

**COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON
Case No. 36146-9-II**

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DIVISION II
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STATE OF WASHINGTON
DEPT. OF JUSTICE
BY *[Signature]*

**DOLORES R. MARTIN, a single woman
RESPONDENT**

v.

**MICHAEL F. SKELLETT AND DEBRA P. SKELLETT,
Individually and the martial community
APPELLANTS**

BRIEF OF RESPONDENT

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I. NO ASSIGNMENT OF ERROR

There was no error by the trial court in granting Martin summary judgment and as such, the efforts of the Skellets to have that decision overturned or remanded should be denied.

II. UNDISPUTED FACTS

Pursuant to the facts set forth in Martin's Motion for Summary Judgment and Skellett's response thereto, the following facts are not in dispute:

Martin is the titled owner of real property commonly known as 102 19th Avenue, Milton, Washington. CP 2, 22, and 56. In 1973, Martin participated in the tearing down of a barn located on the Wilkinson property involving the disputed property and immediately thereafter erected a boundary fence at the exclusion of all others. CP 56, 37, 314. Martin has used the Property in question for agricultural uses and has done so exclusively since at least 1973. CP 36, 45, 41, 51, 128. After 1973, Grace Wilkinson did not use the Property in question. CP 36, 46, 52, 129, 314. The Searle's did not use the Property in question during their ownership of the property and neither the Searle's or Skellett's have had any livestock using the Property in question. CP 46, 129, 274, (See also declaration of Kathy Mundell and Chuck Searle to be designated in Clerks Papers.)

Initially, Martin rented land from the Wilkinson's for pasture for her horses. After 1973 with the tearing down of the barn Martin's construction of the fence which encompasses the Property in question, Martin did not ask permission to use the Property but simply began doing so. CP 129, 61, 117, 118.

The fence running along MARTIN'S driveway (i.e. North West side of property or left side looking from 19th Avenue toward the Property in Question) and that portion of the fence which abuts 19th Avenue, were each in their current location since at least 1973 when MARTIN began exclusively occupying the Property in Question. CP 273. Those fences remain in their same location even today. CP 128, 23, 273.

The fence running along the SKELLETT'S driveway (i.e. South West side of property or right side looking from 19th Avenue) was an electric fence when the Searle's purchased the property and was later changed to wood, but the electric fence is still connected to the new wooden fence built by the Searle's and the fence is in substantially the same location. CP 24. 273.

Martin has paid the bill each month for the electric fence that runs along the inside of the fence depicted on Plaintiff's. CP 129, 275. The

electrical box is also located on her property and has been since 1973. CP 129, 275.

Prior to the time the Skellets purchased the land contiguous to Martin's, the defendants predecessors in interest, the Searle's, observed, understood and recognized the fence as the fixed boundary line, and further recognized that the fenced property touching 19th Avenue and extending East approximately 171.5 feet was Martin's Property. CP 2, 3. All actions taken by Martin were consistent with the fence as being the fixed boundary line. CP 25.

A. Witness Statements:

(1) Chuck Searle:

"I should make it clear that during my ex-wife's and my period of ownership concerning 108 19th Avenue, Milton, Washington, she and I recognized the fence as the designated boundary between our property and 102 19th Avenue, Milton, Washington. We did not maintain or use any of the property located on the 102 19th Avenue side, (i.e. within the fenced area), nor did we even attempt to maintain or use any of the property within the fenced area. We always believed the property on the other side of the fence belonged to Mrs. Martin. We did observe Mrs. Martin and her son using the fenced area as pasture for her horses and saw them trim and maintain a tree that Mrs. Martin had planted inside the fenced area, but we did not have anything to do with their efforts." CP 47.

The Martins maintained and took care of the electric fence. The hot wire was all strung by Martin and charged by her. Martin built the fence. The Martins had exclusive use of the Property. CP 282, 283.

