

FILED

APR 22 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
B: _____

NO. 29448-0-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

MICHAEL & LYNNE WHELAN,
RESPONDENTS,

v.

ALLEN & MICHELLE LOUN,
APPELLANTS.

APPEAL FROM THE SUPERIOR COURT OF KITTITAS COUNTY
KITTITAS COUNTY CAUSE NO. 08-2-00410-7

BRIEF OF APPELLANT

MATTHEW KING, WSBA 31822

Attorney for Appellant
1420 Fifth Avenue, Suite 2200
Seattle, WA 98101
Telephone: 206-274-5303

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I. INTRODUCTION

This matter arises from an adverse possession lawsuit filed in Kittitas County. The Respondents Whelan sought summary judgment quieting title in the disputed parcel in their favor. Appellants Loun, opposed motion introducing evidence of a prior owner (1)acknowledging the Louns's ownership of the disputed property, (2) having the Louns's permission to use the property, and (3) the Whelans' failure to maintain the disputed property. Following oral argument, the trial court entered a memorandum decision on September 23, 2009, granting summary judgment and quieting title in a disputed portion of pasture land in favor of the Whelans. The Louns's sought discretionary review, which was denied. Following trial on damages, this Appeal was filed.

II. ASSIGNMENTS OF ERROR

1. To establish adverse possession, the party claiming adverse possession must establish that their possession was continuous and hostile during the previous ten years. Here, there is an admission from a prior owner that they knew the disputed property was owned by the Louns. Should summary judgment be denied as genuine fact issues exist regarding the continuous and hostile elements of the Whelan's claim?

III. STATEMENT OF THE CASE

The Whelan's initiated this action in Kittitas County Superior Court on June 27, 2008 seeking to quiet title in a strip of land in their favor. *CP 1-4; CP 14-17*. The size of the disputed property is 0.06 acres, but if the Louns do not retain possession of the property, it impacts whether their property can be subdivided and/or developed. *CP 56*. The basis of the quiet title was adverse possession by the Whelans, and their predecessors in interest (The Vasquezs), of the disputed property. *CP 14-17*. The Whelan's used the previous owner's alleged time of possession to tack onto their ownership to establish the ten year period of possession. *CP 14-17*.

On September 21, 2009, the Court heard oral argument on the Whelan's motion for partial summary judgment. *CP 88*. The Whelans relied upon the Declaration of James Vazquez, the Declaration of Christopher Cruse, the Declaration of Bob Haberman, and the Declaration of Richard T. Cole. *CP 89-93*.

In opposition, the Louns relied upon the Declaration of Allen Loun, the Declaration of Ken Titus, and the Declaration of Michelle Loun. *CP 89-93*

After reviewing the evidence and considering the oral argument of counsel, the Court issued its memorandum decision. *CP 89-93*. The

decision states, “other than a conversation between Loun and Vasquez as noted above, no evidence exists to rebut the Haberman and Vasquez assertions they treated all the property south of the fence as their property and that the fence was the boundary line.” *CP 91*

The Court then quieted title in favor of the Whelans. *CP 89-93.*

IV. SUMMARY OF ARGUMENT

Taking the evidence in a light most favorable to the Louns, genuine issues of material fact exist regarding:

1. Mr. Vasquez's knowledge of the Louns's ownership of the disputed property;
2. The granting of permission by the Louns to Mr. Vasquez to use the disputed property; and
3. The Whelans' actions to 'maintain' the property.

As a result, Whelans' summary judgment motion should have been denied. This Court should reverse the granting of the summary judgment and order the matter proceed to trial on the Whelans' adverse possession claims.

V. ARGUMENT

An order of summary judgment is reviewed de novo and the Appellate Court applies the same legal standard as the trial court. *City of*

Seattle v. Mighty Movers, Inc., 152 Wn.2d 343, 348, 96 P.3d 979 (2004).

Summary judgment is only appropriate:

if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* citing CR 56(c).

