IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAN K. KERBY and ILONA A. KERBY, husband and wife,	)	
	)	No. 66247-3-I
Respondents,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
GEORGE AUTTELET and PATSY AUTTELET, husband and wife, and, ALL OTHER PERSONS WHO MAY CLAIM INTEREST IN REAL PROPERTY,	)	
Appellants.	)	FILED: November 21, 2011

Appelwick, J. — Auttelet again appeals the trial court's decision granting Kerby a prescriptive easement for portions of Kerby's access road that ran outside the boundary of the original easement.[1] After the first appeal, we remanded for the trial court to enter a specific finding on the issue of whether Kerby's installation of the road was permissive. Kerby v. Auttelet, noted at 152 Wn. App. 1064, 2009 WL 3723803, at *7. The trial court has now done so. Sufficient evidence supports the finding that it was not permissive and the

[1] See Kerby v. Auttelet, noted at 152 Wn. App. 1064, 2009 WL 3723803. As in our earlier opinion, we refer to the parties as Kerby and Auttelet.

court's other findings do not impeach that finding or otherwise render it erroneous. Because the finding is determinative of Kerby's claim to the prescriptive easement, we affirm.

FACTS

The underlying facts leading to Kerby's claim of a prescriptive easement were discussed in the unpublished opinion of this court addressing Auttelet's first appeal. They are well known to the parties, and need not be repeated here.

In that appeal, along with other claims no longer in issue, Auttelet challenged the trial court's ruling after a bench trial that Kerby had established a prescriptive easement to the present location of his access road across Auttelet's property. Specifically, Auttelet disputed whether Kerby's use of the property was adverse. He claimed that in 1980, he had given Kerby permission to put in the road around some large trees, resulting in a road beyond the original 30-foot easement to which he acknowledged Kerby was entitled. The record, however, contained conflicting testimony on the issue of permissive use. Kerby testified that he never asked Auttelet for permission to put the road in around the trees and Auttelet had no involvement in his decision to site the road to avoid the trees.

At the conclusion of the trial, the trial court ruled that Kerby had a prescriptive easement for the portion of his road that ran beyond the original 30-foot easement. The court neglected, however, to make a specific factual finding to resolve the conflicting testimony over permissive use. Because the ultimate determination of whether a prescriptive easement had been established turned

on whether permission was or was not granted to build the road outside the easement, this court remanded for the trial court to expressly make such a finding.

The trial court accordingly held a hearing on April 9, 2010. The court heard lengthy argument by counsel. The court then orally found that there was no permission given to deviate from the easement. The court also commented that the parties thereafter acquiesced in the location of the roadway for 27 years before Auttelet first raised a complaint about the roadway's location.

On June 11, 2010, the parties appeared again for presentation of written findings. Counsel for Kerby asked the court to simply enter a supplemental finding that there never was any permission requested or granted as to the placement of the road, arguing it was the only additional finding authorized by this court. Referencing the trial court's April 9 oral comments about acquiescence, however, counsel for Auttelet sought to have the court enter a specific finding on acquiescence. After further lengthy argument, over counsel for Kerby's objection, the trial court agreed to enter the additional finding as well, to assist this court if the question of acquiescence was somehow raised in another appeal. The resulting supplemental findings of fact were:

> 30. There was no permission requested or granted relating to the placement of the easement road across the Auttelet property to the Kerby property.
>
> 31. To further assist the court of appeal, to determine the question of acquiescence, the court makes the following findings: The parties mutually located an existing fence, they thought they were within the thirty foot fence line, and based upon the location of the fence, they acquiesced in the location of the road. Later, when

> they realized by survey that part of the road was outside the line, a complaint was made.

Auttelet appeals again, this time challenging the amended findings.

DISCUSSION

We review whether a party has established the elements of a prescriptive easement as a mixed question of fact and law, upholding factual findings supported by the record and determining if those facts, as a matter of law, constitute a prescriptive easement. Lee v. Lozier, 88 Wn. App. 176, 181, 945 P.2d 214 (1997). Here, we remanded to the trial court to settle only the unresolved question of disputed fact of whether Auttelet granted Kerby permission as to the specific placement of the road.

A claimant's use is adverse when he "uses the property as the true owner would, under a claim of right, disregarding the claims of others, and asking no permission for such use." Kunkel v. Fisher, 106 Wn. App. 599, 602, 23 P.3d 1128 (2001)). Use is not adverse if it is permissive. As noted above, there was a clear conflict in the trial testimony. The trial court, as trier of fact, could properly rely on Kerby's testimony to support a finding that there was no permission. Accordingly, the trial court's finding is supported by sufficient evidence, and the findings therefore support the legal conclusion that Kerby established a prescriptive easement.

Auttelet nonetheless argues the trial court erred. He contends that in light of finding 31, this court should treat finding 30 as either a finding that there was permission, or else hold it was an erroneous conclusion of law. He also argues that the trial court further erred by applying the legal doctrine of boundary by

acquiescence for the first time on remand.

We reject these claims.

Finding 30 is unequivocal and supported by the record. The additional facts in finding 31 that the reason Auttelet did not initially object was because he was mistaken that the road was within the 30 foot easement, or did not care whether it was, does not establish that he gave permission. If it did, the failure to object or assert ownership could always be characterized as implied permissive use to defeat adverse possession. Such is not the law.

Nor does Auttelet cite any relevant authority for his alternative claim that we should treat finding 30 as an erroneous conclusion of law. Moreover, this argument appears to rely wholly on the notion that findings 30 and 31 are irreconcilably conflicting, which we reject in any event.

Finally, there is no basis in the record to credit Auttelet's claim that the trial court erred by attempting to employ the legal theory of boundary by acquiescence as its real reason for ruling in favor of a prescriptive easement. See Lamm v. McTighe, 72 Wn.2d 587, 593, 434 P.2d 565 (1967). The court's written findings and conclusions all correctly address the elements of a prescriptive easement by adverse use, and do not address boundary by acquiescence, which our earlier opinion already noted was not a theory involved in this case. Kerby, 2009 WL 3723803, at *2. And, to the extent Auttelet now also contends that the court erred in entering finding 31 as beyond the scope of this court's remand order, the record shows any such error was invited by Auttelet over Kerby's specific objection on precisely this point. See State v.

Henderson, 114 Wn.2d 867, 868-70, 792 P.2d 514 (1990) (under the invited error doctrine, a party who sets up an error at trial cannot claim it as error on appeal).

In a pro se reply brief, Auttelet seeks to raise other, new issues, and attempts to make a claim for attorney fees. Although apparently sincerely made and heartfelt, none of these arguments has even debatable legal merit. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments raised for the first time in reply or unsupported by proper citation to the record or relevant authority will not be considered).

Affirmed.

Appelwick, J.

WE CONCUR:

Leach, A.C.J.

Cox, J.