitesides, P.S.
805 Broadway #1000
Vancouver, WA 98666-1086

ROBERT D. MITCHELSON LAW OFFICE, P.S.
P.O. BOX 87096
VANCOUVER, WA 98687-0096
(360) 260-0925 (360) 944-1947 Fax