

No. 48145-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DARLINGTON OFUASIA *et al*,
Appellant

v.

DANA WILLIAM SMURR,
Respondent.

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DIVISION II
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REPLY BRIEF OF APPELLANT

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No. 48145-6-II; Ofuasia v Smurr;
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INTRODUCTION/SUMMARY OF ARGUMENT

Plaintiffs appealed trial court orders denying their motion for summary judgment on their trespass claim and granting Defendant's summary judgment dismissing their trespass claims. Defendant cross appealed summary judgment in favor of Plaintiffs' adverse possession claim. In his brief, Defendant combined his arguments addressing both Plaintiffs' appeal and Defendant's cross appeal. (Brief of Respondent, p. 10.) In this brief, Plaintiffs combine their response to Defendant's cross appeal and their reply to Defendant's response to Plaintiffs' appeal.

Defendant argues that the outcome of Plaintiffs' appeal and Defendant's cross appeal depends on the effect of an earlier arbitration regarding the same matter. The problem with Defendant's argument is that the arbitration was not conclusive regarding any issues. The arbitration therefore was not binding on the parties, was not *res judicata*, and did not create "lawful authority" for Defendant to cut down and remove Plaintiffs' trees, fence and landscaping.

Uncontested facts in the record supported Plaintiffs' adverse possession of the disputed parcel. The trial court was correct to grant summary judgment to Plaintiffs on their adverse possession claim. The trial court was incorrect dismissing and granting summary judgment to Defendant on Plaintiffs' trespass claim.

ARGUMENT

I. **The arbitration decision was not a final decision precluding Plaintiffs from bringing their suit to quiet title based on adverse possession in the trial court .**

Defendant's primary argument is that the arbitration decision precluded Plaintiffs from bringing their claim for adverse possession. However, not only did Defendant specifically state in the trial court he was not arguing Plaintiffs were foreclosed from bringing their claim for adverse

possession, but the arbitrators did not decide any issues and expressly authorized the Ofuasia to bring the adverse possession claim in another forum. Furthermore, because Mr. Smurr never reduced to judgment what he claims to be an arbitration award, the arbitration decision had no preclusive effect.

A. Claim Splitting

In his brief in opposition to Plaintiffs’ trial court motion for summary judgment on their adverse possession claim, Mr. Smurr stated “Defendant does not contend that the arbitration precludes plaintiffs from pursuing their claim of adverse possession in this proceeding.” (CP 00116, at Fn. 1.) Because he did not claim issue or claim preclusion of the plaintiffs’ adverse possession claim at the trial court, he cannot raise it now. *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370, 374 (1991)(“We will not consider a theory as ground for reversal unless ... the issue was first presented to the trial court.”) *See also*, RAP 2.5(a)(this court may refuse to consider any claim of error not first raised in the trial court).

B. Issue Preclusion

Defendant argued below and apparently renews the argument here that the arbitration was binding on Plaintiffs.¹ However, the arbitration was inconclusive, and the arbitrators specifically held open that the plaintiffs could, “in a proper forum” (presumably not before the arbitrators) “plead

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Defendant discusses issue or claim preclusion as part of his argument against “claim splitting”. Although Plaintiffs believe he is foreclosed from raising the argument here because he expressly did not raise the issue below, Plaintiffs address separately any preclusion and *res judicata* arguments that may remain.

and establish the necessary elements of adverse possession.” (CP 0027; emphasis in original.)²

Defendant argues here Plaintiffs did not rely on a theory of adverse possession at the arbitration. (Brief of Respondent, p. 13.) It should be noted Defendant did not raise this issue below, either in his brief opposing Plaintiffs’ motion for summary judgment (CP 114-116) or in his brief supporting Defendant’s motion for summary judgment on the trespass claim. (CP 138-140.)³ This court need not review Defendant’s arguments. RAP 2.5(a).

