Wuesthoff v. Rutter

1998 | Cited 0 times | Court of Appeals of Washington | May 7, 1998

Panel Seven

Donna Wuesthoff, Sally Fleming, Peter and Pam Von Ranson, Joseph and Zoe Hausken, Charlie and Karen Fields, and GR2H, Inc., (collectively referred to as Plaintiffs) own property along Long Lake. William and Dolly Rutter, Eugene and Loretta Kister, Beverly Werner, Terrance and Pauline Sullivan, Janeece Talbot, Charles and Shirley Nealey, and Beverly Bauska, (collectively referred to as Defendants) also own property along Long Lake. Plaintiffs brought an action against Defendants to quiet title in a roadway which crossed the property of all the parties. Plaintiffs claimed a prescriptive easement and/or an easement by implication. The court concluded only Mr. Wuesthoff had established a prescriptive easement. Contending the court erred in granting an easement to Mr. Wuesthoff, Defendants appeal. Plaintiffs cross appeal, claiming the court erred by not also granting Ms. Fleming, the Von Ransons, and the Hauskens an easement. We affirm.

In 1929, Washington Water Power sold J.T. Felton a significant amount of property along Long Lake in Stevens County, Washington. The eastern portion of most of the property sat high above the lake and fell sharply off to the water's edge to the west.

In 1949, Mr. Felton sold a portion of the property to Lois and Dan Boutwell, his daughter and son-in-law. In 1950, he sold another part of his property to his son Orville. In 1961, J.T. Felton died and the remainder of the lake property was sold through his estate. At one time, the area of the shoreline owned by Orville Felton may have been serviced by a county road which was vacated in 1955. A one-lane unimproved road (referred to as the blue road) now exists along the waterfront. The road runs north through an area known as Daniel Addition and the other lakefront property. There is very little level ground between the road and the water's edge, causing the traffic to pass close to any improvements on the Daniel Addition property. The parcels sold through the estate have access from the south by Lois Lane, a private road, on the east side of these properties.

In 1971, Lois Boutwell platted her lots in Daniel Addition. She placed a locked cable gate across the blue road as it entered the addition. She gave all the current lake property owners and her siblings a key to the lock.

In 1978, Orville Felton recorded a short plat for three small lots along the waterfront portion of his property. He sold one lot to Mr. Wuesthoff and another to William Alderson. As part of the consideration for his purchase, Mr. Alderson constructed a road (referred to as the red road) from the blue road up the bluff to Lois Lane. The red road was to serve as an escape route, but is steep and

unsuitable for winter travel. The Plaintiffs own property along Long Lake. Mr. Wuesthoff's and Ms. Fleming's property was originally owned by Orville Felton. The remaining owners' property was originally part of the J.T. Felton estate. The Hauskens and the Von Ransons live in permanent homes on the east side of their properties atop the bluff overlooking the lake. Mr. Wuesthoff and Ms. Fleming have small parcels which do not reach the bluff. The Defendants all own property within Daniel Addition.

In the late 1980s to early 1990s, Plaintiffs and Defendants began to argue about the Plaintiffs' use of the blue road through Daniel Addition. Plaintiffs filed an action to quiet title to the blue road, claiming it had been in existence for over 20 years and they had acquired the right to use it by prescriptive easement. They also asserted Ms. Boutwell had granted them a written easement. Defendants answered by claiming the use of the blue road had been by permission and denied the validity of the written easement. Defendants also asserted counterclaims for slander of title and trespass.

Defendants filed four motions for partial summary judgment. The court granted one of the motions, finding Ms. Boutwell's written easement invalid. The other motions were denied.

At the Conclusion of the testimony and over Defendants' objection, Plaintiffs argued for the first time they were also entitled to an easement by implication. The court continued the proceedings for further briefing on this issue. When the court reconvened, it heard additional argument, but no new testimony. The court entered judgment granting Mr. Wuesthoff a prescriptive easement in the blue road. It dismissed the remaining Plaintiffs' claims against Defendants.[1]

All appeal.

Plaintiffs[2] claimed they had a prescriptive easement over the blue road. To establish a prescriptive easement, each claimant must prove: (1) his use was adverse to the right of the servient owner; (2) open, notorious, continuous, and uninterrupted use for ten years; and (3) knowledge of such use by the owner at a time when he was able to assert and enforce his rights. Dunbar v. Heinrich, 95 Wn.2d 20, 22, 622 P.2d 812 (1980). Use is adverse if a claimant uses the property as if it were his own, entirely disregards the claims of others, asks permission from no one, and uses the property under a claim of right. Lee v. Lozier, 88 Wn. App. 176, 181, 945 P.2d 214 (1997).

Once a claimant has established all the elements for a prescriptive easement, the burden shifts to the owner to establish the use was permissive. Gray v. McDonald, 46 Wn.2d 574, 578, 283 P.2d 135 (1955). At its inception, use of property is presumed to be permissive. Crites v. Koch, 49 Wn. App. 171, 177, 741 P.2d 1005 (1987). Permissive use cannot ripen into a prescriptive right unless the claimant has made a distinct and positive assertion of a right hostile to the owner. Id. Permission need not be asked for in order to exist. Granston v. Callahan, 52 Wn. App. 288, 295, 759 P.2d 462 (1988). A claimant's use of a road for the prescriptive period, which road was first used by the owner of the

property and who continued to use the road for his own purposes, suggests that such use by the claimant is with the owner's permission. Cuillier v. Coffin, 57 Wn.2d 624, 627, 358 P.2d 958 (1961).

Whether the elements for a prescriptive easement are met is a mixed question of fact and law. Lee, 88 Wn. App. at 181. The trial court's findings of fact will be upheld if supported by the record; its Conclusion that the factual findings constitute a prescriptive easement is reviewed for errors of law. Id.

Mr. Wuesthoff's parcel.

Mr. Wuesthoff bought his parcel from Orville Felton in 1976. Mr. Felton gave him a key to the lock on the cable across the blue road. Mr. Wuesthoff began to develop his property and within the first five years he built a dock, a seawall, a bulkhead, a place for a camper, and moved a mobile home onto the land. In the early 1980s, he drilled a well and brought in electricity. From spring through fall for the first ten years, he and his family used the property almost every weekend. Mr. Wuesthoff has always used the blue road to access his property. When he first acquired the property, the red road did not exist. Starting in 1980, he had problems using the blue road because the lock on the gate was changed. In 1989, he replaced the cable gate because it was not keeping anyone out.

Within the first five years of his ownership, he and Mr. Lucas, the Rutters' predecessor in interest, had two confrontations about his right to use the blue road. Mr. Lucas had blocked the road with cars. Mr. Wuesthoff talked to Mr. Lucas and told him it was the only way into his land. Mr. Lucas said Mr. Wuesthoff did not have an easement; Mr. Wuesthoff claimed he did. Mr. Lucas moved the cars. Prior to 1985, the Werners also blocked Mr. Wuesthoff's use of the road. He told them to move the cars blocking the road; they did. He said this happened on one or two occassions. Mr. Wuesthoff also said the Kisters would glare and shake their fists at him when he drove down the road.

In 1993, Mr. Wuesthoff bought two lots in Daniel Addition. With others, he then put up two gates, one at the entrance to Daniel Addition.

Defendants contend the court erred by finding Mr. Wuesthoff had several confrontations with Daniel Addition property owners since 1980. Findings of fact will be upheld so long as they are supported by the record. Lee, 88 Wn. App. at 181. Mr. Wuesthoff testified to the confrontations. The only controverting evidence was Ms. Werner's and Ms. Kister's testimony that neither of them had confronted anyone about using the road. The record supports the finding Mr. Wuesthoff had several confrontations with Daniel Addition property owners.

Defendants further argue the court erred by concluding Mr. Wuesthoff was entitled to a prescriptive easement. He used the road as if it were his right to do so. In fact, he even gave out keys to the locked gate without consulting the other property owners. This indicates he acted in a manner adverse to the owner's rights.

Mr. Wuesthoff's use was also open and notorious for the required ten-year period. Whenever he went to his property, he used the blue road. He did not use the road at odd hours to hide his use. This element is met if the owner knows of the adverse use. Chaplin v. Sanders, 100 Wn.2d 853, 862, 676 P.2d 431 (1984). The Defendants saw him frequently. He satisfied the open and notorious element.

Mr. Wuesthoff's use also satisfied the exclusivity requirement. It is not necessary for a claimant to be the only person using the property in question, but he must exercise his claim of right independent of others. Anderson, 47 Wn.2d at 494. He used only the blue road throughout his entire ownership because it was the only access to his property. He exercised his own claim of right independently of others. Mr. Wuesthoff established all the elements necessary for a prescriptive easement. But the Defendants also established the initial use of the road was permissive. Ms. Boutwell erected a locked cable gate over the blue road. She gave keys to certain individuals, including current property owners. Mr. Wuesthoff received his key to the gate from Orville Felton, who had obtained a key from Ms. Boutwell. This indicates the initial use was permissive.[3]

In order for Mr. Wuesthoff to establish a prescriptive easement, he must prove he made a distinct and positive assertion of a right which was hostile to the owners. Crites, 49 Wn. App. at 177. His confrontations with the property owners were such an assertion. The court did not err by granting him a prescriptive easement.

The Defendants claim any adverse use by Mr. Wuesthoff only applied to the Rutters, the Werners, and the Kisters so an easement across the property of the other owners was error. However, they rely on cases dealing with the express granting of easements, not prescriptive easements. Hostility "does not import enmity or ill-will, but rather imports that the claimant is in possession as owner, in contradistinction to holding in recognition of or subordination to the true owner." Chaplin, 100 Wn.2d at 857-58 (quoting King v. Bassindale, 127 Wash. 189, 192, 220 P. 777 (1923)). Mr. Wuesthoff's use of the blue road was consistent with someone who had the right to use the road. He always traveled on that road; he instructed others to use the blue road; he provided keys to the locked gate on the blue road to others; and when the road was obstructed by others, he asked them to clear the way. His use of the blue road was adverse. Mr. Wuesthoff satisfied all of the elements required for a prescriptive easement.

Ms. Fleming's property.[4]

Ms. Fleming bought her lot in 1993 from the Ellises. She lived on the property full time and used the blue road to access her property. She had an argument about her use of the road with Mr. Rutter, who told her the red road was her access to her property. She continued to use the blue road until she was locked out in May 1994. Mr. Wuesthoff then bought property in Daniel Addition and put his own lock on the blue road's gate. He gave her a key so she could continue to use the road.

The Ellises had bought the property in 1990 from Joseph Jelke. They lived on the property full time.

They used the blue road for their access.

Mr. Jelke bought the property in 1985 from William Alderson. He made substantial improvements to the lot and used the blue road for access. He never sought permission to use the road. In 1989, he received a letter from an attorney telling him the blue road was intended for the use of Daniel Addition residents only.

Mr. Alderson bought the property from Orville Felton in 1978. Although he used the blue road, Mr. Alderson built the red road.

In order for Ms. Fleming to be entitled to a prescriptive easement, she must establish adverse, open, notorious, uninterrupted, and exclusive use for ten years. Dunbar v. Heinrich, 95 Wn.2d 20, 22, 622 P.2d 812 (1980). Considering the use by her predecessors in interest, she meets this requirement. But the initial use of the road was permissive. In order to change permissive to prescriptive use, the claimant must distinctly assert a right hostile to the owner. Crites, 49 Wn. App. at 177. Ms. Fleming may have acted in a manner which indicated hostility during her confrontations with Mr. Rutter, but none of her predecessors in interest asserted a right hostile to the owners in Daniel Addition. Ms. Fleming's assertions of hostile right do not satisfy the requisite ten years. The court did not err by refusing to grant her an easement. The Hausken property. In 1990 the Hauskens, now full time residents, bought their property along Long Lake from Rick Lyonnais. They built a new home and put in a dock. They were told the blue road was the access to their property. The Hauskens have used the red road, but consider the blue road their primary access. Mr. Lyonnais wanted to give them a key, but could not find one. Mr. Wuesthoff gave them a key.

