

No. 48145-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

---

DARLINGTON OFUASIA and ALENA OFUASIA,

Appellants,

vs.

DANA WILLIAM SMURR,

Respondent.

---

BRIEF OF RESPONDENT

---

BY  STATE OF WASHINGTON  
DEPUTY

2016 MAR -4 PM 12:12

FILED  
COURT OF APPEALS  
DIVISION II

HEURLIN, POTTER, JAHN, LEATHAM,  
HOLTMANN & STOKER, P.S.  
Stephen G. Leatham, WSBA #15572  
211 E. McLoughlin Blvd, Suite 100  
Vancouver, WA 98663  
(360) 750-7547  
sgl@hpl-law.com  
Attorneys for Respondent

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. RESPONSE TO ASSIGNMENTS OF ERROR ..... 2

    1. The trial court properly denied plaintiffs’ motion for partial summary judgment on their trespass claim ..... 2

    2. The trial court properly granted defendant’s motion for partial summary judgment, dismissing plaintiffs’ trespass claim..... 2

III. ASSIGNMENT OF ERROR ON CROSS-APPEAL ..... 3

    1. The trial court erred when it granted plaintiffs’ motion for partial summary judgment on their quiet title claim arising from adverse possession ..... 3

IV. STANDARD OF REVIEW ..... 3

V. STATEMENT OF THE CASE ..... 4

VI. ARGUMENT ..... 6

    A. Principles of Claim-Splitting Preclude Plaintiffs from Pursuing an Adverse Possession Claim in this Proceeding ..... 7

    B. Plaintiffs Cannot Establish the Elements of an Adverse Possession Claim for the Requisite Ten Year Period ..... 10

    C. At a Minimum Genuine Issues of Material Fact Existed Regarding the Adverse Possession Claim, Compelling the Denial of the Motion for Partial Summary Judgment..... 13

D.	The Trial Court Properly Granted Defendant's Motion for Partial Summary Judgment and Correctly Denied Plaintiffs' Motion for Partial Judgment on the Trespass Claim.....	13
VII.	REQUEST FOR ATTORNEY FEES.....	17
VIII.	CONCLUSION .....	17

**TABLE OF AUTHORITIES**

Table of Cases

*Chaplin v. Sanders*, 100 Wn.2d 853 (1984) ..... 11

*Clipse v. Michels Pipeline Const., Inc.*, 154 Wn. App. 573 (2010) .... 15, 16

*Gunn v. Riely*, 185 Wn. App. 517 (2015) ..... 16

*In Re Marriage of Dicus*, 110 Wn. App. 347 (2002)..... 9

*Keck v. Collins*, 181 Wn. App. 57, *aff'd* 184 Wn.2d 358 (2015) ..... 4

*Landry v. Luscher*, 95 Wn. App. 779 (1999)..... 9

*Mahoney v. Shinpoch*, 107 Wn.2d 679 (1987) ..... 3

*Miller v. Anderson*, 91 Wn. App. 822 (1998)..... 11

*Symington v. Hudson*, 40 Wn.2d 331 (1952)..... 8

Statutes

RCW 4.16.020 ..... 11

RCW 4.24.630 ..... 14, 15, 16, 17

RCW 4.24.630(1) ..... 14

RCW 64.12.030 ..... 14, 15, 16

Court Rules

CR 56(c) ..... 4

RAP 18.1 ..... 17

Other Authorities

*Tegland*, 14A Wash. Prac., Civil Procedure § 35:24 (Second Edition) ..... 8

## **I. INTRODUCTION**

This appeal largely turns on the effect of a previous arbitration proceeding between the parties. Defendant Bill Smurr contends that plaintiffs' claim for quiet title due to adverse possession may not be raised in this litigation, as that claim should have been asserted in the course of the prior arbitration. If plaintiffs may not assert an adverse possession claim, then defendant's motion to dismiss plaintiffs' trespass claim was properly granted because there is no evidence that he set foot within, or removed anything from, the surveyed boundaries of plaintiffs' true property lines.

If the Court determines that plaintiffs have a right to assert an adverse possession claim in this action, the order granting plaintiffs' motion for summary judgment on that claim should nevertheless be reversed. Plaintiffs failed to submit evidence that they met the necessary elements for an adverse possession claim for the requisite 10 year period. The trial court was also presented with several genuine issues of material fact that should have resulted in plaintiffs' motion being denied. At a minimum, the Court should remand the adverse possession claim for trial.

Finally, even if this Court determines that the adverse possession claim may be pursued, the trial court properly granted defendant's motion for summary judgment on plaintiffs' trespass claim. Defendant's actions

in removing the boulders, fence, landscaping, and trees from the shared roadway were entirely consistent with the final and binding ruling of the arbitration panel. Thus, none of defendant's actions were done wrongfully, unreasonably, or without lawful authority. The order granting defendant's motion for summary judgment on the trespass claim should be affirmed.

## **II. RESPONSE TO ASSIGNMENTS OF ERROR**

1. The trial court properly denied plaintiffs' motion for partial summary judgment on their trespass claim.

2. The trial court properly granted defendant's motion for partial summary judgment, dismissing plaintiffs' trespass claim.

### **ISSUES PRESENTED**

a) Whether plaintiffs' trespass claim was properly dismissed where claim preclusion principles compel the conclusion that plaintiffs do not have the right to pursue an adverse possession claim following the completion of the prior arbitration proceeding, and where there is no evidence that defendant entered plaintiffs' property if adverse possession had not been established?

b) Whether the trespass claim was properly dismissed because defendant acted pursuant to lawful authority, and did not act wrongfully or unreasonably?

### III. ASSIGNMENT OF ERROR ON CROSS-APPEAL

1. The trial court erred when it granted plaintiffs' motion for partial summary judgment on their quiet title claim arising from adverse possession.

#### ISSUES PRESENTED

a) Whether plaintiffs' claim for adverse possession is barred by principles of claim splitting, where plaintiffs had every right to assert an adverse possession claim or defense in the parties' prior arbitration proceeding, yet failed to do so?

b) Whether plaintiffs failed to submit evidence sufficient to allow the trial court to conclude that the elements of an adverse possession claim had been established for the requisite 10 year period?

c) At a minimum, whether genuine issues of material fact were presented to the trial court, requiring the denial of plaintiffs' motion?

### IV. STANDARD OF REVIEW

When reviewing orders granting or denying summary judgment motions, the standard of review is *de novo*; "that is, the appellate court conducts the same inquiry as the trial court." *Mahoney v. Shinpoch*, 107 Wn.2d 679, 683 (1987). Like the trial court, the appellate court will

“construe all evidence and reasonable inferences in the light most favorable to the nonmoving party.” *Keck v. Collins*, 181 Wn. App. 67, 79 (2014), *aff’d*, 184 Wn.2d 358 (2015). Thus, summary judgment is properly granted where there is no genuine issue of material fact and where the moving party is entitled to judgment as a matter of law. CR 56(c).

## V. STATEMENT OF THE CASE

Defendant accepts plaintiffs’ statement of the case, subject to the following.

David and Yong Harris were the previous owners of plaintiffs’ property. CP 53. During the time the Harrises owned the property, they caused a chain link fence to be installed in approximately January 2003. *Id.* That chain link fence extended approximately 80 feet from north to south. CP 91. The Harrises were aware that the chain link fence was not located on the true property line. CP 54. While the Harrises owned the property, there was never a house located on the property. CP 53. There is no evidence in the record that the Harrises did anything to maintain the property during the time they owned the property. CP 53-54.

Plaintiffs acquired the property at issue from the Harrises on or about July 25, 2005. CP 57-58. At some unstated time thereafter, plaintiffs removed the chain link fence and installed a new wooden fence.

CP 19. Rather than installing 80 feet of fence, however, plaintiffs' fence extends only about 48 feet from south to north. CP 91.

After moving into their house, plaintiffs moved out of the area for approximately two and one-half years. CP 89. During the time they were gone, some plants plaintiffs had placed at the north end of their property died. *Id.* The house was being occupied by renters at that time. *Id.* There was no evidence before the trial court that any maintenance of the property at issue was performed by anyone, let alone by plaintiffs, during this two and one-half year period.

Defendant Smurr commenced an arbitration proceeding in April 2013, asking that plaintiffs be ordered to remove all rocks, fences, and shrubs that plaintiffs had placed within the joint roadway. CP 46-48. At the time of the hearing, all parties confirmed that they were proceeding in the proper forum. CP 90. Plaintiffs did not assert during the arbitration proceeding that they had acquired the land at issue by adverse possession. *Id.*

The arbitrators ruled that the boulders plaintiffs had placed within the private roadway to the north had to be removed. CP 89-90. They also ruled that the fence, landscaping, and arborvitae should be removed from the private roadway "if encroachment is established by a proper survey...". CP 91.

Pursuant to this ruling, defendant obtained a survey from a professional land surveyor. CP 92, 104. The survey confirmed that all of the materials plaintiffs had placed were within the private roadway, outside the true boundary lines of plaintiffs' property. CP 92.

Defendant provided notice to plaintiffs that they should remove the boulders within approximately two weeks or he would do so. CP 103. After receiving the survey results, defendant also gave plaintiffs notice that they should remove the encumbrances from the roadway within 30 days. CP 105. In both notices, defendant informed plaintiffs that he would remove the encumbrances if plaintiffs failed to do so. Plaintiffs took no action to comply with the decision of the arbitrators. CP 93. Defendant therefore removed the encumbrances pursuant to the decision of the arbitration panel. *Id.* Defendant took pains not to set foot within the surveyed boundaries of plaintiffs' property. *Id.* At the time defendant removed the encumbrances pursuant to the arbitration ruling, the complaint in this case had not been filed or served. CP 1.

## **VI. ARGUMENT**

Plaintiffs have appealed the denial of their motion for partial summary judgment on their trespass claim, and also the order granting defendant's motion for summary judgment on that same trespass claim.

Defendant has cross-appealed the order granting plaintiffs' motion for partial summary judgment on their quiet title/adverse possession claim.

The Argument section of defendant's brief will address the issues presented on both plaintiffs' appeal and defendant's cross-appeal. Whether plaintiffs can pursue a claim for adverse possession, and whether they can or have established adverse possession, weighs heavily on the viability of plaintiffs' trespass claim. Defendant will address both claims together since they are so closely related.

**A. Principles of Claim-Splitting Preclude Plaintiffs from Pursuing an Adverse Possession Claim in this Proceeding.**

Plaintiffs could and should have asserted their claim or defense for adverse possession in the arbitration commenced by defendant. Defendant was seeking a ruling that plaintiffs were obligated to remove the encumbrances they had placed within the boundaries of the private roadway. The obvious defense to that claim was that the encumbrances were located on plaintiffs' own property due to adverse possession. Plaintiffs, however, did not assert that defense or make adverse possession an issue to be determined by the arbitrators. Nor did they seek to keep the arbitration open after the arbitrators suggested that adverse possession had not been fully developed. Instead, plaintiffs allowed the arbitration proceeding to become final and then brought the present lawsuit.

Plaintiffs' tactic constitutes prohibited claim-splitting, which is a species of *res judicata*. See *Tegland*, 14A Wash. Prac., Civil Procedure § 35:24 (Second Edition):

...all matters that were considered *or could have been considered* in the prior action, if part of the same claim or cause of action, merge with the judgment and cannot be the basis of a later action.

Thus, a defendant cannot withhold defenses in the first action and seek to base a subsequent action upon them.

\* \* \*

The same rules, however, also apply to the defendant. If the defendant fails in the prior litigation to disclose a defense properly a part of the litigation and then available to the defendant, the defendant may not assert it in a later action. (Emphasis in original.)

Forbidding second lawsuits arising from the same facts, between the same parties, has long been the policy of the State of Washington. See, e.g., *Symington v. Hudson*, 40 Wn.2d 331, 338 (1952):

We have here the same subject matter, the same parties, and the same quality of persons. The causes of action in the two actions to quiet title were the same: the determination of the superior title to the property based upon facts, all of which were in existence at the time of the first judgment, and which were, or could have been, litigated therein. The judgment in the first action operated upon every claim which properly belonged to the subject of the litigation.... The law requires that there shall be an end to litigation, and where a party has had a full and fair opportunity to make all of the defenses at his command, and he elects not to disclose his claim, as did Mr. Symington, the doctrine of *res judicata* applies and he cannot later assert it....The judgment was conclusive upon

the issue of paramount title and of everything that might have been urged for or against such title.

*See also In Re Marriage of Dicus*, 110 Wn. App. 347, 355 (2002) (“Claim preclusion bars litigation of claims that were or should have been decided among the same parties below.”)

An instructive case is *Landry v. Luscher*, 95 Wn. App. 779 (1999). There, the plaintiffs filed a small claims action for property damage to their automobile after a motor vehicle accident. They obtained a judgment in small claims court. They then filed suit in Superior Court for personal injuries suffered in the same accident. The Court’s opinion began as follows, at 780: “Filing two separate lawsuits based on the same event – claim splitting – is precluded in Washington.” The Court then went on to summarize the rules concerning prohibited claim splitting, at 782-83:

A claimant may not split a single cause of action or claim. Such a practice would lead to duplicitous suits and force a defendant to incur the cost and effort of defending multiple suits. An injured party is limited to one lawsuit for property and/or personal injury damage resulting from a single tort alleged against the wrongdoer. This is in accord with the general rule that if an action is brought for part of a claim, a judgment obtained in the action precludes the plaintiff from bringing a second action for the residue of the claim....

A second and related reason for prohibiting claim splitting is the merger and bar components of *res judicata*. The theory of dismissal, “variously referred to as *res judicata* or splitting causes of action,” is based on the rationale that the relief sought in a subsequent action “could have and should

have been determined in a prior action.” Since the purpose of the *res judicata* doctrine is to ensure the finality of judgments and eliminate duplicitous litigation, dismissal on the basis of *res judicata* is appropriate where the subsequent action is identical with a prior action in four respects: (1) persons and parties; (2) cause of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made. (Citations omitted.)

The four elements are met here. This litigation involves the same persons that were parties to the arbitration. The claims asserted are related. The subject matter is the same. Thus, it must be concluded that plaintiffs should have asserted their adverse possession claim either affirmatively or as a defense to defendant’s claim for relief in the arbitration proceeding. Having failed to do so, plaintiffs are barred from pursuing their quiet title/adverse possession claim in this action.

Applying well-established principles of claim splitting, the trial court improperly granted plaintiffs’ motion for partial summary judgment on their adverse possession claim. This Court should reverse that decision and direct that plaintiffs’ quiet title/adverse possession claim be dismissed with prejudice.

**B. Plaintiffs Cannot Establish the Elements of an Adverse Possession Claim for the Requisite Ten Year Period.**

In order to establish a valid claim for adverse possession, plaintiffs must show that four elements existed for ten years. Those elements are: (1) exclusive possession, (2) actual and uninterrupted possession, (3) open

and notorious possession, and (4) hostile possession under a claim of right made in good faith. *See e.g., Chaplin v. Sanders*, 100 Wn.2d 853, 857 (1984).

Because plaintiffs had owned the property for less than eight years when defendant commenced the arbitration proceeding, plaintiffs were obligated to submit evidence of the actions that had been taken by the Harrises, their predecessors-in-interest, in order to reach the necessary ten year statutory period set forth in RCW 4.16.020. This concept is known as “tacking.” To utilize tacking, however, plaintiffs were obligated to show that their predecessors had held the property continuously and adversely, meeting the same four elements. *See, e.g., Miller v. Anderson*, 91 Wn. App. 822, 827-28 (1998). Plaintiffs failed to submit the necessary evidence to the trial court. The declaration of David L. Harris (CP 53-54) merely stated that the Harrises previously owned the property, they installed a fence in early 2003, they knew the fence was not on the true property line, and there was no house on the property while the Harrises owned it. This declaration says nothing whatsoever about the elements necessary to establish an adverse possession claim. Thus, plaintiffs may not tack on the Harrises’ period of ownership to meet the ten-year requirement. Since there was insufficient evidence to enable the trial court to conclude that the elements of adverse possession for the necessary ten

year period had been proven, the order granting plaintiffs' motion for partial summary judgment was in error.

Furthermore, there was uncontradicted evidence before the trial court that plaintiffs moved out of the area for approximately two and one-half years. CP 89. Plaintiffs presented no evidence to the trial court as to the treatment or maintenance of the disputed area during that 2.5 year period. Indeed, the evidence defendant presented was that some of the plants plaintiffs had placed died during their absence, *i.e.*, leading to the reasonable inference that the disputed property was in fact not being maintained.

In short, plaintiffs did not come close to submitting sufficient evidence to enable the trial court to conclude that the elements of adverse possession had been met for a period of ten years. As a result, the trial court erred in granting plaintiffs' motion for partial summary judgment on the adverse possession claim. That ruling should be reversed, with the trial court being directed to dismiss the adverse possession claim with prejudice.

//

//

//

**C. At a Minimum Genuine Issues of Material Fact Existed Regarding the Adverse Possession Claim, Compelling the Denial of the Motion for Partial Summary Judgment.**

In opposition to the adverse possession motion, defendant submitted evidence to the trial court that the wooden fence plaintiffs installed was only 48 feet long, rather than the 80 feet that the chain link had extended. While plaintiffs submitted evidence that they left the metal posts from the prior fence in place, the removal of over 30 feet of fence was evidence leading to the inference that the elements of adverse possession were no longer being met. Whether the planting of arborvitae trees was sufficient was not adequately supported or developed.<sup>1</sup> Accordingly, there were genuine issues of material fact presented, providing yet another reason why the trial court erred in granting plaintiffs' motion for partial summary judgment.

**D. The Trial Court Properly Granted Defendant's Motion for Partial Summary Judgment and Correctly Denied Plaintiffs' Motion for Partial Judgment on the Trespass Claim.**

No evidence was presented to the trial court to indicate that defendant either set foot on or removed anything from plaintiffs' property, as surveyed. Instead, the contradicted evidence was that defendant remained within the joint roadway. The evidence was also that the things

---

<sup>1</sup> The Ofuasia Declaration merely stated: "We planted arborvitae trees there along the west side of our garage." CP 19.

defendant removed were all located within the joint roadway. Thus, if plaintiffs are not allowed to assert an adverse possession claim in this proceeding, or if their adverse possession claim fails on the merits, defendant cannot possibly be held liable for trespass and the trial court's rulings on that claim were correct.

If this Court determines that the adverse possession claim was either appropriately decided or should be remanded, this Court should nevertheless conclude that the trial court properly dismissed the trespass claim. Having acted in complete conformity with the final decision of the arbitration panel, it should be concluded that defendant's actions were undertaken with lawful authority, properly, and reasonably. With that conclusion, the trial court properly dismissed plaintiffs' trespass claim.

Plaintiffs' trespass claims arise under RCW 4.24.630 and RCW 64.12.030.<sup>2</sup> Each of these statutes requires plaintiffs to establish an element of wrongfulness in order to impose liability, let alone treble damages. RCW 4.24.630(1) provides in relevant part:

Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused

---

<sup>2</sup> 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 in order to prevail on a trespass claim.

by the removal, waste, or injury. For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. (Emphasis added.)

RCW 64.12.030 provides in relevant part:

Whenever any person shall cut down...or otherwise injure...any trees...or shrub on the land of another person..., without lawful authority, in an action by the person... against the person committing the trespasses..., any judgment for the plaintiff shall be for treble the amount of damages claimed or assessed. (Emphasis added.)

In order to establish liability under RCW 4.24.630, plaintiffs must make the following showing:

...we hold that RCW 4.24.630 requires a showing that the defendant intentionally and unreasonably committed one or more acts *and* knew or had reason to know he or she lacked authorization. (Emphasis by court.)

*Clipse v. Michels Pipeline Const., Inc.*, 154 Wn. App. 573, 580 (2010).

Plaintiffs' claim for the removal of the fence and the moving of the boulders must be evaluated under the waste statute, RCW 4.24.630. Plaintiffs must therefore demonstrate that defendant "intentionally and unreasonably" acted, again while knowing or having reason to know that he did not have "authorization" to act. RCW 4.24.630.

Plaintiffs' claim with respect to the plants and arborvitae must be evaluated under the timber trespass statute, RCW 64.12.030. Claims which fall under the timber trespass statute must be evaluated under that

statute, and not under the waste statute. *See Gunn v. Riely*, 185 Wn. App. 517 (2015). Plaintiffs must demonstrate that the removal of the arborvitae and plants was done "intentionally and unreasonably," and that defendant knew or had reason to know that he lacked "authorization." *Clipse, supra*.

Plaintiffs cannot establish that defendant acted "wrongfully" or "unreasonably" for purposes of RCW 4.24.630 or "without lawful authority" for purposes of RCW 64.12.030. Again, defendant was acting entirely in accordance with and pursuant to the binding decision of the arbitration panel. He did not take action on the west side of the property until he had obtained a survey which confirmed that the materials plaintiffs had placed in the roadway were outside the western boundary of plaintiffs' property. Indeed, defendant acted precisely **with** lawful authority, as he acted pursuant to and consistent with the decision of the arbitrators.

Plaintiffs primarily rely upon a letter from their counsel dated July 18, 2013. Appellant's Brief, at 24. However, a letter from an attorney setting forth some threatened claim cannot serve to supersede a litigated ruling from an arbitration panel. Defendant was entitled to act in accordance with the panel's final ruling, notwithstanding what other threats or claims might have been made after the fact by plaintiffs' counsel.

Finally, plaintiffs erroneously contend that defendant improperly engaged in “self-help” when he removed the materials from the roadway. Given that the uncontroverted evidence was that all of the materials removed were located within the boundaries of the joint roadway, and not on plaintiffs’ surveyed property, defendant was acting entirely within his rights. Plaintiffs’ complaints about self-help may be worth arguing if defendant had entered plaintiffs’ property, but he did not. In the absence of a determination that plaintiffs had acquired portions of the joint roadway by adverse possession, defendant cannot be faulted for the actions he took.

Based upon the language of the statutes at issue, the ruling of the arbitrators, and defendant's having acted in accordance with that ruling, this Court should affirm the dismissal of plaintiffs' damage claim for trespass to property.

#### **VII. REQUEST FOR ATTORNEY FEES**

Pursuant to RAP 18.1, defendant requests an award of attorney fees on appeal. As the prevailing party, defendant is entitled to an attorney fee award under RCW 4.24.630.

#### **VIII. CONCLUSION**

For the foregoing reasons, the order granting defendant’s motion for partial summary judgment and dismissing plaintiffs’ trespass claim

should be affirmed, as should the order denying plaintiffs' motion for partial summary judgment on that same claim.

The order granting plaintiffs' motion for partial summary judgment on their quiet title/adverse possession claim should be reversed, with the trial court being instructed to enter a dismissal of that claim, with prejudice.

DATED this 2 day of March, 2016.

HEURLIN, POTTER, JAHN, LEATHAM,  
HOLTMANN & STOKER, P.S.



---

Stephen G. Leatham, WSBA #15572  
Of Attorneys for Respondent

**CERTIFICATE OF SERVICE**

I certify that I caused the foregoing BRIEF OF RESPONDENT to be served on the following:

Peter L. Fels  
Peter L. Fels, PC  
211 E. 11<sup>th</sup> Street, Suite 105  
Vancouver, WA 98660

by mailing, by U.S. Mail, First Class postage prepaid, a true copy to the foregoing on the 2 day of March, 2016.

HEURLIN, POTTER, JAHN, LEATHAM,  
HOLTMANN & STOKER, P.S.



Stephen G. Leatham, WSBA #15572  
Of Attorneys for Respondent

FILED  
COURT OF APPEALS  
DIVISION II  
2016 MAR -4 PM 12:12  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY