

FILED
COURT OF APPEALS
DIVISION II

2013 MAR -6 AM 11:50

STATE OF WASHINGTON

BY 
DEPUTY

No. 43834-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WILLIE E. YOUNG, Respondent

v.

MICHAEL A. CALLAHAM, et ux, Appellants

BRIEF OF APPELLANTS – MICHAEL A. CALLAHAM, et ux

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Court Rules

N/A

Other

N/A

I. INTRODUCTION

This case revolves around a boundary line dispute between two neighbors and a fence line that had been in existence for more than 50 years.

The appellants in this case purchased a vacant lot next to the respondent's property some 15 years before the present action was taken. Upon purchasing the vacant lot the appellants proceeded to have the lot professionally cleared, they had an expensive approach installed, used the property up to the existing 50 year old fence line, and in the summer of 2010 they replaced the existing fence with an expensive cedar privacy fence with the permission of the respondent.

After the fence was built, the respondent had her property professionally surveyed and discovered that the existing fence line of 50 plus years was set in on her property by approximately 11 feet. The respondent then filed an action for quiet title to the strip of land and she also sought an award for damages and attorneys' fees under RCW 4.24.630. The appellants counter claimed and sought quiet title to the disputed 11 feet strip of land up to the fence line via an adverse possession claim.

The trial court ruled in favor of the respondent on the competing quiet title claims, and the appellants filed the present appeal in response.

II. ASSIGNMENT OF ERRORS

Assignment of Errors

1. The trial court erred in entering its Conclusion of Law (C) (1) of July 18, 2012, when it denied Michael and Dixie Callaham's adverse possession counterclaim to the disputed 11 foot strip of land.
2. The trial court erred in entering its Conclusion of Law (B) (1) of July 18, 2012 when it concluded that Willie E. Young was the true title owner of the disputed land over appellants counter claim.

Issues Pertaining to Assignment of Errors

1. Did the trial court err when it ruled as matter of law that the Callahams must provide evidence that they used the disputed property in the fashion of a residential back yard?
2. Did the trial court err when it ruled as a matter of law that the Callahams use of the disputed property was non-continuous and irregular?
3. Did the trial court err when it ruled as a matter of law that Willie E. Young was the true title owner of the disputed land?

III. STATEMENT OF THE CASE

The respondent, Willie Young, is the owner of a Pierce County residence located at 1124 East 121st Street, Tacoma, Washington (RP 12). She purchased the property in the early 1970s (RP 26). When Ms. Young purchased the property there was a very old fence located on the East side of her property (RP 26). The wood fence was a solid wood fence that was falling apart (CP 258). Ms. Young had her son, Kenneth, rebuild the fence in the same location in 1974 (CP 258-259). According to Ms. Young, she did not believe the fence was on the boundary line, but was built inside her boundary line to protect her children and grandchildren from a well on the east side of her fence (RP 27). According to Ms. Young, the fence her son built was a little fence and she could see over the fence into the vacant lot from her property (CP 281).

In April of 1990, the appellants, Michael and Dixie Callaham purchased the residence to the South East of Ms. Young's property. The Callaham residence is located at 1135 122nd Street East, Tacoma, Washington (RP 62). The western most boundary line of the Callahams' residence property extends in a straight line to the North until it meets with the North/South fence line on the Eastern portion of Ms. Young's property and that fence continues in a straight line to the North until it reaches 121st Street (RP 67).

In 1997, The Callahams purchased the vacant lot directly to the North of their residence property and directly to the East of the Young property (RP 67).

At the time of their purchase of the vacant lot, the Callahams believed the boundary line between their new lot and the Young property was the existing fence line (RP 67). For the 14 year period between June 27, 1997 (the date the Callahams purchased the vacant lot) through May 23, 2011 (the date Ms. Young filed her claim against the Callahams), the Callahams have used the entire property up to the existing fence line as their own (RP 67).

In May of 1998, The Callahams hired J.E. Pelland Construction Company to clear the entire vacant lot up to the existing fence line and to install an approach/driveway to the property from 121st Street (RP 68-70). J.E. Pelland Construction company cleared the property of blackberry shrubs from the entire lot (three 20 yard loads) using heavy equipment and dump trucks over a three day period (RP 69-72). The approach built included the extension of a culvert that had ended at the fence line. Pelland extended the culvert another 24 feet East from the fence line and brought in quarry spall to fill in the county ditch that was nearly neck high from the bottom of the ditch to street level (69-70). A current visual representation of the approach/driveway looking South along the fence

line can be seen in Exhibit 13. The location of this approach on the disputed 11" of property is uncontroverted.

Despite the clear visibility of this 1998 construction activity to Ms. Young, she did not approach the Callahams to complain of their construction activity or assert a claim to the land (11' East of the fence line) (RP 71). All in all, the Pelland construction activity totaled \$4,200.50 in costs to the Callahams. The cost of the approach alone was \$1,500.00 (Ex 10).

In 2001, 2002 & 2003, the Callaham's hired engineers to come onto the property to conduct Percolation (septic) testing (RP 74). These perk tests consisted of having a backhoe come in and dig perk holes to determine water tables, etc... (RP 74). Due to the nature of the terrain (the western portion of the vacant lot is higher and drier than the rest of the lot) some of the perk holes were dug in the areas within 11' of the existing fence line. (RP 75 & Ex11-12).

Despite the clear visibility of the excavation activity (digging perk holes between 2001 and 2003) to Ms. Young, she did not approach the Callahams to complain about these activities or otherwise assert a claim to the land (11' East of the fence lines) (RP 78).

In the summer of 2005, the blackberry bushes on the vacant lot were nearly consuming the entire lot again, so the Callahams hired a

contractor by the name of Damon Webking to bring in his Bobcat and brush hog, and had the entire vacant lot up to and including the fence line cleared (RP 78). Despite the clear visibility of this 2005 landscaping activity to Ms. Young, she did not approach the Callahams to complain of their activity or assert a claim to the land (11' East of the fence line) (RP 79).

In 2010, the Callahams once again hired a professional landscaper (Damon Webking) to clear the vacant lot with heavy equipment (Bobcat). During Mr. Webking's activities of once again removing the blackberry bushes from the vacant lot up to and including the fence line, the Bobcat inadvertently knocked down an 8' section of the fence between Ms. Young and the Callahams' vacant lot (RP 83-84). At the time, the fence was very old (more than 35 years old) and was leaning in places (RP 84).

Mr. Callaham, who was assisting Mr. Webking then instructed Mr. Webking to turn off the Bobcat and he went over and approached Ms. Young who was observing them from her driveway (RP 85). Mr. Callaham told Ms. Young that they were clearing the property because they were going to build a fence, and that he didn't realize how rotten her fence was (RP 85, lines 6-9). Mr. Callaham then offered to rebuild Ms. Young's fence and Ms. Young responded "Oh, honey I can't afford that and Mr. Callaham responded I'm not asking you to pay for it and that he

would take care of the expense for it (RP 85, lines 9-13). Ms. Young agreed stating “if it doesn’t cost me anything, go ahead” (RP 85, lines 13-14).

Mr. Callaham then proceeded to rebuild the fence between their two properties and around the remaining portion of the vacant lot that summer the summer of 2010 (RP 87). In addition to rebuilding the fence, Mr. Callaham graveled the approach/driveway (the same one constructed in 1998), installed a 14’ gate over the approach/driveway, and poured a concrete curb under the fence all around the vacant lot that same summer (RP 88). A current photo depicting the rebuilt fence line, the approach, the 14’ gate and western most side of the vacant lot prior to trial was admitted into evidence (Ex 13).

In August of 2010, Ms Young hired Riipinen Survey Company to survey her property (RP 34). They discovered that the survey (boundary) line between the Young residence property and the Callaham vacant lot property was actually approximately 11’ east of the fence line, which is not in dispute.

In November of 2010, the Callahams’ septic system to their residence failed (RP 95). Due to the nature of the failure Pierce County conducted further perk tests and approved a new septic design for the

Callahams with the drainfield location substantially on the disputed 11' strip of land; the septic design was approved on March 1, 2011 (Ex 17).

In addition to these professional services contracted for on the subject property, Mr. Callaham testified that his use of the disputed land between 1997 – 2011 included periodically parking trailers on the subject property, that he would access the property from the approach/driveway he had constructed, and that his kids would play in the subject property (RP 80-81). Additionally, Dixie Callham provided testimony that the Callaham family used the property periodically since purchasing the property, that their kids would play on the subject property, and that they would pick berries on a yearly basis on the subject property (RP 153). The Callahams' youngest daughter, Cady Callaham provided testimony that she has witnessed the Callaham family use the disputed 11' strip of property for parking trailers, playing, and picking berries and that she herself has played and picked berries on the disputed 11' strip of land (RP 156).