(2) Kathy Mundell:

The Martins originally paid for pasture rental in the sum of \$10.00 per month and then, after purchasing the land, the Martin's ceased paying for pasture but yet continued to use and have exclusive use of the disputed area thereafter. Additionally, after the barn came down the Wilkinson's ceased having horses on the property but Martin had three that used the Property. The Martins maintained and planted a tree and some shrubs in the disputed area. CP 279, 280.

The Martins did not ask permission to use the property and their use of the same was regular. CP 281

The Martins built that portion of the fence that abuts 19th Avenue and that portion of the fence that runs along the Martin driveway after the barn came down and was thereafter used exclusively by the Martins. CP 281 and 37

The Martins constructed an electric fence. The electricity was paid for by the Martins. After the Martins installed the fence in the Area in Question, the Wilkinson's never thereafter used the property. CP 282 and 37.

III. LEGAL ARGUMENT

A. Standard of Review for Summary Judgment.

If the moving party satisfies its burden, the nonmoving party must present evidence that demonstrates that material facts are in dispute. *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127 (1989). If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to his case, then the trial court should grant the motion. *Hines v. Data Line Systems, Inc.*, 114 Wn.2d 127 (1990).

Unless an affidavit sets forth facts, evidentiary in nature, that is, information as to what took place, an act, an incident, a reality as distinguished from supposition or opinion, the affidavit does not raise a genuine issue for trial. *Grimwood v. University of Puget Sound Inc.*, 110 Wn.2d 355 (1988).

B. The Trial Court Properly Granted Summary Judgment Because no Material Facts Were in Dispute.

To establish adverse possession, the claimant must provide evidence that possession was: (1) exclusive, (2) actual and uninterrupted, (3) open and notorious, and (4) hostile. *Chaplin v. Sanders*, 100 Wn.2d 853 (1984); RCW 4.16.020. Such possession must have existed for at least 10 years. *Chaplin*, supra.

C. Adverse Possession:

(1) First Element – Exclusivity:

Martin never shared the property in question with anyone; she has had exclusive possession of the land since 1973. Neither the Skelletts nor their predecessors in interest have used or claimed to “use” any portion of the property in question and do not dispute Martin’s exclusive possession of the same. The Martin’s erected a wood fence as well as the electric that continues to exist today on the property. These acts alone satisfy the exclusivity element required.

The disputed area in question is not simply a “grassy area with a tree and some shrubs” (Appellants brief page 8). In Washington, neither actual occupation, cultivation or residence are necessary to constitute actual possession. *Bellingham Bay Land Co. v. Dibble*, 4 Wash. 764 (1892); *Grays Harbor Comm'l Co. v. McCulloch*, 11 Wash 203 (1920). Even if Martin approached Chuck Searle inquiring about the Property, her exclusion of all others therefrom satisfies the exclusivity element required under the statute.

(2) Second Element – Actual and Uninterrupted:

It is undisputed that Martin’s use of the Property in question has been uninterrupted for a period of 34 years. Land, even without a structure present, requires maintenance and Martin exclusively maintained the land.

Even if Chuck Searle moved the fence several feet to enlarge his driveway, he did not claim the entire disputed area in recognition of Martin’s possession of the same. Indeed, if this was not the case Chuck Searle would have simply eliminated the fence altogether. Proof of a legal boundary need not be exact concerning adverse possession. The boundary may be defined by use of the property, by a natural feature, or by some building or structure such as a fence. *Bryant v. Palmer Coking Coal Co.*, 86 Wn.App. 204 (1997). Martin is not attempting to adversely possess any Property not included inside the fenced area.

In regard to actual possession, by her act of fencing off the disputed area and using it for her own pleasure, whether for her horses or for agricultural purposes, Martin's use was actual. Appellant's argument that because the area was used for Martin's horses and for agricultural purposes, actual possession is somehow absent. However, in this state, "[N]either actual occupation, cultivation or residence are necessary to constitute actual possession." *Bellingham Bay Land Co. v. Dibble*, 4 Wash 764 (1892); *Grays Harbor Comm'l Co. v. McCulloch*, 11 Wash 203 (1920).

