

No. 42666-8-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

MICHAEL O. MATTHEWS and DIANE M.
MATTHEWS, husband and wife, and
the marital community composed thereof,

Appellants.

vs.

T. & T. LARSON, a partnership; TERRY V. LARSON
and TRACY V. LARSON, single men,

Respondents.

APPELLANTS' REPLY BRIEF

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I. Introduction.

Contrary to the argument of Respondents, the Appellants have sufficiently described the location of the barb wire fence to defeat a motion for summary judgment. Moreover, the Appellants' use of the area up to the fence was not occasional, but of the character necessary to establish adverse possession. Further, the argument regarding the purpose of the fence is irrelevant under Chaplin v. Sanders,¹ Finally, the Appellants' reference to RCW 4.24.630 does not inject a new theory into the case, but merely sets forth a statutory remedy available to the Appellants.

II. The Matthews have Sufficiently Described the Fence Line for the Purposes of Adverse Possession.

The Respondents wrongly claim "The Matthews cannot even establish the disputed area."² But, the Appellants submitted the Declaration of Cal Hampton (CP 201-203) that sets forth the location of the fence line. The Respondents made no objection to Mr. Hampton's Declaration, nor made a motion to strike before the trial judge.

¹ 100 Wash.2d 853, 676 P.2d 431 (1984).

² Respondents' Brief, Page 15 ("RB 15").

In Peeples v. Port of Bellingham,³ Peeples offered a hearsay statement in support of its case. Because the Port failed to move to strike the testimony, it was properly considered by the court.

Although testimony on this point was hearsay, and beyond the scope of the question, it does not appear from the record that the court ruled on the objection. Moreover, the Port did not move to strike the testimony, nor did it thereafter attempt to present contradicting evidence. Under such circumstances, the testimony is properly evidence which we may consider.⁴

Based on the Peeples analysis, the Hampton Declaration is properly before this court and may be considered.

The fence line relied upon by the Appellants was obliterated by the Respondents' logging activities. In such a case, a Plaintiff will always be required to reconstruct the location of the fence from memory. If the court does not rely on a Plaintiff's memory to locate the obliterated line, it would encourage parties like the Larsons to destroy fence encroachments at every instance knowing a Plaintiff could not thereafter locate the line. Allowing Plaintiffs to testify from memory when a fence line is destroyed deters such behavior.

Nonetheless, there is more evidence than just the Appellant's memory to establish that the fence line existed.

³ 93 Wash.2d 766, 613 P.2d 1128 (1980).

⁴ 93 Wash.2d at 774.

Michael Matthews testified to the existence of the fence (CP 104). Carol Larson testified to the existence of the barb wire fence (CP 137). Both Terry Larson (CP 180) and Tracey Larson (CP 95) observed the wire from the fence. Based on this testimony, there is sufficient evidence of the existence and location of the line.

III. The Appellants' Use of the Disputed Area Was Sufficient to Establish Adverse Possession.

The Respondents argue “The Matthews occasionally used the wooded area behind their yard, which was owned by the Larsons and their predecessors in interest, simply because it was there and no one told them to keep out.”⁵ Further, they claim the Appellants “traipsed across it from time to time, allowed their children to play in the woods, and put debris back there.”⁶

First, claiming the Appellants' use was occasional is factually incorrect. As set forth in Appellants' Opening Brief, the Appellants created two compost piles, planted shrubs, stored a vehicle, cleared part of the area, regularly mowed within the area, built part of a chicken coop in the area, constructed a dog house in the area and maintained a grey water kitchen line across the area.⁷ Karl Germanson noted

⁵ RB 12.

⁶ RB 12.

⁷ See Appellants' Opening Brief, Page 3.

the use on his survey. The use was not merely occasional, but is consistent with how an owner would use his back yard in a rural area.⁸ The use is sufficient to establish adverse possession.

IV. The Purpose of the Fence is Irrelevant.

The Respondents argue that because there were no discussions regarding the purpose of the barb wire fence, the Appellants cannot establish Adverse Possession. For example, the Respondents state “The Matthews had no discussions with the Raistakkas regarding whether the fence was the boundary line, or where the boundary line was. The Matthews never discussed the barb wire fence with the Larsons.”⁹ But, whether there was a discussion regarding the purpose of the fence is irrelevant in an adverse possession claim.

