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Appellants Vincent A. Dhanens and Susan J. Dhanens hereby appeal from the decision of the Superior Court of Thurston County recognizing certain easement rights across certain property owned by the Dhanens in favor of Appellees Ross and Kathleen McWaid.

DECISION BELOW

On November 18, 2011, the Superior Court of Thurston County, Judge Thomas A. McPhee, entered a Judgment against Defendants based on certain Findings of Fact and Conclusions of Law entered after a trial on the merits. In its Judgment, the trial court held that the McWaids had a prescriptive easement over property owned by the Dhanens. In addition, the trial court held that the McWaids had the right, under a Road Easement and Maintenance Agreement, to create a second road to access their property on the same property.

ASSIGNMENTS OF ERROR

- I. The trial court erred by concluding that the McWaids had a prescriptive easement across property owned by the Dhanens.

Issue presented: Whether the record supports the court's finding that an absentee owner used of neighboring property used a

roadway during the prescriptive period
designated by the trial court.

Issue presented: Whether the infrequent nonspecific use of a road by an absentee property owner constituted the “open, notorious, continuous, uninterrupted” use necessary to support a claim for a prescriptive easement.

Issue presented: Whether the record supports the trial court’s finding that the owner of the servient property knew of the alleged adverse use.

Issue presented: Whether the trial court erred in recognizing an unlimited prescriptive easement right for the benefit of a residential property owner based on the infrequent use by a previous nonresidential property owner.

II. The trial court erred by concluding that the McWalds had a unilateral right to alter the route of a road serving multiple lot owners.

Issue presented: Whether an express easement, created by a Road Easement and Maintenance Agreement which contemplates the construction and

maintenance of a single road, grants to an individual property owner the right to unilaterally construct an additional route within the easement area.

BACKGROUND

This matter concerns the roads which the McWaid's have easement rights to use to access their property (the "McWaid Property"). The roads in question traverse two parcels owned by the Dhanens: the "Dhanens Property," on which Defendants reside, and the "Spridgen Property" an unoccupied residential lot located between the Dhanens Property and the McWaid Property. Findings of Fact and Conclusions of Law (hereinafter "CP 158"), ¶ 4.

The McWaid Property is the last of several lots served by a private road constructed by Friend and Friend Enterprises, Inc. ("Friend") The private road extends from a public street— Mullen Road — to the McWaid property. In traversing the properties from Mullen Road, a driver would cross the Dhanens Property, then the Spridgen Property, and then arrive at the McWaid Property. CP 158, ¶ 8.

The private road constructed by Friend lies within an easement created by Friend, that also extends from Mullen Road to the edge of the McWaid Property. CP 158, ¶ 8. The easement is described in a Road Easement and Maintenance Agreement (the “Road Agreement”), which was executed by Friend in July, 1991 and was recorded in September, 1991. CP 158, ¶ 12. Beginning at Mullen Road, the easement is 40 feet wide and maintains that width for most of its entire length. However, as the easement approaches the McWaid Property, the easement widens to 60 feet. This widened easement area exists on the Spridgen Property. CP 158, ¶ 13.

Although an unpaved road existed prior to the execution and recording of the Road Agreement, a paved road was created several months after the easement was recorded. As the paved road crosses the Spridgen Property, there is a fork in the road. The right hand, or “upper fork” continues to the edge of the McWaid Property. The center of this upper fork is exactly in the center of the easement area. CP 158, ¶ 24.

The left hand, or “lower fork” also travels to the edge of the McWaid Property. However, the paved surface of the road extends outside of the easement area. CP 158, ¶¶ 30-31. The right hand edge of this lower fork is located at left hand edge of the easement. Therefore, a person wanting to use

this lower fork to access the McWaid Property must travel across the Spridgen Property in an area that is outside the easement.

Larry Kaufman purchased the McWaid Property in September, 1991 from Friend, and sold it to Andrew Schell in September, 2001. CP 158, ¶s 18 and 56. Mr. Schell owned the parcel until 2004 when he sold it to the McWaids.

