

The State Supreme Court Confirms Washington is a Neighborly State

Legal Alert
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Adverse possession and prescriptive easements are scary concepts to landowners. Valuable property rights can be lost to neighbors and strangers, seemingly rewarding longtime bad behavior. The Washington Supreme Court has recently struck a chord to promote harmony in our state, and make prescriptive easements tougher to establish in the case of *Gamboa v. Clark*, 183 Wn.2d 38, 348 P.3d 1214 (2015).

The Gamboas and Clarks owned adjoining parcels of enclosed agricultural land which had originally been part of one larger parcel separated by a gravel road, largely crossing the Clarks' property. The road was used by the Gamboas to access their home and by the Clarks for farming grapes on their parcel. The road had been used by both parties and their predecessors for these purposes for decades. Each was aware of the other's use of the road, and neither party gave the other permission, objected or interfered with the other's use. After an unrelated dispute arose between the parties in 2008, the Gamboas brought an action seeking a prescriptive easement to use the gravel road to the extent on the Clarks' property.

The Court found that the elements of a prescriptive easement were all present in this case, with the possible exception of "adversity". The Gamboas' use of the road was "open, notorious, continuous, hostile and uninterrupted over the prescriptive period of ten years" and the Clarks had "knowledge of such use at the time when [they] would be able at law to assert and enforce his or her rights." Incidentally, it's not clear to me how the use can be found to be "hostile" without also being "adverse".

In certain circumstances, Washington courts have found that a use of someone's property will be presumed to be with the owner's permission and therefore not "adverse". For example, in the case of unenclosed lands, the regular crossing of another's

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property is presumed to with permission. *Roediger v. Cullen*, 26 Wn.2d 690. A presumption of permissive use also applies to enclosed or developed land cases when it is “reasonable to infer that the use was permitted by neighborly sufferance or acquiescence.” The third situation recognized was when the owner created the road and the claimant’s use did not interfere with the owner’s use. *Cuillier v. Coffin*, 57 Wn.2d 624, 627 (1961).

In this case, the trial court ruled that because the land was enclosed, there was no presumption of permission from the Clarks, and in effect, accepted a presumption of adverse use. In this close case, that shift from a presumption of permissive use, to placing on the Clarks the burden of establishing permissive use, led to the ruling that the Gamboas were entitled to a prescriptive easement to use the gravel road over the Clarks’ property.

Division III of the Court of Appeals disagreed, and found that the trial court erred in not recognizing that the Clarks should enjoy a presumption of permissive use, placing on the Gamboas the burden of rebutting that presumption to show their use was “adverse”. *Gamboa v. Clark*, 180 Wn. App. 256, 321 P.3d 1236 (2014). This can be done by presenting evidence that the claimant’s use was “adverse and hostile to the rights of the owner” such as by showing he “interfered with the owner’s use of the land in some manner” or that the owner’s acts or statements acknowledged the claimant’s right to an easement.

Interestingly, Division I of the Washington Court of Appeals (*Drake v. Smersh*, 122 Wn. App. 147, 153-54, 89 P.3d 726 (2004)) as well the Oregon Court of Appeals (*Wels v. Hippe*, 269 Or. App. 785, 787 (2015)) have recently taken positions more closely aligned with the trial court approach to the presumption of adversity. However, the Washington’s Supreme Court held that even in cases of enclosed land, “an initial presumption of permissive use applies to enclosed or developed land cases in which there is a reasonable inference of neighborly sufferance or acquiescence.” *Id.* at 1220. “Showing a reasonable inference of neighborly sufferance or acquiescence is a fairly low bar.” *Id.* at 1221. In this case the fact that both parties knew the other used the road and didn’t object, and the use did not interfere with the owner’s use of its land, was enough to create this inference. Bingo. No prescriptive easement.

I like this decision, and it fits the traditional Scandinavian silent but friendly culture of the Northwest. Why put the burden on the neighbor who allows a neighbor to use his or her road to be nasty to make sure he or she doesn’t lose property rights? Why encourage more fence building when a policy which assumes that neighbors will be generous with each other creates a more pleasant atmosphere? Here’s to a neighborly Washington!