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No. 635921

COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION ONE

DAVID ALLAN,
Appellant,
v.

BEARRACH McMONAGLE & JENNIFER GLYZINSKI,
Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY
No. 05-2-02463-4

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The Superior Court erred by excluding most of the evidence offered by the Appellant based on discovery deadlines without a demonstration of willful disobedience and substantial prejudice, and without considering less drastic sanctions.
2. The Superior Court erred by applying the Dead Man Statute to exclude key statements of a decedent, notwithstanding the fact that opposing party introduced evidence from the same decedent.
3. The Superior Court erred by denying a jury demand even though the case was primarily a case of trespass and ejection.

B. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Was it error for the Superior Court to exclude most of the evidence offered by the Appellant based on discovery deadlines without a demonstration of willful disobedience and substantial prejudice, and without considering less drastic sanctions.
2. Was it error for the Superior Court to apply the Dead Man Statute to exclude key statements of a decedent, notwithstanding the fact that opposing party introduced evidence from the same decedent?
3. Was it error for the Superior Court to deny a jury demand that was filed even though the case was primarily a case of trespass and ejection?

C. HISTORY

The underlying action in this matter was a lawsuit by Bearrach McMonagle and Jennifer Glyzinski to eject David Allan from property that Mr. Allan and his predecessors have historically used, and to obtain damages for Mr. Allan's alleged uses of that property. The disputed

property was the area between the unfenced northern surveyed property line and a fence line north of the surveyed line. Mr. Allan claimed ownership of the disputed property under alternative theories of adverse possession and mutual recognition and acquiescence. McMonagle and Glyzinski argued that Mr. Allan's use of the disputed area was permissive.

A non-jury trial was set for November 13, 2007. On June 2, 2007, the Superior Court entered a discovery order. On June 14, 2007, McMonagle and Glyzinski's counsel contacted the Superior Court Clerk's Office and ask that the trial date be stricken. On July 31, 2007, said counsel filed a Motion to Strike Trial Date. On August 22, 1007, the Superior Court entered a stipulated order striking the trial date.

On November 6, 2007, Mr. Allan's counsel filed a jury demand, accompanied by a check for the requisite fee. On November 8, 2007, McMonagle and Glyzinski's counsel filed a Motion to Strike Jury Demand, arguing that said demand was waived because it was filed after the original trial date had been set (and dismissed), and that the issues in the case were primarily equitable and therefore not entitled to a jury trial. The Superior Court entered an Order Granting Motion to Strike Jury Demand on December 21, 2007.

Trial was held in this matter April 15-18, May 7-9, June 9-11, August 28-29, September 30, and October 1, 2008. (Findings of Fact and

Conclusions of Law (“Findings”), CP at 111.) Significantly, the Superior Court found as follows:

The relationship between the Howers and the Fravels, on the one hand, and the Hasselbergs and the Reads, on the other hand, were friendly and neighborly. Any fences erected on or near their boundaries were erected for stock/gardening purposes and not as boundary fences. Such fences were erected with the express or implied permission of the other party and were neither adverse nor hostile.

After the Reads took possession in the Spring of 1988, there was no change in the Reads’ use of fences and surrounding land which would have put the Howers on notice of any adverse or hostile intention on their part. Permission continued and the Reads’ possession of the land on Plaintiffs’ property was neither adverse nor hostile.

After the Defendant took possession from the Reads in Spring 1995, there was no change in his use of fences and surrounding land that would have put the Howers on notice of any adverse or hostile intention on the Defendant’s part. Permission continued until the Plaintiffs purchased their interest in the property on August 13, 2004.

(Findings ¶¶ 8-10, CP at 113.) Based on its findings that Mr. Allan had not established title to the disputed area by adverse possession, the Superior Court granted a judgment in favor of McMonagle and Glyzinski for alleged damages to the disputed area in the principal amount of \$125,706, together with attorney fees and costs in the amount of \$73,201.11. The judgment further required Mr. Allan to remove various items of personal property and his driveways and culverts from the disputed area, as well as moving a large pole building on a cement foundation at least thirty feet from the surveyed property line.