The object and function of summary judgment is the avoidance of useless trials. *Mark v. Seattle Times*, 96 Wn.2d 473, 484, 635 P.2d 1081 (1981); *Meissner v. Simpson Timber Company*, 69 Wn.2d 949, 951, 421 P.2d 674 (1966); *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). A material fact is one upon which the outcome of the litigation depends. *Wojcik v. Chrysler Corp.*, 50 Wn. App. 849, 853, 751 P.2d 854 (1988). On review, the Appellate Court must accept all facts as true and consider all facts and reasonable inferences in the light most favorable to the nonmoving party. *Dickinson v. Edwards*, 105 Wn.2d 457, 461, 716 P.2d 814 (1986). A summary judgment motion is properly granted only if, from all of the evidence, reasonable men could reach but one conclusion. *Barrie v. Hosts of America*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980).

Under CR 56(a), a summary judgment can be rendered only if the evidence submitted to the court:

show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The burden is on the moving party to demonstrate that there is no issue as to any material fact, and the moving party is held to a strict standard. *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 502-503, 834 P.2d 6 (1992).

Any doubt as to the existence of a genuine issue of material fact will be resolved against the movant. *Atherton Condominium Ass'n v. Bloom Development Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990).

In ruling on a motion for summary judgment, the court must consider all of the material evidence and all inferences from the evidence most favorably to the non-moving party and, when so considered, if reasonable persons might reach different conclusions, the motion should be denied. *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 502-503, 834 P.2d 6 (1992). The court must deny a motion for summary judgment if the record shows any reasonable hypothesis that entitles the non-moving party to denial of summary judgment. *Mostrom v. Pettibone*, 25 Wn. App. 158, 162, 607 P.2d 864 (1980).

If different inferences or conclusions may be drawn from evidentiary facts as to ultimate facts such as intent, knowledge, good faith, or negligence, summary judgment is not appropriate. *Preston v. Duncan*, 55 Wn.2d 678, 681-682, 349 P.2d 605 (1960); *Money Savers*

Pharmacy, Inc. v. Koffler Stores (Western) Ltd., 37 Wn. App. 602, 608, 682 P.2d 960 (1984).

In ruling on a motion for summary judgment, the court's function is to determine whether a genuine issue of material fact exists, not to resolve factual issues on their merits. *Balise v. Underwood*, 62 Wn.2d 195, 199, P.2d 996 (1963). "The summary judgment device may not be used to try a question of fact but is limited to those instances in which there is no genuine dispute of fact." *Thoma v. C.J. Montag & Sons. Inc.*, 54 Wn.2d 20, 26, 337 P.2d 1052 (1959). The trial court should not replace the jury by weighing facts or deciding factual issues. *Ames v. City of Fircrest*, 71 Wn. App. 284, 289, 857 P.2d 1083 (1993).

A. LAW OF ADVERSE POSSESSION

In order to prevail on an adverse possession claim, the Whelans must present evidence that possession existed that was: (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile. *Chaplin v. Sanders*, 100 Wash.2d 853, 857, 676 P.2d 431 (1984). Possession of the property with each of the necessary concurrent elements must exist for the statutorily prescribed period of 10 years. RCW 4.16.020. As the presumption of possession is in the holder of legal title, *Peeples v. Port of Bellingham*, 93 Wash.2d 766, 773, 613 P.2d 1128 (1980), *overruled on other grounds, Chaplin v. Sanders, supra*, the party claiming

to have adversely possessed the property has the burden of establishing the existence of each element. *Skansi v. Novak*, 84 Wash. 39, 44, 146 P. 160 (1915), *overruled on other grounds*, *Chaplin v. Sanders*, *supra*.

