IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WAYNE R. DAVIS and SHARON L. DAVIS, husband and wife,	)	**No. 28046-2-III**
Respondents and Cross-Appellants,	)	
v.	)	
LARRY FENDELL and LORETTA A. FENDELL, husband and wife,	)	
Appellants,	)	
	)	**Division Three**
YAKIMA COUNTY,	)	
Defendant,	)	
JOHN KOOPMANS and BEVERLY KOOPMANS, husband and wife; HI LAND, L.L.C., a Washington limited liability company,	)	
Respondents and Cross-Appellants.	)	**UNPUBLISHED OPINION**

Korsmo, A.C.J. — This case involves a dispute concerning two easements in rural Yakima County. The trial court found one of the easements was actually a public access that could not be adversely possessed. We agree that the evidence supports that decision. The court also found that the other easement was abandoned by nonuse. We reverse that aspect of the trial court's ruling because it conflicts with a Washington Supreme Court opinion. The other challenged rulings are affirmed.

FACTS

The present controversy has its genesis in June 1972, when Larry G. and Loretta A. Fendell purchased approximately 32 acres of pastureland in Yakima County from Norman V. Sylling. This land was originally part of a plat called the Zillah Orchard Tracts (Plat) filed in 1916. The deed to the land the Fendells purchased provided for an easement across the eastern edge of the Fendell property (East Easement) for the benefit of a tract to the north of the Fendell property. In December 1972, Wayne R. and Sharon L. Davis purchased this northern tract from Sylling. The Davises and Fendells agreed to construct a road along the western edge of the Fendell property (West Road). There was a fence along this border which the Fendells believed marked their property line. The Fendells built another fence east of the existing fence to keep their livestock in. The Fendells and Davises jointly maintained the new road.

In January 1981, the Davises purchased more land surrounding the Fendell property. In 1991, the Davises removed the older fence on the west side of the West Road. In response, the Fendells moved their newer fence 10-15 feet west. This blocked significant portions of the West Road and made it impossible to move farm equipment along the road. The Davises retained an attorney and threatened litigation if the Fendells did not move the fence back to provide unrestricted access to the West Road. The Fendells did not move their fence and the Davises did not follow through on their litigation threat. The Davises constructed a driveway across their property to Roza Drive, a county road, and moved their farm equipment along this road.

In late 1998, the Davises moved to Idaho and leased nearly all their property to John and Beverly Koopmans. The Koopmanses own a dairy located northeast of the area in question here. They leased the Davises' land for the purposes of growing crops to feed their cows and to have a place to use their manure for fertilizer.

The Koopmanses began using the West Road and a road along the southern edge of the Fendell property (South Road) for hauling manure, servicing irrigation, and other uses. In the spring of 2000, Mr. Fendell installed single strand wire gates across the north and south entries to the West Road.

In early 2003, manure, which the Koopmanses had applied to their leased land, ran

off onto the Fendells' and others' property. Mr. Fendell called the Washington Department of Ecology which investigated the incident. Mr. Fendell told the Department that he had observed runoff in 2000, 2001, and 2003, and he showed the department videos. The Department found no violation, but observed the potential for a future violation. Accordingly, the Department issued a notice of violation which directed the Koopmanses to file a report on what steps they were taking to control their potential pollution. The Koopmanses adopted a Nutrient Management plan which regulated the amount and time of application of manure to the leased property.

In March 2003, the Davises filed suit to quiet title to the East Easement, and enjoin the Fendells to remove their fence along the West Road and cease blocking access to the West Road and South Road. The Fendells filed counterclaims against the Davises and named the Koopmanses as third-party defendants. The counterclaim sought damages and injunctive relief for trespass and nuisance. The Fendells complained about the manure runoff and the smell, flies, birds, and noxious weeds which they contended the manure application process had produced.

In a summary judgment order, the trial court ruled that the West and South Roads were not easements, but rather were rights-of-way. It left the decision on whether they were public or private rights-of-way for trial. A five-day bench trial was held in 2008.

During trial, the court visited the property with the attorneys and the parties. Several experts testified at trial.

Agronomist Stuart Turner testified that that there was no statistical difference in nutrient content between the areas of the Fendells' property which had allegedly had numerous manure spills and those that had not. Turner also testified that certain types of weeds of which Mr. Fendell complained could not have come from the Koopmanses' fields, because there were no similar weeds in the Koopmanses' fields. Finally, Turner testified that the Koopmanses' manure application and irrigation practices produced normal nutrient levels in their fields.