Michael Spridgen bought the Spridgen Property from Friend in October, 1992 and sold it to the Dhanens in 2003. CP 158, ¶ 38. Mr. Spridgen did not reside on the parcel he owned. Mr. Spridgen intended to build a residence on the property, but never did. He moved away from the area in mid-1995. CP 158, ¶¶ 50-51.

The McWaids, when they purchased their property, considered the lower fork to be a second route of access for their parcel. CP 158, ¶ 74. The Dhanens, however, considered the lower fork to be a driveway serving only the Spridgen Property, as did that property's previous owner, Michael Spridgen. CP 158, ¶ 75.

After a dispute arose over the use of the lower fork, and without warning, the McWaids built an additional road within the easement area on the Spridgen Property. This third road lies between the upper and the lower

paved forks, and lies within the easement area. CP 158, ¶ 79. The parties disagreed over whether the Road Agreement permits the McWaids to unilaterally construct this additional route across the Spridgen Property.

Following a trial, the lower court entered judgment in favor of the McWaids. The trial court held that the McWaids had a prescriptive easement over the paved lower fork that was outside the easement area on the Spridgen Property. The trial court also held that the McWaids could modify the road within the easement area on the Spridgen Property by adding an additional access route to the McWaid Parcel.

LEGAL ARGUMENTS

I. The trial court erred in concluding that the McWaids have a prescriptive easement across the Spridgen Property

The trial court held that the McWaids had a prescriptive easement over the portion of the lower fork that extends outside of the easement area. The court based this conclusion on two factual findings that are not supported by the record, and committed two legal errors in reading its conclusions. To begin with, the trial court's finding that the area in question was "regularly" used by an absentee property owner between September, 1991 until September, 2001 is not supported by the record. And the trial court's related legal conclusion that this use was sufficiently "open, notorious, continuous

and interrupted” was erroneous. The trial court’ second flawed factual finding is its determination that the owner of the Spridgen Property knew of the adverse use. In addition, the trial court applied the wrong legal standard in concluding that the infrequent prior use by an absentee, nonresidential owner of the property can create a prescriptive easement that gives the subsequent owner an unlimited right to use the prescriptive area.

These errors warrant vacating the trial court’s conclusion that the McWaids have a prescriptive easement.

The elements for proving a prescriptive easement are well established and have been repeatedly cited in Washington court opinions. To establish a prescriptive right of way over the land of another person, the claimant of such right must prove that, for a period of ten years, the claimant used the other’s in an “open, notorious, continuous and uninterrupted” manner, and that the owner of the property knew of the use at such a time when he was able to assert and enforce his rights. Rodruck v. Sand Point Maintenance Commission, 48 Wash.2d 565, 570 (1956) *quoting* Northwest Cities Gas Co. v. Western Fuel Co., Inc., 13 Wash.2d 75 (1942). The trial court articulated this standard in its Oral Opinion. Verbatim Report of Proceedings (hereinafter “RP”), p. 490, lines 2-7. The trial court’s verbal ruling regarding

the prescriptive easement is confirmed at RP: 490, line 2 through 491, line 24.

The use of another's property is presumed to be permissive not adverse. Todd v. Sterling, 45 Wash.2d 40, 42-43 (1954). That presumptively permissive use may become a right by "prescription" only if all of the conditions referred to above are established. Northwest Cities Gas Co. v. Western Fuel Co., Inc., 13 Wash.2d 75, 84 (1942).

The Court used a time period between September 20, 1991 and September 20, 2001 as the period of time during which prescriptive easement rights were created. Larry Kaufman was the owner of the McWaid property for the first nine years of this period and was the presumptive "adverse user" of the prescriptive area. Andy Schell owned the McWaid Property after September, 2000 and was the "adverse user" during the period during which the prescriptive rights were allegedly created.

A. Standard of Review

Whether the elements of a prescriptive easement are met is a mixed question of law and fact. Petersen v. Port of Seattle, 94 Wash.2d 479, 485 (1980). Factual finds will be upheld if supported by "substantial evidence" in the record. Sunnyside Valley Irrigation District v. Dickie, 149 Wash.2d

873, 879 (2003). Conclusions as to whether the facts, as found, satisfy the elements for demonstrating a prescriptive easement, are reviewed for errors of law. Stokes v. Kummer, 85 Wash.App. 682, 689-90 (1997). Not only are two factual findings of the trial court not supported by the record, but the court applied the wrong legal standard concerning the nature of the use necessary to prove a prescriptive easement.

