IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FIRST PACIFIC PROPERTIES, INC., a Washington Corporation,	)	**No. 27804-2-III**
Respondent,	)	**Division Three**
v.	)	
	)	**UNPUBLISHED OPINION**
NILKANTH, INC., a Washington Corporation, and MAYUR PATEL and JANE DOE PATEL, husband and wife,	)	
Appellants.	)	

Brown, J. ─ Nilkanth, Inc. (owned by Mayur and Jane Doe Patel) appeals the trial court's summary grant of a surface water drainage easement over its property to First Pacific Properties, Inc., an adjacent property owner. We affirm because the record supports an implied easement based on undisputed facts showing a common grantor of the two properties, intent to benefit First Pacific's property, and a reasonable necessity to continue the easement. Accordingly, we affirm.

FACTS

The parties own adjacent commercial parcels. Nilkanth's property is located to

the north and west of First Pacific's property. A motel is located on Nilkanth's property. Due to an elevation difference between the properties, water runoff flows from First Pacific's property onto Nilkanth's property and down a drain located 60 feet onto Nilkanth's property. The two parcels were owned as one parcel until the 1960s. The owner then divided the parcels and sold them to different parties. Melting snow and rainwater has flowed from First Pacific's parcel to Nilkanth's parcel since the two parcels were joined as one. This water was not impeded and prior owners did not request that the flow of surface water be stopped.

In March 2007, Nilkanth built a concrete fence along the property line between the two parcels. This structure blocked the flow of surface water from First Pacific's parcel. First Pacific contacted an engineering company, GeoEngineers, to determine the feasibility of installing an onsite storm water drainage system. After drilling nine test holes, GeoEngineers determined they could not install an onsite drainage system because the composition of the earth and rock on First Pacific's property prohibit the building of a proper and conforming storm water drainage system. First Pacific contacted the City of Spokane, which informed it that the city storm water system was at capacity, and it would not permit First Pacific to discharge water into its system.

After construction of the fence, First Pacific sued for injunctive relief, private nuisance, prescriptive easement, and way of necessity. First Pacific requested summary judgment, arguing a prescriptive and implied easement existed over the

Nilkanth's property. In response, Nilkanth argued, *inter alia*, that the common enemy doctrine limited First Pacific's remedies. The trial court found both easements applied before granting partial summary judgment to First Pacific. The court did not address the common enemy doctrine. The parties later stipulated to dismiss First Pacific's remaining claims. Nilkanth appealed.

ANALYSIS

The issue is whether the trial court erred in granting First Pacific's request for summary judgment, and partly concluding an implied easement existed over Nilkanth's property.

We review summary judgments de novo. *Korslund v. DynCorp Tri-Cities Servs. Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005). Summary judgment is appropriate where, viewing the facts in a light most favorable to the nonmoving party, no genuine issues of material fact exist and the issues can be resolved as a matter of law. *Id.*

Preliminarily, we note the trial court incorrectly concluded a prescriptive easement existed. To establish a prescriptive easement, a claimant must prove use of the servient land that is: (1) adverse to the owner of the land sought to be subjected, (2) open and notorious, (3) over a uniform route, (4) continuous and uninterrupted for 10 years, and (5) with the knowledge of such owner at a time when he was able in law to assert and enforce his rights. *Kunkel v. Fisher*, 106 Wn. App. 599, 602, 23 P.3d 1128 (2001) (citing *Mountaineers v. Wymer*, 56 Wn.2d 721, 722, 355 P.2d 341 (1960)).

The claimant has the burden of establishing the existence of *each* element. *Drake v. Smersh*, 122 Wn. App. 147, 151, 89 P.3d 726 (2004). This court reviews 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).

A claimant's use is adverse when he or she "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*, 106 Wn. App. at 602. Use is not adverse if it is permissive. *Id.* Whether use is adverse or permissive is generally a question of fact, but if the essential facts are not in dispute, it can be resolved as a question of law. *Drake*, 122 Wn. App. at 152. The inference of permissive use applies when a court can reasonably infer that the use was permitted by neighborly sufferance or acquiescence. *Kunkel*, 106 Wn. App. at 602. A use that is permissive at its inception cannot ripen into a prescriptive right, no matter how long it may continue, "unless there has been a distinct and positive assertion by the dominant owner of a right hostile to the owner of the servient estate." *Nw. Cities Gas Co. v. W. Fuel Co.*, 13 Wn.2d 75, 84, 123 P.2d 771 (1942). Here, the facts show the initial use was permissive, and continued to be permissive. Thus, a prescriptive easement is, under these facts, inapt because First Pacific cannot establish its use was adverse.

Turning now to the implied easement, the factors relevant to establishing an implied easement, either by grant or reservation, are (1) former unity of title and subsequent separation; (2) prior apparent and continuous quasi easement[1] for the benefit of one part of the estate to the detriment of another; and (3) a certain degree of necessity for the continuation of the easement. *Fossum Orchards v. Pugsley*, 77 Wn. App. 447, 451, 892 P.2d 1095 (1995).

Factor (1) is an absolute requirement. The presence or absence of factors (2) and (3) is not necessarily conclusive. Rather, they are aids to determining the presumed intention of the parties as disclosed by the extent and character of the use, the nature of the property, and the relation of the separated parts to each other. *Id.*

Here, it is undisputed that the parcels were formerly joined and then separated. Thus, factor (1) is satisfied. Factor (2) is satisfied because the existence of the drain and drainway was apparent and continuous until the construction of the concrete fence. Factor (3) is also satisfied because the continuation of the easement is reasonably necessary since there is only one drain that is situated downhill from First Pacific's property on Nilkanth's property for the removal of surface water for both properties. After drilling nine test holes, engineers determined that they could not install an onsite drainage system because the composition of the earth and rock on First Pacific's

[1] A "quasi easement" refers to the situation where one portion of a person's property is burdened for the benefit of another portion and such benefit would be a legal easement if the portions were owned by different persons. *Adams v. Cullen*, 44 Wn.2d 502, 504, 268 P.2d 451 (1954).

property prohibited the building of a proper storm water drainage system. The City of Spokane informed First Pacific that it could not construct a drainage system to the city's drains because the city storm water system was at capacity.

Given all, First Pacific has established a reasonable necessity for the use of Nilkanth's drain for the removal of surface water. An easement by implied grant requires only reasonable necessity not absolute necessity. *Adams*, 44 Wn.2d at 507; *see also Berlin v. Robbins*, 180 Wash. 176, 179-80, 38 P.2d 1047 (1934) (where there is unity of title and a subsequent severance, the law subjects the servient tenement to all visible uses and incidents as are reasonably necessary to enjoy dominant tenement in substantially same condition as when grant was made).

Accordingly, the trial court properly granted summary judgment in favor of First Pacific based on the existence of an implied easement. Because we have concluded summary judgment was properly granted, we do not reach Nilkanth's common enemy doctrine arguments that are premised on the incorrect assumption that no easement could be established by First Pacific.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Kulik, C.J.

Korsmo, J.