

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 344886-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

CHARLES AND BAMBI COMPTON,

Respondents,

v.

LEWIS CLARK SADDLE CLUB,

Appellant.

RESPONSE BRIEF OF APPELLANT

Ellis E. Eifert, WSBA No. 45229
Attorney for Appellant
Broyles & Eifert, PLLC
901 Sixth Street
Clarkston WA 99403
(509) 758-1636

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I.

STATEMENT OF THE CASE

There are some facts in the Respondent's brief that need to be addressed and corrected.

This first is the assertion that the Respondent's property sits two feet higher than that of the Saddle Club. In his testimony, Eric Hasenoehr states that the fill material that is pushing against the retaining wall and Saddle Club fence is what is called deleterious material (it was filled with trash and wood bits). This would have been put there after the fence was built and was not a natural part of the property. *Direct Exam. of Eric Hasenoehr*, RP at 376-378.

The second is that the Respondent's were given permission to attach their taller solid fence to the Saddle Club fence. In his testimony, Jimmie Morgan does not say that the Comptons asked the Saddle Club's permission to put up the new fence. Neither does he say that the Saddle Club gave permission. He merely stated that the Comptons were discussing whether they would put the fence up, not that they were given that permission. *Direct Exam. of Jimmie Morgan*, RP. at 88:1-9.

II.

ARGUMENT

1. Adverse Possession was not Properly Plead As An Affirmative Defense Or Under CR 15

In section 2-a the Respondents state that notice did not need to be given, and that since the adverse possession claim was raised in an answer as well as being considered at summary judgment, the court did not err in considering it. First, it was not considered at summary judgment, the Court stated that there are questions regarding the incursions. CP. at 079 para 2. This is not a consideration, merely an observation. Further, the Court stated that whether the Respondents should be allowed to claim the time and previous use of prior owners is not before the Court either. Clerk's Document #34 – Memorandum Decision on Partial Summary Judgment. Also, in the response to the counterclaim, there was no prayer for relief by the Respondents asking that adverse possession be found, whether as an affirmative defense or not. Finally, the Respondents, in their response to the motion for summary judgment only discussed trespass and made no mention of adverse possession (Clerk's Papers Document #30). Adverse possession was not an issue, and mentioned in passing in the Respondent's response to counterclaim. Clearly, it was not an issue, and if the Court

wanted to hear argument on that issue, which affects ownership of real property, the Court should have amended the pleadings according to CR 15(b) and allowed the Appellant time to prepare to respond to the new cause of action. Finally, The statute brought up by Respondent, RCW 7.28.085 (5), does not confirm that adverse possession can be brought up as a defense. That statute is regarding forestland, which is not at issue here, since this matter takes place in city limits.

2. Adverse Possession

Regardless of whether the complaint was properly amended, the Appellants allege that the Respondents cannot prove that the property was adversely possessed under the facts of this case. As laid out the Appellant's initial brief, in order for a claim of adverse possession to be established, there must be possession for 10 years that is: (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile. *ITT Rayonier, Inc. V. Bell*, 112 Wash.2d 754, 757, 774 P. 2d 6 (1989); RCW 4.16.020. Also, the holder of legal title has the presumption of possession, and the party who is claiming adverse possession has the burden of establishing each element. *ITT Rayonier*, 112 Wash.2D at 757, 774 P.2d 6. Adverse possession is a mixed question of law and fact; whether the essential facts exist is for the trier of fact; however, whether the facts constitute adverse possession is for the court to determine as a matter of

law. *Peeples v. Port of Bellingham*, 93 Wash.2d 766, 771, 613 P.2d 1128 (1980), overruled on other ground, *Chaplin v. Sanders*, 100 Wash.2d 853, 676 P.2d 431 (1984).

In regards to adverse possession, the Respondents, on whom the burden of proving the elements rests, have not satisfied all the elements of adverse possession, and thus have not established a claim for adverse possession.

As stated in the Appellant's initial brief, the Respondents have not established the requisite statutory period of 10 years, and Respondents have not shown that the possession was hostile and open and notorious. The Respondents state that the only reasonable conclusion is that the strip of land between the fence and home was the Respondents. However, at no point did the Appellant indicate that the fence was a boundary line fence, which could establish hostility. The fence is a random fence, which will not establish hostility. *Acord v. Petit*, 174 Wn.App. 95, 107-09 (2013). Until the retaining wall was built, there was no showing of hostility, since this is a random fence. Therefore, the Respondent will not be able to tack time and establish the statutory time of 10 years necessary to establish adverse possession.

For those reasons, the trial court incorrectly ruled that the Respondents adversely possessed the property on which the retaining wall was built.

3. Trespass

The Respondents state that the trespass claim should fail because of 1) the Respondents owned the property via adverse possession, 2) there is no showing that the Respondents intended or negligently trespassed, and 3) there is no showing of actual and substantial damages.

As has been discussed in this brief and the initial brief of the Appellant, the Respondents did not own the property via adverse possession since they are unable to establish the elements of adverse possession.

The Respondent also alleges that Appellant never showed the intentional trespass by Respondent. In order to show intentional trespass, the plaintiff must establish: (1) an intentional invasion of property affecting an interest in exclusive possession, (2) reasonable foreseeability that the act would disturb the plaintiff's possessory interest, and (3) actual and substantial damages. *Wallace v. Lewis County*, 134 Wn.App. 1, 15, 137 P.3d 1-1 (2006). The Respondents state that there was no intention to trespass, although they admit that they built a retaining wall next to the fence. (*cite Resp Brief at page 16-17*). They state that they owned it by adverse possession, which has already been addressed in this brief and the Appellant's initial brief.

The Respondents further state that there are no actual and substantial damages and that the Appellant did not provide a measure of the damages. However, both parties have agreed that the Respondents had attached their fence to the poles of the Appellant's fence. (*cite*) Further, even if adverse possession is found, there is trespass, since the retaining wall is pushing the fence over, and the bolting on of Respondents' fence also constitutes trespass. These facts are established by the testimony of Mark Fleming in Pages 58, Line 13-471 of the Verbatim Transcript and Clerk's Papers, Exhibits D-3.1 through 9, D-4.1 through 4.3, D 6.1-6.8, D-5.1-5.2. The damage caused by the bolting on of the Respondents' fence and the facts that the retaining wall is pushing against the fence both show actual damage. Further, Mark Fleming testified that damage to the fence alone is roughly \$15,000.00, which can be found in Verbatim Proceedings testimony of Mark Fleming, Page 487 and 489-491. This would definitely constitute substantial damage.

The damages can be measured. The Respondent correctly states that unless the proper measure of damages is shown, the claimant may not prove the element of actual and substantial damages. *Wallace v. Lewis County*, 134. Wn.App. 1, 17 (Div. 2 2006). The Respondent states that Appellant failed to demonstrate damages to prove its claim. First, in response to the Respondent's claim that installation of a concrete retaining

wall to replace the current retaining wall is beyond restorative damages. The fill from the retaining wall is pushing against the Appellants' fence, causing the damage. A new retaining wall is absolutely necessary in order to restore the fence to its prior condition, and it is not beyond what is necessary to restore the property. Second, the Respondent states that Mark Fleming's testimony regarding the amount necessary to restore is unsupported and that he is not an expert and therefore should not be taken seriously. A landowner or someone who is a party to the ownership of property may always be allowed to testify to the value of his/her property. *Cunningham v. Teiton*, 60 Wn.2d 434, 437 (Wash. 1962). Therefore, Mr. Fleming had every right and authority to give testimony on the damages and what would need to be done to rectify the damages.

4. Treble Damages and Attorney's Fees

In reliance on RCW sec 4.24.630, the Appellant asks for treble damages. This applies when the opposite party acts "wrongfully". RCW sec 4.24.630. As has been shown here and in the initial brief, the Respondents acted intentionally and wrongfully. They had the requisite intent, and intended to build the retaining wall and attach their fence to the Appellant's fence, from which the damages occurred. It is based on this that the treble damages should be awarded.

5. RCW Civil Protection Order

The Findings of Fact at 1.18, the Saddle Club is not a specific person as juxtaposed to the Court's Memorandum Opinion (CP 170-179, where the Court said in closing:

In the case at hand, Defendant Saddle Club is not a specific person. While certain members of Defendant Saddle Club may have a basis to seek anti-harassment orders individually, Defendant Saddle Club is not a specific person to which this statute affords protection. Furthermore, Plaintiffs conduct in requesting dust reduction, installing security cameras and protecting their property is done for a legitimate purpose. Defendants counterclaim for harassment and stalking is denied and dismissed.

While it is true that the Saddle Club cannot be granted the protection of the statute, this is exactly the kind of situation the Court should have amended the pleadings to conform to the situation according to 15(b). Furthermore, the Court should have, in accordance with 15(b), granted certain members of the Defendant Saddle Club anti-harassment orders individually based upon the testimony given at trial

There is no dearth of testimony of harassment by Mr. Compton in the record. Milton Campbell (VRP 319), Tina Luper (CRP 344-358), Rebecca Wright (VRP 360-393), Casey Storey (VRP 407-419) and

particularly VRP 412, Line 19 through 23, being physically afraid (VRP 418), starting at Line 13, feeling harassed, violated and unsafe, the testimony of Allen Klein running from VRP 420-431, particularly describing behavior (VRP 424-429), Susan Berghammer (VRP 433-442), specifically testimony at 439, and finally the testimony of Mark Fleming (VRP 444-458). All of these people, based on their fears, should have been awarded restraining orders against Mr. Compton.

III.

CONCLUSION

The Respondents should be denied on all counts. They did not correctly amend their pleadings according to the Civil Rules. Even if they had correctly amended their pleadings to include adverse possession, they did not prove the elements necessary to show adverse possession, particularly since they bear the burden to prove the elements. The Respondents have further not shown that there was no trespass, when they intentionally built the retaining wall, which pushed against the Appellant's fence, causing damage, and by bolting their fence to the existing fence, also causing damage. Finally, RCW 4.24.630 clearly lays out that treble damages and attorney's fees should be awarded the Appellants.

DATED this 14th day of September, 2017.

Respectfully submitted,



ELLIS E. EIFERT, WSBA # 45229
Attorney for Appellant

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DATED this 2nd day of October, 2017



ELLIS E. EIFERT

Subscribed and sworn to before me on this 2nd day of October, 2017, by ELLIS E. EIFERT.



Cindy L Bolen
Notary Public in and for the State of Washington
Residing at: Lewiston, Id
My Commission expires: 8/25/2021