B. The Trial Court's Conclusion that the use of the Lower Fork was "Open, Notorious, Continuous and Uninterrupted" Is Erroneous

Prescriptive rights are disfavored in the law because they take away rights of other persons. Northwest Cities Gas Co. v. Western Fuel Co., Inc., 13 Wash.2d 75, 83 (1942). Courts therefore hesitate to recognize such rights unless the user shows "by clear proof" that the use meets the legal requirements to establish a prescriptive easement. Lee v. Lozier, 88 Wn. App. 176, 185 (1997).

In order for one's use of another's property to create an prescriptive easement, the use must continue for a full ten year period. In this case, the trial court found that a prescriptive easement was created during the ten year period beginning in September, 1991 and ending in September, 2001. CP 158, ¶ 63. During this period there were two separate users of the disputed

lower fork. Larry Kaufman claimed to have used this portion of the road from September, 1991 until September, 2000, at which time he sold the McWaid Property to Andrew Schell. Andrew Schell claimed to have used the lower fork after September, 2000.

In its Findings of Fact and Conclusions of Law, the trial court stated that Andrew Schell “regularly accessed and used the McWaid Property” and “both forks of the road” leading to the McWaid Property. CP 158, ¶ 58. In its Oral Opinion, the trial court stated that “continuous and uninterrupted use” did not require the McWaids to prove “constant use” of the lower fork. RP: p. 490, lines 21-23. Rather, because the McWaid Property was unimproved, infrequent use caused by the absentee owner’s “sporadic presence” was sufficient. RP: p. 491, lines 4-6.

Whatever the trial court’s characterization of the use of the lower fork, the evidence at trial does not support the finding that Andy Schell’s use of the lower fork was “open, notorious, continuous and uninterrupted” from September, 2000 until September, 2001.

Mr. Schell testified that he owned the property for four years. Over this period of time, he testified that he visited the property only twelve times.

During questioning by the McWaid's counsel during the trial, Mr. Schell was asked about his use of the property:

Q: And how frequently would you be out on the property during the time you owned it?

A: Honestly, I mean, I – I'd be lying if I told you an exact number. I mean, we were out there periodically, you know? You know, I actually had to go back and look. We had this thing for, like, four years. So we went out there probably more than a dozen times. And we camped out there with our family probably – I don't know – several times.

RP: 75, lines 10-19. During cross examination, Mr. Schell confirmed that he visited the property only twelve times during the four year period that he owned the property. RP: 83, lines 3-17.

That was the total extent of the evidence concerning the extent of Mr. Schell's the number of times Mr. Schell used the lower fork. There is absolutely no testimony in the record that Mr. Schell used the lower fork between September, 2000 until September, 2001. As a result, there is not "evidence sufficient to persuade a rational fair-minded person" that Mr. Schell "regularly" used the lower fork to access his property. Sunnyside Valley, 149 Wash. 2d at 879.

Even if one assumes that Mr. Schell must have used the lower fork in that time period, the use he described in his testimony certainly was not

“open, notorious, continuous and uninterrupted” as required by Washington law. On average, Mr. Schell would have used the lower fork three times per year. “Continuous” use does not include use that is “occasional”. Downie v. City of Renton, 167 Wn. 374, 382 (1932). The Downie court described continuity as the “very essence” of the prescriptive easement doctrine. “Occasional trespasses or acts of ownership” are not, according to that court, sufficient to demonstrate the required continuity.

The evidence of use by Mr. Schell falls far short of the “clear proof” required to prove the use required to create a prescriptive easement.