Possession is not hostile, and so not adverse, if it is with the owner's permission. *See Price v. Humptulips Driving Co.*, 116 Wash. 56, 198 P. 374 (1921) (prescriptive easement case); *O'Donnell v. McCool*, 89 Wash. 537, 154 P. 1090 (1916). *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989). "Exclusive" possession does not need to be absolutely exclusive, but must "be of a type that would be expected of an owner." *Id.* at 758. Hostility is not based on subjective belief or intent. The element of hostility requires only that:

the claimant treat the land as his own as against the world throughout the statutory period. The nature of his possession will be determined solely on the basis of the manner in which he treats the property. His subjective belief regarding his true interests in the land and his intent to dispossess or not dispossess another is irrelevant to this determination.
Id. at 761.

Prescriptive rights are not favored in the law, and the burden of proof is upon the one who claims such a right. *Todd v. Sterling*, 45 Wash.2d 40, 42, 273 P.2d 245 (1954). The claimant must prove that his use of the particular land adverse to the owner has been open, notorious, continuous, and uninterrupted. *Id.* at 42-43.

The Whelans must also prove not only a continuous ten-year period of adverse possession, but also that the use was sufficiently adverse. Possession is adverse if a claimant uses property as if it were his own, entirely disregards the claims of others, asks permission from nobody, and uses the property under a claim of right. *Lee v. Lozier*, 88 Wn.App. 176, 182, 945 P.2d 214 (1997) (citing *Crescent Harbor Water Co. v. Lyseng*, 51 Wash.App. 337, 341, 753 P.2d 555 (1988)). Moreover, once an owner gives one neighbor permission to use his land, that use - permissive at inception - is presumed to remain permissive even following sales of the benefited estate, unless proof exists of a change beyond that permitted and notice of hostility to the true owner, or the sale of the servient estate. An owner who gives a neighbor permission to use his land is not required to monitor any and all transfers of the neighbor's estate to ensure that the permission is not extinguished. *Miller v. Anderson*, 91 Wn.App. 822, 964 P.2d 365 (1998), *review denied*, 137 Wn.2d 1028, 980 P.2d 1281 (1999).

B. FACT ISSUES PRECLUDE SUMMARY JUDGMENT

Here, the Whelan's presented evidence supporting their adverse possession claim, including:

1. The Declaration of Michael Whelan;
2. The Declaration of James Vasquez;

3. The Declaration of Christopher Cruse (the surveyor); and
4. The Declaration of Robert Haberman,
5. The Declaration of Richard Cole authenticating the Deposition of Michelle Loun.

In opposition to the Motion, the Loun's submitted the following

1. The Declaration of Michelle Loun;
2. The Declaration of Allen Loun;
3. The Declaration of Ken Titus;

Of note, the Declaration of Allen Loun contains statements as follows:

I asked Mr. Vasquez if he knew whom the structure [the wall/fence] belonged to. His reply was no it was not his fence. I stated that the structure or wall and fence was on my property. He agreed that it was on my property. I then told him I would be removing the fence as it was encroaching on my property. *CP 84.*

The testimony of Ken Titus supports Mr. Loun's declaration as Mr. Titus was present during the conversation between Mr. Loun and Mr. Whelan. *CP 86.* This conversation occurred in April 2008. *CP 84.*

Similarly, the Declaration of Michelle Loun provided:

On or about the middle of March 2008, Mr. Vasquez came to my house and introduced himself as "The Professor" and informed me that "my" tree had a large branch hanging down into his irrigation ditch and that I needed to remove it....The tree was on the South East corner of my property...but on the south side of the wall....After many conversations with Mr. Vasquez his final comment...was "If you were a good neighbor you would give me the

land.”...The property is unkept and not used by the Whelan’s at all....I gave permission for Mr. Vasquez to use the wall and property to keep his ailing dog in. *CP 54-55*.

The Whelans aver that “at all times during [their] ownership...I utilized the property as my own, claimed it as part of my backyard, and maintained the property...to the best of my ability.” *CP 30*. Loun’s declaration, however, states “[t]he property is unkept and not used by the Whelan's at all.”*CP 56*.

There are significant factual disputes presented in these depositions. As Tegland states

The classic example of a genuine issue of material fact occurs when the two parties submit contradictory affidavits on a key factual issue in the case. The plaintiff says the light was red and the defendant says the light was green. Situations like this are easily identifiable and easily resolved in favor of allowing the case to go to trial. 15A WAPRAC § 69.14.

The Haberman declaration establishes use from 1986 through 1990, when the property was purchased by Mr. Vasquez. *CP 46*. Taking the evidence in a light most favorable to the Louns, however, Mr. Vasquez could have known that the disputed property was not his when he purchased the property. His averments that the tree branch hanging over his property (where the tree was south of the purported boundary) establish that a genuine fact issue exists regarding hostility. Similarly, Ms.

Loun's testimony that she gave permission for the Vasquez use of the disputed property creates a fact issue as to hostility.

As the Court in *Chaplin* held:

The nature of his possession will be determined solely on the basis of the manner in which he treats the property. His subjective belief regarding his true interest in the land and his intent to dispossess or not dispossess another is irrelevant to this determination Under this analysis, permission to occupy the land, given by the true title owner to the claimant or his predecessors in interest, will still operate to negate the element of hostility. *Chaplin v. Sanders*, 100 Wn.2d 853, 860–62, 676 P.2d 431, 435–436 (1984).

Use of property by a claimant for adverse possession or prescriptive easement is not adverse if the true owner grants the claimant permission to occupy or use the land. *Harris v. Urell*, 133 Wn.App. 130, 139, 135 P.3d 530 (2006); *see also, Kunkel v. Fisher*, 106 Wn.App. 599, 602, 23 P.3d 1128 (2001) (a use is not adverse if it is permissive). Accordingly, Washington courts have held that a user cannot establish adverse use where the use was permitted by a revocable license. *Lee v. Lozier*, 88 Wn.App. 176, 182-83, 945 P.2d 214 (1985).

Here, there are genuine fact issues regarding Mr. Vasquez's knowledge of the ownership of the disputed property, the maintenance of the property by the Whelans, and whether the use was with a license from

the Louns. The trial court seemed to acknowledge that this contradictory evidence existed by stating in a footnote in its Memorandum Opinion,

It is noted in Ms. Loun's declaration and in her deposition that she merely granted permission to Mr. Vasquez to keep the fence there for the purpose of protecting Mr. Vasquez's dying dog and that Mr. Vasquez had initially and unintentionally brought the issue of the boundary question to her attention when he claimed that the tree limb on the south side of the fence belonged to Ms. Loun. *CP 90-91*

Despite the clear factual disputes that arise out of Mr. Vasquez's conflicting statements, and the Loun Declarations, the trial court granted summary judgment to the Whelans.

VI. CONCLUSION

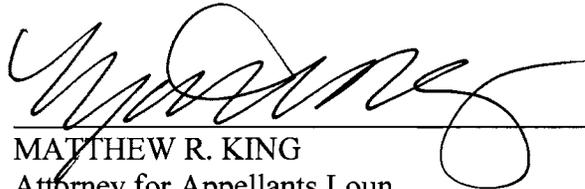
In taking the evidence in a light most favorable to the Louns, sufficient fact issues exist precluding summary judgment. The conflicting Vasquez evidence can be construed to destroy the Whelan's ability to "tack" onto their possession. The statements establish that Mr. Vasquez knew the disputed property was not his from when he took possession of the property. This is evidenced by the fact that he sought the Louns' permission to allow his dog to remain there and demanded that they maintain a tree branch on a tree on the disputed property.

Similarly, conflicting fact issues exist regarding the Whelans' use and maintenance of the property. Mr. Whelan's declaration provides, in a

conclusory manner, that he maintained the property to the best of his ability. The Louns

This Court should reverse the trial court's grant of the summary judgment and order the matter remanded for trial on the issues of adverse possession.

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink, appearing to read 'Matthew R. King', is written over a horizontal line. The signature is fluid and cursive.

MATTHEW R. KING
Attorney for Appellants Loun
Washington State Bar Association No. 31822