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SUPERIOR COURT OF WASHINGTON FOR SAN JUAN COUNTY

CARLA J. HIGGINSON & A. JOHN WUEBKER

Plaintiffs,

NO. 18-2-05089-28

vs.

**ORDER GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AND
DISMISSING AMENDED
COMPLAINT**

DUNCAN WILSON, Individually and as Administrator of the Town of Friday Harbor;

TOWN OF FRIDAY HARBOR, a municipal corporation; and

JOHN & JANE DOES 1-10

Defendants.

Defendants Duncan Wilson and Town of Friday Harbor & John Doe 1, having moved the Court on a Motion for Summary Judgment, and the Court having considered all arguments for and against said Motion and having reviewed the pleadings and documents filed in support or opposition thereto, including:

1. Defendants Duncan Wilson and Town of Friday Harbor's (John Does 1's) Motion for Summary Judgment;
2. Declaration of Robert Anderson in Support of Duncan Wilson and Town of Friday Harbor (John Doe 1)'s Motion for Summary Judgment dated March 6, 2019 (Third Anderson

1 Declaration) and exhibits attached thereto (First and Second Anderson Declarations dated June
2 11, 2018 and June 20, 2018 respectively, and exhibits attached thereto).

3 3. Declaration of Duncan Wilson in Support of Town of Friday Harbor and Duncan
4 Wilson's Response to Motion for Preliminary Injunction and exhibits attached thereto dated June
5 18, 2018;

6 4. Declaration of Eileen M. Keiffer in Support of Town of Friday Harbor's and Duncan
7 Wilson's Response to Motion for Preliminary Injunction and exhibits attached thereto dated June
8 18, 2018;

9 5. Plaintiff's Response to Motion for Summary Judgment dated March 22, 2019;

10 6. Declaration of Carla Higginson and exhibits dated March 22, 2019;

11 7. Declaration of Patrick Kirby and exhibits dated March 23, 2019;

12 8. Declaration of David Osterbrink dated June 18, 2018;

13 9. Declaration of Robert Wilson dated July 20, 2018;

14 10. Town Defendants' Reply dated April 1, 2019;

15 11. The Supplemental Briefing on Summary Judgment Standards filed by Plaintiffs on
16 April 10, 2019;

17 12. Defendants Motion to Strike and Response to Plaintiff's Supplemental Briefing on
18 Summary Judgment Standards;

19 The Court, having heard argument of counsel and being otherwise fully advised, now
20 hereby finds as follows:

21 **LEGAL STANDARD ON SUMMARY JUDGMENT**

22 Summary judgment is proper if the pleadings, depositions, answers to interrogatories,
23 admissions on file, and affidavits show that there is no genuine issue as to any material fact and
24 that the moving party is entitled to a judgment as a matter of law. CR 56(c). These statements are
25 all required to be made under oath or penalty of perjury. All facts submitted and all reasonable

ORDER GRANTING SUMMARY JUDGMENT

Higginson et. al v. Wilson et. al

18-2-05089-28

- Page 2 of 8

1 inferences are to be considered in the light most favorable to the nonmoving party. *Ellis v. City*
2 *of Seattle*, 142 Wn.2d 450, 458, (2000). Summary judgment should be granted only if, from all
3 the evidence, reasonable persons could reach but one conclusion. *Clements v. Travelers Indem.*
4 *Co.*, 121 Wn.2d 243, 249 (1993).

5 A party against whom a claim is asserted or a declaratory judgment is sought may move
6 with or without supporting affidavits for a summary judgment in such party's favor as to all or
7 any part thereof. CR 56(b). "The moving defendant may meet the initial burden by 'showing—
8 that is, pointing out to the district court—that there is an absence of evidence to support the
9 nonmoving party's case.'" *Young v. Key Pharmaceuticals, Inc.*, 112 Wash.2d 216, 225 n1 (1989)
10 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). When a motion for summary
11 judgment is properly made and supported according to CR 56, the nonmoving party may not rest
12 upon the mere allegations or denials of a pleading. A response, by affidavits or otherwise
13 provided in the rule, must set forth specific facts showing that there is a genuine issue for trial.
14 CR 56(e). These facts must be admissible in evidence "and shall show affirmatively that the
15 affiant is competent to testify to the matters stated therein." *Id.* "Material facts are those upon
16 which the outcome of the litigation depends." *Zedrick v. Kosenski*, 62 Wash.2d 50, 54 (1963).