“The fact that the parties previously may not have known the true boundary is irrelevant. For the purposes of an adverse possession claim, the nature of possession is determined by the manner in which the parties treated the land, not by their subjective belief regarding their true interests in the land.”¹⁰

Respondents’ argument regarding the purpose of the fence is only relevant in an acquiescence case, a claim not made nor relied upon by the Appellants. Respondents

⁸ Shelton v. Strickland, 106 Wash. App. 45, 50, 21 P.3d 1179 (2001).

⁹ RB 7.

¹⁰ Reitz v. Knight, 62 Wash. App. 575, 581, 814 P.2d 1212 (1991).

concede as much when they argue "...Carol Larson, admits that the Raistakkas never acquiesced that the barb wire fence demarcated the property line."¹¹

Further, Respondents claim the fence at issue was only a fence for the purpose of "keeping in cattle"¹² and not a boundary line. The Respondents cite Roy v. Goerz¹³ for the proposition that "A fence erected to control pasturage or cattle and not as a boundary does not establish adverse possession."¹⁴ But, this ruling was explicitly overruled in Chaplin v. Sanders.¹⁵ After Chaplin, the nature of the actual use, rather than the original purpose for constructing the fence, is controlling. As set forth in Appellants' Opening Brief, the nature of use by the Appellants is sufficient to establish adverse possession.

V. The Court May Remand for a Determination of Trespass Damages Under RCW 4.24.630.

In their complaint, the Appellants request damages for trespass to their property and "for costs and attorney fees as allowed by law." On appeal the Appellants request this court remand the case for a determination of trespass damages under RCW 4.24.630.

¹¹ RB 14.

¹² RB 19.

¹³ 26 Wash. App. 807, 614 P.2d 1308 (1980).

¹⁴ 26 Wash. App. at 807, 814, 614 P.2d 1308 (1980).

¹⁵ 100 Wash.2d 853, 676 P.2d 431 (1984).

The Respondents object claiming that this request amounts to a motion to amend that is an “untimely attempt to amend the complaint in general, violating equitable rules of estoppel, election of remedies, and invited error doctrine.”¹⁶ But, the amendment in the International Raceway case was sought after a trial. Here, where the appeal is from a summary judgment, the court can recognize RCW 4.24.630 as a basis of recovery. In August v. U.S. Bancorp,¹⁷ the Plaintiff raised the theory of fraudulent concealment for the first time on a motion for reconsideration after a motion for summary judgment was granted. The Defendant objected, citing the rule in International Raceway. But, the court allowed the argument.

“However, International Raceway is distinguishable. First, the motion to reconsider in International Raceway was filed after a trial. The motion for reconsideration here was filed after a motion for summary judgment. ‘In the context of summary judgment, unlike in a trial, there is no prejudice if the court considers additional facts on reconsideration.’ Second, even after a trial, generally, an issue may be raised in a motion for reconsideration when the issue is closely related to an issue previously raised and no new evidence is required.”¹⁸

In this case, reference to RCW 4.24.630 is not a new theory, but merely a remedy that has always been available

¹⁶ JDFJ Corporation v. International Raceway, Inc., 97 Wash. App.2d 1, 7, 970 P.2d 343 (1999).

¹⁷ 146 Wash. App. 328, 190 P.3d 86 (2008).

¹⁸ 146 Wash. App. at 347.

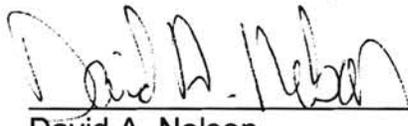
to the Plaintiffs. Even if it is considered a new theory, however, it is closely related to the Plaintiffs' trespass claim, and should be allowed under the holding in August.

VI. Conclusion.

When viewing the evidence in this case in a light most favorable to the Appellants, the trial court decision must be reversed. The Appellants used the property to the old barb wire fence line in the manner a true owner would use their back yard in a rural area. Respondents focus on an irrelevant inquiry regarding the purpose of the fence. When the correct standard is applied that focuses on the nature of the use and the character of the property, the conclusion is that the trial court's decision must be reversed.

DATED this 18th day of April, 2012.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 18th day of April 2012, she deposited in the United States Post Office in Longview, Washington, in a first-class sealed envelope postage prepaid a copy of Respondents' Reply Brief, addressed to:

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