(3) Third Element – Open and Notorious:

Martin fenced the Property not only with wooden fence posts, but with electrical fencing as well. The electrical panel to operate the current through the fence is located on Martin's property and she has open and notoriously paid the cost of the electricity exclusively for the 34 years that the electric fence has been installed.

Whether during the lifetime of Mrs. Wilkinson, the Martins and Wilkinsons recognized the fence as the boundary between their properties is irrelevant and does not create an issue of material fact. It is undisputed that after Mrs. Wilkinson's death in 1994, the Searles recognized the fence as the boundary line. The fences represented the boundary lines. This fact is evident by Chuck Searle's unwillingness to eliminate the fence encompassing

the Property in question. The simple fact is that if the Wilkinson's and Searle's each believed the disputed area belonged to them, there would be no need for the fence which runs east to west along the Wilkinson, Searle and now Skellett driveway.

(4) Fourth Element – Hostile:

As the court in Chaplin v. Sanders 100 Wn.2d 853 (1984) held:

“The hostility/claim of right” element of adverse possession requires only that the claimant treat the land as his own as against the world throughout the statutory period. The nature of his possession will be determined solely on the basis of the manner in which he treats the property. His subjective belief regarding his true interest in the land and his intent to dispossess or not dispossess another is irrelevant to this determination.

Chaplin, 100 Wn.2d at 860.

The defendants reliance on Wood v. Nelson, 57 Wn.2d 539, 358 P.2d 312 (1961), to support their assertion that Martin has not satisfied this element is not supported. In Wood, the court held that the building of the fence constituted prima facie evidence of hostile possession. Specifically, the court stated:

“Where a fence purports to be a line fence, rather than a random one, and when it is effective in excluding an abutting owner from the unused part of a tract otherwise generally in use, it constitutes prima facie evidence of hostile possession up to the fence. We know of no requirement that a particular degree or kind of use be established as to every part of a fenced tract of land as a prerequisite to finding possession thereof.” (Id at 541)

In Washington, there is no presumption of permissive use in relationship to property which is occupied and/or developed. *Drake v. Smersh*, 122 Wn. App. 147 (2004).

The Appellants reliance on *Granston v. Callahan*, 52 Wash. App. 288, 759 P.2d 462 (1988), and *Roediger v. Cullen*, 26 Wn.2d 690, 175 P.2d 669 (1949), is misplaced and completely irrelevant to a determination in this matter. In *Granston*, the court held that even if one originally had permission to use a portion of land, permission ceases at the termination of that individuals life or ownership in the property. *Id* at 295. Consequently, even assuming Martin's use was permissive, which it was not, that permissive use ended when the death of Mrs. Wilkinson.

The Skelletts reliance on an allegedly "close, friendly relationship or family relationship" to defeat Martin's success on summary judgment is not supported by the facts of the case. There was no evidence submitted to the trial court documenting a "friendly" or "family relationship" between Martin and either Searle or Skelletts. An occasional conversation over the fence does not a "friendly" or "family relationship" make.

Immediately after the barn was demolished and Martin erected the wooden fence and then erected an electric fence inside the wooden fence,

placing the electrical panel for the fence on her property, these acts were evidence of her claim to ownership in the Property.

The Skellett's efforts to somehow relate the 1994 lot line adjustment regarding the back portion of the land, and that it does not show Martin as the owner of the Property in question as creating an issue of fact is error. Whether the lot line adjustment completed in 1994 identified Martin as the owner of the Property is irrelevant because original title vested in Martin in 1973 and ripened in her as early as 1983. *El Cerrito, Inc. v. Ryndak*, 60 *Wn.2d* 847 (1963). Even if the court chooses to view the 1994 lot line adjustment's failure to identify Martin as the titled owner of the Property in question still is irrelevant to the issues presented. Even at this late date, title ripened in her in 2004.

Martin's acknowledgment of the land belonging to the Searles simply strengthens her adverse possession claim because despite these statements, she continued to possess the property and asserting her ownership interest in the same through her actions.

D. No Genuine Issues as to Boundary by Recognition and Acquiescence.

The court in *Lamm v. McTighe*,⁷² *Wn.2d* 587 (1967) held:

“To establish a boundary line by recognition and acquiescence: (1) the line must be certain, well defined, and in some fashion physically designated upon the ground, e.g., by monuments,

roadways, fence lines, etc.; (2) in the absence of an express agreement establishing the designated line as the boundary line, the adjoining landowners, or their predecessors in interest, must have in good faith manifested, by their acts, occupancy, and improvements with respect to their respective properties, a mutual recognition and acceptance of the designated line as the true boundary line; and (3) the requisite mutual recognition and acquiescence in the line must have continued for that period of time required to secure property by adverse possession. *Lamm at 593.*

Martin has exclusively used the Property in question for a minimum of 34 years. Chuck Searle's unwillingness; indeed, his refusal to eliminate the fence when expanding his driveway serves as further evidence of this fact.

Boundaries between adjoining properties, at odds with the true boundary as revealed by subsequent survey, may be established, under appropriate circumstances, through the doctrine of mutual recognition and acquiescence of a definite line by parties for a long period of time. *Lamm v. McTighe, 72 Wn.2d 587 (1967).*

The fencing served as a boundary not a barrier. Following this logic to its ultimate conclusion, all fencing in the disputed Property, with the exception of the fence running along the Martin driveway, would have been eliminated. There would be no need then for a barrier because Martin's horses would not have been able to occupy the Property. There is no issue of material fact – the fence served as a boundary that all parties who were real

property owners of the property commencing in 1973 recognized and accepted.

E. There are No Genuine Issues as to Estoppel or Whether the 10 year Statute of Limitations has Run.

RCW 4.16.020 provides in pertinent part:

The period prescribed for the commencement of actions shall be as follows:

Within ten years:

“(1) for actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appears that the plaintiff, his or her ancestor, predecessor or grantor was seized or possessed of the premises in question within ten years before the commencement of the action.”

There are no issues of material fact as to whether the ten year statute of limitations has run. Martin has used exclusively the Property in question for 34 years! Original title vested in Martin as far back as 1973. In support of Martin’s position, the court in *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, (1963), provided in pertinent part:

“When real property has been held by adverse possession for ten years, such possession ripens into an original title. Title so acquired by the adverse possessor cannot be divested by the acts other than those required where title was acquired by deed. ***

The person so acquiring this title can convey it to another party without having had title quieted in him prior to the conveyance. Once a person has title (which was acquired by him or his predecessor by adverse possession), the ten-year statute of limitations does not require that the property be continuously held in an adverse manner up to the time his title is quieted in a lawsuit. He may bring his action at any time after possession has been held adversely for ten years.” [emphasis added.] *El Cerrito*, 60 Wn.2d at 855.

Skellett did not come into possession of their property until August 2004; far less than ten years. The Skelletts cannot claim adverse possession – it is not available to them, and the title to the property under *El Cerrito* has already vested in MARTIN.

Because Martin’s use of the property ripened into an original title as far back as 1983, issues regarding estoppel and waiver are not applicable in this case. Under an estoppel argument, Martin has not engaged in any action or admission inconsistent with her ownership of the Property. Likewise, Skelletts reliance on Martin’s waiver of her claims to ownership is not supported by the facts. Martin has ALWAYS used the Property in question since moving onto the land back in 1969. In 1973 her use of the Property in question became adverse. By her act of installing a fence with concrete boots at the base of each pole along most of the Property in question and then installing an electric fence and placing the box supplying power to the electrical fence on her property is evidence of her adverse

claim of which not only her neighbors but any third party viewing the Property would have known.

When the Searles purchased the property Martin continued to exclusive and regularly use the Property in question. Mr. Searle moved the fence in order to widen his driveway, but his process of widening primarily used land located along the right side of his driveway – his own land. Mr. Searle could not state with certainty how far he moved the fence in the order to expand his driveway. Again, if the Searles did not believe that Martin possessed the Property in question he would have removed the fence in this area altogether.

Contrary to the assertion of the Skelletts, the adverse period does not begin to run with the Skellett's ownership of the land contiguous to the Property in question.

F. There were no Errors by the Trial Court Concerning Evidence.

The court can certainly investigate whether there were any errors of evidence. Given the broad latitude given the trial court regarding the consideration of evidence, any investigation of the facts will show that if there were any errors in consideration of evidence, they did not alter the outcome and that summary judgment was proper.

G. The Trial Court Did not Abuse its Discretion in Considering Martin's Statements and the Deadman's Statute was not Violated.

The Plaintiff did not have to "rely" on statements that allegedly violated the Deadmans Statute, of which none of the statements submitted in support of her motion for summary judgment did. The facts of Martin's use and ownership alone provided all the evidence the court needed to rule in favor of Martin. Again, those facts are that the fence has been in its current location for a minimum of 34 years, only Martin and her son have maintained the Property in question during this time, Martin pays for the electricity that charges the electric fence surrounding the Property in question and has since 1973, for over thirty four years she has not asked permission to use the land or to erect a fence. These facts alone, without considering any of the statements shared between Martin and Wilkinson are conclusive proof of her right to title to the Property.

H. The Trial Court Did not Consider Evidence Precluded by the Hearsay Rule.

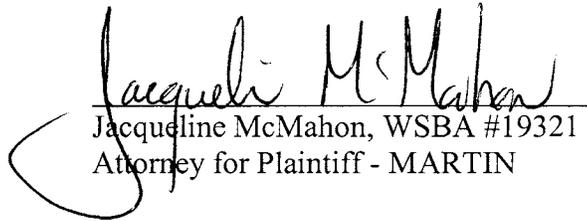
The Skelletts statement that Martin's declaration contained hearsay is inaccurate. In her declarations in support of summary judgment, Martin made assertions of what she believes to be the truth and what the evidence supports the truth as being.

The declarations of Ron Larson and Betty Hastings are based on their personal knowledge of the facts surrounding use and possession of the property. Clearly, as a neighbor living next to Ms. Martin, each had knowledge of who was using the Property in question and there can be no doubt that that person was Martin.

IV. CONCLUSION

There is no question of fact concerning Martin's fulfillment of all elements of adverse possession, boundary by recognition and acquiescence. Martin had the Property fenced 34 years ago and has used it exclusively since that time. There are no issues of material fact and the trial court was correct in granting Martin's motion for summary judgment. The decision of the trial court deserves to be upheld.

Dated this 12th day of July, 2007.


Jacqueline McMahon, WSBA #19321
Attorney for Plaintiff - MARTIN

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY AW
DEPUTY

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

DOLORES R. MARTIN, a single woman;

No. 36146-9-II

Respondent,

AFFIDAVIT OF MAILING

and

**MICHAEL F. SKELLETT and DEBRA P.
SKELLETT, individually and the marital
community,**

Appellant.

STATE OF WASHINGTON)

: ss

COUNTY OF PIERCE)

The undersigned, being first duly sworn on oath, deposes and says that:

On the 12th day of July, 2007, she placed a true copy of the BRIEF OF
RESPONDENT on filed in the above-entitled matter, in an envelope addressed
to the below stated as follows:

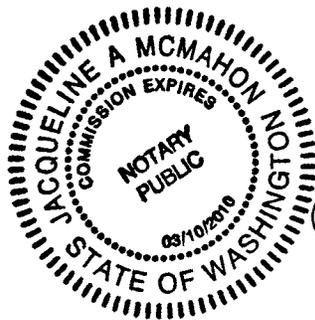
Mr. Boyd Wiley
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ORIGINAL

That she placed and affixed proper postage to the said envelope, sealed the same, and placed it in a receptacle maintained by the United States Post Office for the deposit of letters for mailing in the City of Orting, County of Pierce, State of Washington.

Rhonda Ryan
Rhonda Ryan

SUBSCRIBED AND SWORN to before me this 12th day of July, 2007.



Jacqueline McMahon
Notary Public in and for the
State of Washington, residing at Puyallup
Appointment expires: 3/10/2010
Printed Name: Jacqueline A. McMahon