D. ARGUMENT

1. **The Superior Court erred by excluding most of the evidence offered by the Appellant based on discovery deadlines without a demonstration of willful disobedience and substantial prejudice, without considering less drastic sanctions, and without sanctioning the other party who was also in violation of the discovery order**

While most often a trial court's management of a trial is reviewed for abuse of discretion, the standard is much more rigorous for decisions precluding witnesses on the basis of discovery violations:

We generally review a trial judge's management of a trial for abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993); *MacKay v. MacKay*, 55 Wn.2d 344, 347 P.2d 1062 (1959). But decisions that preclude a party from calling an expert as a sanction for discovery violations are different. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 706, 732 P.2d 974 (1987). The standard is more rigorous. *Id.* And while we might question such a limitation on a trial judge's traditional authority to manage his or her courtroom, the difference is now well ensconced in Washington law.

Peluso v. Barton Auto Dealerships, Inc., 138 Wn. App. 65, 69-70 (2007) (emphasis supplied). In order to exclude a witness for failure to comply with a discovery timetable, the Court must consider lesser sanctions, must find that the non-compliance with a discovery order was willful, and that the non-compliance substantially prejudiced the opposing party's ability to prepare for trial.

Before the trial court can exclude a witness as a sanction for the failure to comply with a discovery time table, the court must consider, on the record, lesser sanctions. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). And the court must find that the disobedient party's refusal to obey a discovery order was willful or deliberate and that it substantially prejudiced the opponent's ability to prepare for trial. *Id.* Indeed, the court must find that the failure to comply amounted to “intentional nondisclosure, willful violation of a court order, or other unconscionable conduct.” *Id.* (internal quotation marks omitted) (quoting *Holman*, 107 Wn.2d at 706). The failure to support a decision to exclude a witness with these essential findings is an abuse of discretion. *Id.* at 497.

Our Supreme Court has concluded that it is an abuse of discretion for the trial court to impose the severe sanction of limiting discovery and excluding expert witness testimony without first having considered, on the record, a less severe sanction. *Id.* The court must consider a sanction that will advance the purposes of discovery and yet compensate the defendant for the effects of the plaintiff's discovery failings. *Id.* Here, that might well entail additional monetary sanctions for the expenses incurred by Barton as the result of Ms. Peluso's failure to follow the court's case discovery orders.

Id. In the present case, the record is devoid of evidence that the Court considered lesser sanctions, or that Mr. Allan's alleged non-compliance was substantially prejudicial to McMonagle and Glyzinski. At trial Mr. Allan's counsel specifically requested a continuance to correct any prejudice resulting from the Court's application of the discovery order stating, “If the Court is inclined to not allow our witnesses to testify I

think we would have to ask for the remedy of the continuance so that we can bring them in.” (RP, April 16 at 195.)

The Superior Court recognized that its exclusionary order would essentially destroy Mr. Allan’s case:

[Y]ou know me well enough to know the last thing I want to do is blow out your case if I can avoid it. But I also feel to some extent constrained by the law of the case, which is the order that Judge Needy entered in June of 2007.

(RP, April 16 at 196.) The Court’s eventual order to that effect violated the Supreme Court’s admonition to “decide cases on the merits, disregarding mere technicalities, where possible.” *State v. Olson*, 126 Wn.2d 315, 322 (1995) (quoting *State v. Reader's Digest Ass’n*, 81 Wn.2d 259, 266 (1972)).

Almost all of Mr. Allan’s evidence was excluded based on his alleged non-compliance with discovery deadlines outlined in the Superior Court’s order entered June 2, 2007, specifically the order’s provision requiring the Court to designate fact and expert witnesses ninety days prior to the scheduled trial date. (CP at 23-26.) McMonagle and Glyzinski contended that the deadline for the witness designations fell on January 16, 2008, and that Mr. Allan did not provide a witness list until March 6, 2008, thereby violating the discovery order. (CP at 52.) However, the discovery order, by its terms, provided that “Should the trial

date be continued, the deadlines specified in this order remain unchanged (i.e. the deadlines in this order relate to the original trial date, rather than the continued trial date).” The trial date in place on the day the discovery order was entered was November 13, 2007, though it was later continued to April 15. (CP at 34-35.) Thus, by the unambiguous terms of the discovery order, witnesses should have been designated by both parties on or prior to August 11, 2007. McMonagle and Glyzinski did not provide a witness designation until January 16, 2008, more than five months after the deadline.

