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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GLADYS TOMAN and WILLIAM TOMAN, Respondents, v. ROBYN RICKS, Appellant.	)	No. 81620-9-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, J. — Robyn Ricks seeks reversal of an order granting summary judgment to her neighbors Gladys and William Toman on their claim of adverse possession of a strip of land between the two properties. She also argues that the trial court erred in entering the legal description of the disputed area, dismissing her counterclaim for wrongful injury to property, and granting the Tomans an award of attorney fees. Finding no error, we affirm.

FACTS

In February 2019, Gladys and William Toman brought a quiet title action claiming title to a portion of their next-door neighbor's land by adverse possession. The neighbor, Robyn Ricks, answered and counterclaimed for wrongful injury to property. She claimed that the Tomans had wrongfully removed and damaged a small wire garden fence that she had placed on her land. The Tomans moved for

summary judgment on the issue of adverse possession. They presented the following facts in support of their motion.

In 1938, Gladys Toman's parents purchased a property on Densmore Avenue in Seattle. Gladys[1] inherited the property from her father in the 1970s. The property was her sole residence throughout her childhood and until the late 1990s, when she began splitting her time between the property and another home. The Tomans' grandsons lived on the property from 2013 to 2017, but the house is now vacant. Ricks purchased the adjacent property to the north in 1987.

Gladys asserted that there had been a fence, gate, and pathway along the northern edge of her property since at least the 1940s. The fence extends west toward the street from the southwest corner of Ricks' garage and connects to a gate on the northern side of the Tomans' house. The gate leads to the Tomans' backyard. A narrow strip of land and concrete pathway several feet wide extends toward the street between Ricks' driveway and the north side of the Tomans' house and allows access to the backyard though the gate.

Gladys stated that she always believed and acted as though the fence, gate, and pathway were part of her property. She believed that the boundary line between the two properties was marked by the fence and the edge of the tire tracks in Ricks' driveway. She and her family regularly maintained and crossed over the pathway for ingress and egress to the backyard, and used and maintained the property inside the fence as part of the backyard and garden. Gladys stated that

[1] For clarity, we will refer to the Tomans individually by their first names. We intend no disrespect.

neither she nor her family ever sought or received permission from anyone to use or maintain the disputed area.

Gladys recalled meeting Ricks when she moved into the adjacent property around 1987. Gladys asserted that she had never communicated to Ricks any intent to relocate the fence, nor had she sought or received any permission from Ricks to continue using the disputed area. She stated that she had no reason to doubt that the disputed area was part of her property until she received a letter from Ricks' attorney in 2018 demanding that she remove and relocate the fence. She learned from the letter that Ricks intended to build a new fence on the property line Ricks had surveyed in 2016. Gladys declined to comply because she believed she owned the disputed area. The Tomans submitted four declarations from friends and neighbors confirming that the fence, gate, and pathway were unchanged since the 1950s and that Gladys' family had consistently used and maintained the disputed area as if they owned it.

Ricks opposed summary judgment and argued that genuine issues of material fact remained. She submitted a declaration in which she stated that she had many conversations with Gladys over the years in which Gladys acknowledged that the fence stood six to eighteen inches north of the true property line. Ricks stated that she made contemporaneous records of the conversations in datebooks and attached relevant pages from 1987, 1990, 2002, 2006, 2010, 2011, and 2016. She submitted three declarations from witnesses corroborating her understanding that the fence was not on the true property line.

Ricks also submitted excerpts from Gladys' deposition and the Tomans' responses to interrogatories. In her deposition, Gladys stated that she had no idea when the fence, gate and pathway were built or who built them, and that she had no memory of the property without these features. She said that her family had a flower garden inside the fence and used the pathway for cleaning the side of the house, washing windows, and cleaning out the chimney. She also described using the pathway as a play area when she was a child and for access to the garbage cans from the street. Gladys stated that it would be "extremely surprising if [her father] ever asked for any permission to do anything in the disputed area because there never any question about it." When asked how she knew that no one had given permission to her parents to use the disputed area, Gladys responded,

> [I]t wasn't anything that was ever discussed in any way between neighbors of any sort ever. . . . There was never any question of any kind about seeking permission to do anything. Neighbors were neighbors. They weren't any—there wasn't any permission to do things. We just did them, and there was never any question.

The trial court granted summary judgment for the Tomans and ordered that title to the disputed area was quieted in Gladys Toman. The court's order did not mention the legal description of the disputed area or Ricks' counterclaim. The court also stated that the Tomans were entitled to an award of attorney fees under RCW 7.28.083(3). A judgment was entered against Ricks for attorney fees and costs in the amount of $27,251.97.

