

63099-7

63099-7

COURT OF APPEALS
STATE OF WASHINGTON
2010 MAR 15 AM 10:45 *EW*

No. 63099-7-1

**COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE**

DARRIN G. HANSON and ERIN J. HANSON,
husband and wife; JUSTIN ATCHLEY and LEAH M.
ATCHLEY, husband and wife,
Appellants,

v.

PETER BEVERSTOCK and VIOLA
BEVERSTOCK, husband and wife,
Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR SKAGIT
COUNTY
#03-2-00836-5

REPLY BRIEF OF APPELLANT

BURI FUNSTON MUMFORD, PLLC

By PHILIP J. BURI
WSBA #17637
1601 F Street
Bellingham, WA 98225
(360) 752-1500

TABLE OF CONTENTS

INTRODUCTION 1

**I. NONE OF THE BEVERSTOCKS' ARGUMENTS INVALIDATE
THE PRIVATE EASEMENT 2**

 A. The Plats Created Private Easements. 4

 B. Nothing Changed or Extinguished The
 Easements. 5

**II. IN THE ALTERNATIVE, A PRIVATE WAY OF
NECESSITY IS APPROPRIATE. 8**

CONCLUSION 10

TABLE OF AUTHORITIES

Washington Supreme Court

Heg v. Alldredge, 157 Wn.2d 154, 137 P.3d 9 (2006).....3, 5

Van Buren v. Trumbull, 92 Wash. 691, 159 P. 891 (1916)..... 4

Washington State Court of Appeals

M.K.K.I., Inc. v. Krueger, 135 Wn. App. 647, 145 P.3d 411
(2006).....2, 5

Other Authorities

17 Stoebuck & Weaver, Washington Practice § 2.1 (2nd Ed.)..... 6

Codes and Regulations

RCW 8.24.....3

INTRODUCTION

Respondents Peter and Viola Beverstock argue that “the Appellate Court should not allow the Appellants to argue ancient history which is speculative and inapplicable in this matter as no one relied on any of Appellants’ theories...” (Response Brief at 14). Yet this same ancient history – the 1890 and 1891 Plats – defines the present-day boundaries of the parties’ property. The town of Montborne may be long gone, but the Plats remain legally significant and relevant.

The Beverstocks do not dispute that vacated streets can create private easements for adjoining lot owners. Instead, they imply two reasons why appellants Darrin Hanson and Leah Atchley (“Darrin and Leah”) do not have an easement. First, they allege Darrin and Leah did not preserve this issue. (Response Brief at 13) (private easement “not the issue in this appeal”). Second, they argue that their purchase of the railroad right-of-way in fee extinguished any easement. (Response Brief at 16) (“after the 1991 quiet title action, fee title was conveyed to all affected parties”).

Neither claim extinguishes the private easement Darrin and Leah have over Railroad Avenue. As the Court of Appeals ruled in a similar case,

this argument demonstrates the fundamental misunderstanding driving this appeal. With limited and specific exceptions, once a private easement is depicted on a short plat, the easement cannot be extinguished without amending the plat document.

M.K.K.I., Inc. v. Krueger, 135 Wn. App. 647, 659, 145 P.3d 411 (2006).

Both the Beverstocks and Darrin and Leah took possession of their land subject to the 1890 Plat of Montborne (trial exhibit 12) and 1891 Plat of Reserve Addition to Montborne (trial exhibit 13). The legal descriptions for both parties' lots rely on the Plats and expressly incorporate them. Because nothing has extinguished the private easements arising from these Plats, appellants Darrin Hanson and Leah Atchley respectfully request this Court to reverse the trial court, vacate its judgment and fee award, and remand for entry of the private easement over the path of Railroad Avenue.

I. NONE OF THE BEVERSTOCKS' ARGUMENTS INVALIDATE THE PRIVATE EASEMENTS

At trial and on appeal, Darrin and Leah presented two alternative arguments for accessing their lots through the vacated

Railroad Avenue. First, they established that a private easement remains over the vacated street. Second, they provided grounds under the private condemnation statute, RCW Ch 8.24, to create a driveway over the Beverstocks' property. The Beverstocks' response brief devotes only a few sentences to the private easement issue. This is an important concession.

Unlike condemning a way of necessity, Darrin and Leah do not compensate the Beverstocks for using the private easement. The Beverstocks' predecessors-in-interest conveyed the access right in the original Plats. Darrin and Leah may use the easement for ingress and egress regardless of its nonuse in the past.