Mr. Allan’s counsel explained these circumstances at trial:

6-18 we get notice of a trial date. Per the request of the plaintiff the trial date is set for November 13th. I, as defendant in this case, am now looking at a trial date. I’m looking at a disclosure date [of August 11]. And I’m getting nothing from plaintiff that has basically done very little. I don’t get anything by the required date.

. . . .

So at that point they were in violation of the discovery order I had opposed because I thought it would cause problems in the case. In my mind that discovery order was out the window because they hadn’t complied with it.

The next question would be how do we get the case to trial? We’ve got civil rules for that that govern discovery. Seems to me that we’re back under the Civil Rules to get our discovery and get the case ready for trial.

(RP, April 18, 2008 at 13-15.) Despite the fact that McMonagle and Glyzinski violated the discovery order themselves, they moved to have it enforced against Mr. Allan to exclude almost all of his evidence. The

Superior Court granted this request and enforced the order only against Mr. Allan.

The Superior Court's broad exclusionary order was highly prejudicial to Mr. Allan's ability to present his case at trial. At trial, Mr. Allan's Counsel summarized the Court's exclusionary order as follows, without objection from the Court or opposing counsel:

I think what was stated in chambers and what is in your written order would be the exception to the general order that [Mr. Allan is] barred [from calling witnesses], if I understand it correctly. We discussed a couple of particular witnesses. One of them was through Lister's surveyor. He is listed as an expert on plaintiff's witness list. He's also listed on the defendant's witness list. He also was interviewed prior to trial by the plaintiff. And his report has been introduced into evidence by the plaintiff.

In chambers I have your ruling as being that he could testify only in rebuttal that we would otherwise be barred from calling [him]. Mr. Whitfield is listed on the witness list as a defense with his expert specialty without the word expert and whose report has been introduced by the plaintiff. It is the same situation, he can be called in rebuttal but cannot otherwise be called.

Generally our fact witnesses are barred from testifying except as to tacking. And we were instructed to identify the tacking witnesses, which we have done.

(RP, May 1, 2008 at 4-5 (emphasis supplied).) With a few limited exceptions, Mr. Allan was prevented from presenting witnesses for his adverse possession or mutual recognition and acquiescence claims, and his defenses to McMonagle and Glyzinski's claims that he was responsible for environmental damage in the disputed area. The basis for this exclusion

was a discovery order that all parties violated, but which was only enforced against Mr. Allan.

For example, the Court's order prevented Ricky D. Soria from testifying that Mr. Allan cleaned up junk and other debris left in the disputed area, that he plowed, planted, grazed animals, maintained wooded areas (including tree removal when needed), and otherwise maintained the disputed area openly and notoriously as a true owner would. (RP, June 10, 2008, at 22-23.) These facts are central to an adverse possession claim. Adverse possession can be established by mowing, maintaining vegetation, and other such acts within a disputed area. *Mesher v. Connolly*, 63 Wn.2d 552, 556-57 (1964); *see also Reymore v. Tharp*, 16 Wn. App. 150 (1976). Mr. Allan's testimony as an expert witness regarding excavation activities, septic design and installation, earth moving, and the cost of modifications requested by McMonagle and Glyzinski was also excluded pursuant to the exclusionary order. (RP, September 30 at 35-47, June 10 at 87.)

2. The Superior Court erred by applying the Dead Man Statute to exclude key statements of a decedent, notwithstanding the fact that opposing party introduced evidence from the same decedent.

The Washington Dead Man Statute is as follows:

No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility: PROVIDED, HOWEVER, That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, or as the guardian or limited guardian of the estate or person of any incompetent or disabled person, or of any minor under the age of fourteen years, then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent or disabled person, or by any such minor under the age of fourteen years: PROVIDED FURTHER, That this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and have no other or further interest in the action.

RCW 5.60.030. While this statute prevents direct testimony by an interested party about a transaction with a deceased person, a witness's testimony may imply an agreement with a deceased, so long as the testimony relates solely to the acts of the witness, and not directly to the transaction with the deceased. *Richards v. Pacific Nat'l Bank*, 10 Wn. App. 542, *review denied*, 83 Wn.2d 1014 (1974).

In the present case, this statute was used to exclude testimony by Jennifer Glyzinski about a conversation with David Allan where Mr. Allan indicated that he believed that property where he was cutting wood belonged to Larry Hower and that he had Mr. Hower's permission to cut

firewood there pursuant to an oral maintenance agreement. (RP, May 2, 2008, at 23-39.) The Court issued this ruling despite the fact that Ms. Glyzinski had opened the door to this testimony by discussing the same conversation in earlier testimony. (*Id.* at 9, 25-27.)