The Tomans later moved for summary judgment on Ricks' counterclaim for wrongful injury to property and an order supplementing the judgment for additional attorney fees and costs. Gladys asserted that Ricks had placed a wire garden

fence in front of the gate and extending out to the street while the ownership of the area was under dispute. She stated that the fence impeded her ability to move the trash cans down the pathway to the street as was her custom. Ricks responded that she had installed the garden fence about four inches north of the boundary line shown in the 2016 survey to ensure that the fence would not be on the Toman property.

The court granted summary judgment, dismissed Ricks' counterclaim, and denied the Tomans' motion for additional attorney fees and costs. The order also granted declaratory judgment in favor of the Tomans naming them sole title owners of the disputed area and enjoining Ricks from interfering with their use of the area. The court attached a legal description of the adverse possession area:

> THAT PORTION OF LOT 11, BLOCK 42, LAKE UNION ADDITION TO THE CITY OF SEATTLE, ACCORDING TO THE PLAT THEREOF, RECORDED IN VOLUME 1 OF PLATS AT PAGE 238, RECORDS OF KING COUNTY, WASHINGTON, BEING A PORTION OF THE NORTHEAST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 18, TOWNSHIP 25 NORTH, RANGE 4 EAST OF THE WILLAMETTE MERIDIAN, DESCRIBED AS FOLLOWS:
>
> BEGINNING AT THE SOUTHWEST CORNER OF SAID LOT 11; THENCE SOUTH 88°26'37" EAST, ALONG THE SOUTH LINE OF SAID LOT 11, A DISTANCE OF 93.77 FEET; THENCE NORTH 0°49'51" EAST, A DISTANCE 0.53 FEET; THENCE NORTH 88°03'47" WEST, A DISTANCE OF 40.31 FEET; THENCE NORTH 88°26'37" WEST, ON A LINE PARALLEL WITH THE SAID SOUTH LINE OF LOT 11, A DISTANCE OF 53.46 FEET TO THE WEST LINE OF SAID LOT 11; THENCE SOUTH 01°34'18" WEST, ALONG SAID WEST LINE OF SAID LOT, A DISTANCE OF 0.80 FEET TO THE POINT OF BEGINNING.
>
> Containing 69 SQ. FT.

Ricks appealed.

ANALYSIS

I. Summary Judgment

We review summary judgment orders de novo, performing the same inquiry as the trial court. Owen v. Burlington N. & Santa Fe R.R. Co., 153 Wn.2d 780, 787, 108 P.3d 1220 (2005). We examine the pleadings, affidavits, and depositions put before the trial court and view all facts and reasonable inferences in the light most favorable to the nonmoving party. Id. Summary judgment is proper only if "the record before the trial court establishes 'that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Id. (quoting CR 56(c)). If the moving party adequately supports its motion, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." CR 56(e). "A nonmoving party in a summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value." Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

A. Adverse Possession

Ricks argues that the Tomans failed to meet their burden to prove two of the required elements of adverse possession. To establish a claim for adverse possession, a claimant must prove that their possession of the property was "(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). "Possession of the property with each of the necessary concurrent elements must exist for the

statutorily prescribed period of 10 years." Id. (citing RCW 4.16.020). Because the presumption of possession rests in the person who holds legal title, the party claiming adverse possession bears the burden to establish each element by a preponderance of the evidence. Id.; Teel v. Stading, 155 Wn. App. 390, 394, 228 P.3d 1293 (2010). Adverse possession is a mixed question of law and fact; whether the necessary facts exist is a question for the trier of fact, but whether the facts as found constitute adverse possession is a question of law. Chaplin v. Sanders, 100 Wn.2d 853, 863, 676 P.2d 431 (1984).

1. Hostility

Ricks first contends that the Tomans failed to prove that their use of the disputed area was hostile. "In adverse possession cases, 'hostile' does not mean animosity; rather, it is a term of art which means that the claimant possesses property in a manner not subordinate to the title of the true owner." Teel, 155 Wn. App. at 395. The hostility element of adverse possession requires that the claimant treat the disputed land "as his own against the world throughout the statutory period." Chaplin, 100 Wn.2d at 860–61. The claimant's subjective belief regarding their interest in the land and intent to dispossess or not dispossess the true owner is irrelevant to this analysis. Id. at 861. Division Three of this court has recognized that one "general test of hostility is whether '[c]onsidering the character of possession and the locale of the land, is the possession of such a nature as would normally be objectionable to owners of such land?'" LeBleu v. Aalgaard, 193 Wn. App. 66, 72, 371 P.3d 76 (2016) (quoting 17 WILLIAM B. STOEBUCK & JOHN W.

WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 8.12, at 526 (2d ed. 2004)).

"Fences are typical expressions of hostility, evidencing that an adverse possession claimant is treating the land inside the fence 'as [his] own as against the world.'" Ofuasia v. Smurr, 198 Wn. App. 133, 144, 392 P.3d 1148 (2017) (quoting Acord v. Pettit, 174 Wn. App. 95, 107–09, 302 P.3d 1265 (2013)). However, Division Two of this court has indicated that installation of a fence does not necessarily exceed the express permission to use another's property and put the true owner on notice of an adverse use. See Teel, 155 Wn. App. at 396–97 ("While the Teels assert that their fence put the appellants on notice of their adverse use, the trial court did not find that the Teels' fence exceeded, from the appellants' viewpoint, the permission given to them to use the property. In the absence of such a finding, the statutory adverse possession period did not begin to run.").

"Permission, express or implied, from the true owner negates the hostility element because permissive use is inconsistent with making use of the property as would a true owner." Id. at 394. Washington courts apply an initial presumption of permissive use when "there is a reasonable inference of neighborly sufferance or acquiescence." Gamboa v. Clark, 183 Wn.2d 38, 50–51, 348 P.3d 1214 (2015). "A finding of permissive use is supported by evidence of a close, friendly relationship or a family relationship between the claimant and the property owner." Granston v. Callahan, 52 Wn. App. 288, 294, 759 P.2d 462 (1988).

Here, Ricks argues that the Tomans failed to rebut the presumption of permissive use. The Tomans argue that the presumption of permissive use was inappropriate because there was insufficient evidence that the Tomans' use of the disputed area was the result of neighborly sufferance or acquiescence before or after Ricks' arrival. They contend that Ricks presents no more than mere speculation on this topic.

The Tomans have the better argument. There is no evidence that Gladys' family received express permission from Ricks' predecessors to use the disputed area. Ricks presents no direct evidence that the initial use was impliedly permissive and insufficient evidence that the presumption of permissive use should apply. Gladys acknowledged a generally friendly atmosphere in the neighborhood, but there is no evidence to indicate that her family had a particularly close relationship with Ricks' predecessors. As noted above, fences are typical expressions of hostile use. Although not determinative of the issue, in the context of a dense Seattle residential neighborhood, it is not reasonable to infer that building a fence on another's property would be greeted with neighborly sufferance or acquiescence. A presumption of permissive use was not appropriate for the fenced portion of the disputed area, and the Tomans demonstrated that their use of this area was hostile.

Whether a presumption of permissive use should apply to the strip of land and pathway leading from the gate toward the street is a closer issue. Although use of such a pathway could be the result of neighborly accommodation in some circumstances, considering the location of this land, the Tomans' use of it was not

likely to be tolerated out of neighborly courtesy. The Tomans presented evidence that Gladys and her family used and maintained the pathway as sole owners, and there is no evidence in the record that Ricks' predecessors similarly used or maintained the pathway. Gladys' subjective belief that she owned the pathway is irrelevant to this analysis, but the fact that she made consistent use of the disputed area as an owner would supports a finding of hostility.

2. Exclusivity

Ricks also argues that the Tomans failed to establish exclusive use of the entire disputed area. "Generally, shared occupancy of disputed property by the adverse possessor and the title owner precludes 'exclusive' possession." Crites v. Koch, 49 Wn. App. 171, 174, 741 P.2d 1005 (1987). However, the claimant's possession need not be absolutely exclusive for purposes of adverse possession; rather, it must be "of a type that would be expected of an owner under the circumstances." Id. The nature and location of the land are important factors in this consideration. Id.

The Tomans argue that they were not required to establish absolutely exclusive use and that Ricks offered only mere speculation about the use of the disputed area prior to her arrival in 1987. They also argue that the evidence of Ricks' alleged use of the disputed area after 1987 is insufficient to raise a genuine issue of material fact on the element of exclusivity.

Ricks does not appear to contest that Gladys and her family exclusively used the fenced portion of the disputed area. Regarding the pathway, the Tomans presented evidence of their consistent use of the area in a manner comporting with

the use of an owner. Ricks provides only speculation as to the previous owner's potential use of the pathway. And, even if Ricks' predecessors had to step into the area when exiting the passenger side of a car parked in Ricks' driveway, such incidental use would not be sufficient to destroy the element of exclusivity.

