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Division III's Neighborly Approach to Prescriptive Easements

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Some people say that once you get outside the Puget Sound metropolis, you find friendlier people. I've heard of the "Seattle freeze," where people move here and have a hard time making friends. It's not hard to meet people in Manson, Wenatchee or Yakima, Washington, three cities I know and have spent time in. Overall, they seem like friendlier places to me than the big city on Elliot Bay.

A recent decision by Division III of the Washington Court of Appeals may reflect that warmer culture. Its decision in *Gamboa v. Clark* (No. 30826-0-III, March 25, 2014) discussed "presumptions" and "inferences" in the context of prescriptive easements. The Court ruled that among otherwise friendly neighbors, the use of a roadway on a neighbor's property is presumed to be permissive. As a result, in the absence of other evidence, a neighbor who openly, notoriously, uninterruptedly travels on a neighbor's road does not acquire a prescriptive easement. The element of "adversity" is missing. The neighbors are presumed to be acting generously with one another.

Contrast the Eastern Washington appellate decision with the ruling of the Court of Appeals based in Seattle. Division I of the Court of Appeals ruled in *Drake v. Smersh*, 122 Wn. App. 147 (2004) that while the presumption of permission may apply in "vacant land cases," in "developed land cases" evidence of "neighborly sufferance or accommodation" may be the basis for avoiding a presumption of adverse use, but may not in each case.

The Gamboas and the Clarks were neighbors, each of them farmers raising crops and living on their adjoining parcels. They got along well, and the Gamboas used a road put in by the Clarks which ran across the Clarks' property to access the Gamboa home. The Clarks also used that road for their own farming purposes. Each believed the road was their own and

that they were letting the other family use the road out of neighborly accommodation. However there was no evidence of express permission to use the road coming from either party.

A dispute arose at some point, and they decided to have the road surveyed to determine ownership. The survey showed it was largely located on the Clarks' property, and the Gamboas brought a lawsuit to establish their right to a prescriptive easement over the roadway. The trial court ruled that the Gamboas had demonstrated all the elements required to prove a prescriptive easement. They'd used the road openly and notoriously for an uninterrupted period of 16 years, believing they were the owners. They'd also done some maintenance on the road during that period. While they never openly claimed ownership of the road, conversely, the Clarks never gave them express or implied permission to use it. The trial court found that "a claimant's use is adverse unless the property owner can show that the use was permissive." Because the Clarks didn't present evidence of express or implied permission, the Gamboas were granted a prescriptive easement over the Clarks' land.

The Court of Appeals, sitting in Spokane, by a 2-1 majority, overturned the trial court and ruled, instead, that in cases where there's a history of neighborliness, or where the claimant is using a road which was established by the property owner along with the property owner, the is no presumption that use by a neighbor of another's land in such case is adverse. Instead, in those cases, as in cases where the land is vacant, open and unimproved, the law won't apply the presumption of adversity necessary to establish prescriptive rights. In effect, it's a recognition of a characteristic I've observed first hand on the dry side of the Cascades. It's just friendlier there.