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Recording Date - November 7, 2018

Recording Availability – November 21, 2018

Meeting Location	Date	Time	Topic
King County Bar Association 1200 Fifth Avenue - Suite 700 Seattle, WA	Wednesday, November 7, 2018	12:00 PM to 1:15 PM	Boundary Disputes and Adverse Possession

AGENDA

12:00 PM Introduction

12:10 PM Presentation: ‘Boundary Disputes and Adverse Possession’, by Joseph Rockne, The Law Office of Joseph L. Rockne, PLLC

1:15 PM Adjourn

SPEAKER BIOGRAPHY

Joseph Rockne, The Law Office of Joseph L. Rockne, PLLC – Joseph Rockne is a litigation and trial lawyer who represents businesses, families and individuals in state court. Joe has handled bench and jury trials in several Washington counties and has argued cases before the Washington Court of Appeals. He also represents clients in private arbitration and mediation.

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1. Introduction

I don't know if boundary disputes are more prevalent today than ten years ago. The percentage of my practice devoted to their resolution has certainly increased. But the increase I am experiencing may simply be a factor of my age and reputation.

I suspect that there has been an increase in boundary disputes. The rapid development in the Puget Sound area, the increase in the value of real property and increased density all support the idea that there are more disputes today than in decades past.

2. The Law of Adverse possession/Ejectment

Adverse possession is the act of claiming another's legally described property as one's own. Ejectment actions are brought by the legal owner to "eject" someone currently possessing their property. Both actions are governed by Chapter 7.28 of the Revised Code of Washington. The Chapter sets forth the jurisdictional basis for the filing of the action as well as the various statutory elements that must be shown to either clear title (RCW 7.28.120) or establish ownership in some other manner.

In order to establish a claim to property by adverse possession, the claimant must establish that he or she has had possession of the property, which possession has been (1) exclusive; (2) actual and uninterrupted; (3) open and notorious; and (4) hostile. *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984).

In an ejectment action, the Plaintiff may recover damages for the withholding of property for a period not exceeding six years. RCW 7.18.150. Defendant may counterclaim for taxes or assessments paid and for the value or permanent improvements made by him—provided he holds in good faith under color or claim of title adverse to plaintiff. RCW 7.28.150-170.

A search for "adverse possession" in lexis turned up ~~924~~ 1032 cases. This makes a quick analysis of the facts and law very difficult. New cases (especially if you read the unpublished cases) are handed down nearly every week.

Recent cases include:

Gorman v. City of Woodinville, 175 Wn.2d 68 (2012)– Claim arising prior to municipal ownership. Title becomes vested when the elements, specifically the ten year period, are established.

Kiely v. Graves, 173 Wn.2d 926 (2012)– Claim against public lands. Court rejected respondents adverse possession claim to a portion of an alley that had been dedicated to public use.

Merriman v. Cokeley, 168 Wn.2d 627 (2010)– Mutual recognition and acquiescence. Three widely spaced markers overgrown by blackberry bushes did not constitute a well-defined boundary.

Teel v. Stading, 155 Wn.App. 390 (2010)– Permissive use.

Nickell v. Southview Homeowners Ass’n, 167 Wn.App. 42 (2012) – Sufficiency of evidence. Party claiming must establish elements by a preponderance of the evidence.

Herrin v. O’Hern, 168 Wn.App. 305 (2012) – Revocation of permissive use.

Acord v. Pettit, 174 Wn.App. 95 (2013), *rev.denied* 178 Wn.2d 1005 (2013) – Sufficiency of evidence.

Pendergrast v. Matichuk, 186 Wn.2d 556 (2016) – Boundary established by common grantor; timber trespass damages.

Sometime the nature of a “hostile” possession is more like an easement. In that case, when a dispute arises between the property owner and the person using the property, one must analyze whether a prescriptive easement has been created.

The dispositive case for resolving the prescriptive easement claim is *Gamboa v. Clark*, 183 Wn.2d 38, 348 P.3d 1214(2015).

For more than ten years, the Gamboas had used a gravel road on the Clark’s property as a driveway to access their home. *Gamboa*, 183 Wn.2d at 41. They maintained portions of it. The trial court found that “[t]he Gamboas and the Clarks both 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.” *Gamboa*, 183 Wn.2d at 41.

The appellate court reversed the trial court’s finding that the Gamboas had acquired a prescriptive easement through their long use of the roadway, which was upheld by the Supreme Court. *Gamboa*, 183 Wn.2d at 42, citing *Gamboa v. Clark*, 180 Wn.App. 256, 321 P.3d (2014).

Gamboa cited the “seminal case” on prescriptive easements and then went on to articulate the “fundamental propositions” that are “binding” on the court. *Gamboa*, 183 Wn.2d at 43, citing *Northwest Cities v. Western Fuel*, 13 Wn.2d 75, 123 P.2d 771(1942). Critical is the proposition that “prescriptive rights . . . are not favored in the law, since they necessarily work corresponding losses or forfeitures of the rights of other persons.” *Gamboa*, 183, Wn.2d at 43, quoting *Northwest Cities*, 13 Wn.2d at 83.

The Court then listed the elements necessary to establish the prescriptive easement. Those are: (1) that the claimant used the land in an “open” and “notorious” manner, (2) the use was “continuous” or “uninterrupted,” (3) the use occurred over a “uniform route,” (4) the use was “adverse” to the landowner, and (5) the use occurred “with the knowledge of such owner at a time when he was able in law to assert and enforce his rights.” *Gamboa*, 183 Wn.2d at 43 quoting *Northwest Cities* 13 Wn.2d at 83. The claimant bears the burden of proof. *Id.*

The critical element in *Gamboa*, is whether the claimant’s use was adverse. Subjective belief is irrelevant. *Gamboa*, 183 Wn.2d at 44 citing *Dunbar v. Heinrich*, 95 Wn.2d 20, 27, 622 P.2d 812 (1980); see also *Chaplin*, 100 Wn.2d at 860-61.

The Court then set out in a block quote the following:

“The law should, and does encourage acts of neighborly courtesy; a landowner who quietly acquiesces in the use of 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.” *Gamboia*, 183 Wn.2d at 48, quoting, *Roediger*, 26 Wn.2d at 709 quoting *Weaver v. Pitts*, 191 N.C. 747, 133 S.E. 2, 3 (1926).

3. Tools for Resolving Boundary Issues

Boundary Line Agreements and Boundary Line Adjustments

Stipulation and Agreed Orders

Easements

Licenses

Litigation and Judgment

4. Methods for Resolution

Informal Negotiation

Formal Negotiation and Mediation

Lawsuits, Discovery, Motions and Mediation

5. Paying for the Resolution

Statutory Warranty Deed – Make the Seller Pay

Title Insurance – Make the Title Company Pay

Other Insurance – Umbrella Policies

Statutory Attorney Fees – Discretionary

6. Miscellaneous Issues

Survey Issues

Gaps and Gores

Security Interests in “lost” property

Restraining Orders and Pretrial Stipulated Agreements

7. Conclusion

Much of my practice involves disputes between neighbors. I enjoy working on them. This is not a practice area that requires an intense detailed reading of statutory schemes or case law. It does, however, require patience and a willingness to try to understand the emotional and psychological makeup of all the participants in the dispute.