

NO. 36626-6-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

THOMAS TROTZER

Appellant,

v.

GARY VIG and SHERRIE VIG ,

Respondents

RESPONDENT'S REPLY BRIEF

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TABLE OF AUTHORITIES

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I. INTRODUCTION

The narrow issues in this case as framed by Appellant do not reflect the issues that were before the trial court in the five-day bench trial. For the convenience of the Court and the parties instead of completely reframing the issues in my briefing I will to respond to Appellant's narrow issues by giving a more complete context with my response to each alleged error. The main issues were: Did the statute of limitations apply to the 2000 trespass? And was the Vigs 2003 trespass willful?

In order to determine if there was an applicable exception to the time barred 2000 trespass the trial court considered the following issues: Was there a written contract? If so, there could be a viable contract cause of action rather than a timber trespass action. If there was a contract what were its terms? Was the only matter agreed upon an assurance that the Vigs would not claim adverse possession occurred by their use of the portion of the trail on Mr. Trotzer's property? If there were other terms were they met? Specifically if the Vigs were required to "consult" with Mr. Trotzer before doing future work near the property line did the Wal-Mart discussion, meet that term? Was the matter resolved by accord and satisfaction?

The only issue regarding the 2003 trespass is, did the trial court abuse its discretion in finding the trespass was not willful, given all the facts, including that Mr. Trotzer told the Vigs the fence was the property line? Finally, if no damages

are awarded in a quiet title, and the boundary line was not disputed, does a CR 68 offer of judgment still apply, even if at the close of evidence counsel requests the boundary line be set in accordance with the evidence presented at trial?

II. STATEMENT OF THE CASE

In the summer of 2000 Gary Vig made a walking trail with his tractor for his wife Sherry Vig. RP 416 lines 6-14. Mr. Vig followed stakes and markers in the area and afterward Mr. Trotzer told Mr. Vig he believed Mr. Vig went over the property line. RP 269 line 3 to 272 line 21. At Mr. Trotzer's request Sherrie Vig wrote Mr. Trotzer a letter both she and Mr. Vig signed, addressing Mr. Trotzer's expressed concern that the Vigs were not attempting to adversely possess his land. Ex-p-31, Ex-p-32, CP 36 line 13 to 37 line 1, RP 421 line 1 to 422 line 6, RP 91 line 13 to 92 line 5. The notarized letter also contained an apology and a statement that the Vig's intended to measure the property (when it was drier) and an intention to "consult" with Mr. Trotzer before working near the property line in the future. Ex-p-32. Mr. Trotzer responded by letter that he considered the matter fully resolved. Ex-d-3. Mr. Trotzer also accepted Mr. Vig's offer to grade his driveway as compensation for damages caused by the 2000 trespass. Ex-d-4, RP 77 line 9 to 78 line 3. Mr. Trotzer gave the Vigs permission to continue to use the portion of the trail on his property, and specifically gave permission for the Vig's grandchildren to use the trail for their quad runners. RP 71 lines 1-12, RP 425-26.

The Vigs had a discussion with Mr. Trotzer in Wal-Mart during the holiday season of 2001-2002. They discussed the Vig's planned extension of the walking trail, and the location of the property line. RP 280 line 18 to 281 line 6, RP 428 line 3 to RP 431 line 2. There was conflicting testimony, but Mr. Vig testified that Mr. Trotzer told him the fence was the property line and the trial court found that Mr. Trotzer told the Vigs the fence was the property line. RP 275 line 11 to 276 line 2, RP 291 line 7 to 17, CP 7 line 15. When Mr. Vig extended the trail in 2003 he followed the fence line. The fence was not constantly in clear view. RP 286 line 12 to 288 line 12. A five-day bench trial was held in Mason County in May of 2007. RP (see table of contents). The honorable James B. Sawyer II heard all of the testimony, walked the property at issue, was the fact finder and issued oral, and written opinions. RP 297-298 (notation on record property inspected), RP 631-647 (court's oral opinion), CP 7. The trial court's oral opinion reflects that the court recognized that Mr. Vig was six feet off in his testimony about the width of his property, and that neither party knew the correct location of the property line. RP 639 line 2 to 25. The trial court found that the statute of limitations had passed on the 2000 trespass, and that even if the statute of limitations had not passed the issue was resolved by accord and satisfaction. CP 8 line 19-21. The court further found that no contact existed giving rise to a breach of contact claim. CP 8 lines 15-18. The trial court found that the Vig's trespass was not willful and found that Mr. Vig reasonably relied upon the fence line. RP

640 line 4 to 641 line 2, CP 9 line 1. The trial court found that the Vigs and Mr. Trotzer had both trespassed and offset damages. CP 8 line 8, CP 9 lines 21-23. Mr. Trotzer was awarded single damages for the 2003 trail extension and the Vigs were awarded damages to clean up the debris Mr. Trotzer had thrown onto their property. CP 9 lines 14-23. No damages were awarded for the quiet title claim. The damage calculations have not been appealed.