Extinguishing an easement through abandonment requires more than mere nonuse - the nonuse must be accompanied with the express or implied intention of abandonment. This court has previously held that the lapse of time does not, of itself, constitute an abandonment, but is a circumstance for the jury to consider in arriving at the intention of the owner of the dominant estate and that an intention to abandon property for which one has paid value will not be presumed. An easement appurtenant which runs with the land is not a mere privilege to be enjoyed by the person to whom it is granted or by whom it is reserved. It passes by a deed of such person to his grantee and follows the land without any mention whatever.

Heg v. Alldredge, 157 Wn.2d 154, 161, 137 P.3d 9 (2006) (citations omitted).

A. The Plats Created Private Easements

As detailed in Darrin and Leah's Opening Brief, the public lost its right to use Railroad Avenue when the plat was vacated. But the lot owners' private rights remain unaffected.

When a man or company of men own land, and lay it off into blocks and streets, and sell lots abutting on a street so laid off, so that the street is a convenience to the purchasers of the lots, those acts amount to a dedication of the land so laid off into streets, and the persons so laying it off cannot recall it or in any manner prevent its being used as streets. Such persons are barred or estopped by their acts, and all persons or corporations subsequently claiming under them are equally bound.

Van Buren v. Trumbull, 92 Wash. 691, 697, 159 P. 891 (1916); (Opening Brief at 13). No reasonable dispute exists that the statutory vacation of the 1890 and 1891 Montborne Plats did not alter the private easements existing for all lot owners over the platted streets.

The Beverstocks state that a private easement "is not the issue in this appeal". (Response Brief at 13). If they mean to imply that Darrin and Leah did not preserve this argument on appeal, they are incorrect. Darrin and Leah presented this argument to the trial court and have appealed the court's adverse ruling. If they mean to imply that the trial court rejected the argument, they are

correct. But for the reasons detailed in the Opening Brief, the trial court erred as a matter of law by refusing to recognize the easement. (Opening Brief at 16).

The continued existence of a private easement is the central issue in this appeal.

B. Nothing Changed Or Extinguished The Easements

Once created, the private easement over Railroad Avenue survives in perpetuity unless extinguished. Heg, 157 Wn.2d at 161; M.K.K.I., 135 Wn. App. at 659. The Beverstocks argue that because they purchased the railroad right-of-way in fee, this extinguished the easement by implication.

The term right-of-way can convey either an easement or a fee title. In this case, and considering that no other language was used in the conveyance such as “for as long as it is used for a railroad” or “specifically for railroad purposes” or any “right of reverter” language, the Weppler Court must have found that it passed fee title because the instructions to John Milnor, the expert in the case, drafted the 185 deeds at issue in fee title to all property owners.

(Response Brief at 8). Three flaws exist in this argument.

First, owners of property burdened by an easement can hold it in fee simple *subject to* an easement.

Like estates in land, [easements] are property rights or interests. Unlike estates, they do not give those who hold them the full spectrum of rights known as

“possession” but, rather, what are sometimes called “usufructuary” rights. They are rights that were contained within the right of possession and carved out of it by the owner of the possessory estate: sticks taken out of the bundle. Thus, they have a dual aspect. To the holder of an easement or profit, they are rights in land, additions to his legally protected worldly wealth. To the owner of the estate, they are subtractions from his full spectrum of rights, burdens on his title.

17 Stoebuck & Weaver, Washington Practice § 2.1 (2nd Ed.).

Purchasing the railroad right-of-way in fee does not exclude purchasing it *subject to* the pre-existing private easement.

Second, the railroad had no power to extinguish the private easement. The Montborne Plats created both Railroad Avenue and the railroad right-of-way. The railroad had no more power to erase the private easements than an individual lot owner. Once the original grantor created the plat, all owners took their property subject to the streets, alleys, lots and right-of-ways. This included the railroad.

Third, the railroad could convey fee simple title because Railroad Avenue was vacated a century earlier. When the Washington Legislature vacated all unopened plats in 1890, the public lost its rights to Railroad Avenue and the railroad became the sole owner. However, the railroad owned the property subject to

the private easement rights of the adjoining lot owners. Fee simple ownership of Railroad Avenue acknowledges only that the public street shared with the railroad was vacated. It does not prove or imply that no one other than the railroad had an interest in the street.

By purchasing their share of the railroad's right-of-way, the Beverstocks did not extinguish the private easement over their portion of Railroad Avenue. Fee simple ownership was subject to the easement.

