FILED
COURT OF APPEALS
DIVISION II

2017 MAR 16 AM 11:23

STATE OF WASHINGTON

BY
DEPUTY

NO. 48885-0-II

COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION TWO

KEVIN SCHOENFELDER and EMILY SCHOENFELDER,
husband and wife, et al,

Respondents,

vs.

ROBERT LARSON and JENNIFER LARSON,
husband and wife,

Appellants,

vs.

DAVID KING and JANE DOE KING, et al,
Third Party Defendants.

REPLY BRIEF OF APPELLANTS

Timothy R. Gosselin,
WSBA #13730
Attorneys for Appellants

GOSSELIN LAW OFFICE, PLLC
1901 Jefferson Avenue, Suite 304
Tacoma, WA 98402
Office: 253-627-0684

TABLE OF CONTENTS

Table of Authorities ii

I. INTRODUCTION 1

II. RESPONSE TO STATEMENT OF THE CASE 1

III. REPLY ARGUMENT 2

1. Reviewing for substantial evidence does not require the appellate court to weigh the evidence 3

2. Reply regarding prescriptive easement 4

3. Expansion of express easement 13

IV. CONCLUSION 16

Table of Authorities

Cases

Caroll v. Belcher, 1999 WL 58597 (Tn. App. 1999) 14

Carson v. Elliott, 111 Idaho 889, 728 P.2d 778 (App. 1986) . . . 14

Gamboa v. Clark, 183 Wn.2d 38,
348 P.3d 1214 (2015) 7-12

Gray v. McDonald, 46 Wn.2d 574, 283 P.2d 135 (1955) 4

Heriot v. Lewis, 35 Wn. App. 496, 668 P.2d 589 (1983) 3

In re Dependency of E.L.F., 117 Wn. App. 241,
70 P.3d 163 (2003) 3

In re Marriage of Watson, 132 Wn. App. 222,
130 P.3d 915 (2006). 3

Kosich v. Braz, 247 Cal. App.2d 737, 56 Cal. Rptr. 737 (1967) . 14

Lingvall v. Bartmess, 97 Wn. App. 245, 982 P.2d 690 (1999) . 4-5

Malnati v. Ramstead, 50 Wn.2d 105, 309 P.2d 754 (1957) 5

Murray v. Bousquet, 154 Wash. 42, 280 P. 935 (1929) 4

Niemann v. Vaughn Community Church, 118 Wn. App. 824,
77 P.3d 1208 (2003). 3

Nw. Cities Gas Co. v. W. Fuel Co., 13 Wn.2d 75,
123 P.2d 771 (1942) 10

Roediger v. Cullen, 26 Wn.2d 690, 175 P.2d 669 (1946) 11

Sordi v. Adenbaum, 533 N.Y.S.2d 566, 143 A.D.2d 898 (1988) . 15

I. INTRODUCTION

Prescriptive easements put the power of the courts behind *taking property rights* from one who lawfully owns them, and *giving them*, without charge or consideration, to somebody else. For that powerful and nearly unprecedented event to happen, the law ought to and does require a significant reason supported by significant facts.

The trial court misunderstood the facts needed to justify such an action. As a result, it twice took property rights from Larson and handed them to the plaintiffs. The court did it once because King, Larson's predecessor, did not object when his neighbor moved two rocks from the side of the road. The court did it a second time by expanding the express written agreement the Plaintiffs had with King to cover property the easement did not include. The law, common sense and good public policy prohibited the court from doing that. Plaintiffs' response does not support a different conclusion.

II. RESPONSE TO STATEMENT OF THE CASE

Plaintiff's statement of the case largely comports with Larson's. The exceptions demonstrate weaknesses in Plaintiff's arguments.

For example, Plaintiffs repeatedly state that "without the turnouts, oncoming vehicles would be forced to back up hundreds of feet, and that backing up for such a distances is "neither safe nor feasible." E.g., Brief of Respondent at 2, 6. Plaintiffs do not cite the record for these statements. In

fact, the testimony was undisputed that the Kings owned, used and lived on their property for decades without ever using a turnout except for parking their cars. (RP 1:74; 3:177-78, 196-97) Obviously, the turnouts are not necessary for use of the property.