As the Ofuasias were not required to file formal pleadings in the arbitration and there was no verbatim record, what was raised and not raised is not clear. However, the arbitration decision references facts offered by Plaintiffs to show their fence was in the same place as their predecessors’ fence and indicates the arbitrators considered the issue of adverse possession.

The arbitrators initially found:

The side yard requirement is five feet. According to Claimant’s measurements the fence is approximately eleven feet from the west side of Respondents’ house and encroaches into the ‘turn around’ easement. The fence should be removed if encroachment is established by a proper survey to be paid for by Claimant. However, arbitrator Townsend dissents from this conclusion because adverse possession may

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“Dear Mr. Fels: In response to your letter of July 9, 2013 requesting clarification of our Arbitration Decision we offer the following: There was evidence presented that the fence encroached into the ‘turn around’ easement. Although the fence may have existed since 2003 the issue of adverse possession was not fully developed. We were unsure about the exact location of the property line. A survey would have been helpful to determine where the fence was actually located and our comment in that regard was simply a suggestion. We did not intend to foreclose the possibility that Mr. Ofuasias could in a proper forum plead and establish the necessary elements of adverse possession. The three arbitrators have communicated via email and concur with the above statements. Yours truly, (signed) John N. Skimas” (CP 0052, emphasis in original.)

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Defendant’s argument below was that the arbitration decision was conclusive in authorizing removal of Plaintiffs’ fence and landscaping and binding on Plaintiffs. *Id.*

have occurred based on the testimony of Charles Mason and Darlington Ofuasia who said the fence was built where a previous chain link fence existed. (CP 00012-13.)

The statement that “arbitrator Townsend dissents ... because adverse possession may have occurred based on the testimony of Charles Mason and Darlington Ofuasia who said the fence was built where a previous chain link fence existed” shows there was evidence presented which caused the arbitrators to consider adverse possession. “(T)he pleadings will be deemed amended so as to embrace all of the issues upon which the court made findings.” *McGregor v. Hollingsworth*, 190 Wn. 576, 577, 69 P.2d 813, 814 (1937).

Although the Ofuasia presented evidence that supported their claim of adverse possession, the arbitrators never reached a decision on the issue. *Res judicata* did not occur where there was no actual decision. *Cunningham v. State*, 61 Wn.App.562, 567, 811 P.2d 225 (Div. 1, 1991)(In order to have preclusive effect, the decision must be “firm, rather than tentative”), *Yakima Cty. v. Yakima Cty. Law Enft Officers Guild*, 157 Wn. App. 304, 331-332, 237 P.3d 316, 331 (Div. 3, 2010)(to avoid litigation of an issue based on collateral estoppel a party must show the earlier proceeding ended in a judgment on the merits). The plaintiffs were not barred from bringing their claim in the Superior Court.

Plaintiffs were free to bring their adverse possession and trespass claims to the trial court because the arbitrators never finally and fully ruled on any questions before it.⁴ “Collateral estoppel

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Mr. Smurr did not meet his burden of persuasion before the arbitrators, who found additional evidence in the form of a survey was necessary. *Fed. Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413, 433, 886 P.2d 172, 183 (1994)(“The burden of persuasion is ‘the burden of persuading the trier of fact that the alleged fact is true.’”) The Ofuasia, therefore, did not need to provide any defense. Their ownership of the property was an affirmative defense, not a compulsory counterclaim, and therefore did not need to be raised when Mr. Smurr failed to prove his case.

may be applied to preclude only those issues that have actually been litigated and necessarily and finally determined in a prior proceeding.” *Yakima City, supra*. An arbitration decision which has not been reduced to judgment is not “final” and does not have preclusive effect. *Larsen v. Farmers Ins. Co.*, 80 Wn.App. 259, 265-66, 909 P.2d 935, 938-39 (Div. 2, 1996).

Arbitrator Townsend explained:

The fence - we did not require its removal. We said that if Mr. Smurr pays for a survey and the fence is in the right of way, then it MAY have to be removed, but it may also be that adverse possession has occurred. In Washington, if the fence has been there for a sufficient period of time, then you have a right to say that you now possess that piece of property, even if it is in the right of way. It does not resolve the dispute at this time, but the fence does not have to be removed. Any survey has to be paid for by Smurr. If he pays for a survey and he shows it to be in the right of way, then you have to show if adverse possession has occurred, and if it has - the fence stays. (CP00049.)

It is evident from the arbitration decision, Judge Skimas’ letter and Ms. Townsend’s explanation that the panel did not believe Mr. Smurr’s testimony sufficiently established the location of the surveyed boundary delineating the Ofuasi’s west line and the east line of the easement turn around. As a result, they said a survey was necessary.

The Ofuasi’s attorney wrote the panel asking them to “correct, change or clarify” their decision under RCW 7.04A.240. (CP00014.) The arbitrators declined to consider the Ofuasi’s request to find they had established adverse possession, telling them instead to pursue the matter in a “proper” forum. (CP 00027.)

The arbitration decision never “finally determined” Mr. Smurr’s request to rule the Ofuasi’s fence and arborvitae should be removed, because the arbitrators did not have information regarding the location of the property line or the length of time the fence was present. Their suggestion that

the fence should be removed if shown by a survey to be outside the surveyed boundaries can be seen as an invitation to re-open the matter after a survey. Judge Skimas' letter in response to the Ofuasia's attorney's letter specifically said the arbitrators "did not intend to foreclose the possibility" of further litigation on the issue of adverse possession. (CP 0027.)

Because neither the boundary issue nor adverse possession was resolved in the arbitration, the arbitration decision was not *res judicata* or collateral estoppel on those issues. *Ullery v. Fulleton*, 162 Wn.App. 596 (Div. 3, 2011), rev. denied 173 Wn.2d 1003 (2011)(decision not final on merits is not bar to subsequent action). The arbitration decision did not preclude the plaintiffs from taking their claim of adverse possession to the trial court. *Yakima, supra, Larsen v. Farmers, supra*.

II. Plaintiffs established the elements of adverse possession and the decision granting summary judgment on this issue was correct.

The record before the trial court showed the plaintiffs continuously established open and adverse possession during the time their predecessor controlled the property and during a time when they were personally absent from the premises.

David Harris, who owned the property immediately before the Ofuasia, stated he installed a chain-link fence in 2003 and it remained in the same location continuously until after the Ofuasia purchased the property. (CP 00052 -53.) Alena Ofuasia stated she and Mr. Ofuasia landscaped their property up to the fence erected by the Harrises, her husband eventually replaced part of the chain link fence with a wood fence, and they continued to landscape, weed and water all along the new fence and up to the line created by the original fence. (CP 0018-19.)

Mr. Smurr did not provide any opposing evidence other than his own declaration. In his declaration, he surmised that the Ofuasia may have moved back into their house after a period of

absence to avoid foreclosure. (CP 00088, ¶5). He agreed Mr. Harris had a chain link fence installed in approximately 2003. (CP 00091, ¶13.) He also agreed Plaintiffs placed a fence, some arborvitae and some plants beyond their property line, within the private roadway. *Id.*, ¶16. Defendant further opined, without citing to any evidence, “Neither fence was intended to show the boundary line of the property. Mr. Harris installed his fence for the sole purpose of keeping schoolchildren from crossing through the property. It was a barrier, not a boundary marker.” *Id.*, ¶17.

The Harris and Ofuasia declarations created undisputed evidence the Harris fence existed in January 2003 and the Ofuasia landscaping was continuously maintained up to the line of the former fence for a total of ten years before Mr. Smurr commenced the arbitration.