III. ARGUMENT

A. LEADING QUESTIONS

Appellant claims it was error for the Court to disallow leading questions of Gary Vig (a party opponent) during direct examination, unless plaintiff could demonstrate he was hostile.

The controlling evidence rule is ER 611, which grants courts broad discretion.

➔RULE 611. MODE AND ORDER OF INTERROGATION AND

PRESENTATION

(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross Examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading Questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness'

testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation **may be** by leading questions. (emphasis added). ER 611

The evidence rule does not make mandatory the use of leading questions. Therefore, it is within the court's discretion.

It is well settled in Washington that the trial court has broad discretion "to conduct [a] trial with dignity, decorum and dispatch and [to enable it to] maintain impartiality...

The standard of review for alleged violations of ER 611 is manifest abuse of discretion. See State v. McDaniel, 83 Wash. App. 179, 185, 920 P.2d 1218 (1996).

The trial court abuses discretion when its decisions are manifestly unreasonable, based on untenable grounds, or made for untenable reasons. State ex. rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

State v. Hakimi, 124 Wash.App. 15, 19, 98 P.3d 809 (2004).

The standard of review is manifest abuse of discretion. There has been no showing that the court abused its discretion. In addition, Plaintiff has not shown any prejudice by not being allowed to ask leading questions.

B. OFFER OF JUDGMENT

Mr. Trotzer contends that it was error for the court to conclude the Offer of Judgment exceeded the damages awarded by the court, because it did not include damages for the quiet title.

The trial court ordered Appellant to pay \$214.50 in costs and fees pursuant to a CR 68 offer of judgment that exceeded the damages. CP 10 lines 7-9

First, no damages were awarded for the quiet tile. CP 9 lines 5-13. Second, title was never disputed. Defendants offered several times before and during trial to stipulate to the boundary line. CP 93-94 lines 15 to 3 (during deposition), RP 292 line 16 to 293 line 7, CP 182 lines 14 to 16. There was no reason to ever bring a quiet title claim as the Vig's represented all along that they were willing to stipulate to the boundary line. The court's order explicitly states title was never disputed. CP 9 lines 5-7. The purpose of CR 68 is to discourage needless litigation. There was no reason to bring a quiet title action. At the end of the trial defense counsel made a motion to conform the boundary line to the evidence, which the court rejected for numerous reasons. RP 629 line 10 to 631 line 3. However this does not change the fact that the boundary line was stipulated to over and over again. Third, appellant cites no authority at all for the proposition that assertion of a quiet title claim makes mandatory that it be addressed in an offer of judgment.

C. STATUTE OF LIMITATIONS

The statute of limitations on trespass to land is three years. RCW 4.16.080 (1). Damages in trespass are limited to those occurring within three years preceding the suit, even if the trespass is continuing, unless an exception to the statute of limitations applies. Bradley v. American Smelting and Refining Co., 104 Wash.2d 677, 709 P.2d 782, 23 ERC 1851, 16 Env'tl. L. Rep. 20, 346 (1985). The trial court found that the statute of limitations barred the 2000 trespass. CP 8 line 12.

EQUITABLE TOLLING

Mr. Trotzer has requested that the statute of limitations be extended on the timber trespass statute due to the doctrine of equitable tolling. For equity to apply there must be no adequate remedy at law. City of Lakewood v. Pierce County, 144 Wash.2d 118, 126 30 P.3d 446 (2001). If there is a contract there is an adequate remedy at law. If there was a binding promise intended then contract law applies. If no promise was intended by the exchanged documents then equity would not apply, because there was no promise.

In addition, for equitable tolling to apply Mr. Trotzer must not have known all the facts about the 2000 trespass. The statute of limitations begins to run at the time the injury occurs unless the plaintiff can show due diligence was exercised and he still did not know or reasonably should not have known a trespass occurred. Will v. Frontier Contractors, Inc., 121 Wash.App. 119, 124, 125, 89 P.3d 242 (2004).

Equitable tolling is not available to a party who 'knew all necessary facts' before the running of the statutory time limit. State v. Littlefair, 112 Wn.App. 749, 759, 51 P.3d 116 (2002) (citing In re Pers. Restraint of Stoudmire, 145 Wn.2d 258, 36 P.3d 1005 (2001)); see also In re Pers. Restraint of Greening, 141 Wn.2d 687, 697, 9 P.3d 206 (2000). Here, Mr. Trotzer knew all of the facts about the 2000 trespass and did not bring a cause of action, therefore equitable tolling does not apply.

Mr. Trotzer would have the court believe that he did not know all of the facts because, Mr. Vig purposely deceived him and planned to wait three years to extend the trail onto his property again after the statute of limitations passed. Consequently, based on this deception Mr. Trotzer claims he ought to be able to collect damages for the stale claim. There was no plan or deception. In fact, Mr. Vig followed the fence line that Mr. Trotzer told him was the property line, when the trail was extended in 2003. So if there was any deception here it was Mr. Trotzer's representation.

In addition, equitable tolling does not fit the facts before the court, because equity does not require the statute to be tolled. Mr. Trotzer was content with the result of the 2000 trespass.

“Equitable tolling is a remedy that “permits a court to allow an action to proceed **when justice requires it**, even though a statutory time period has nominally elapsed. Equitable tolling is generally used only sparingly, when the plaintiff exercises diligence and there is evidence of bad faith, deception, or false assurances by the defendant.” (emphasis added) In re Carlstad, 150 Wash.2d 583, 593, 80 P.3d 587(2003) citing State v. Duvall, 86 Wash. App. 871, 874, 940 P.2d 671 (1977).

Justice does not require equitable tolling. The evidence was Mr. Trotzer was perfectly happy with the outcome of the 2000 trespass, until 2003 when he considered the possibility of treble damages. Mr. Trotzer told the Vigs he was glad to have access to a part of his property he had not had access to before. RP 422 lines 7 –12. Mr. Trotzer wrote a letter saying he considered the matter resolved. Ex-d-3. Mr. Trotzer had his driveway graded and graveled. Ex-d-4. RP 77 line 9 to 78 line 3.

The content of Mr. Trotzer's letters show his satisfaction:

June 15, 2000

Gary and Sherrie,

I received your notarized letter of June 13, 2000, pertaining to the property line discrepancies and accept the letter and it's intent fully as resolve of the situation.

Thank you, for your prompt attention to the matter, and looking forward to having you as neighbors.

Sincerely,

Thomas F. Trotzer

Ex-d-3

August 24, 2000

Gary & Sherrie,

I want to thank you for grading my driveway last week. It is much improved. It hasn't had a complete grading for years.....!!

Sincerely,

Tom Trotzer

Ex.- d- 4

Mr. Trotzer received his assurance the Vigs were not attempting adverse possession by creating the portion of the trail on his property. Mr. Trotzer had entirely

friendly communications with the Vigs and gave them and their grandchildren permission to use the trail. RP 71 lines 1-12, RP 425-26.

D. ACCORD AND SATISFACTION

Mr. Trotzer alleges that there was a contact in which the Vig's promised Mr. Trotzer "notice" before they did future work and that no notice was given, so accord and satisfaction could not apply.

Nowhere in any of the notes and letters exchanged was the term notice used.

The trial court found that:

Even if the statute of limitations did not bar the 2000 claim and even if there was a basis to assert the existence of a contract the Court finds that the issue of the 2000 trespass was addressed by accord and satisfaction.

CP 8 line 19-21

First, there was no contact, and even if there was one, no "notice" was required, which will be addressed in the following "Contract" section. The parties agreed the matter was resolved back in 2000.

Accord and satisfaction is based upon the law of contract. Teel v. Cascade-Olympic Construction Co., 68 Wash.2d 718, 415 P.2d 73 (1966). For an accord and satisfaction to be binding and thus discharge the earlier obligation, there must be a bona fide dispute, an agreement to settle that dispute, and then performance of that agreement. Boyd-Conlee Co. v. Gillingham, 44 Wash.2d 152, 266 P.2d 339 (1954); Dodd v. Polack, 63 Wash.2d 828, 389 P.2d 289 (1964).

Eagle Ins. Co. v. Albright, 3 Wash.App. 256, 271-72, 474 P.2d 920 (1970).

In short, the Vigs trespassed in 2000. Mr. Trotzer requested a letter from the Vigs stating they were not attempting to adversely possess his property. Ex-p-31, Ex-p-32, CP 36 line 13 to 37 line 1, RP 421 line 1 to 422 line 6, RP 91 line 13 to 92 line 5. The Vigs provided the requested letter. Ex-p-31, Ex-p-32. Mr. Trotzer wrote back saying he consider the matter “fully resolved.” Ex-d-3 the matter was fully resolved at that time. Then on top of that, Mr. Trotzer accepted the grading and graveling of his driveway as compensation as well. Ex-d-4, RP 77 line 9 to 78 line 3. The 2000 trespass was fully resolved by agreement of the parties and therefore the trial court’s finding was correct.

E. BREACH OF CONTRACT CLAIMS FOR 2000 DAMAGES

Mr. Trotzer first alleges that the notes and letters exchanged constitute a settlement agreement, and then alleges that it was breached because no “notice” was provided.

First not all necessary elements of a contract are present in the notes and letters exchanged. Second, if there was a contract the only agreed upon term was that the Vigs would not attempt adversely possess Mr. Trotzer’s property based on the trail. Third, even if a binding promise was requested and provided it was that the Vigs would “consult” before future work near the property line. The undisputed evidence was that the Vigs consulted with Mr. Trotzer about a trail extension and the location of the property line.

CONTRACT FORMATION

In order to form a contract there must be three essential elements. The subject matter must be agreed upon. The material terms must be agreed upon and the parties must intend to be bound.” Thus, the party moving to enforce a settlement agreement carries the burden of proving that there is no genuine dispute over the existence and material terms of the agreement.” Brinkerhoff v. Campbell, 99 Wash.App. 692, 696-97, 994 P.2d 911 (2000) citing Ferree, 71 Wash.App. at 41, 856 P.2d 706 (1993). It is clear from the evidence that there was no agreement as to subject matter and no intent to be bound. This is why the court found no contract existed. The purpose of the notarized letter was undisputed, it was to assure Mr. Trotzer pursuant to his request that the Vigs were not attempting to adversely possess Mr. Trotzer’s property. Ex-p-31, Ex-p-32, CP 36 line 13 to 37 line 1, RP 421 line 1 to 422 line 6, RP 91 line 13 to 92 line 5.

The cover letter from the Vigs dated June 13, 2000 said:

Hi Tom,

We hope that the enclosed notarized document from us will put your mind at ease. We tried to make it clear that we will not make any claims against your property, which I believe from our conversation, was your main concern.

We enjoyed meeting and visiting with you and hope to see you around this summer, (if it ever gets here!) We hope to have a congenial relationship with all of our new neighbors, starting with you. Take care. See you soon.

Sincerely,

Gary and Sherrie Vig

Ex-p-31

The accompanying notarized letter dated June 12, 2000 reads:

While making a trail/road along the west line of our property located at: S.E. Arcadia RD., Shelton, Wa., we have apparently erroneously strayed onto your property. This was an honest error on our part. You have our wholehearted apology for the mistake. We want you to know that this trail/road will give us no claim whatsoever for use of, or trespass of your property.

This road/trail has absolutely nothing to do with real property lines and we will never make any claim whatsoever to use or ownership of your property. Because of the woods and swamp we still do not know exactly where the property line is, but we will take measurements as soon as it dries out, to determine where the property line is located. In the future we will never do any work near the property line without first consulting with you.

Thank you for your understanding.

Gary and Sherrie Vig.

Ex-p-32

The language about consulting was no more intended to be material than the language about taking new measurements when the swamp dried out. The cover letter says that Mr. Trotzer requested assurance about adverse possession. The only testimony provided was that Mr. Trotzer asked for assurances that the Vigs were not trying to adversely possess his land by making and using the portion of the trail that extended onto his property. Even Mr., Trotzer affirmed at trial that his interpretation of the agreement at the time was "That the Vigs would not be on the property, making use of the property in the future, they make no claim to the property in the future." RP 91 line 21 to 92 line 5. It appears Mr. Trotzer was familiar with the concept of adverse possession because he was attempting to adversely possess another neighbor's property. RP 57 line 6 to 62 line 3, RP 316 line 14 to 317 line 2.

Mrs. Vig then drafted a letter, which was intended to respond to that concern, to apologize, and to assure Mr. Trotzer they did not act intentionally and wanted to be good neighbors. Ex-p-31, Ex-p-32, CP 36 line 13 to 37 line 1, RP 421 line 1 to 422 line 6, RP 91 line 13 to 92 line 5. A cover letter accompanied the notarized letter, which stated explicitly that the letter was intended to address adverse possession. ex-p-31. Litigation was never mentioned and all correspondence and contacts were friendly. RP 218 line 8 to 219 line 3. Ex-p-31, Ex-p-32

There is a difference between an intention to do something in the future like measuring, a swampy area and discussing a property line, and a promise. No promise was intended here. A promise, in the sense of a commitment, is to be distinguished from a description of a future event. Peoples Mortgage Co. v. Vista View Builders, 6 Wn.App. 744, 748-49, 496 P.2d 354 (1972). There was no contract.

BREACH OF CONTRACT

Even if the apology letter was intend to be a contract, the “term” alleged to have been violated was fulfilled. It is contained in the portion of the letter following the apology and assurance about adverse possession :

Because of the woods and swamp we still do not know exactly where the property line is, but we will take measurements as soon as it dries out, to determine where the property line is located. In the future we will never do any work near the property line without first consulting with you.

Thank you for your understanding.

Ex-p- 32

The Vigs discussed the property line and proposed trail extension with Mr. Trotzer at Wal-Mart during the 2001- 2002 holiday season, during a rather lengthy conversation. RP 406 line 12.

The uncontroverted evidence was the Vigs “consulted” with Mr. Trotzer about the trail extension and the property line. RP 428 line 3 to 431 line 1, RP 282 line 3 to 283 line 1. Mr. Trotzer admitted that during testimony that he considered that conversation a consultation. RP 217 lines 10 to 21.

F. TREBLE DAMAGES

The court found that between 2000 and 2003, Mr. Trotzer told the Vigs the fence was the property line and that Mr. Vig followed the fence. Mr. Trotzer denied he told the Vigs the fence was the property line. However, since this was a five-day bench trial the court was the fact finder and therefore, was called upon to determine the credibility of the testimony. It would be illogical for the court to find that Mr. Vig followed the fence line pursuant to Mr. Trotzer’s instructions and then find that the 2003 trespass was willful.

As for the issues raised by Mr. Trotzer : the court did not address whether Mr. Vigs following what he believed were survey markers in 2000 was reasonable, because the court found that the matter was time barred, and addressed by accord and satisfaction.

Similarly, the court did not specifically address the other efforts Mr. Vig made to locate the property line in 2003, because Judge Sawyer found that Mr. Vigs

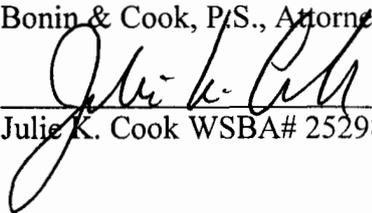
following the fence line as directed by Mr. Trotzer was sufficient evidence to support Mr. Vig's assertion that the trespass was not willful. RP 640 line 4 to 641 line 2. Reviewing courts must defer to the trier of fact when there is conflicting testimony, credibility determinations, and weighing of the evidence. See State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Consequently, it was not relevant that Mr. Vig testified in court that his property was six feet wider than it actually is, and that Mr. Vig could not see the fence line the entire time he was on the tractor. The trial court after days of testimony and walking the property found that Mr. Vig's trespass was not willful. Mr. Vig made a reasonable attempt to locate the property line.

IV. CONCLUSION

Whether or not to allow leading questions is within the trial court's discretion. When a boundary line is stipulated to, a CR 68 offer of judgment need not address a quiet title claim to be valid. The statute of limitations barred the 2000 trespass, and neither equitable tolling nor a contract cause of action exists to revive that claim. In any case the 2000 trespass was resolved by accord and satisfaction. The 2003 trespass was not willful given that Mr. Vig followed the fence line as instructed by Mr. Trotzer. Consequently the Vigs request that the trial court's determinations as the fact finder, having heard the evidence and walked the property be affirmed.

Respectfully submitted this 21st day of March 2008

Bonin & Cook, P/S., Attorneys for Respondents


Julie K. Cook WSBA# 25298

CERTIFICATE OF SERVICE

I, Julie K. Cook certify under penalty of perjury of the laws of the State of Washington that on March 21, 2008 I caused to be mailed the following documents by US Mail 1st class postage prepaid.

Respondent's Reply Brief

Supplement to Designation of Clerk's Papers

Upon:

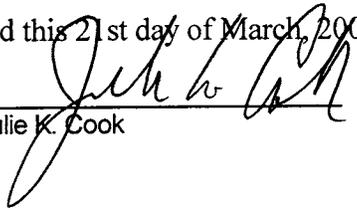
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Signed this 21st day of March, 2008 at Shelton, WA



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