Surveyor Richard Wehr testified that solid lines on the Plat indicated the intention to create public rights-of-way rather than an easement along the West and South Roads. County Engineer Gary Ekftedt testified the West and South Roads were not county roads. The Yakima County database coordinator testified that public rights-of-way are not taxed by the county. The coordinator's records indicated that the West Road and South Road were not taxed.

Mr. Fendell produced videos at trial which purported to document several different manure and irrigation spills. After cross-examination, it was apparent that the spills were repetitions of the same spill, despite Mr. Fendell's statements to the contrary. Mr.

Fendell also claimed to have sprayed thousands of gallons of herbicide on weeds, but photographs he produced showed large weeds growing in the same areas he contended he regularly sprayed.

After the trial concluded, the court issued a memorandum opinion. The court ruled: (1) the West Road was a public right-of-way and thus not subject to adverse possession by the Fendells; (2) the East Easement had been abandoned by the Davises; (3) the manure and water runoff onto the Fendells' property was not intentional and therefore not an actionable trespass; and (4) the Koopmanses' manure spreading and other farming operations was not an actionable nuisance. The Fendells moved for reconsideration on the issues of whether the West Road was a public right-of-way and whether the Fendells adversely possessed portions of the road.

The Yakima County Assessor filed a declaration in support of the Fendells' motion for reconsideration. He stated that his records indicated that the county did not possess the alleged rights-of-way and that Mr. Fendell was taxed for one-half of the West Road and all of the South Road. Thus, the Assessor concluded the database coordinator's trial testimony was in error.

Surveyor Wehr submitted a declaration in opposition to reconsideration. He stated his trial testimony was not affected by the tax status of the property, but rather was based

on plain reading of the Plat. Wehr also noted that the surveyor notes, which Mr. Fendell attached to his declaration supporting reconsideration, tended to support the notion the roads were public rights-of-way because the notes contained the language "Dedication and Field Notes. Yakima Zillah Investment Company to The Public."[1]

The court denied the Fendells' motion for reconsideration. They then filed this appeal. Both the Davises and the Koopmans filed cross appeals.

ANALYSIS

The issues presented by this appeal involve both the East and West access areas, as well as the trial court's rulings related to the manure run-off claims. We will first address the two access issues before turning to the nuisance-related claims.

West Road

The Fendells challenge the trial court's determination that the West and South Roads constituted public rights-of-way. The issue of the landowner's intent was a factual question. The evidence supported the factual determination.

In the early days of statehood, county roads could be created by two distinct methods. County commissioners could create roads upon the petition of freeholders. Bal. Code § 3772 *et seq.* A landowner could also create roads by filing a plat with the county auditor. *Murphy v. King County*, 45 Wash. 587, 589, 593, 88 Pac. 1115 (1907).

[1] Clerk's Papers 57, 92.

As originally enacted, roads created under either method were vacated if they were not opened to the public within five years. *Leonard v. Pierce County*, 116 Wn. App. 60, 65, 65 P.3d 28 (2003); *Murphy,* 45 Wash. at 593; Laws of 1889-1890, ch. XIX, § 25. In response to the *Murphy* decision, the Legislature promptly amended the statute to exempt privately platted roads from the automatic vacation process; county-created roads were still vacated if unopened after five years. Laws of 1909, ch. 90, § 1.[2] A plat needed to be filed with the county auditor and was effective upon approval by the county commissioners. Laws of 1901, ch. CXXIV, § 3.

The plat map is the best evidence of the dedicator's intent; where the plat map is unambiguous, it is error for the trial court to consider parol evidence. *Olson Land Co. v. City of Seattle*, 76 Wash. 142, 145, 136 Pac. 118 (1913). The intent is determined by considering all lines on the map, but where the map is ambiguous, it is appropriate to consider the "surrounding circumstances" in order to determine the intention. *Roeder Co. v. Burlington N., Inc.*, 105 Wn.2d 269, 273, 714 P.2d 1170 (1986).

The plat map admitted at trial shows that it was approved by the county engineer and accepted by the Board of County Commissioners in October 1916. We agree with the trial court that the South and West Roads were in fact platted to be county roads. The disputed roads run between adjacent parcels, the boundaries of which stop at the

[2] This statute is now codified at RCW 36.87.090.

respective edges of the roads. The only natural reading of this document is that the roads were in fact intended to be roads when the document was filed in 1916. Any other interpretation would leave a road-like "no man's land" running between parcels.

The plat does not carry an explicit statement of dedication to the public. The trial court understandably turned to evidence of the "surrounding circumstances." That evidence confirmed the reading of the plat. Surveyor Richard Wehr explained that the lines used on the map were those used to designate roads. Most persuasive of all is the evidence produced in reconsideration—the original surveyor's notes containing the notation "Dedication and Field Notes. Yakima Zillah Investment Company to The Public." From the time of our earliest legislation, surveyor's reports have been required to be filed with the county commission as evidence to be considered in approving roads and weighing challenges to road siting decisions. Laws of 1889-1890, ch. XIX, §§ 13-14.

This evidence amply supported the natural reading of the Plat map. The fact that the county did not consider the roads to be county roads for tax purposes does not alter the dedicative intent shown in the Plat map and accompanying survey notes. The trial court correctly determined that the West Road was a public right-of-way. Public roads cannot be adversely possessed. "An abutting property owner does not acquire by adverse possession any part of a right of way to which a municipal corporation has title."

Goedecke v. Viking Inv. Corp., 70 Wn.2d 504, 509, 424 P.2d 307 (1967).[3] Rather, the statutory vacation process is the exclusive process for ending a public right-of-way. *City of Seattle v. Hinckley*, 67 Wash. 273, 279, 121 Pac. 444 (1912).

Substantial evidence supports the trial court's determination that the South and West Roads are public rights-of-way. There was no error.

East Easement

The trial court ruled that the East Easement was abandoned by the Davises. While the evidence was consistent with the common understanding of the term "abandonment," it was not sufficient to support the legal definition applicable here. A Washington Supreme Court decision requires us to reverse.

An easement appurtenant to land is for the benefit of adjoining property rather than for the benefit of the property's owners. As such, it "follows the land without any mention whatever." *Winsten v. Prichard*, 23 Wn. App. 428, 431, 597 P.2d 415 (1979) (quoting 2 G. Thompson, *Commentaries on The Modern Law of Real Property*, § 322, at 69 (J. Grimes repl. 1961)). An easement can be extinguished by abandonment. *Neitzel v. Spokane Int'l Ry. Co.*, 80 Wash. 30, 41, 141 Pac. 186 (1914). In order to do so, there must be a showing that the easement is not being used and there must be an express or

[3] The *Goedecke* court also noted: "A public road does not lose its character as a public road because no public funds are expended for its maintenance and upkeep." 70 Wn.2d at 509.

implied intention to abandon the easement. *Heg v. Alldredge*, 157 Wn.2d 154, 161, 137 P.3d 9 (2006). Nonuse for an extended period is insufficient to establish the intent to abandon property. *Id*. Rather, there must be acts "inconsistent with the continued existence of the easement." *Id*.

In *Heg*, the appellant had two means of accessing her property, one of which crossed through the respondent's property. Appellant typically used her other access route; respondents cut up the road on their property to make it unusable by vehicle traffic. *Id*. at 157-159. The court concluded that this evidence was insufficient to support a finding of abandonment. *Id*. at 156. Appellant's decision to use one route over the other, even if the choice was partially forced upon her by the respondents, did not indicate she intended to give up her right to use the easement.

Similarly here, the fact that the Davises chose to use one of their two access routes, and even later built a third route, did not indicate an intention to abandon their right to use the East Easement. The Fendells essentially see the decision to expand the West Road access as a decision to abandon the eastern road. However, more is needed to extinguish an easement. The record does not establish that the Davises forever gave up the East Easement.

Following *Heg*, we reverse the trial court's ruling extinguishing the East

Easement.

Trespass

The trial court rejected the Fendells' trespass claim for manure running down onto their property, concluding that several elements of the claim were not proven. While this court is not in the position of substituting its judgment for that of the trial court, we also agree that the evidence supported the trial court's view of the case.

To prevail on a trespass action, the plaintiff must establish four elements:

> (1) an invasion affecting an interest in the exclusive possession of his property; (2) an intentional doing of the act which results in the invasion; (3) reasonable foreseeability that the act done could result in an invasion of the plaintiff's possessory interest; and (4) substantial damages to the *res*.

Bradley v. Am. Smelting & Refining Co., 104 Wn.2d 677, 691, 709 P.2d 782 (1985).

The trial court found that elements (2), (3), and (4) of the *Bradley* formulation were not established. Those factual determinations are dispositive. As this court recently stated:

> [W]here a trial court finds that evidence is insufficient to persuade it that something occurred, an appellate court is simply not permitted to reweigh the evidence and come to a contrary finding. It invades the province of the trial court for an appellate court to find compelling that which the trial court found unpersuasive. Yet, that is what appellant wants this court to do. There was conflicting evidence in this case. The trial judge weighed that conflicting evidence and chose which of it to believe. That is the end of the story.

