FILED
COURT OF APPEALS
DIVISION II
09 APR 13 PM 12:55
STATE OF WASHINGTON
BY
DEPUTY

No. 37417-0-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

MARTY TEEL and MARY TEEL

Respondents,

vs.

RALPH J. STADING II, individually,
RALPH C. STADING III; and
STADING FAMILY TRUST, LLC

Appellants.

Appellants' Reply Brief

David A. Nelson
Nelson Law Firm, PLLC
Attorney for Appellants
Stading
1516 Hudson St., Ste. 204
Longview, WA 98632
(360) 425-9400

TABLE OF CONTENTS

Page

I. INTRODUCTION.....1

II. RESPONDENTS' USE OF THE NORTH DISPUTED AREA WAS NOT OPEN AND NOTORIOUS TO PROVIDE NOTICE TO APPELLANTS..... 1

III. THE USE OF THE PROPERTY AND NOT THE CIRCUMSTANCES OF CONSTRUCTION OF THE LIVESTOCK FENCE MUST CONTROL THE CLAIM FOR ADVERSE POSSESSION.....4

IV. APPELLANTS HAVE NOT FORFEITED THEIR OBJECTION TO CONCLUSION OF LAW NO. 2,..6

V. CONCLUSION.....7

TABLE OF AUTHORITIES

CASES

Anderson v. Hudak,
80 Wash. App. 398, 402, 907 P.2d 305 (1995)...4

Harris v. Urell,
133 Wash. App. 130, 141, 135 P.3d 530 (2006)..2

Miller v. Anderson,
91 Wash. App. 822, 827, 964 P.2d 365 (1998)...1, 3

People's Savings Bank v. Bufford,
90 Wash. 204, 206, 155 P. 1068 (1916).....1, 5

Standing Rock Homeowners Association v. Masich,
106 Wash. App. 231, 239, 23 P.3d 520 (2001)...3

I. INTRODUCTION.

The Appellants submit the following Reply Brief arguing that the use of the north disputed property was not open and notorious such as to provide notice to the Appellants, that the Respondents' use of the property never became hostile and that Appellants have not forfeited their right to challenge Conclusion of Law No. 2.

II. RESPONDENTS' USE OF THE NORTH DISPUTED AREA WAS NOT OPEN AND NOTORIOUS SO AS TO PROVIDE NOTICE TO APPELLANTS.

The purpose of the open and notorious requirement in adverse possession is to assure that the owner of the property being possessed has sufficient notice to protect his or her rights. Over ninety years ago, the Washington Supreme Court recognized:

> "The disseisor must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest."[1]

Recently, the Court of Appeals was more blunt, observing:

> "[C]ourts will not permit 'theft' of property by adverse possession unless the owner had notice and an opportunity to assert his or her right."[2]

---

[1] People's Savings Bank v. Bufford, 90 Wash. 204, 206, 155 P. 1068 (1916).
[2] Miller v. Anderson, 91 Wash. App. 822, 827, 964 P.2d 365 (1998).

The burden is on the claimant to show "that the true owner knew, or should have known, that the claimant's occupancy constituted an ownership claim."[3]

The undisputed facts are that prior to establishing a livestock fence, Ms. Teel asked Ralph J. Stading for permission to ride and graze horses on the Stading property.[4] In this case, the permission not only vitiates the hostility requirement of adverse possession, but also prevents a finding of notice. The Respondents' argument is that the construction of a livestock fence, removing car parts, weed whacking and seeding all place the Appellants on notice that they claim ownership of the property to the livestock fence line. But, when all those activities are carried out after a request for permission to graze their horses, the Respondents' activities appear to be consistent with creating an area that is safe and enclosed to graze horses. The Respondents' conduct was never inconsistent with the permission granted. For example, if they started building a garage on the disputed area their conduct would be inconsistent with grazing horses and the permission given. Building a garage would "unfurl the flag", and provide notice

[3] Harris v. Urell, 133 Wash. App. 130, 141, 135 P.3d 530 (2006).
[4] Findings of Fact 5 and 8.

of their claim, whereas grazing their horses does not provide that notice.

The permission also prevents a finding of hostility. The courts are uniform that an adverse possession claim only begins when the use exceeds the scope of the permission.

> Use that is permissive at its inception is presumed to remain permissive unless proof exists of (1) a change in use beyond that permitted, providing notice of hostility to the true owner, or (2) the sale of the servient estate.[5]

The Respondents question Appellants' conclusion that use that establishes adverse possession must create a positive and unmistakable mark on the land that is readily observable to the true owner. But, Washington courts have adopted a similar test to determine if permissive use ripens into adverse possession.

> If express permission is given to use the right of way, use does not ripen into a prescriptive easement unless the use makes a distinct, positive, assertion of a right adverse to the property owner.[6]

There is no aspect of Respondents' conduct of erecting a livestock fence, removing car parts, removing garbage, weed whacking and seeding that is a distinct, positive assertion inconsistent with the permission to graze

---

[5] Miller v. Anderson, 91 Wash. App. at 825.
[6] Standing Rock Homeowners Association v. Misich, 106 Wash. App. 231, 239, 23 P.3d 520 (2001).

their horses. The undisputed findings establish that the Respondents' use of the property never was adverse to the Appellants. Even after the survey line was marked in 2000, Respondents' use of the property did not change and was consistent with the scope of the permission requested and received.

III. THE USE OF THE PROPERTY AND NOT THE CIRCUMSTANCES OF CONSTRUCTION OF THE LIVESTOCK FENCE MUST CONTROL THE CLAIM FOR ADVERSE POSSESSION.

The Respondents place great weight on the testimony that when Marty Teel erected the fence, it was in the approximate location described to him by the former owner, Mr. Wheatley, and that when it was constructed "Teel was acting as a true owner when he used a fence to mark a boundary..."[7] But Marty Teel's subjective belief about the location of the boundary is irrelevant.

> The nature of possession is determined objectively by the manner in which the claimant treated the land; the claimant's subjective belief regarding the claimant's true interest in the land and intent to dispossess or not dispossess another is irrelevant to determine whether hostility has been established.[8]

Apart from the issue of permission, the Respondents' use of the land does not objectively amount to an adverse

---

[7] Respondents' Brief, Page 8.
[8] Anderson v. Hudak, 80 Wash. App. 398, 402, 907 P.2d 305 (1995).

claim. Rather than a straight fence built of cedar and cement, the Respondents built a fence of horse wire that traversed the edge of a slope, anchored by metal posts and trees when convenient.[9] In their Complaint, the Respondents refer to the fence as a "livestock fence."[10] After construction of the fence, it became overgrown.[11]

Within the livestock horse wire fence, the Respondents grazed horses, raised pigs, took out old cars for one day, sprayed for weeds and weed whacked.[12] The Respondents argue these activities are what a true owner would do with the land, given its nature, character and locality.[13] But grazing horses, and performing transient activities consistent with grazing horses on land in its natural condition,[14] provides no notice of an adverse claim to the true owner. Again, the Respondents' claim fails because, even viewed objectively, their conduct does not "unfurl the flag on the land."[15]

---

[9] Findings of Fact No. 9.
[10] Clerk's Papers 1-19.
[11] Findings of Fact No. 10.
[12] Findings of Fact No. 13.
[13] Respondents' Brief, Page 8.
[14] Findings of Fact No. 14.
[15] Peoples Savings Bank v. Bufford, 90 Wash. At 206.

IV. APPELLANTS HAVE NOT FORFEITED THEIR OBJECTION TO CONCLUSION OF LAW NO. 2.

The Appellants assigned error to Conclusion of Law No. 2 that states:

> "The Teels proved by clear cogent and convincing evidence that their use of the north disputed area was open, notorious, hostile, continuous and exclusive for a 10-year period."

Respondents claim the Appellants forfeited their challenge to this Conclusion because they failed to cite any authority, or specify any part of the record to support the assignment of error. But, Respondents fail to recognize that Appellants' Opening Brief directly addressed the court's conclusion that adverse possession was established. Conclusion of Law No. 2 is in error because:

1. Respondents had express permission to use the Appellants' property;[16]

2. Respondents had implied permission to use the north disputed property;[17]

3. The Respondents' use of the property was not open and notorious.[18]

Each argument sets forth the law and records to support Appellants' position that the Respondents did not

[16] Appellants' Opening Brief, Page 12.
[17] Appellants' Opening Brief, Page 9.
[18] Appellants' Opening Brief, Page 5.

establish adverse possession, and that Conclusion of Law No. 2 is in error. The Appellants request this challenge be dismissed and that Conclusion of Law No. 2 be reversed.

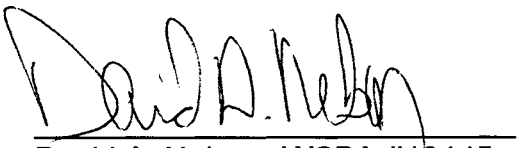
V. CONCLUSION.

All of the acts cited by the Respondents to support their claim for adverse possession are consistent with the permission given by Ralph J. Stading to Mary Teel: to graze horses on his land. That permission prevents both notice of an adverse claim and the hostility element of adverse possession from arising.

The Appellants request that the court reverse the trial court and find that the Respondents did not establish adverse possession in this case.

DATED this 10th day of April, 2009.

NELSON LAW FIRM, PLLC



David A. Nelson, WSBA #19145
Attorney for Appellants

Copy to Counsel for Respondent
Cassie Crawford
1201 Main Street
P.O. Box 61918
Vancouver, WA 98666

FILED
COURT OF APPEALS
DIVISION II

09 APR 13 PM 12:55

STATE OF WASHINGTON
BY _____
DEPUTY

CERTIFICATE OF SERVICE

I hereby certify that under penalty of perjury of laws of the State of Washington that I served the document to which this certificate is attached on the attorney for Respondent, Cassie Crawford, by first class mail, postage prepaid on the date signed below.

DATED this 10th day of April, 2009, at Longview, Washington.

Sandra L. Good, Paralegal to David A. Nelson