Plaintiffs say that they would be denied fire and emergency services if a fence was erected along the easement road. The testimony, however, was that emergency response may be slowed but would not be prevented or denied. (CP 146-48) Impediments like that are common throughout Washington.

At various points in their brief, Plaintiffs discuss the history of written easements applicable to the property. None of this is relevant because the trial court ruled and the parties stipulated that their rights were to be determined by the 1996 express easement.

One point Plaintiffs do not discuss that bears highlighting is the fact that Plaintiff Lepape erected and for years has maintained a ten foot wide gate which serves as the entrance to all of the Plaintiffs' properties after the Larsons'. (RP 1:171, 183) After the easement leaves the Larsons' property at this gate, it runs another 500 feet. (RP1:58-59) Noone suggested it had to be removed to make using the easement feasible or safe.

III. REPLY ARGUMENT

In general, Plaintiffs' brief acknowledges the same underlying facts

as stated in Larson's opening brief. Plaintiffs largely just argue that the facts as found meet the applicable legal standards. Whether the facts, as found, meet the legal standard is for the court to determine as a matter of law. *Heriot v. Lewis*, 35 Wn. App. 496, 501, 668 P.2d 589 (1983).

1. Reviewing for substantial evidence does not require the appellate court to weigh the evidence.

At points in their brief, Plaintiffs contend the Larsons are asking the court to re-weigh the evidence. E.g., Brief of Respondent at 26-27. They are not. The Larsons have challenged the trial court's findings and conclusions, not its admission of evidence. In determining whether substantial evidence supports the trial court's findings, the court does not weigh the evidence or the credibility of witnesses. *In re Dependency of E.L.F.*, 117 Wn. App. 241, 245, 70 P.3d 163 (2003); *Niemann v. Vaughn Community Church*, 118 Wn. App. 824, 840, 77 P.3d 1208 (2003). But, unproven allegations do not provide substantial evidence. *In re Marriage of Watson*, 132 Wn. App. 222, 233, 130 P.3d 915 (2006). Whether the facts, as found, meet the legal standard is for the court to determine as a matter of law. *Heriot v. Lewis*, supra. Larson contends substantial evidence did not support the trial court's findings, and even if they did, the facts as found do not support the court's conclusions of law.

2. Reply regarding prescriptive easement.

At pages 9 and 10 of their brief, Respondents describe the standards for proof of adversity. After reviewing what facts are not necessarily required to prove adversity, Plaintiffs state that adversity can be demonstrated through "constructive knowledge if the use was sufficiently open and notorious." Brief of Respondents at 10. This understates the standard of proof. It is not constructive knowledge simply of the use that demonstrates adversity, it is constructive knowledge of the *user's adverse intent*.

> Such adverse use must be open, notorious, continuous, and uninterrupted over a uniform route, and with knowledge of such use by the owner at the time when he was able in law to assert and enforce his right.

Gray v. McDonald, 46 Wn.2d 574, 578, 283 P.2d 135 (1955). In other words, the character of the use must be so notorious that the owner may be presumed to have knowledge that it is adverse. *Murray v. Bousquet*, 154 Wash. 42, 50, 280 P. 935 (1929). Adverse use is measured objectively based on the observable acts of the user and the rightful owner. *Lingvall v. Bartmess*, 97 Wn. App. 245, 250, 982 P.2d 690 (1999). Simply knowing that another is using your property, whether the knowledge is direct or constructive, does not establish. The Kings had to have actual or constructive knowledge not simply that the Plaintiffs were using the turnouts, but that they were using it adversely. If mere use was the standard, any use, even permissive would be

adverse.

Adverse use means "use of property as the owner himself would exercise, entirely disregarding the claims of others, asking permission from no one, and using the property under a claim of right." *Lingvall v. Bartmess*, 97 Wn. App. at 250-51, quoting *Malnati v. Ramstead*, 50 Wn.2d 105, 108, 309 P.2d 754 (1957). Plaintiffs had to show that the Kings had actual or constructive knowledge that each of the Plaintiffs was using the turnout in a way that entirely disregarded the Kings' rights to their property.

The Larsons reiterate that, unless moving two rocks is an assertion of ownership and claim of right, the evidence was not sufficient to show adversity here. Plaintiffs' arguments notwithstanding, other than using the turnouts, that was the only assertion of adversity that any of the Plaintiffs made. And even that was only by one of them. Plaintiffs did not tell the Kings they thought they had a right to the turnouts. They did not claim a right when they negotiated the express easement. They did not improve the property. They did not prevent any of the Kings from using the property. The only arguable expression of adverse intent occurred when Schoenfelder moved two rocks.

Moreover, even if moving two rocks was evidence of adverse intent, Plaintiffs presented no evidence that the Kings had actual or constructive knowledge that even Schoenfelder had that adverse intent. Plaintiffs did not

present evidence the Kings had actual or constructive knowledge that Schoenfelder or any of the plaintiffs moved the rocks. In fact, Plaintiffs did not present evidence that the Kings even knew what the original configuration of the rocks looked like. That is important because Schoenfelder testified he moved the rocks within a day or two after they were placed. If the Kings did not know what the rocks looked like originally, they could not know they had been moved from their original position. Thus, Plaintiffs did not show that the Kings should have interpreted moving the rocks as an assertion of ownership by anyone, let alone them.

Plaintiffs claim the Larsons have only challenged one of the two grounds for overcoming the presumption of permissive use: proof that the owner has indicted by some act his admission that the claimant has a right of an easement. They claim the Larsons have not challenged that "the user was adverse and hostile to the rights of the owner." Brief of Respondent at 14. The assertion is false. Plaintiffs admit as much earlier in their brief when they state: "Larson only challenges the trial court's findings with regard to the last two elements – that Plaintiffs' use of Larson's property was adverse and that Larson's predecessors, the Kings, had knowledge of Plaintiffs' use." Brief of Respondents at 9. Larson has challenged the sufficiency of the evidence to overcome the presumption of permissive use. That includes all grounds for meeting that standard.

Plaintiffs are critical of Larson for discussing trial court findings related to Kings' intent to place the rocks, claiming these are not relevant to proving adversity. But it was Plaintiffs who made them relevant. Plaintiffs argued – and, Larson contends, the trial court incorrectly agreed – that King placed the rocks as a statement of his exclusive ownership and control over the property so that when Schoenfelder moved the rocks, King had constructive knowledge of Schoenfelder's adverse assertion of ownership. Aside from other flaws in that reasoning, the reasoning is only valid if King actually intended the placement of rocks as an assertion of his exclusive ownership. But, despite the trial court's findings, there was no evidence to support such a conclusion. Plaintiffs cannot erect a straw man then object when it gets burned.

The center point of Plaintiffs' analysis is their argument that in order to overcome the presumption of permissive use, all they had to show was that they "interfered with the owner's use of the land in some manner," citing *Gamboa v. Clark*, 183 Wn.2d 38, 348 P.3d 1214 (2015) Brief of Respondent at 14. They met that standard, they contend, by proving they "deliberately removed the [two] large rocks, which temporarily blocked their use of the turnouts, then continued to use the turnouts." Brief of Respondent at 15. *Gamboa* makes clear, however, that more than de minimis conduct is required to overcome the presumption of permissive use.

In *Gamboa*, Plaintiffs and defendants had shared a common gravel driveway for decades. Since coming to the parcel in 1992, the Gamboas used the gravel road as a driveway to access their home and some of their alfalfa crop. The Gamboas occasionally bladed the road and on one occasion applied gravel to maintain its condition. When the Clarks came to their parcel in 1995, they used the road to farm grapes, including watering the grape plants and spraying for weeds. The Gamboas and the Clarks both used the roadway in these ways without any disputes until 2008. Each party was aware of the other's use of the roadway, but no one objected to the other's use until a dispute arose in 2008. 183 Wn.2d at 41. The trial court found that Gamboa's established adversity because the Clarks could not show that Gamboa's use was permissive. The Court of Appeals reversed.

The Supreme Court affirmed the Court of Appeals and reversed the trial court. The Court concluded first that, because the land involved in the case was enclosed, an initial presumption of permissive use applied to the case if there was "a reasonable inference of neighborly sufferance or acquiescence."[1] *Id.* at 50-51. The Court noted that the bar to proving that inference was "fairly low." And, the Court found it was met:

---

1. Plaintiffs correctly point out that proof of this additional element was not required here because the trial court concluded the land at issue here was unenclosed. Therefore, the trial court did not, and did not have to, find neighborly acquiescence.

> Both the Gamboas and Clarks used the roadway as described above without any disputes until 2008. Each party was aware of the other's use of the roadway, but no one objected to the other's use until a dispute arose in 2008. Like the example in Roediger [v. Cullen, 26 Wn.2d 690, 175 P.2d 669 (1946)], here the Gamboas and Clarks are neighbors and they used the road for their own purposes in conjunction with each other without incident. Thus, we find a reasonable inference of neighborly sufferance or acquiescence.

Id. at 51 (some citations and internal quotations omitted).

The Court then went on to discuss the requirements for overcoming the presumption.

> [A] claimant may defeat the presumption of permissive use when the facts demonstrate (1) "the user was adverse and hostile to the rights of the owner, or" (2) "the owner has indicated by some act his admission that the claimant has a right of easement." Nw. Cities, 13 Wn.2d at 87 (citing Thompson, supra, § 523, at 111). For a claimant to show that land use is "adverse and hostile to the rights of the owner" in this context, the claimant must put forth evidence that he or she interfered with the owner's use of the land in some manner. See id. at 90-91 (finding that the claimant's direct predecessor's acts of laying out a "definite road across the premises" and regularly improving and maintaining the road were sufficient to indicate a hostile intent to the owner's rights and use of the property).

Id. at 51-52. After reviewing the facts, the Court decided the Gamboas could not overcome the presumption even though they had used the road for decades and even bladed and graveled the road.

> Here, the Gamboas cannot demonstrate either that they interfered with the Clarks' use of the driveway or that the Clarks indicated that the Gamboas had an easement over the

> driveway. The Gamboas' occasional blading of the road did not interfere with the Clarks' use of the road in any manner because the Clarks used the road as a road (to access their grape plants). Indeed, the trial court found that both parties "used the roadway ... without any disputes until 2008. Each party was aware of the other's use of the roadway, but no one objected to the other's use until a dispute arose in 2008." CP at 195. The fact that the Gamboas thought they owned the road was irrelevant. Dunbar, 95 Wn.2d at 27. Thus, the Gamboas failed to overcome the presumption of permissive use because they did not demonstrate a use that was adverse and hostile to the rights of the Clarks, and they did not demonstrate that the Clarks indicated that they had an easement.

Id. at 52.

The distinction the *Gamboa* Court drew between the case before it and *Nw. Cities Gas Co. v. W. Fuel Co.*, 13 Wn.2d 75, 85, 123 P.2d 771 (1942), shows that the "interference" required to overcome the presumption on the first ground is not de minimis. In *NW. Cities*, the claimant laid out, improved and maintained a road across the owner's property. That was sufficient. In *Gamboa*, blading, graveling and uninterrupted use were not. Those actions did not interfere with the owner's use of the property.

Moreover, requiring something more than de minimis actions is consistent with the policy supporting the presumption of permissive use in the first place: "[p]rescriptive rights ... are not favored in the law, since they necessarily work corresponding losses or forfeitures of the rights of other persons."

> "The law should, and does encourage acts of neighborly courtesy; a landowner who quietly acquiesces in the use of a path, or road, across his uncultivated land, resulting in no injury to him, but in great convenience to his neighbor, ought not to be held to have thereby lost his rights. It is only when the use of the path or road is clearly adverse to the owner of the land, and not an enjoyment of neighborly courtesy, that the landowner is called upon 'to go to law' to protect his rights."

Gamboa at 48, quoting *Roediger v. Cullen*, 26 Wn.2d 690, 709, 175 P.2d 669 (1946). If any use is sufficient, these policies are irrelevant and the interference standard meaningless. Merely standing on the property for a second would suffice because, for that second, the claimant is preventing the owner from using the property to its fullest extent.

Plaintiffs try to distinguish *Gamboa* because "this is not a case where the plaintiffs are using the road of another," and because "in *Gamboa*, there was no evidence of interference." Brief of Respondent at 30-31. Plaintiffs claim this case is different because they had an express easement to use the road. In fact, the Gamboas also had an express easement, it just did not cover all the property they wanted to use. 183 Wn.2d at 41 ("a small portion of the gravel road . . . is on the Gamboas' property, but that the rest of the gravel road is on the Clarks' property until the road reaches an area where the Gamboas have an express easement over the Clarks' property (the express easement dating back to 1964 when the parent parcel was split).") Those same facts are present here: Plaintiffs have an express easement that does not

cover all the property they want to use. And, as in *Gamboa*, there is no evidence that Plaintiffs' use of the turnouts interfered with the King's use of their property in anything other than a de minimis way. *Gamboa* is on point.

In this case, the trial court applied the presumption of permissive use. Plaintiffs have not challenged that decision. The question on appeal, therefore, is whether Plaintiffs presented sufficient evidence to overcome the presumption. As stated in *Gamboa*, to overcome the presumption Plaintiffs had to show either (1) that their use was adverse and hostile to the rights of the owner, or (2) the owner has indicated by some act his admission that the claimant has a right of easement. And, to establish the first ground, they had to show they interfered with the owner's use of the land in some manner.

Plaintiffs obviously produced no evidence to support the second method of overcoming the presumption. They produced nothing showing that the Kings ever indicated by some act their admission that the plaintiffs had a right of easement. Indeed, the very fact that all the parties to this lawsuit felt a need to have an express written easement for the road itself belies any possibility that the Kings actually believed Plaintiffs had a right of easement over any other part of the road.

Thus, this appeal turns on whether Plaintiffs supported the first method, that is, whether they showed that they interfered with the Kings' use of the land. They did not. As the Larsons pointed out in their opening brief,

and as stated above, Plaintiffs' evidence of interference was that one of the Plaintiffs moved two rocks. While Plaintiffs want to impress the court with the size of the rocks, the fact is they were small enough for one person to move without straining or injury, and they were small enough to be driven over. Claimants acknowledge that moving the rocks did not interfere with the King's use of the property; the Kings also continued to use the turnout areas. Brief of Respondent at 24, n.9. Obviously, if the Kings used the turnouts after the rocks were placed, they did not intend to exclude vehicles from the area and did not expect the rocks to exclude vehicles in any event. Plaintiffs also did not present evidence that moving the rocks interfered with even the speculative reason Plaintiffs gave for the rocks being there in the first place: To prevent people from dumping garbage on the King's property. Plaintiffs presented no evidence that dumping either continued or stopped after the rocks were moved. Under these circumstances, the trial court erred in concluding that Plaintiffs interfered with the Kings' use of their land sufficient to overcome the presumption of permissive use.

3. Expansion of express easement.

The Larsons stand on the arguments set out in their opening brief on the issue of expanding the express easement. Ingress and egress easements do not necessarily give access to large modern emergency vehicles. The limitations of the easement affect the Larsons and the Plaintiffs to the same

extent. The express terms of the easement here gives Plaintiffs and the Larsons a driveway, not a roadway wide enough to accommodate modern emergency vehicles. Plaintiffs presented no evidence that they or anyone else had ever used the airspace beyond the 10 foot boundary of the express easement, or that they needed to use such airspace in order to have reasonable ingress and egress. Plaintiffs' discussion of the history of the easement, the benefits of access by emergency services and the circumstances of Larson offering an alternative easement do not change any of these facts.

The cases on which Plaintiffs rely are inapposite. The Larsons have already discussed *Caroll v. Belcher*, 1999 WL 58597 (Tn. App. 1999). See Brief of Appellants at 29-30. In *Kosich v. Braz*, 247 Cal. App.2d 737, 56 Cal. Rptr. 737 (1967), the servient estate holder put a post at a 90 degree turn in the easement. The easement owner presented direct evidence that the post made it impossible for him to turn his vehicle. Thus, there was direct evidence that a use to which the easement had been put previously was impaired by the owner's post. Plaintiffs did not present such evidence here. Moreover, the court made the servient estate holder remove the post so the purpose of the easement could be fulfilled. Unlike the court here, the court there did not hold that the servient estate could not erect a fence or put a post along the entire length of the easement. In *Carson v. Elliott*, 111 Idaho 889, 728 P.2d 778 (App. 1986), the servient estate owner erected a raised garden

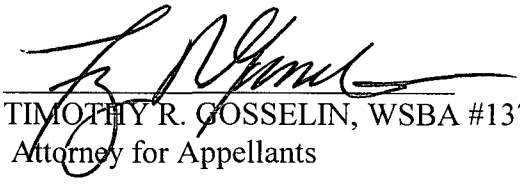
within the boundaries of the easement, and testimony showed that vehicles could not use the easement without striking it. Here, the fence is outside the easement and Plaintiffs did not show they could not use the easement if a fence was erected. In *Sordi v. Adenbaum*, 533 N.Y.S.2d 566, 143 A.D.2d 898 (1988), the court did not discuss the facts except to note that the easement was "for the purpose of ingress and egress for motor vehicles and the parking of seven motor vehicles" and the issue was "whether the defendants may unilaterally change the dimensions of the easement so as to, as a practical matter, deprive the plaintiff of its benefit." Those aren't the facts or the issue here.

The question this case presents is whether Plaintiffs get the easement they bargained for or whether they get more. The heart of Plaintiffs' argument is as Larson originally stated: Safety concerns justify expanding the express easement beyond what the parties provided in the first instance. But those concerns were just as well known to the parties when they signed the express easement as they are now. Those concerns were just as applicable to the Kings as they were to the Plaintiffs – and are just as applicable to the Larsons. They still agreed to a ten foot easement. They agreed to a driveway not a public roadway. There was no evidence that placing a fence along the easement would prevent anyone from using the easement for that intended purpose. Therefore, the trial court erred in expanding the easement to 15 feet.

IV. CONCLUSION

For the foregoing reasons and the reasons set forth in their opening brief, the Larsons again ask this court to reverse the trial court's judgment awarding a prescriptive easement to Plaintiffs and enjoining the Larsons from erecting a structure within 2½ feet of the boundary of the express easement.

Dated this 14th day of March, 2017.



TIMOTHY R. GOSSELIN, WSBA #13730
Attorney for Appellants

FILED
COURT OF APPEALS
DIVISION II

2017 MAR 16 AM 11:24
STATE OF WASHINGTON
BY _____
DEPUTY

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

KEVIN SCHOENFELDER and EMILY SCHOENFELDER, husband and wife, et al, Respondents, vs. ROBERT LARSON and JENNIFER LARSON, husband and wife, Appellants, vs. DAVID KING and JANE DOE KING, et al, Third Party Defendants.	NO. 48885-0-II CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I, TIMOTHY R. GOSSELIN, declare and state:

I am a citizen of the United States of America and the State of Washington, over the age of twenty-one (21), not a party to the above-entitled proceeding, and competent to be a witness therein.

On the 14th day of March, 20176, I did place with the United States Postal Service, first class postage paid, and did email the Reply Brief of Appellants and this Certificate to the following:

GOSSELIN LAW OFFICE, PLLC
1901 JEFFERSON AVENUE, SUITE 304
TACOMA, WASHINGTON 98402
OFFICE: 253.627.0684 FACSIMILE: 253.627.2028

Margaret Y. Archer
GORDON THOMAS
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6550
marcher@gth-law.com

James R. Tomlinson
DAVIES PEARSON
920 Fawcett Ave.
P.O. Box 1657
Tacoma, WA 98401-1657
(253) 620-1500
jtomlinson@dpearson.com

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

Signed this 14th day of March, 2017, at Tacoma, Washington.

By : _____
TIMOTHY R. GOSSELIN

GOSSELIN LAW OFFICE, PLLC
1901 JEFFERSON AVENUE, SUITE 304
TACOMA, WASHINGTON 98402
OFFICE: 253.627.0684 FACSIMILE: 253.627.2028