Quinn v. Cherry Lane Auto Plaza, Inc., 153 Wn. App. 710, 717, 225 P.3d 266 (2009),

review denied, 168 Wn.2d 1041 (2010).

This case presents the same situation. The Fendells presented evidence in support of their claims. The trial judge did not find the evidence persuasive. This court is not in a position to second-guess that determination. *Id*. But, even if we were to weigh the evidence, we would reach the same conclusion as the trial court. Unlike the situation in *Bradley*, where a smelter disposed of particulates by discharging them in the air knowing they would land on other people's property, here the Koopmanses placed manure on their own property in order to dispose of it and fertilize their fields. They did not intentionally put the manure on the Fendell property, nor did they put the manure on their own property with the intention that it would slide down onto the Fendell property.

The trial court, as trier-of-fact, had the sole responsibility of deciding if it was persuaded by the evidence. It was not. This court lacks authority to reweigh the evidence. There was no error.

Nuisance

The Fendells also argue that the trial court erred in rejecting their nuisance claim for the odor and other problems caused by manure being used on the adjoining properties. The trial court found that the manure use was not unlawful and that any problems were transitory in nature and did not constitute an ongoing nuisance. We affirm.[4]

[4] The parties debate whether the "right to farm" statutes, RCW 7.48.300 *et seq*.,

> Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others . . . or in any way renders other persons insecure in life, or in the use of property.

RCW 7.48.120.

The essence of a nuisance action "is whether the use to which the property is put is reasonable or unreasonable." *Morin v. Johnson*, 49 Wn.2d 275, 280, 300 P.2d 569 (1956).

The trial court determined that using manure to fertilize the adjoining fields was not unlawful and did not cause any additional odor or flies than was typically experienced on a farm. Clerk's Papers 114, 116. The court expressly rejected Mr. Fendell's testimony to the contrary. Determinations of witness credibility rest exclusively with the trier-of-fact and will not be overturned by an appellate court. *Quinn*, 153 Wn. App. at 717. Instead, the trial court credited evidence that the manure was applied in limited and appropriate quantities at appropriate times. There was no excessive application and there were minimal problems associated with the use.

These factual determinations are binding on this court. *Id*. They also lead inescapably to the trial court's conclusion that there was no nuisance. There was no unlawful action by the Davises or Koopmanses, and no resulting interference with the

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apply to this nuisance action between neighboring farmers. The trial court did not address this argument and we, too, decline to do so.

Fendells' use of their property.

The trial court did not err in rejecting the nuisance claim.

Attorney Fees

The Davises and Koopmanses sought attorney fees for successful defense of the trespass and nuisance actions. The trial court denied their requests. We affirm.

Attorney fees were sought under two statutes. The first, RCW 4.24.630(1), deals with damages recoverable for trespass to land. The trespasser is liable for various damages, including "investigative costs and reasonable attorneys' fees and other litigation-related costs." Nothing in this statute suggests it applies to a party that successfully defends against a trespass claim. It is a damages award statute rather than an access to the courts statute. The trial court properly concluded that it was inapplicable to this action.

The respondents also argued that they were entitled to attorney fees under RCW 7.48.315. A subsection of that statute provides: "A farmer who prevails in any action, claim, or counterclaim alleging that agricultural activity on a farm constitutes a nuisance may recover the full costs and expenses . . . incurred by the farmer as a result of the action, claim, or counterclaim." RCW 7.48.315(1). The statute also defines "reasonable attorneys' fees" as a component of the recoverable costs and expenses. RCW

7.48.315(3).

This statute was enacted effective July 24, 2005. Laws of 2005, ch. 511, § 1. The litigation in this case began in 2003 with the filing of the complaint, answer, and cross complaint. Absent legislative intent to the contrary, statutes which create new remedies will be applied prospectively. *E.g.*, *Anderson v. Pierce County*, 86 Wn. App. 290, 310-311, 936 P.2d 432 (1997) (declining to apply newly created attorney fee award). We see no prospective language or other indicia of legislative intent to retroactively apply this legislation. RCW 7.48.315 did not apply to this lawsuit begun two years before its enactment.

The trial court correctly denied the claims for attorney fees.

CONCLUSION

The ruling extinguishing the East Easement is reversed. In all other respects the judgment is 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.

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Korsmo, A.C.J.

WE CONCUR:

Sweeney, J.

Brown, J.