Without the benefit of evidence that Mr. Hower had given Mr. Allan permission to perform the clearing at issue in this matter, the Court found that Mr. Allan had committed timber trespass in violation of RCW 64.12.030 and damage to land in violation of RCW 4.24.630, and thereby awarded the Plaintiff treble damages for Mr. Allan's clearing activities in the aggregate amount of \$125,706. (Findings at 115 (Conclusions of Law ¶¶ 2-4).) That sum of money is the entire money portion of the judgment aside from attorney fees and costs.

The Dead Man Statute is waived when the protected party opens the door to testimony by introducing evidence of a relevant conversation or transaction with the deceased:

The protection of the statute may be waived, however, when the protected party introduced evidence concerning a transaction with the deceased. *McGugart v. Brumback*, 77 Wn.2d 441, 450, 463 P.2d 140 (1969); *Ellis v. Wadleigh*, 27 Wn.2d 941, 952, 182 P.2d 49 (1947); *Percy v. Miller*, 115 Wash. 440, 444-45, 197 P. 638 (1921); *Thor v. McDearnid*, 63 Wn. App. 193, 202, 817 P.2d 1380 (1991). Once the protected party has opened the door, the interested party is entitled to rebuttal. *Johnston v. Medina Imp. Club, Inc.*, 10 Wn.2d 44, 59-60, 116 P.2d 272 (1941).

Bentzen v. Demmons, 68 Wn. App. 339, 345 (1993). When a party claiming through a decedent testifies as to conversations with the decedent, the dead man statute is waived. *Fies v. Storey*, 21 Wn. App. 413 (1978). Where one party opens the door by asking questions as to transactions with the deceased, a witness may be permitted to explain the circumstances fully. *Robertson v. O'Neill*, 67 Wn. 121 (1912). In the present case, the Court did not permit this. Plaintiff's Counsel elicited testimony from Jennifer Glyzinski about meeting Mr. Allan on her property when he was cutting wood, but prevented her from giving evidence as to Mr. Allan's explanation as to why he was there:

Q. Okay. So you're up there and this is November. How did you encounter Mr. Allan?

A. I heard a chain saw running and so I went to investigate what was going on and found him and his oldest daughter cutting firewood rounds.

Q. Okay. And this was on whose property?

A. My property.

Q. Okay. And did you have some discussion with him about that?

A. I did. I approached him and knowing full well that he was on my property, I asked him whose property is this and he said it belonged to Larry Hower. I said it doesn't belong to Larry Hower anymore, that Barry and I bought it in August. He said --

Q. I don't want to get what he said.

(RP, May 2, 2008, at 9.) The Court specifically excluded testimony by Ms. Glyzinski that Mr. Allen told her that he had a maintenance agreement with Mr. Hower that permitted him to be on Mr. Hower's property to cut firewood. (*Id.* at 23-28.) Once Ms. Glyzinski had opened the door by testifying that Mr. Allan believed that he was on Mr. Hower's property, she should have been permitted to give evidence fully explaining the circumstances of her conversation with Mr. Allan and his explanation for his conduct on her property.

3. The Superior Court erred by denying a jury demand even though the case was primarily a case of trespass and ejection

This case was scheduled for a non-jury trial beginning on November 13, 2007. This date was stricken at the request of McMonagle and Glyzinski and re-noted for the trial setting calendar for November 19, 2007. Mr. Allan filed a jury demand on November 5, 2007. Mr. Allan's jury demand was stricken December 21, 2007.

Article I, Section 21 of the Washington Constitution requires that, "The right of trial by jury shall remain inviolate." The United States Supreme Court quoted the great English Justice William Blackstone for the proposition that this right is the most transcendent privilege of citizenship: "Blackstone . . . held trial by jury *both in civil and criminal cases* in

such esteem that he called it ‘the glory of the English law,’ nevertheless looked upon it as a ‘privilege,’ albeit ‘the most transcendent privilege which any subject can enjoy.’” *Patton v. U.S.*, 281 U.S. 276, 297 (1930) (emphasis supplied). As Justice Joseph Story said, “The trial by jury in civil cases at common law was as dear to the people [as in criminal cases], and afforded at least an equal protection to persons and property.” 1 Joseph Story, *Commentaries on the Constitution of the United States* 220 (5th Ed. 1891) (1833). The denial of this right is a serious matter, implicating the fundamental principles of American liberty, and should not be considered lightly as a matter of mere procedure. According to the Supreme Court, “in the exercise of [its] discretion, great weight should be given to the constitutional right of trial by jury and if the nature of the action is doubtful, a jury trial should be allowed[.]” *Brown v. Safeway Stores*, 94 Wn.2d 359, 368 (1980).

A party to an action for ejectment is entitled to a trial by jury per *Durrah v. Wright*, 115 Wn.App. 634, 644 (2003). An ejectment action is one “in which the ‘recovery of . . . specific real . . . property’ is sought[.]” *Id.* (quoting *Rognrud v. Zubert*, 282 Minn. 430, 434, 165 N.W.2d 244, 247 (1969)). The *Durrah* Court held that “article 1 § 21 guarantees the right to jury trial in common law actions for ejectment, but not in equitable actions to quiet title.” *Id.* Where both legal and equitable

questions are at issue, the trial court has broad, but not unlimited, discretion to determine which issues predominate for purposes of determining whether a jury trial is required:

In determining whether a case is primarily equitable in nature or is an action at law, the trial court is accorded wide discretion, the exercise of which will not be disturbed except for clear abuse.

Green v. Hooper, 149 Wn. App. 627, 645 (2009) (quoting *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 365 (1980).) "The overall nature of the action is determined by considering all the issues raised by all the pleadings." *Id.* (quoting *S.P.C.S., Inc. v. Lockheed Shipbuilding & Constr. Co.*, 29 Wn. App. 930, 933, 631 P.2d 999 (1981)).

The Complaint in the present case accuses the Mr. Allan of "encroachments and trespasses" including fences, sheds, a container car, cutting trees, building a driveway, and other uses of the Respondents' property. (CP, 1-7 (Second Amended Complaint for Ejectment ¶¶ 6-7 9, 11-12, 19-20, 22).) The Prayer in the Complaint requests that the Court make an order:

enjoining and directing Defendants to remove any and all encroachments from Plaintiff's real property, cease trespassing upon Plaintiff's real property and quieting title in and to Plaintiff's real property in favor of Plaintiffs as against Defendants thereby eliminating any and all claims of Defendants in and to Plaintiff's real property[.]

(CP 1-7 (Complaint, Prayer ¶ A).) The Complaint additionally requests:

Judgment for damages or, alternatively, for an order requiring defendants to dismantle their pole barn so that it does not encroach upon the 35-foot setback required by the applicable Skagit County Code.

(CP 1-7 (Complaint, Prayer ¶ E).) The Complaint further requests that the Court require Mr. Allan to stop removing trees and shrubs from the Respondents' property. (CP 1-7 (Complaint, Prayer ¶ C).) All of the foregoing very clearly request that the Court eject Mr. Allan from the property claimed by the respondents. A thorough review of the Complaint clearly reveals that the prominent theme is that Mr. Allan is occupying a portion of the Respondents' property and the Respondents are asking the Court to eject him. Significantly, the *Durrah* Court quoted the Oregon Court of Appeals for the proposition that, "a party out of possession cannot maintain a suit to quiet title against a defendant in actual possession and must proceed by ejectment." *Durrah*, 115 Wn.App. 634 (citing *Kohler v. Alspaw*, 132 Or.App. 67, 72-73, 887 P.2d 832 (1994), review denied, 321 Or. 94, 893 P.2d 540 (1995)). Those are precisely the facts of the present case. The Respondents were out of possession and could not regain possession simply by filing an equitable quiet title action. They were required to file an action for ejectment. The fact that Mr. Allan made a counterclaim of adverse possession does not deprive the case of its character as an ejectment case, nor does it deprive him of his right to a jury trial.

E. CONCLUSION

The Superior Court's decisions in this matter should be vacated and the matter remanded for a new trial.

Respectfully re-submitted this 18th day of August 2010.

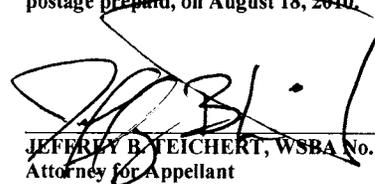


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CERTIFICATE

I certify that I mailed a copy of the attached document to this COURT and Respondents' attorneys, at:

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