C. The Trial Court’s Conclusion that the Owner of the Spridgen Property had Notice of the Adverse Use Is Not Supported by the Record

A critical component of a prescriptive easement claim is that the owner against whom an interest is claimed has notice of the adverse use. Courts have consistently required that the owner of the servient estate either actually knew of the adverse and acquiesced, or, that the use occurred “with the knowledge of such owner at a time when he was able in law to assert and protect his rights.” Northwest Cities Gas Co. v. Western Fuel Co., Inc., 13 Wash.2d 75, 84 (1942); Todd v. Sterling, 45 Wash.2d 40, 43 (1954).

In this case, the burden was on the McWaid's to prove that the owner of the servient property during the prescriptive period – Michael Spridgen – had knowledge of the alleged use. The trial court acknowledged this standard in its verbal ruling, including among the elements of a prescriptive easement that the claimant must prove “that the owner knew of the adverse use when he was able to enforce his rights.” RP: p. 490, lines 2-7.

The trial court found that the McWaid's had proven that Mr. Spridgen knew of the alleged use through aerial photographs taken in 1992 and 1996. Id. at lines 13-19. The court concluded that there was a road “clearly visible” in 1992 and 1996 aerial photographs which provided “sufficient notice” to Mr. Spridgen that the lower fork was being used as a driveway to the McWaid Property.

The problem with this conclusion, however, is that neither photograph, was taken at a time during which Mr. Spridgen was on the property. The earlier photograph was taken in July, 1992. CP 158, ¶ 26. Mike Spridgen didn't purchase the property until October 1992. CP 158, ¶ 38. The purchase was made within a few days of first viewing the property. CP 158, ¶ 42.

During the trial, Mr. Spridgen was asked by Mr. Spridgen about what was shown in the July, 1992 aerial photograph and how it compared to what he saw on the ground in October, 1992. RP: p. 244, line 13 to p. 245, line 20. He testified that although the July photograph may depict a road off the end of the lower fork, when he was there in October, that area was covered with blackberry bushes. RP: p. 245, lines 11-20.

Plainly the 1992 photograph does not “prove” that Mr. Spridgen had notice of a road leading off the end of the lower fork, let alone that anyone was, in fact, using the road.

Similarly, the second aerial photograph, taken sometime in 1996 (CP 158, ¶ 27) cannot provide proof any “notice” to Mr. Spridgen regarding the use of the lower fork. Mr. Spridgen had moved away from this area in mid 1995, months before the photograph could have been taken. CP 158, ¶ 50. The photograph shows the condition of the area when Mr. Spridgen was living in Washington, D.C., not its condition at the time Mr. Spridgen was physically present on the parcel.

Another important factor to consider in determining whether a property owner has the requisite knowledge of the adverse use, the nature and location of the property involved are material and important considerations.

Northwest Cities Gas Co. v. Western Fuel Co., Inc., 13 Wash.2d 75, 88 (1942). Travel over unoccupied land does not constitute notice to an absent owner. Todd v. Sterling, 45 Wash.2d 40, 44 (1954).

Yet, in this case, however, that is exactly what happened. Despite finding that Mr. Spridgen had adequate legal notice of the alleged use, the trial court specifically recognized that Mr. Spridgen “had very little opportunity to observe occupants on Lot F and even less opportunity to see actual use of” the lower fork. RP: 491, lines 12-13. Mr. Spridgen, the trial court found, “was mostly absent, never lived on the property and was seldom there.” CP 158, ¶ 66.

The aerial photographs clearly do not show that Mr. Spridgen knew of the adverse use, and the trial court’s findings concerning his absence from the property reinforce the conclusion that Mr. Spridgen did not know of the adverse use.

D. The Trial Court Used the Wrong Standard in Concluding that Andy Schell’s Use of the Lower Fork was Sufficient to Support a Prescriptive Easement

The trial court granted the McWaides an unlimited right to use the lower fork outside of the easement area. The McWaides are residents of their property, and claimed a right to use the lower fork in a manner consistent

with residential ownership. In recognizing the existence of the prescriptive easement, however, the court relied upon the very infrequent use by a previous, absentee owner of the property. An owner who rarely visited the property. The trial court considered the occasional use of the lower fork by Mr. Schell to be “continuous and uninterrupted” because it was the type of use an absentee owner of the McWaid Property would make of that road. As a result, the trial court allowed what it described as the “sporadic” use of the lower fork to vest unlimited use in the McWaid. See RP: 491, line 5.