Mr. Smurr argues that the declarations of Mr. Harris and Ms. Ofuasia are insufficient to establish adversity for a continuous period of ten years. (Defendant’s Brief, p. 15.) But Ms. Ofuasia stated in her declaration that after purchasing the lot from the Harris, she and her husband “landscaped the area between the west side of our garage and the fence erected by the Harris. (CP 00018, ¶4.) Mr. Ofuasia then removed the chain link fence on the side “near the garage” (the north end of the fence line), and “(w)e continued to landscape up to the line created by the original fence. We weeded and watered all along the fence line and trimmed the arborvitae. We maintained all of the area up to the paved part of the turn-around part of “Tract A”. (CP 00019, ¶¶6 and 7.)

A fence creates the necessary elements of “open and notorious” and “hostile” use regardless of the subjective intent of the person who installs the fence or his knowledge of the true owner’s title. *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984), specifically overruling *O’Brien v. Schultz*. *Id.*, 100 Wn.2d.861, fn. 2, 676 P.2d 436.

Mr. Harris's erection of the fence along the west side of his property, knowing it was off the property line and on Tract A, was an open and "hostile" act sufficient to put the owners of Tract A like Mr. Smurr on notice. Although Mr. Smurr surmised that Mr. Harris did not intend to establish ownership over the disputed parcel, Mr. Smurr's speculation is not only inadmissible⁵, it does not create a question of fact because Mr. Harris' subjective intent is not relevant. *Chaplin, supra; Roy v. Cunningham*, 46 Wn.App. 409, 413, 731 P.2d. 526, 528-29 (Div. 3, 1986) rev. denied 108 Wn.2d 1018 (1987).

Similarly, the Ofuasia's continuous landscaping and care of the land between their house and up to the line created by the chain link fence posts, even after a portion of the fence was removed, satisfy the open, notorious and hostile elements of adverse possession. *Chaplin, supra*.⁶ Mr. Smurr conceded the landscaping created a "barrier". Photographs submitted by both parties show an obvious boundary created by the Ofuasia's fence and landscaping up to the line created by the posts of the former chain link fence line, compared to the grass, pavement, and moss and gravel shoulder of the "Tract A" turn around. (CP 0029, 00030; 102.)

Defendant further argues that because the Ofuasia were not residing in their home for approximately two and a half years during the ten year period (although he admitted there were

⁵ It was hearsay. Plaintiffs noted their objection to this "evidence" below. (CP 0019.)

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"The open and notorious element is satisfied where the use of property is such that 'any reasonable person would assume' the claimant was the owner. *Chaplin*, 100 Wash.2d at 862, 676 P.2d 431. The hostility element 'requires only that the claimant treat the land as his own as against the world throughout the statutory period.' *Chaplin*, 100 Wash.2d at 860-61, 676 P.2d 431." *Maier v. Giske*, 154 Wn. App. 6, 18-19, 223 P.3d 1265, 1272 (Div. 1, 2010)

renters there during that time)(CP 0089), a “reasonable inference” arises that Plaintiffs did not maintain or control the disputed area. (Resp. Brief, p. 15.) Defendant also argues that because some bushes on the *north* side of the Ofuasia property died while they were gone, the disputed property on the *west* was not maintained. *Id.*

Mr. Smurr provides no legal or logical support for his arguments. He also did not raise these arguments below. Mr. Smurr’s only argument below was to say “there are fact issues regarding the unfenced 30 feet to the north of where plaintiff’s fence terminates.” (CP 114.) He did not say what the “fact issues” were. “A naked assertion of unresolved factual questions is not sufficient to oppose a motion for summary judgment.” *Steward v. Good*, 51 Wn. App. 509, 513-14, 754 P.2d 150, 153 (Div. 1, 1988)[citing *Jacobsen v. State*, 89 Wn.2d 104, 111, 569 P.2d 1152 (1977)].

Ms. Ofuasia’s declaration that Plaintiffs “continued” to care for the landscaping from the time they built their house until Mr. Smurr filed his request for arbitration was uncontested. That renters occupied the premises for a portion of the period does not negate the continuous nature of the plaintiffs’ care. To interrupt adverse possession there must be actual cessation of the possession. *Lingvall v. Bartmess*, 97 Wn.App. 245, 256, 982 P.2d 690, 697 (Div. 2, 1999). Defendant did not claim or present any evidence the disputed area was untended during the time Plaintiffs were absent.