Mr. Lyonnais bought the property from the J.T. Felton estate in 1975 or 1976. It was represented to him that the blue road was his access to the beachfront part of his property. His use of the property was infrequent. He used Lois Lane as his primary access. Mr. Lyonnais brought a mobile home to the property in hopes of setting up a permanent residence, but he removed it in 1984. From 1983 to 1990 he was not on the property very much. During that time, he used the blue road two or three times.

Plaintiffs contend the court erred by not finding the use of the Hausken property was consistent with the recreational and seasonal nature of the property. But the record does not support such a finding. Mr. Lyonnais testified his use of the property was infrequent, especially after 1983. Sometimes, he would not return to it for months. During that period, he only used the blue road two or three times. The evidence indicates most of the property owners only used their property in the spring through early fall. Their seasonal use was described as every weekend or almost every weekend during the warm seasons. Mr. Lyonnais' infrequent use was not seasonal. The court did not err by refusing to find the use was consistent with the nature of the property.

Furthermore, the court did not err by failing to grant the Hauskens a prescriptive easement. Since Mr. Lyonnais' use of the property was sporadic, the Hauskens were unable to establish open,

continuous, and uninterrupted use for ten years. They only owned the property for five years when this action was brought. Mr. Lyonnais' use of the property was integral to their establishing a prescriptive easement. Even if they could establish the requisite elements, no facts indicate a hostile assertion by them or Mr. Lyonnais which would negate permission. The Hauskens failed to establish the necessary requirements for a prescriptive easement.

The Von Ranson property. In 1992, the Von Ransons bought their property from the Griffins. The property has a permanent residence, a dock, a changing house, and a well. When they bought the land, they received keys to locks for the gates on both the blue and red roads. They used the blue road 70 percent of the time and the red road the remaining 30 percent. The Griffins had bought the property from the Walkers in 1989. They used the blue road.

Mr. Walker bought the property from the J.T. Felton estate in 1978. In 1979, he built a home and a dock on the property. His primary access was Lois Lane. The Feltons gave him a key to the gate on the blue road, and he used that road as well at times. Mr. Walker used the home mostly in the summer, but from 1984 to 1987 he spent his summers in Alaska. Other people did use his property while he was in Alaska.

Plaintiffs again contend the court erred by failing to find the use of the Von Ranson property was consistent with the seasonal and recreational nature of the property. Mr. Walker did use the property on a seasonal basis until 1984. Although other people used his property when he was in Alaska, the record does not indicate how often they used the property. During the ten-year prescriptive period, the evidence does not support a finding of seasonal use. There was no error.

The Von Ransons were not entitled to a prescriptive easement. They cannot establish continuous, open, notorious, and uninterrupted use for ten years. Although he sometimes used the blue road, Mr. Walker used Lois Lane as primary access to the property. But his use of the property and the blue road was not continuous and uninterrupted for the time he owned the property. See Lee v. Lozier, 88 Wn. App. 176, 185, 945 P.2d 214 (1997). He spent little time on the property from 1984 to 1987 since he summered in Alaska during that period. The Griffins' and Von Ransons' use of the property did not meet the ten-year prescriptive period. Neither the Von Ransons nor their predecessors in interest acted in any manner which negated permission. The court did not err by failing to grant a prescriptive easement.

Defendants sought to admit evidence at trial that Ms. Boutwell had asked permission, on her brother Orville's behalf, to use the blue road. Mr. Sullivan was prepared to testify she had made such a request. Plaintiffs sought to exclude the testimony under the deadman's statute, RCW 5.60.030, since Ms. Boutwell was deceased. Finding it was inadmissible hearsay, the court excluded the testimony and did not rule on the applicability of the deadman's statute.

"Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing,

offered in evidence to prove the truth of the matter asserted." ER 801. Hearsay is not admissible at trial unless an exception to hearsay applies. ER 802.

We review the decision to admit evidence for an abuse of discretion. Martini v. Boeing Co., 88 Wn. App. 442, 945 P.2d 248 (1997). Defendants sought to admit evidence that Ms. Boutwell had asked Mr. Sullivan for permission for Orville Felton to use the blue road. They wanted to establish that it was understood use of the blue road was permissive. They also claim the scope of the evidence could have been limited to avoid hearsay problems by allowing only evidence that Mr. Sullivan had actually allowed Ms. Boutwell and Mr. Felton to use the road with permission. But any such evidence would be offered to prove the truth of the matter asserted and is inadmissible hearsay. The court did not abuse its discretion by excluding the evidence.[5]

Plaintiffs also contend they established an easement by implication. To establish an easement by implication, the claimant must prove: (1) unity of title and subsequent separation; (2) prior apparent and continuous quasi- easement for the benefit of one part of the estate to the detriment of another; and (3) reasonable necessity for the continuation of the easement. Fossum Orchards v. Pugsley, 77 Wn. App. 447, 451, 892 P.2d 1095, review denied, 127 Wn.2d 1011 (1995); see also Evich v. Kovacevich, 33 Wn.2d 151, 156-57, 204 P.2d 839 (1949).

In 1929, J.T. Felton purchased all of the subject property along Long Lake. The property was subsequently separated. The unity of title and subsequent separation requirement is satisfied.

In order for the prior use requirement to be satisfied, the road must have been in use at the time the property was severed. In 1949, J.T. Felton sold a portion of the property to Ms. Boutwell. There is no evidence in the record that the blue road existed when this occurred.

The reasonable necessity requirement is satisfied by determining whether the party claiming the right can, at reasonable cost, on his own estate, and without trespassing on his neighbors, create a substitute. Bays v. Haven, 55 Wn. App. 324, 329, 777 P.2d 562 (1989). The Plaintiffs could use Lois Lane, or even the red road at times, to access their property. The evidence does not support a showing of reasonable necessity. The Plaintiffs failed to establish the prior use or reasonable necessity requirements for an easement by implication. The court did not err by refusing to grant one.

Both parties request attorney fees on appeal. RAP 18.1(a) allows for fees on appeal, but requires the party seeking fees to devote a portion of his brief to the request. See also Thweatt v. Hommel, 67 Wn. App. 135, 148, 834 P.2d 1058, review denied, 120 Wn.2d 1016 (1992). Since no party complied with the rule, the respective requests are denied.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate

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Reports, but it will be filed for public record pursuant to RCW 2.06.040.

1. Defendant William and Dolly Rutter had a default judgment entered against them.

2. The Fields and GR2H were plaintiffs in this action, but no evidence was presented regarding their use of the road. On cross appeal, Plaintiffs do not argue the Fields or GR2H are entitled to a prescriptive easement. Only the Wuesthoffs', Ms. Fleming's, the Von Ransons', and the Hauskens' right to an easement will be discussed.

3. The Plaintiffs contend the court erred by concluding the use was permissive when it did not enter any finding the use was permissive. Finding No. 15 states Ms. Boutwell erected a locked gate, but handed out keys. This indicates permission.

4. The Defendants claim the Plaintiffs cannot appeal the court's findings because they adopted them. While it is the prevailing party's duty to procure findings of fact, it does not follow that they adopt the findings. See Peoples Nat'l Bank of Washington v. Birney's Enters., Inc., 54 Wn. App. 668, 670, 775 P.2d 466 (1989). Plaintiffs' assignments of error to the findings and Conclusions in their cross appeal will be considered.

5. Because we decide the evidence was inadmissible hearsay, we need not consider Plaintiffs' contention that the deadman's statute also barred its admission.