18 FINDINGS

19 Plaintiffs own property located at 580 Perry Place, Friday Harbor, Washington. This
20 property sits on the corner of Tucker Avenue and Perry Place. The legal boundaries of
21 Plaintiffs' property are described as:

23 Parcel "A"

24 the west 143 feet of Lot 8 Marble's Addition to the Town of Friday Harbor,
25 according to Plat recorded in Volume 1 of Plats, page 91, records of San Juan
County, Washington EXCEPT the north 70 feet thereof.

1 Parcel "B"

2 The north 55 feet of the west 143 feet of Lot 9, Marble's Addition to the Town of
3 Friday Harbor, according to plat recorded in Volume 1 of Plats, page 91, records
4 of San Juan County, Washington.

5 There are no facts submitted that refute the location of the actual lines of Plaintiffs'
6 property as set forth by Defendants. Rather, Plaintiffs claim that they have adversely possessed
7 the property between the legal boundaries of their property and the physical (paved) border of
8 both Perry Place and Tucker Avenue.

9 Plaintiffs claim that they were using the property in between their legal property line and
10 the edge of the paved border of both Perry Place and Tucker Avenue in an open and notorious,
11 continuous and uninterrupted manner for a period in excess of ten years. Thereby adversely
12 possessing said property. In June 2018, Defendants began work expanding both Tucker Avenue
13 and Perry Place on to the land that Plaintiffs claim they have adversely possessed. If the
14 disputed land is subject to adverse possession, Plaintiffs have set forth sufficient facts to create a
15 material issue of fact for the jury regarding whether Plaintiffs have adversely possessed the land.
16 However, Defendants assert that the disputed land is not subject to adverse possession under the
17 law because it is, and has been during all relevant time periods, owned by (or at least subject to a
18 right of way for the benefit of) the Town or the County.

19 **Perry Place**

20 Defendants have provided evidence clearly showing that the land Plaintiffs claim to have
21 adversely possessed is part of the Perry Place right of way owned by the Town of Friday Harbor.
22 Plaintiffs' property does not include the portion of lot 9 that was later dedicated by plat as a
23 portion of Lawson Place (now Perry Place). This land is not subject to adverse possession.
24 Plaintiff's responsive declaration from professional surveyor Patrick Kirby does not address
25 Perry Place. Nor does any other evidence create any material question of fact as to Perry Place.

1 Defendant's Motion for Summary Judgment on all of Plaintiff's claims, insofar as they
2 relate to the property along Perry Place is granted and Plaintiff's claims are dismissed.

3 **Tucker Avenue**

4 At the outset of this case, Defendants provided evidence that the 15 feet immediately
5 west of Plaintiffs' property was deeded to San Juan County by Kenneth McDonald on July 2,
6 1894. Plaintiffs' expert initially agreed. This was the parties' understanding when Plaintiff
7 sought an injunction preventing further construction in June 2018. Plaintiffs' expert provided
8 testimony that there were problems with the Defendants' survey, including that it did not identify
9 the plat(s) from which the Tucker Avenue right of way was derived. However, he did not
10 provide an opinion as to who actually owned the disputed property, or even that the town did not
11 own the property.

12 Subsequently, the parties learned (and appear to agree) that Tucker Avenue was, in fact,
13 created by dedication in Gould's Second Acre Addition to Friday Harbor (Gould's Plat). This
14 has been established by the evidence provided by the Defendants. However, no survey of
15 Tucker Avenue as it relates to Plaintiff's property has been provided to the court since the
16 discovery that it was created by Gould's Plat. Defendants have submitted, however, the Third
17 Declaration of Robert Anderson, which states, "Based on my knowledge, training, experience
18 and extensive research of the property records, the Tucker Avenue right-of-way *abutting the*
19 *west side of the parcel in question* was created by dedication on the face of the Gould Second
20 Acre Addition to Friday Harbor Plat on March 30, 1906, as recorded in Volume 1, page 6 of
21 Long Plats in the Auditor's records of San Juan County." (emphasis added). This, when taken
22 in conjunction with the First and Second Declarations of Robert Anderson and exhibits attached
23 thereto, and the exhibits admitted at the hearing on motion for summary judgment, creates an
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1 affirmative showing that the disputed property along Tucker Avenue is part of the right of way
2 owned by the Town and has belonged to the county or the town since the early 1900s. This is
3 established by Anderson's declarations; Gould's Plat, showing that Tucker Avenue runs along
4 the far eastern edge of Gould's Plat for almost the entirety of the plat; and the Town View
5 Addition to Friday Harbor and Marble Addition to Friday Harbor Plats, which both show a
6 public right of way (initially named "County Road" and then later named "Tucker Avenue")
7 running north and south immediately adjacent to and abutting Plaintiffs property. Defendants
8 have met their initial burden on summary judgment.

9 In response, Plaintiffs submitted and/or relied on several declarations, attachments, and
10 exhibits. The primary response to the conclusions reached by Mr. Anderson was the declaration
11 of Patrick S. Kirby, also a professional land surveyor. Mr. Kirby states that it is not possible to
12 accurately locate the Plaintiffs' property relative to the depiction of Tucker Avenue on Gould's
13 Plat from the materials presented by Mr. Anderson, nor is it possible to accurately describe the
14 location of the physical road referenced on Gould's Plat as it existed at the time the plat was
15 approved. Mr. Kirby goes on to say that, based on the information that he has reviewed, the
16 *physical* location of the public road prior to the completion of Phase 2 of Tucker Avenue project
17 did not abut the western edge of the Plaintiff's property line, either in 1969 or in 2017.

18 However, no one is contending that the *physical* (paved or otherwise publicly used) road
19 abutted Plaintiff's property line prior to the 2018 expansion. Rather, the defendants claim that
20 the *right of way*, abuts Plaintiffs' property. Mr. Kirby offers no opinion regarding the *right of*
21 *way*. At best, Plaintiffs offer only speculation that the disputed property *might* have belonged to
22 someone other than the Town of Friday Harbor during the time that Plaintiffs allege they
23 adversely possessed the property.
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1 In order to prevail on their claims at trial, Plaintiffs must establish that the land they are
2 claiming to have adversely possessed did not belong to the Town of Friday Harbor (or was not
3 within the right of way granted to Friday Harbor.) And here, to survive summary judgment,
4 Plaintiffs must produce *some* evidence from which a reasonable juror could reach that
5 conclusion. Taking all of the evidence and inferences therefrom in the light most favorable to
6 the Plaintiffs, there is simply no evidence upon which a reasonable juror could base a finding
7 that someone other than the Town owned the disputed property. Plaintiffs have failed to submit
8 evidence in response that that submitted by Defendants to create any genuine issue of material
9 fact. As such, Defendants' motion for summary judgment as to all claims related to the property
10 along Tucker Avenue is granted.

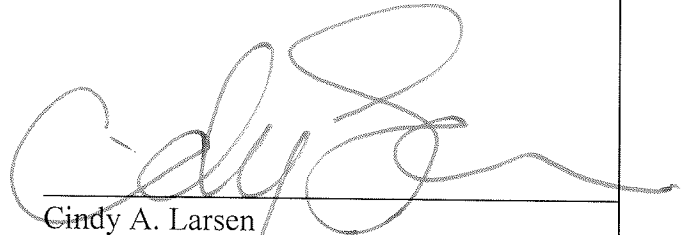
11 **CONCLUSION AND ORDER**

12 Based on the foregoing, the Court hereby ORDERS:

- 13 1. The motion to strike evidence contained in the declarations of David Osterbrink and
14 Robert Wilson is denied (and was also withdrawn);
- 15 2. The Court will not consider statements made during oral argument as evidence.
- 16 3. The motion to strike supplemental briefing is also denied;
- 17 4. Defendants' motion for Summary Judgment is granted;
- 18 5. Plaintiffs' Amended Complaint to Quiet Title and For Damages is dismissed in its
19 entirety with prejudice as a matter of law; and
- 20 6. The Court will now consider the Town Defendants' previous motion to collect the
21 attorneys' fees associated with defendant against Plaintiffs' request for a temporary
22 restraining order and preliminary injunction which the Court previously deferred in its
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1 October 29, 2018 Amended Order. The parties may submit additional briefing related to
2 those attorneys' fees within 30 days of today's date.

3 DATED this 21ST day of May, 2019.

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6 Cindy A. Larsen
7 Snohomish County Superior Court Judge
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