

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 37760-8-II

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

VICTOR ERICKSON, and LARRY ERICKSON,
Appellants,

v.

CHARLES W. CHASE, and NANCY CHASE,
Respondents/Cross-Appellants,

LLOYD COMBS & DORIS COMBS,
Cross-Respondents/Cross-Appellants,
and

JAMES ROBSON,
Cross-Respondent.

CHASE REPLY TO COMBS AND ERICKSON

WIGGINS & MASTERS, P.L.L.C.
Charles K. Wiggins, WSBA 6948
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

Attorney for Respondents/Cross-Appellants

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REPLY TO CROSS-RESPONDENT'S CLAIMS

Respondents/cross-appellants Chase argued their cross-appeal against Combs in their earlier brief. Brief of Respondents/cross-appellants Chase ("Chase Brief"). Chase argued that the attorney fee clause in Chase's purchase and sale agreement entitles Chase to recover fees incurred in suing Combs because the agreement expressly provides that the representations in the agreement survive closing. Combs Brief 30-34. Chase also argued that the trial court erred in refusing to award damages for the diminution in value of Chase's property. Chase Brief 34-40. Finally, Chase requested attorney fees on appeal against Combs. *Id.* at 41.

Chase was served with only one brief by Combs. Opening Brief Of Third Party Defendants And Fourth Party Plaintiffs Combs. The only argument against Chase in the Combs brief is the request in Combs' Conclusion that the Court grant Combs relief against Robson, and that the Court substitute Robson for Combs as debtor in the \$39,405.00 money judgment in favor of Chase" Combs Brief 7.

Combs cites no authority for his Conclusion and he fails to argue for the Conclusion. There is no authority for Combs' conclusion because Combs breached the warranty deed he gave to Chase and his Purchase and Sale Agreement to Chase. Combs is liable for breaching the contract and the warranty deed, and it is irrelevant whether Combs can recover over against Robson.

In short, the Court should grant the relief requested in Chase's cross appeal against Combs.

REPLY ON CHASE'S CROSS APPEAL AGAINST ERICKSON

Chase's prior brief argued against Erickson's appeal as to the Upper Road and cross appealed against Erickson as to the Lower Road. This Reply Brief is limited to replying to Erickson's response to Chase's cross-appeal as to the Lower Road.

Chase argued three separate reasons for reversing the trial court's finding of a prescriptive easement across the Lower Road. The first ground was that Erickson had failed to prove that his use of the Lower Road was adverse because use of vacant, open and unenclosed property is presumed permissive. Chase Brief 22-24. Erickson replies that, "[t]here was ample evidence that no one gave anyone permission to use the road." Erickson Reply 14. What Erickson actually means is that he never asked permission to use

the road, RP 20, 308, which means there is no evidence that Erickson used the road with or without permission. In the absence of evidence, the presumption of permissive use is un rebutted.

The burden was on Erickson to prove each element of a prescriptive right, which includes proof that the use was adverse to the true owner. ***Granite Beach Holdings, LLC v. Dep't of Natural Res.***, 103 Wn. App. 186, 200, 11 P.3d 847 (2000). The element of adversity is proven by showing "that the claimant treat the land as his own as against the world throughout the statutory period." ***Chaplin v. Sanders***, 100 Wn.2d 853, 860-61, 676 P.2d 431 (1984).

Erickson failed to prove that he adversely used the road, or that he used the road without permission, or that he treated the road as if he had an absolute right to use it without or without permission. There are no findings of hostility or adversity. Erickson points to finding 7 that his use of the property "averaged about 700 trips per year," but he omits the qualifying phrase from the finding, "although in a sporadic or off and on nature." Erickson FF 7, CP 210. Finding 7 does not redeem Erickson's claim.

Erickson argues that the facts of the cases on which Chase relies are different than this case. Erickson Reply 15-17. That is

the nature of cases, the facts are almost always different, but the announced principles continue to apply.

Erickson argues that Robson had logged the 20 acres before he subdivided it. Erickson Reply 17. The presumption of permissive use does not depend on whether property is logged or unlogged, but on whether the property is “vacant, open, unenclosed, and unimproved” **Granite Beach**, *supra*, 103 Wn. App. at 200.

Chase’s second argument was that Erickson’s use of the Lower Road was neither open nor notorious after Erickson’s short plat application was filed, reciting that access to the 9 acres was to the south, not to the north across the Lower Road. Chase Brief 25-26. Erickson mischaracterizes this argument, characterizing it as an “argument that the short plat application somehow lulled the true owners of the 20 and the 16 into believing the Erickson’s would not continue to use the Road as their primary access to the pit” Erickson Reply 17-18.

The cross-easements have nothing to do with “lulling” anyone. The Supreme Court emphatically held in **Chaplin v. Sanders** that subjective beliefs are irrelevant to determination of hostility or adversity. **Chaplin**, *supra*, 100 Wn.2d at 860-61. The

issue, as stated above, is whether the claimant treats the property as his own as against the world throughout the prescriptive period. By obtaining access for the 9 acre parcel to the south, instead of the north through the Lower Road, Erickson was not treating the Lower Road as if he had a right to use it.

Erickson argues that the short plat application had nothing to do with prescriptive use of the Lower Road because the use of alternative roads is of no concern to the County. Erickson Reply at 18. Erickson again misses the point. By filing the plat application, Erickson was telling the world he was not claiming a right of access over the lower road.

Chase's third argument against Erickson's prescriptive easement over the Lower Road was that after Robson and Zumstein exchanged easements, it was impossible for anyone to know whether the trucks using the Lower Road were coming from the 16 acres or the 9 acres. Chase Brief 27-28. Since the 16 acres have a recorded easement, Erickson's use of the Lower Road cannot be open and notorious as to the 9 acres. Erickson does not seem to have any response to this argument. Erickson Reply 18.

CONCLUSION

The Court should reverse the trial court's grant of an easement to Erickson allowing Erickson to use the Lower Road for the benefit of the 9 acres.

The Court should reverse the trial court's denial of attorney fees against Combs for the cost of bringing this action against Combs because the attorney fee clause in Chase's purchase and sale agreement entitles Chase to recover fees incurred in suing Combs. The Court should also hold that the trial court erred in denying any damages to Chase for diminution in value of his property and remand for determination of the amount of diminution.

Finally, the Court should to Chase award fees on appeal against Combs.

RESPECTFULLY SUMITTED this 26 day of August , 2009.

WIGGINS AND MASTERS, P.L.L.C.



Charles K. Wiggins, WSBA 6948

241 Madison Avenue North

Bainbridge Is, WA 98110

Counsel for Respondent/Cross-Appellant

Chase

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **CHASE REPLY TO COMBS AND ERICKSON** chase postage prepaid, via U.S. mail on the 21 day of August, 2009, to the following counsel of record at the following addresses:

For Appellants Erickson

Mr. Robert Mitchelson
202 SE 124th Avenue
P.O. Box 87096
Vancouver, WA 98687

For Cross-Respondents/Cross-Appellants Combs

Mr. Gideon Caron
900 Washington Street, Ste 1000
Vancouver, WA 98660

For Cross-Respondent Robson

Mr. Michael Simon
805 Broadway Street, Ste 1000
P.O. Box 790
Vancouver, WA 98666

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Charles K. Wiggins, WSBA 6948
Attorney for Respondents/Cross-Appellants Chase