Finally, Defendant argues that the only evidence supporting Plaintiffs’ adverse possession claim for the portion where the chain link fence was removed and not replaced by a wood fence was Ms. Ofusia’s declaration that “We planted arborvitae trees there along the west side of our garage.” (Def’s Brief, 16.) However, as noted above, Ms. Ofuasia also stated that she and her husband continuously maintained landscaping on the west side of their house and garage to the fence line

from the time they built their house. That undisputed evidence, along with the photographs showing a clear demarcation between their landscaped yard and the remaining portion of Tract A, was sufficient evidence to demonstrate that they maintained the property as their own. *Chaplin, supra*.

III. The arbitration decision did not authorize Defendant to cut down or remove Plaintiffs' fence, arborvitae trees and landscaping. Plaintiffs' motion for summary judgment on their trespass claim should have been granted and Defendant's motion for summary judgment on the trespass claim should be reversed.

Defendant argues "Having acted in complete conformity with the final decision of the arbitration panel, it should be concluded that defendant's actions were taken with lawful authority, properly and reasonably." (Def's Brief, 17.) However, the "final decision" of the arbitration panel was inconclusive. The panel initially only said "The fence should be removed if encroachment is established by a proper survey to be paid for by Claimant." (CP 0012.) Arbitrator Townsend interpreted this to mean

"if Mr. Smurr pays for a survey and the fence is in the right of way, then it MAY have to be removed, but it may also be that adverse possession has occurred. *It does not resolve the dispute at this time*, but the fence does not have to be removed. Any survey has to be paid for by Smurr. If he pays for a survey and he shows it to be in the right of way, then you have to show if adverse possession has occurred, and if it has - the fence stays." (CP00049, CAPS in original, italics added.)

Plaintiffs' attorney's letter to Defendant put him on notice that the arbitrators left open the option for the Ofuasia to pursue their adverse possession claim and that Plaintiffs intended to sue him for trespass if he were to remove their property. (CP 51-52.)

Defendant's argument that he had lawful authority to cut down and remove Plaintiffs' fence, arborvitae and landscaping is without basis. The panel's statement that the fence "should be

removed if encroachment is established” was not an invitation or license for him to determine on his own that encroachment had been established.

Judge Skimas stated:

“We were unsure about the exact location of the property line. A survey would have been helpful to determine where the fence was actually located and our comment in that regard was simply a suggestion.” (CP00052.)

In fact, the surveyor’s report only stated the surveyor had located the corners of the plaintiffs’ lot. (CP 104.)

This case is squarely within the holding in *Mullally v. Parks*, 29 Wn.2d 899, 190 P.2d 107 (1948). There, defendant Schroeder had a survey which showed the property lines. He informed his neighbor of the result but Parks disputed the validity of the survey. Schroeder nevertheless proceeded to remove trees from the disputed area. The court held:

“Where a person has knowledge of a bona fide boundary dispute, and thereafter consciously, deliberately, and intentionally enters upon the disputed area for the purpose of destroying, and does destroy, trees or other property which cannot be replaced, such acts are neither casual nor involuntary, nor can they be justified upon the basis of probable cause for belief by the tortfeasor that he owned the land, but, on the contrary, are without lawful authority and will subject such person to treble damages as provided by statute.” *Id.*, 29 Wn.2d 911, 190 P.2d 114.

“(W)here a person has been given notice that another has an ownership interest in trees, and the person nonetheless cuts them down, the actor will be liable for treble damages under RCW 64.12.030.” *Happy Bunch, LLC v. Grandview N., LLC*, 142 Wn. App. 81, 96, 173 P.3d 959, 967 (Div. 1, 2007).

Defendant’s entire argument depends on his belief the arbitrators authorized him to remove Plaintiffs’ fence, trees and landscaping himself once he had commissioned a survey. However, the

initial arbitration decision was conditional, not final and binding as he argues. When he cut down his neighbors' fence and trees with a chainsaw, Defendant knew ownership of the land continued to be in dispute. He was obligated to seek further clarification before taking action. His actions were deliberate, intentional and not pursuant to any lawful authority.

IV. Plaintiffs' common law trespass claim was distinct from their statutory claims.

In his brief Defendant states "Plaintiffs' assertion of a claim for 'common law trespass' does not change the analysis. Plaintiffs' claims arise under the referenced statutes, and they must prove the statutory elements to prevail on a trespass claim." (Def's brief, p. 17, fn.2.)

Defendant ignores the elements of a common law claim as discussed in Plaintiffs' opening brief, pp. 21, 29-30. The common law claim was specifically pleaded in Plaintiffs' complaint as a separate claim. (CP 3, ¶12.) Case law does not provide a defense to the intent element of common law trespass for a defendant claiming his act was under "lawful authority". If the actor undertakes an action with substantial certainty of damaging consequences, he is liable. *Grundy v. Brack Family Trust*, 151 Wn.App., 557, 569, 213 P.3d 619, 625 (Div. 2, 2009) *rev. denied*, 168 Wn.2d 1007 (2010).

V. Defendant is not entitled to an award of attorney fees.

The defendant would only be entitled to an award of attorney fees for defending Plaintiffs' statutory trespass claims if this court upholds the trial court's decision on that issue. There is no statutory or other basis for an award of attorney fees on the adverse possession claim. If the trial court's decision on trespass is reversed, that decision should be remanded to the trial court for further determination.

CONCLUSION

There were no material issues of fact to be decided at the trial court. Plaintiffs submitted substantial evidence they had continuously maintained the area between their property line and the line created by their predecessors' chain link fence, that they maintained it in the manner of a true owner of the property and in a way which was obvious to the defendant. The defendant failed to present any evidence refuting Plaintiffs' claims. The decision granting summary judgment for Plaintiffs on their adverse possession claim was correct.

The initial arbitration decision did not decide ownership of the disputed parcel. It left the matter open for further proof, either based on a survey or evidence of adverse possession. It was not final or binding and did not preclude the Ofuasia from bringing their action in the Superior Court.

Because the arbitration decision was not conclusive, it did not provide lawful authority for the defendant to engage in self help. Mr. Smurr took his chances when he decided to cut down the plaintiffs' fence and trees and remove their landscaping despite his knowledge they claimed ownership of the land underneath. The trial court's ruling granting summary judgment to Defendant on Plaintiffs' trespass claims was in error.

This court should uphold the decision below granting Plaintiffs summary judgment on adverse possession and reverse the trial court on the trespass issue.

Respectfully presented this 4th day of April, 2016.


Peter Fels, WSBA #23708

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

DARLINGTON OFUASIA and ALENA
OFUASIA, husband and wife,

Appellants,

v.

DANA WILLIAM SMURR,

Respondent.

No. 48145-6-II

CERTIFICATE OF SERVICE

I, JUDY FRYER, state that I am the assistant to the attorney for Appellants,
DARLINGTON OFUASIA and ALENA OFUASIA, in this action and that on the date
signed below I caused true and complete copies of this Certificate of Service and the
following document:

1. REPLY BRIEF OF APPELLANT

to be served on the Respondent, DANA SMURR, by causing a true copy of each to be
mailed to his attorney at the following address:

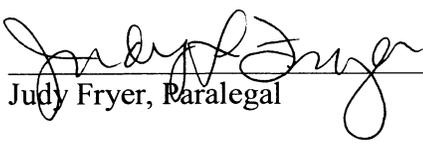
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I declare under penalty of perjury under the laws of the State of Washington that
the foregoing is true and correct.

Signed at Vancouver, Washington on this 4th day of April, 2016.



Judy Fryer, Paralegal