

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

APPELLANTS' REPLY BRIEF

Alan J. Wertjes
Wertjes Law Group
1800 Cooper Point Rd S.W., Building #3
Olympia, WA 98502
(360) 570-7488

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Attorney for Defendants/Appellants Vincent A. and Susan J. Dhanens

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Come Now the Appellants, Vince and Susan Dhanans and submits the following as their Reply Brief in support of their appeal in the above captioned matter.

ARGUMENTS

- I. The Record Does Not Support the Court's Conclusion that the McWalds have a Prescriptive Easement over a Portion of Outside the Road Easement
 - A. The Respondents Have Conceded That There Is No Factual Support in the Record for the Court's Conclusion That the Owner Had Notice of the Alleged Adverse Use

In order to establish a prescriptive easement, the person claiming the easement must prove that the owner of the property over which the easement was claimed had notice of the adverse use. Northwest Cities Gas Co. v. Western Fuel Co., Inc., 13 Wash.2d 75, 84 (1942); Todd v. Sterling, 45 Wash.2d 40, 43 (1954). As was pointed out in Appellant's Initial Brief, this requirement was openly acknowledged by the trial court. RP: p. 490, lines 2-7.

Michael Spridgen owned the servient parcel during the last nine years of the prescriptive period: from October, 1992 through 2001. The trial court concluded in its verbal ruling that Michael Spridgen had "notice" of the

adverse use of his property in 1992 and 1996. RP: p. 490, lines 8-19. Appellants argued in their initial brief that this conclusion was erroneous. Respondents made no response to this argument, apparently agreeing that this error occurred.

The only evidence that Mr. Spridgen had “notice” of the adverse use were two photographs that purportedly show a path leading onto the McWaid’s parcel from the parcel owned by Mr. Spridgen. The existence of this road, the trial court reasoned, demonstrated that Mr. Spridgen had notice of the use of his property. *Id.*

The problem with the court’s conclusion is that one of the photographs was taken months before Mr. Spridgen was on the property (mid-1992), and the second was taken months after he moved away from the area (sometime in 1996). Mr. Spridgen purchased the property on October 2, 1992, (RP: p. 240, lines 4-6) months after the July 1992 photograph. He moved away from this area in mid-1995. CP 158, ¶ 50, months before the 1996 photograph. Indeed, the trial court described Mr. Spridgen’s presence on the property as “he was mostly absent, never lived on the property and was seldom there.” CP 160, ¶ 66. In fact, there is no evidence in the record that demonstrates a road was visible during a time Mr. Spridgen was present. The

only evidence of what existed while Mr. Spridgen was present on the property was his testimony. Mr. Spridgen unambiguously testified that he did not see any road leading onto the McWaid's parcel. RP: p. 245, lines 11-20; and RP: p. 236, lines 9-13.

Therefore, the trial court's conclusion that Mr. Spridgen had the required notice of the adverse use is not supported by the trial record. Without notice of use to Mr. Spridgen, a claim for prescriptive easement cannot be sustained. This error, by itself, warrants vacating the trial court's conclusion that the McWaid's have a prescriptive easement across the portion of the road that extends outside the easement area.

B. The Trial Court Also Erred by Concluding that Use of the Lower Fork was "Open, Notorious, Continuous and Uninterrupted" For the Entire Ten Year Prescriptive Period

The trial court used September, 1991 to September, 2001 as the ten year period for determining whether the McWaid's had a prescriptive right to traverse the portion of the road outside the easement area. During the first nine years of that period, the property on which the disputed area exists was purportedly used by Larry Kaufman. During the last year it was used by Andrew Schell. The adverse use must continue in any "open, notorious,

continuous and uninterrupted” manner for the entire ten year period including the time during which Andrew Schell was the user.

The trial court committed two errors regarding Mr. Schell’s use of the lower fork: one factual and one legal. The factual error lies in the trial court’s finding that Mr. Schell “regularly” used the lower fork during the prescriptive period. This finding is set forth at CP160, ¶ 61.

Neither Mr. Schell nor anyone else provided any testimony as to the regularity of his use of the road across the prescriptive area. He owned the property and visited it only twelve times over a four year period. RP: 83, lines 3-17. He gave no specific testimony regarding his usage during the first year. The factual finding that Mr. Schell’s use was “regular” is not supported by substantial evidence. It is mere speculation to state that Mr. Schell used the disputed area “regularly” during the prescriptive period.

The trial court’s legal error was in concluding that this use satisfied the requirement of “open, notorious, continuous and uninterrupted” necessary to establish a prescriptive easement. Respondents concede in their response brief that in order for the adverse use to be “open” and “notorious, it must be “such as would charge a reasonable person in the owner’s position with

notice of the use.” Respondents’ Brief, p. 30. A use such as Mr. Schell’s, which occurred, on average, three times per year, isn’t sufficient.

In addition, Mr. Schell’s use of the road does not meet the legal requirement of “continuous and uninterrupted.” As described above, Mr. Schell did not provide any description of the frequency of his use of the disputed roadway during the prescriptive period. It is simply not known whether he visited the property once, twice or more times during that time. It is also not known whether days, weeks or months separated his visits.

As a result, there is not the required “clear proof” that the use was continuous and uninterrupted. See Lozier v. Lee, 88 Wash. App. 176, 185 (1997).

Respondents rely heavily on the Lozier case to assert that the frequency of Mr. Schell’s visits to the property is not important. This reliance is misplaced. The Lozier court did, in fact, consider the frequency of use an important factor in its decision. What is different about the Lozier case is that it involved the seasonal use of a dock. In such a case, that court reasoned, it is not necessary for a person claiming an adverse easement to prove that use continued during the offseason. Instead, so long as the use was consistent with the seasonal nature of the property it was not necessary to

demonstrate constant use. The Lozier court then observed that the dock was used “more frequently” in the summer months. Id. at 186.

This importance of demonstrating that the adverse use must have an appropriate degree of regularity is made more clear in Howard v. Kunto, 3 Wash.App. 393, 398 (1970), the case relied upon by the Lozier court. The Howard case involved an adverse possession claim to a summer vacation home. The Howard court explained that “continuity” may be proved in some cases in which “the land is used regularly for only a certain period each year.” Id. at 398. According to the court, “if the land is occupied during the period of time it is capable of use, there is sufficient continuity.” Id.

Thus, neither the Lozier nor the Howard case stands for the proposition that the frequency of use doesn’t matter.

In this case, there is no evidence as to the frequency or the regularity of Mr. Schell’s use of the road. Rather, there is simply vague testimony that he used it twelve times over four years. Unlike in Lozier, there is nothing seasonal about this lot. This case does not involve a dock, which is used primarily during one portion of the year. Nor does it involve the use of a seasonal summer home. Rather, it involves a road over a residential parcel

that is inhabited year round. There is also no evidence Mr. Schell's use of the road was consistent with its use by the other residents in the area.

Given the vagueness surrounding the timing of Mr. Schell's use, it can't reasonably provide "clear proof" that he used the property in a "continuous and uninterrupted" manner. Id.

C. The Infrequent Use of the Road by Previous Property Owners Does Not Give the McWaids the Unlimited Right to Use the Road

The Court erred in concluding that the infrequent – almost rare – use of a driveway during the prescriptive period gives rise to an unlimited right to use the roadway. A seminal principle underlying prescriptive easements is 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. The McWaids should have been required by the trial court to prove that the easement rights they now claim were exercised over the ten year prescriptive period.

II. The Road Maintenance Agreement did not Authorize the Unilateral Expansion of the Road within the Easement Area

The McWaids' rights to a roadway should be limited to those described in the Road Maintenance Agreement and then provided through a road constructed by the original grantor. The Road Maintenance Agreement, and the easement it contains, was intended to provide a single road for common use by multiple property owners. It benefits and burdens multiple parcels.

The Agreement reserved for the grantor the right and responsibility to build the road that served the individual lots. The grantor fulfilled that responsibility by building the road that would serve the affected lots. Nothing in the Road Maintenance Agreement grants the McWaids the right to alter the grantor's original design.

Instead of enforcing the grantor's design, the trial court's decision, in effect, gives every user of the road the right to alter the road, and to change the burden on any parcel.

The case of City of Seattle v. Nazareus, 60 Wn. 2d 657 (1962) is plainly distinguishable. That case involved a general grant of an easement for utilities. The easement was not embedded in a document that placed burdens and created benefits for multiple parties. Given the general nature of the

easement, the Nazarenius court had no difficulty in deciding that the grantee of that easement could place utilities anywhere within that express easement. It was the grantee – and not the grantor – who had the right and obligation to install utilities.

In this case, however, the Road Maintenance Agreement reserved for the grantor the right and responsibility to construct a road within the easement. It then left the maintenance of that road to the property owners. The use of the easement described in the Road Maintenance Agreement and implemented by the original grantor define the limits of the McWaid's easement rights. See Sanders v. City of Seattle, 160 Wash. 2d 198, 214-15 (2007). The court erred in failing to enforce those limitations.

III. The McWaid's Cannot Rely on the Common Grantor Doctrine to Obtain Easement Rights Across the Neighboring Property

A. The “Common Grantor Doctrine” Is Not a Legal Theory That Creates Easement Rights.

The “Common Grantor Doctrine” is a common law doctrine that courts rely upon to establish boundaries between parcels. It is one of four common law theories relied upon to alter the boundary lines of parcels that are at variance with the boundary established by a physical survey. See generally, Livingston, “Boundary Litigation”, Section 70.3 Washington Real

Property Deskbook; See also, 11 C.J.S., “Boundaries,” Section 77, page 651 (cited by numerous Washington courts). It is not a doctrine relied upon to create easement rights.

As explained in Thompson v. Bain, 28 Wash.2d 590, 591-592 (1947), this doctrine is also known as the doctrine of “location by mutual grantor.” Courts use this theory to recognize the “practical location” of a boundary line made by the transferor of property who owns both the property being transferred as well as the neighboring parcel. Id. The doctrine allows a court to enforce a designated boundary line that separates a parcel being sold from a parcel being retained by a seller, and legitimizes the parcels buyer and seller both had in mind at the time of sale. Id.

The purpose and policy underlying the common grantor doctrine is to protect a grantee who relied on the boundary between two lots that was described by a person who owns both of the neighboring lots. Levien v. Fiala, 79 Wash.App. 294, 302 (1995).

The matter before this Court does not involve the location of a boundary line between two parcels. The non-applicability of the doctrine to this case is illustrated by the very cases cited by Respondents. Every single case they cite involves a dispute over a boundary line. Thompson v. Bain, 28

Wash.2d 590, 591 (1947)(fence constructed by common owner of neighboring parcels constituted the boundary line between two parcels); Levien v. Fiala, 79 Wash.App. 294, 297 (1995) (dispute over whether boundary line was established by chain link fence erected by common grantor); Fralick v. Clark County, 22 Wn.App. 156, 158 (1978) (dispute over whether verbal representation of boundary line by owner of both parcels was binding); Atwell v. Olson, 30 Wash.2d 179, 182-83 (1948) (dispute over whether stakes and a hedge created boundary line between two parcels previously owned by a common grantor); Winans v. Ross, 35 Wn.App. 238, 239-240 (1983) (dispute over whether fence which divided two parcels previously owned by a common grantor constituted the boundary line between the parcels).

Every formulation of the Common Grantor Doctrine in these cases plainly contemplates the resolution of a dispute over the boundary line between two parcels. None of these cases involves the rewriting the scope of easement rights across a neighboring parcel. None of the cases involve the modification of any property rights other than a boundary line of a purchased parcel.

Respondents are not seeking to change the boundary line between property owned by the Appellants and the property owned by the Respondents. Rather Respondents are seeking a right to drive across an area which lies outside an express easement. This Court should avoid Respondents invitation to extend the Common Grantor Doctrine to the law of easements.

B. Even If the Common Grantor Doctrine Applies to Define Easement Rights, Plaintiffs Cannot Satisfy the Requirements Necessary for Them to Prevail

In order for the Common Grantor Doctrine to apply there must have existed, at the time of purchase, an agreed boundary between the transferor and transferee that varied from the recorded line. It must “plainly” appear that transfer occurred with reference to specific line so that there was a “meeting of the minds” as to the “identical” property being transferred. Fralick v. Clark County, 22 Wn.App. 156, 159 (Div. II 1978). Put another way, a buyer and seller must agree at the time of the sale upon a particular line. Without this common understanding between a transferor and transferee, a recorded line is not subject to modification under the Common Grantor Doctrine.

The record doesn’t demonstrate any such “meeting of the minds” occurred between Friend and Friend Enterprises, Inc., the transferor, and

Lawrence Kaufman, the transferee with respect to the location of the road. In fact, the record demonstrates, and Respondents concede, that the road wasn't even constructed until months after Mr. Kaufman purchased the property.

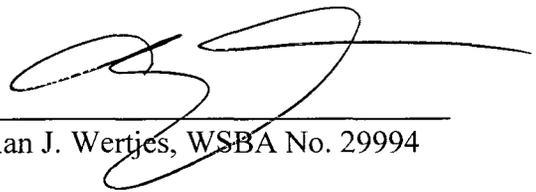
Respondents simply can't meet the first requirement of the Common Grantor Doctrine.

CONCLUSION

The trial court erred by granting Respondents a prescriptive easement over a portion of Appellants property that lies outside an express easement. The trial court also erred in interpreting an agreement granting an express easement to include the right of Respondents to expand access to their property within the easement. In addition, the Common Grantor Doctrine has no application to this case and should be disregarded.

DATED this _____ day of July, 2012.

WERTJES LAW GROUP, P.S.



Alan J. Wertjes, WSBA No. 29994