Although research has not discovered a case exactly on point, the decision by the trial court in this case is inconsistent with at least on principle regarding prescriptive easements. Namely, that the scope of the prescriptive easement is defined by the prescriptive use. See, e.g., Northwest Cities Gas Co. v. Western Fuel Co. Inc., 13 Wash.2d 75, 92-93 (1942). In this case, however, use that was rare has been transformed into a right that is unlimited.

Instead of focusing on whether Mr. Schell’s adverse use was consistent with the use of an absentee property owner, the trial court should have focused on that use was consistent with the use by a typical residential owner. That, after all, is the right being pursued by the claimant of the prescriptive easement in this case. If, under that alternate analysis, the prior

use by Mr. Schell had been consistent with the right now claimed by the McWaids, a prescriptive easement could be properly recognized. To follow the trial court's approach, however, claimants would obtain "rights" that had never been exercised previously by the adverse user.

Such a result is inconsistent with the historical method of recognizing prescriptive easements.

Furthermore, the trial court's finding that Andy Schell used the property in a "manner" that was typical of an absentee owner is completely without support in the record. There was no evidence that his alleged use was the same or similar to absentee owners of unimproved waterfront property.

II. The trial court erred in concluding that the Road Easement and Maintenance Agreement includes the right to alter the existing road

The interpretation of an express easement is a mixed question of law and fact. What was "intended" is a question of fact and the consequences of that intent is a question of law. Sunnyside Valley, 149 Wash.2d at 880.

The scope of an easement is limited by the language of the instrument granting the right. Sanders v. City of Seattle, 160 Wash. 2d 198, 214 (2007). An easement is "construed strictly" in accordance with its terms. Id. at 214-15. A party is privileged to use another's land only to the extent expressly

allowed by the easement. Sanders v. City of Seattle, 160 Wash. 2d 198, 214-15 (2007). In Sanders the limited purpose was to provide pedestrian access. Sanders v. City of Seattle, 160 Wash. 2d 198, 214-15 (2007).

Similarly, the use of the easement described in the Road Agreement should be limited to the purpose and design set forth in that agreement. The McWaid's right to use the easement across the Spridgen Property is limited by the purpose for which the easement was created. Easement rights are not generic in nature. Instead the extent and nature of an easement is defined by the instrument that created it. State v. Decker, 188 Wash.2d 222, 225 (1936). Where, as in this case, the creation of an easement is included in a larger agreement, the extent of the easement should be determined in the context of the other provisions of that agreement. Moe v. Cagle, 62 Wash.2d 935, 937 (1963). Therefore, in this case, the easement benefitting the McWaid Property is defined by a "proper construction of the language" in the Road Agreement. City of Seattle v. Nazareus, 60 Wash.2d 657, 665 (1962).

The Road Agreement describes a complete plan for a road to serve four neighboring lots. It is clear from the language of the Road Agreement, that Friend intended to construct a single road over an easement he defined

and then to have that road jointly maintained by the owners of the lots who used the road. This intent is clear from the plain language in the recitals section of the Road Agreement. Friend announces that its desire to “construct a permanent, common access road” to serve the identified parcels, and create an easement to accomplish that purpose.

This paragraph sets forth several important features of the road: Friend is going to construct the road. The road is to be permanent. There is to be a single road. These features are reinforced throughout the Road Agreement. To begin with, Friend reserves for itself in Section 2 the design and construction of the road. Then, Friend reinforces his intent for the road’s configuration to be fixed by using the phrases “said roadway,” “the road” and “the roadway described herein above” ten different times to describe the road that will serve the four lots.

The permanence and singularity of the road constructed by Friend is further supported by the paragraphs concerning maintenance of the road. In Section 3, Friend states that “the roadway described herein above shall be maintained in perpetuity.” In Section 4, Friend also directs that “the costs of maintaining the roadway described herein above” shall be prorated among the owners.

Nothing in the language of the Road Agreement gives the McWaids the unilateral right to alter, expand or change the road. Rather, the Road Agreement only authorized parties to “maintain” the roadway created by Friend. The term “maintain” means “to keep in an existing state; to preserve from failure or decline”. Miriam Webster English Dictionary, 11th Edition. See Castanza v. Wagner, 43 Wn. App. 770, 776 (1986) (terms used in documents creating easements should be given their plain and ordinary meaning). Furthermore, Section 3 limits the scope of the maintenance work. Such work is limited to the “roadway described herein above,” and directs that the “surface” of the roadway be “maintained” so as to allow owners access to their property. “Maintaining” an existing road is fundamentally different than expanding it or creating a second road.

Friend’s intent regarding an easement is further evident in the way he used it. The use of an easement by the person who created it, is evidence of the purpose for which it was intended. York v. Cooper, 60 Wash. 2d 283, 285 (1962); Scott v. Walliter, 49 Wash. 2d 161 (1956). Friend built a single paved road within the easement.

Friend’s intent to provide a single access road to the McWaid Property is also evident from the placement of the asphalt surfaces on the

Spridgen Property. The “upper fork” is exactly in the middle of the easement. A person intending to have two access routes within the easement is unlikely to place one of those routes in the center. Moreover, the “lower fork” was constructed outside the easement. In fact, it is precisely outside.

Larry Kaufman provided much testimony concerning his desire to have two access routes to the McWaid Property, and Friend’s supposed understanding of that desire. Mr Kaufman also testified that the easement was widened from 40 to 60 foot in order to accommodate two roads to the McWaid Property, and that the upper and lower fork were, in fact, intended to both be access routes to that parcel.

However, and more importantly, Mr. Kaufman also testified that Mr. Friend’s placement of the upper and lower forks were inconsistent with this purported commitment to provide two routes to the McWaid Property.

Q: But he [Friend] placed the road right in the center, right? The upper road to [the McWaid Property] is right in the center of that easement.

A: Correct.

Q: Is that consistent with what you would have expected him to do?

A: No.

Q: And the placement of the [lower fork] is outside the easement area, isn’t it?

A: Correct.

Q: And that’s not consistent with what you believe your understanding with Mr. Friend was?

A: Correct.

RP: 63, line 9 through p. 64, line 1.

The best evidence of what Friend intended for the easement is what Friend did, not memories of conversations that occurred twenty years ago. Both the Road Agreement read as a whole, and the undisputable actions of the creator of the easement, indicates the easement was intended to accommodate a single road to the McWaid Property. Any rights of the McWaids to an access road to their property are limited to those granted in the Road Agreement, and those rights do not include their unilateral changes in the common road, or the construction of an additional route to the McWaid Property.

CONCLUSION

The trial court's conclusion that the McWaids are entitled to a prescriptive easement is based on unsupported findings of fact and erroneous conclusions of law. Furthermore, the trial court erred in concluding that the express easement contained in the Road Agreement carried with it the unilateral right to change the road. As a result, the trial court's judgment on these issues should be vacated.

DATED this 10 day of May, 2012.

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No. 4-2891-1-II

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

Thurston County Superior Court
Cause No. 10-2-01370-6

ROSS and KATHLEEN MCWAID, husband and wife,

Plaintiffs/Respondents.

vs

VINCENT A. and SUSAN J. DHANENS, husband and wife and their
marital community,

Defendants/Appellants

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FILED
COURT OF APPEALS
DIVISION II
2012 MAY 10 PM 3:06
STATE OF WASHINGTON
BY _____
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ORIGINAL

I, Tanya L. Acevedo declares:

1. I am over 18 years of age, not a party to the above-entitled action, and not interested in the action. I am competent to be a witness in the action.

2. On May 10, 2012, I hand delivered a true and correct copy of **Appellants' Initial Brief** in the above titled action to:

Matthew Edwards
Owens Davies Fristoe Taylor & Schultz, P.S.
1115 West Bay Drive, Suite 302
Olympia, Washington 98502

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10th day of May, 2012 at Olympia, Washington.



Tanya L. Acevedo
Legal Assistant to Alan J. Wertjes