Finally, the Beverstocks do not address the flaws in John Milnor's testimony that the 1891 Plat removed Railroad Avenue. (Opening Brief at 17). This is not a question of credibility, but rather a legal interpretation of the 1890 and 1891 Plats. The trial judge found Mr. Milnor's *argument* more persuasive – a legal conclusion rather than a finding of fact. This Court appropriately reviews the plat interpretation as a question of law, de novo. (Opening Brief at 13).

In 1891 an unknown draftsman drew the plat map for the Reserve Addition to the town of Montborne. (1891 Plat; trial exhibit 13; Appendix F to Opening Brief). He drew the proper dimensions for Railroad Avenue and even showed the location of the train

depot at the corner of Lafayette Avenue and Railroad. (1891 Plat; trial exhibit 13). He did not, however, label Railroad Avenue. Based on this, Mr. Milnor concluded that the Plat intentionally removed the street. (VRP 183). Yet the draftsman wrote in the dedication to the 1891 Plat: "Reserved, Blocks 34,35 & 36 and that portion of Railroad Avenue heretofore reserved for a right-of-way for the Fairhaven and Southern Railroad." (1891 Plat; trial exhibit 13). The second Plat did not extinguish the avenue created in the first Plat; it reconfirmed it. The draftsman's failure to label Railroad Avenue did not wipe it off the Plat.

Darrin Hanson and Leah Atchley have a private easement over Railroad Avenue to reach their property. This easement began with the 1890 and 1891 Plats and has remained in force to the present. Because the Beverstocks have failed to show any intentional relinquishment of the easement, Darrin and Leah may appropriately use it for access.

II. IN THE ALTERNATIVE, A PRIVATE WAY OF NECESSITY IS APPROPRIATE

If the Court rules that a private easement remains over Railroad Avenue, it need not review the trial court's decision on the

private way of necessity. However, the evidence supports a private condemnation action if that is the only means to provide access.

In their response brief, the Beverstocks assert that the northern route to Darrin's and Leah's lots via Highway 9 is not dangerous.

[S]aid entrance and driveway are in no way "dangerous" as of 2003, which is post to the appellant's testimony that the Department of Transportation found the *old* driveway itself and its location to be dangerous.

(Response Brief at 18). Two flaws undermine this claim.

First, Ronald Storme, development service manager for the Department of Transportation, testified that the *location* of the driveway, not its width or construction, made the route dangerous. (VRP 47-48). Improvements to the driveway cannot mitigate its location on a blind corner. For good reason, it remains the "last resort" access to Darrin's and Leah's property.

Second, a driveway connecting Highway 9 with Darrin's and Leah's lots is infeasible, given the steep slope and bluff separating the Hansons' parent's lots from theirs. In contrast, the proposed driveway from Westview Road over the vacated Railroad Avenue is flat. (VRP 75-76). As detailed in Darrin and Leah's opening brief,

the southern route to the property is much safer and more feasible than the northern route.

The trial court abused its discretion by requiring Darrin and Leah to use the northern route.

CONCLUSION

Peter and Viola Beverstock understandably do not want to allow Darrin Hanson and Leah Atchley to use their property for access. But the legal significance of an easement is that Beverstocks must allow that use. Because the trial court erred by refusing to recognize an easement over the vacated Railroad Avenue, Appellants Darrin and Leah Hanson respectfully request this Court to reverse the judgment and orders of the trial court, vacate its fee award, and remand this case for entry of judgment recognizing an easement over Railroad Avenue.

DATED this 12th day of March, 2010.

BURI FUNSTON MUMFORD, PLLC

By 

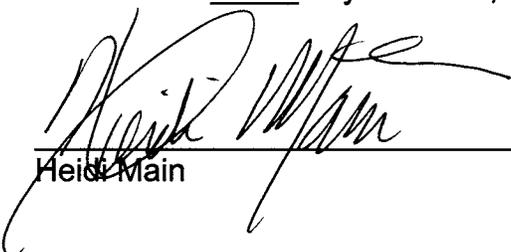
Philip J. Buri, WSBA #17637
1601 F. Street
Bellingham, WA 98225
360/752-1500

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of the Reply Brief of Appellant to:

John A. Christopherson
Christopherson Law Firm, PLLC
415 S. First Street
Mount Vernon, WA 98273

DATED this 12th day of March, 2010.



Heidi Main