Despite the Callahams' extensive activities and use of the subject property between 1997 and 2011, Ms. Young filed her action for trespass and quiet title on May 23, 2011. The Callahams filed a counterclaim for adverse possession based upon their 14 years of use and construction activities on the disputed 11' strip of land.

IV. SUMMARY OF ARGUMENT

The court erred when it imposed the standard that the Callahams use of the disputed property must be “in the fashion of a residential backyard” to prevail on their adverse possession claim. The Court erred when it held as a matter of law that the Callahams use of the property was non-continuous and irregular. The Court erred when it dismissed the Callahams adverse possession claim and quieted title to the disputed strip of land in Ms. Young.

V. ARGUMENT

The Appellants established their claim for adverse possession entitling them to an order quieting title to the disputed eleven (11) foot strip of land.

A claim of adverse possession is established when ones possession of land is 1) exclusive, 2) actual and uninterrupted, 3) open and notorious and 4) hostile to and under a claim of right. Hostility, as defined by the Supreme Court of Washington, does not import enmity or ill will, but rather imports that the claimant is in possession as owner, in contradistinction to holding in recognition of or subordinate to the true owner. *Chaplin v. Sanders*, 100 Wn 2d 853,857-858 (1984). The period through which these elements must have concurrently existed is 10 years. *RCW 4.16.020*. The doctrine of adverse possession was formulated at law

for the purpose of, among others, assuring maximum utilization of land, encouraging the rejection of stale claims and, most importantly, quieting titles. *Chaplin* at 859-860.

What constitutes possession or occupancy of property for purposes of adverse possession necessarily depends to a great extent upon the nature, character, and locality of the property involved and the uses to which it is ordinarily adapted or applied... Accordingly, the claimant need only demonstrate use of the same character that a true owner might make of the property considering its nature and location. *Frolund v. Frankland*, 71 Wn 2d 812, 817 (1967). In the case of *Heriot v. Lewis*, 35 Wn. App 496 (1983), the Court recognized that the disputed property was overgrown with berry vines, and concluded the following: **Considering the nature and character of the land, a rightful owner might very well make little active use of such property.** *Id* at 505. Emphasis Added.

In this case, the Callahams have had actual and uninterrupted possession of the disputed 11' strip of land for more than 10 years. Their actual possession began in 1997 when they purchased the vacant lot to the north and adjoining their residence parcel. The trial court made a specific finding of fact which read as follows:

In 1998, the Callahams hired a contractor to do some work on their vacant lot. The contractor cleared shrubbery and hauled it away, installed a culvert in a ditch running along the north side of the

property, and laid quarry spalls over the culvert. Some of the removed shrubbery may have been located on the Young property east of the fence. A portion of the culvert and quarry spalls was located on Young's property east of the fence (CP 315, Lines 16-21).

This construction activity was not insignificant, the appellants paid the contractor more than \$4,200 for the 1998 work and it put Ms. Young on notice that they claimed the property as their own up to the fence line. Why else would they construct a driveway approach almost entirely on the disputed 11' strip of land?

Over the next 13 years, the Callahams have had multiple percolation test holes dug on the property. Perk tests were conducted in 2001, 2002, 2003 and again in 2010/2011 (See Ex 11, 12, & 17). The septic design produced by Pierce County in 2011 demonstrates that 3 of the 4 soil logs taken were located on the disputed 11' strip of land, and the approved septic design is substantially on the disputed 11' strip of land (Ex 17).

In 2005, the Callahams had the entire lot up to the fence line professionally cleared of brush and blackberry bushes. In 2010, the Callahams once again had the entire vacant lot cleared of blackberry bushes and brush up to the fence line. In fact, the Court even made the following finding of fact:

In July of 2010, The Callahams hired a contractor to clear the vacant lot of blackberry bushes and shrubbery, to lay a gravel driveway onto the vacant lot, except for the boundary between the vacant lot and the Callaham's residential property. In the course of this work, the contractor accidentally knocked down an 8 foot section of the Young's fence located 11 feet west of the property line between Young's residential property and the Callaham's vacant lot. When this happened, Mr. Callaham walked over to Young's driveway, where Young happened to be standing told her what had happened and asked her permission to replace the fence. She agreed. The Callahams' contractor completed the removal of Young's fence, and the Callahams deposited materials on the vacant lot. The Callahams then built a new fence in approximately the same location as the Young's fence had been located. They also laid gravel across the 1998 culvert. (CP 316-317, Lines 14-23).

In addition to these professional services contracted for on the subject property, Testimony was given by Mr. Callaham, Mrs. Callaham, and their 21 year old daughter, Caty Callaham to the effect that during their possession of the disputed property, the Callahams routinely used the subject property to access the property via the approach they built on the disputed land, to periodically park trailers on the disputed land, that their kids would play on the disputed land, and that the family would pick berries on the disputed land.

During this same period of time (June 1997 – May 2011), Ms. Young, who claims to be the true owner of the disputed 11' strip of land made no use of the land. In fact, Ms. Young testified and the Court found that Ms. Young believed the 11' strip of land to be to the east of her fence line

was hazardous and she had her son replace the old existing fence in 1974 for the specific purpose of preventing her family from accessing this property. The Court wrote:

Furthermore, the uncontroverted evidence shows that Young built the fence to prevent her children and grandchildren from playing on land she considered hazardous – specifically including land she owned where she had reason to believe a well was located (CP 318, Lines 17-20).

Despite the actual findings of fact made by the Court, which supports the Callahams' claim of adverse possession, the Court erred when it concluded as a matter of law that the Callahams had "failed to provide evidence that they maintained or used the property in a fashion of a residential back yard" and therefore had not established their adverse possession claim.

In essence, the Court imposed as the standard of what constitutes possession or occupancy of property for purposes of adverse possession in this case as "use of the property in a fashion of residential back yard." (CP 318, Lines 14-16). That is not the standard laid out by the Washington Supreme Court in the *Frolund* case. In *Frolund*, the Court stated "the claimant need only demonstrate use of the same character that a true owner might make of the property considering its nature and location." *Frolund v. Frankland*, 71 Wn 2d 812, 817, (1967). In this case, the property in question was vacant land that periodically would be overgrown

with blackberry vines, which is undisputed. In fact, this Court heard a very similar case (dealing with a vacant lot and blackberry vines) and held “Considering the nature and character of the land, a rightful owner might very well make little active use of such property.” *Heriot v. Lewis*, 35 Wn. App 496, 505 (1983),

Applying the proper standards laid out by the *Frolund* and *Heriot* Courts, the Callahams need only demonstrate use consistent with that of what Ms. Young might make of the property. Since her ownership of the property (some 40 plus years), Ms. Young made very little if any use of the property. In fact, according to her testimony and the findings of the trial Court, Ms. Young had her son reconstruct the fence in question to keep her family out of the 11’ strip of property, which she considered hazardous. There was no testimony or evidence presented by Ms. Young to indicate that she had ever used the property in the Callahams’ adverse possession period (June 1997-May 2011).

Considering the nature and location of the disputed property, the Callahams use of the property far exceeded what a true owner might make of the property and their use was certainly not “non-continuous and irregular.” The Callhams went to great expense, which is demonstrated by the evidence and undisputed, when they had the property professionally cleared in 1998, a professionally built approach built in 1998, engineering

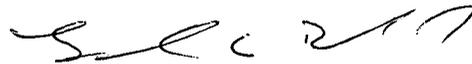
(percolation tests) being conducted in 2001, 2002, 2003 & 2010/2011), and when they had the property once again professionally cleared in 2005 & 2010. Ms. Young engaged in none of these activities, nor did she complain or inform the Callahams that they were engaging in activities on her property. Applying the *Frolund* and *Heriot* standards, the Callahams have established their claim for adverse possession of the disputed 11' strip of land in question.

VI. CONCLUSION

For the foregoing reasons, the Appellants assert that the court erred when it imposed the standard for possession and occupancy (use in a fashion of a residential backyard) in their adverse possession claim, and that the Court erred when it applied that erroneous standard to their case and held the Appellants' use of the property was therefore non-continuous and irregular as a matter of law. This error resulted in the dismissal of their adverse possession claim and the quiet title of the disputed land in the respondent, Ms. Young.

DATED this 6th day of March, 2013.

RESPECTFULLY SUBMITTED



Thomas A. Baldwin, Jr., WSBA #28167
Attorney for Appellant

DECLARATION OF SERVICE

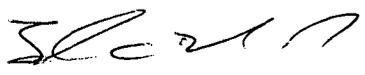
I, Thomas A. Baldwin, Jr., declare under penalty of perjury of the laws of the State of Washington that the foregoing statements are true and correct and based upon my own personal knowledge.

I certify that I caused one copy of the foregoing Brief of Appellant to be served on the following parties of record and/or interested parties by email delivery, to the below named parties as follows:

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Dated this 6th day March, 2013, at Puyallup, Washington.



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