The Tomans established that their use of the disputed area was open and notorious, actual and uninterrupted, exclusive, and hostile for a period of over ten years before Ricks moved into the neighborhood. The trial court did not err in granting summary judgment on the issue of adverse possession.

B. Legal Description

Ricks contends that, even if summary judgment on the adverse possession issue was proper, the trial court erred in adopting the Tomans' proffered legal description of the disputed area. She contends that the legal description adopted by the trial court expanded the disputed area and extended it "by roughly half a foot into the southern track of Ricks's driveway" such that she "could no longer drive a car down it and would be unable to park her car in the garage at the end of the driveway without driving over the land granted to Toman." The Tomans argue that Ricks provides no evidence of how the legal description of the adversely possessed land is incorrect.

In their complaint, the Tomans described the disputed area primarily as the space behind the fence but referred to "a gate affixed to the portion of the fence that sits within the Disputed Area that the Plaintiffs (and their predecessors in interest) have used as a pathway to the backyard for a period of five decades or

more." However, in their motion for summary judgment, the Tomans defined the disputed area more specifically:

> Since at least the 1940s, there has been a fence on what Plaintiff thought was the boundary between Lot 10 and Lot 11, as well as gate affixed to said fence which opens into a narrow pathway leading to the street (the land under the fence, gate, and pathway constitute "the Disputed Area").

In Washington, a complaint must give sufficient notice to the defendant of the nature of the claim being brought. Adams v. King County, 164 Wn.2d 640, 657, 192 P.3d 891 (2008). "[I]nitial pleadings which may be unclear may be clarified during the court of summary judgment proceedings." State v. Adams, 107 Wn.2d 611, 620, 732 P.2d 149 (1987).

Here, although the complaint did not make abundantly clear that the pathway was included in the Tomans' claim for adverse possession, the motion for summary judgment specifically included the pathway running from the gate to the street as part of the disputed area. Ricks has not shown that the trial court erred in adopting a legal description of the adverse possession area that included this section of the property.

C. Counterclaim

Ricks argues that, because the court erred in concluding that the disputed area had been adversely possessed by the Tomans, the court also erred in dismissing Ricks' counterclaim for wrongful injury to her property and improvements under RCW 4.24.630. The Tomans argue that the dismissal of the counterclaim should be affirmed with the affirmance of the adverse possession decision and that the unchallenged findings that Ricks' wire garden fence had

virtually no value and the Tomans did not cause any damage to Ricks' land provide a sufficient alternative basis to affirm the dismissal of Ricks' counterclaim for trespass.

Because we conclude that the court did not err in granting summary judgment for the Tomans, the property that Ricks claims was injured by the Tomans' actions did not belong to her. The court did not err in dismissing Ricks' counterclaim.

D. Attorney Fees

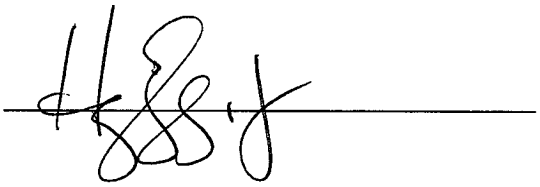
Ricks contends that we should reverse the award of attorney fees under RCW 7.28.083 to the Tomans because they should not have been the prevailing party. The court may enter an award for reasonable attorney fees and costs to the prevailing party in an action asserting title to real property by adverse possession "if, after considering all the facts, the court determines such an award is equitable and just." RCW 7.28.083(3). In accordance with our conclusion that summary judgment was warranted, the court did not err in awarding attorney fees and costs to the Tomans as the prevailing party.

E. Attorney Fees on Appeal

Ricks requests an award of attorney fees on appeal under RCW 7.28.083 and RAP 18.1. The Tomans also request an award of attorney fees on appeal on the same bases and based on their argument that the appeal is frivolous under RAP 18.9 and RCW 4.84.185.

Attorney fees may be awarded on appeal when authorized by a contract, statute, or recognized ground of equity and when properly requested by a party. RAP 18.1; Labriola v. Pollard Grp., Inc., 152 Wn.2d 828, 839, 100 P.3d 791 (2004). This court has recognized RCW 7.28.083(3) as a proper statutory basis for an award of attorney fees on appeal. See Workman v. Klinkenberg, 6 Wn. App. 2d 291, 309, 430 P.3d 716 (2018). Both parties set out their requests for attorney fees on appeal in dedicated sections of their opening briefs, in compliance with RAP 18.1. Because the Tomans are the prevailing party on appeal, they are entitled to an award of reasonable attorney fees on appeal upon compliance with the requirements set out in the rule.

Affirmed.



WE CONCUR: