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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SHERRI A. URANN, an unmarried individual, Respondent, v. WILSON LUU, an unmarried individual, Appellant.	No. 81199-1-I DIVISION ONE UNPUBLISHED OPINION

SMITH, J. — Wilson Luu appeals the trial court's summary judgment order holding him liable for timber trespass after he cut down the hedge separating his property from his neighbor Sherri Urann's property. Luu acknowledges that Urann was the title holder of the hedge but alleges that he acquired the hedge through adverse possession. Alternatively, he alleges that the court erred by granting summary judgment because Urann failed to comply with a local court rule, erred by failing to find that Luu's actions were justified because the hedge constituted a nuisance, and erred by trebling damages on the basis that the trespass was willful. The parties also request attorney fees on appeal.

We hold that Luu has not met his burden to establish adverse possession or that his trespass was not willful. We decline to find that the court erred by waiving the court rule or by not entering findings about nuisance, and we decline to grant attorney fees on appeal. We affirm.

FACTS

Sherri Urann moved into her north Seattle home in 2008. The north side of her property was lined with a mature English laurel hedge. In February 2018, Luu purchased and moved into the neighboring home on the north side of the hedge. At some point, he decided to remove the hedge. On August 6, 2018, he e-mailed the previous owner of his property, Sharon Bitcon, to ask if she knew where the hedge was relative to the property line. She answered the same day to tell him that she did not know the answer, but had "had them maintained so the property would look nicer." Two days later, without notice to Urann, Luu hired a tree service to cut down the hedge.

After the hedge was removed, Urann and Luu each commissioned a survey. Both surveys indicated that the hedge was south of the recorded property line. Luu's survey also identified iron pipes at the south corners of his property and railroad ties approximately marking the south line of his property. Urann sued Luu for timber trespass, and Luu counterclaimed to quiet title on the basis that he and his predecessors in interest had acquired the hedge through adverse possession.

The parties presented considerable evidence concerning a fence on the south side of the hedge. Viewing the facts and inferences in the light most favorable to Luu, from at least 1985 to 2007, there was a white fence running along the south side of at least the portion of the hedge toward the front of Luu's

and Urann's homes.[1] The hedge was initially slightly taller than the fence and by 2007 was some feet taller. By 2006, the backyard of the Urann property was fully fenced, although it is unknown whether this was through an extension of the white fence or not. At some point, the white fence was removed, and when Luu moved in in 2018, there was a wire fence running down the length of the hedge. This fence was significantly shorter than the hedge and was often obscured by laurel branches growing through it.

The parties also presented evidence regarding maintenance of the hedge. Bitcon declared that she had owned Luu's property from 1988 to 2018 and lived there from 1988 to 1992. She indicated that she did not recall her neighbors discussing or maintaining the hedge during the time she lived there and that at some point after she moved out, she hired a property management company which arranged for maintenance and yard work. She provided three of the property manager's records from 2013 and 2016 which referenced payment for yard work including "hedge trimming" or "south hedge trim." Former and current residents of the Urann property variously stated that they did not recall having the hedge trimmed, that they trimmed the hedge up to the fence, or that they would sometimes permit Bitcon's landscapers to access the Urann property to trim the south side of the hedge.

[1] The evidence supporting this inference is limited to a 1985 King County record card that appears to show a white fence post at the end of the hedge, although the rest of the fence is not visible, the statement of Sharon Bitcon that when she owned the Luu property from 1988 to 2018, she believed the hedge was hers because of a fence on the south side of the hedge, and a 2007 Google street view image showing a white fence running along the hedge in the front of the Urann property.

In August 2019, Urann moved for summary judgment, and the court denied the motion. In December 2019, the case was transferred to a different King County Superior Court judge. Luu then filed a motion for summary judgment before the new judge, and Urann filed a cross motion for summary judgment. The court granted summary judgment to Urann and awarded her treble damages for timber trespass.

Luu appeals.

ANALYSIS

Luu contends that the court erred by granting summary judgment for Urann and by awarding treble damages. We hold that Luu has not met his burden to establish adverse possession or that he had a basis to believe the hedge was his, and that the court did not err by waiving a local court rule or by failing to make findings about the hedge as a nuisance. Finally, we decline to award attorney fees on appeal.

Standard of Review

We review an order on summary judgment de novo. Strauss v. Premera Blue Cross, 194 Wn.2d 296, 300, 449 P.3d 640 (2019). We consider "the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party." Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). "Summary judgment is appropriate only when no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law." Keck, 184 Wn.2d at 370 (footnote omitted).

Timber Trespass/Adverse Possession

Luu claims that he is not liable for timber trespass, which provides a cause of action "[w]henever any person shall cut down . . . any tree, . . . timber, or shrub on the land of another person . . . without lawful authority." RCW 64.12.030. While the surveys commissioned by the parties indicate that the hedge was on Urann's property, Luu alleges that he and his predecessors in interest acquired the hedge through adverse possession. We disagree that Luu has met his burden to establish adverse possession.

"In order to establish a claim of adverse possession, there must be possession that is: (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile." ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 757, 774 P.2d 6 (1989). Each of these elements must exist concurrently for 10 years. Rayonier, 112 Wn.2d at 757; RCW 4.16.020(1). Because there is a presumption in favor of the holder of legal title, "the party claiming to have adversely possessed the property has the burden of establishing the existence of each element." Rayonier, 112 Wn.2d at 757.

To establish hostility, the claimant must "treat the land as his own as against the world throughout the statutory period." Chaplin v. Sanders, 100 Wn.2d 853, 860-61, 676 P.2d 431 (1984). The characterization of the possession "will be determined solely on the basis of the manner in which he treats the property," without regard to any subjective belief about the ownership of the land. Chaplin, 100 Wn.2d at 861. Furthermore, "[w]here a fence purports to be a line fence, rather than a random one, and when it is effective in excluding

an abutting owner from the unused part of a tract otherwise generally in use, it constitutes prima facie evidence of hostile possession up to the fence." Wood v. Nelson, 57 Wn.2d 539, 541, 358 P.2d 312 (1961).

Here, viewing the facts in the light most favorable to Luu, they do not establish hostility. Luu points to the existence of the fence and the parties' and their predecessors' maintenance of the hedge as evidence of hostility. We address both in turn.

First, the fence cannot properly be considered to establish hostility. The fence was not a straight line, but instead jumped south or north at points, such that it would not "purport[ ] to be a line fence." See Wood, 57 Wn.2d at 541; Lindberg v. Davis, 164 Wash. 680, 684, 4 P.2d 501 (1931) (approving trial court's finding that fence, which was "'not straight, but varie[d] to a marked degree in its direction at different places,'" was not a boundary line fence). There is no evidence that the fence ever served the purpose of "excluding" Urann from the other side, because from even the earliest records, the hedge served as a taller and more significant boundary than the fence. The evidence indicates that in 1985, the hedge was an effective boundary all the way down the property line, but there is no indication that the white fence was similarly effective because it is unknown whether the white fence spanned the length of the hedge. In recent years, the hedge was growing high over the wire fence, and visibility of the fence was obscured by laurel branches growing through it. Furthermore, while there was no evidence regarding the origin of the fence, Urann and her predecessor both stated that the fence enclosed the yard to contain their pets. Thus, the

evidence establishes that the hedge, rather than the fence, is what was "excluding . . . abutting owners." See Wood, 57 Wn.2d at 541. This conclusion is bolstered by the fact that a "hedge" is "a *fence or boundary* formed by a row of shrubs or low trees." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1048 (2002) (emphasis added). Given this context, we cannot conclude that the fence establishes hostility.

The only other evidence here that could tend to establish hostility is the maintenance of the hedge. The evidence shows that from 1988 to 1992, the occupant of the Luu property does not remember her neighbors maintaining the hedge, and that from 2006 to 2008, the occupant of the Urann property does not remember maintaining the hedge. At some point between 1992 and 2013, the owner of the Luu property hired a property management company which arranged for yard maintenance, including hedge trimming. The extent of this trimming is unknown, but on some occasions, Urann permitted the landscapers access to her backyard to trim the south side of the laurels. There is no evidence regarding whether Bitcon, the then-owner of the Luu property, ever directly communicated with the landscapers or directed them with respect to hedge maintenance. Finally, Urann's ex-husband stated that from 2008 to 2013, he performed "routine maintenance" by trimming the south side of the hedge up to the fence, which he thought was the boundary between the properties.

We cannot say, based solely on "the manner in which" Luu and his predecessor "treat[ed] the property," that this possession was hostile. Chaplin, 100 Wn.2d 861. The evidence shows that neighbors each tended to their side of

the hedge, at least to some extent. Maintenance on the north side of the hedge does not indicate hostility because "a landowner has the legal authority to 'engage in self-help and trim the branches and roots of a neighbor's tree that encroach onto his or her property.'" Herring v. Pelayo, 198 Wn. App. 828, 835, 397 P.3d 125 (2017) (quoting Mustoe v. Ma, 193 Wn. App. 161, 164, 371 P.3d 544 (2016)). No evidence establishes that Luu's predecessor routinely maintained the hedge south of the property line, let alone for 10 years continuously. Accordingly, even viewing the evidence in the light most favorable to Luu, he has not established hostility and therefore has not met his burden to show adverse possession of the hedge.

Luu disagrees and contends that he at least established adverse possession of the hedge at the front of the property due to the existence of the white fence. However, as we have concluded, the white fence did not establish hostility because the hedge, not the fence, excluded abutting owners. Thus, the court did not err by granting summary judgment for Urann on the issue of timber trespass, because Luu did not overcome the presumption that the hedge was on Urann's property.

Compliance with LCR 7(b)(7)

Luu next contends that the court erred by granting Urann's summary judgment motion because she did not comply with the local rules in filing her cross motion for summary judgment. We disagree.

King County Superior Court's local rules provide that "[n]o party shall remake the same motion to a different judge . . . without showing by declaration

the motion previously made, when and to which judge . . . , what the order or decision was, and any new facts or other circumstances that would justify seeking a different ruling from another judge." KING COUNTY SUPER. CT. LOCAL CIV. R. 7(b)(7). In this case, Urann did not include such a declaration in her cross motion for summary judgment. However, she did discuss the original motion and new evidence in a declaration. Furthermore, in his response to Urann's motion, Luu raised the issue of her first summary judgment motion and pointed out the differences between the two motions. The court chose to rule on the cross motion anyway. Because "[t]he court has inherent power to waive its rules," we find no basis to reverse the court's determination. Ashley v. Superior Court, 83 Wn.2d 630, 636, 521 P.2d 711 (1974).

Nuisance

Luu claims that the court erred by failing to find that the hedge constituted a nuisance and that therefore Luu's trespass was excused or, alternatively, Luu was entitled to an offset in damages.[2] Although Luu's summary judgment pleadings discussed the negative impacts that he purportedly suffered as a result of the hedge, he did not ask the court to make any determination on nuisance, either as excusing or mitigating Luu's trespass. In support of his contention on appeal, Luu makes no citations to the record or to any source of law.[3] In

[2] Luu contends that he was entitled to an offset for the damages he purportedly suffered from the hedge in two separate sections of his opening brief. Both of these sections suffer from the same defects, and we decline to address either issue.

[3] We note that the record is lacking in evidence that would establish the hedge was a nuisance—it includes two pest control receipts for yellow jacket and spider extermination and two vet receipts referring to treating Luu's dog for bee

reviewing an order on summary judgment, we consider only "issues called to the attention of the trial court." RAP 9.12. Furthermore, "[w]e do not consider conclusory arguments that are unsupported by citation to authority." Brownfield v. City of Yakima, 178 Wn. App. 850, 876, 316 P.3d 520 (2014). Therefore, we decline to address this issue.

Damages

Luu claims that the court erred by trebling damages, which is only permitted where the timber trespass is "willful," and by failing to provide an offset for damages due to the "overgrowth and intrusion" of the hedge.

RCW 64.12.030 provides that in a timber trespass case, "any judgment for the plaintiff shall be for treble the amount of damages claimed or assessed." However, "there must be an 'element of willfulness' on the part of the trespasser to support treble damages." Blake v. Grant, 65 Wn.2d 410, 412, 397 P.2d 843 (1964). Accordingly, if the trespasser establishes that the trespass was "casual or involuntary" or that the "defendant had probable cause to believe that the land on which such trespass was committed was his or her own," damages should not be trebled. RCW 64.12.040; Herring, 198 Wn. App. at 834.

We hold that Luu has not established that he had probable cause to believe the hedge was on his property. The only basis to support such a belief was the small wire fence on the south side of the hedge, which was barely visible and not a straight line. He has not claimed that anyone told him the hedge was

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stings. None of these records reference the hedge. Luu's only declaration simply states that he "had been experiencing issues since moving in which [he] believed to be caused by the hedges."

on his property, and indeed the former owner told him that she did not know where the property line was two days before he had the hedge cut down. He did not ask his neighbor where the property line was. He did not see the pipes or railroad ties that more accurately represented the true property line. He commissioned a survey after the hedge was cut down, again indicating that he was not sure where the property line was. Under these facts, we hold that Luu did not have probable cause to believe the hedge was on his property. See Blake, 65 Wn.2d at 412 (circumstantial evidence that trespasser did not locate starting point for determining boundary line, did not ask neighbors where the line was, and did not see previously blazed boundary line was sufficient to establish willfulness and support treble damages).

Attorney Fees

Both parties request attorney fees on appeal, and Luu appears to challenge the award of attorney fees below only on the basis that he should have prevailed. RAP 18.1 requires parties to request attorney fees in a section of their brief. "Argument and citation to authority are required under the rule to advise the court of the appropriate grounds for an award of attorney fees as costs." Stiles v. Kearney, 168 Wn. App. 250, 267, 277 P.3d 9 (2012). Here, Urann failed to cite any authority for an award of fees. Accordingly, we decline to grant her fees on appeal but affirm the award below.

We affirm.

WE CONCUR: