Kerby v. Auttelet

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UNPUBLISHED OPINION

The Auttelets appeal the trial court's decision granting their neighbors, the Kerbys, a prescriptive easement for portions of the Kerbys' access road that ran outside the boundary of the original easement. Because the trial court did not make a finding of fact determining whether the Kerbys' use was permissive, and such a finding is determinative of any adverse claim by them, we remand for the trial court to enter a specific finding on this issue. The Auttelets also argue that the trial court improperly quieted title in favor of the Kerbys along the north-south survey line, when instead it should have quieted title in favor of the Auttelets based on a fence they built in 1988. Because the record demonstrates the Auttelets adversely possessed the portion of the Kerbys' land between the survey line and the fence, we reverse the trial court's decision quieting title along the survey line and remand for the trial court to quiet title in favor of the Auttelets.

FACTS

George and Patsy Auttelet (hereinafter Auttelet) own real property in Castle Rock, Washington. Jan and Ilona Kerby (hereinafter Kerby) own real property, whose southern boundary line adjoins Auttelet's northern boundary line.

In 1980, Auttelet sold the northern five acres of his property to Augusta and Faye Kerby.[1] The deed from Auttelet included a 30-foot easement through the east side of his property for access to the Kerby property. Kerby installed a road in 1980. The road traversed in places up to nine feet outside the 30-foot easement.

In 1987, Auttelet erected a fence to contain horses on the northern portion of his property abutting Kerby's. The fence ran 600 feet east and west. The fence did not sit on the true boundary. Rather, it traversed from a pre-existing fence post above the northwest corner of Auttelet's property, across the property eastward, increasingly close to the boundary line, thereby creating a triangle, over which the quiet title dispute arose. The fence turned south at the easement, traveled along the west edge of the road, and then turned westward again to create an enclosure for horses. In 1992, Kerby began to live full-time on the property. Kerby could see a fence that ran north to south, along the western edge of the easement road, and observed that Auttelet kept horses on the northern part of the property.

In 2004, Kerby logged his property and noticed Auttelet's fence, this time observing it as it ran east to west near the property line. Concerned that the fence encroached on his property, Kerby hired a

surveyor. The surveyor determined that Auttelet's fence ran north of the boundary line.

Kerby sued Auttelet both to quiet title to the survey line and to establish a prescriptive easement over any portion of the access road that was outside the 30-foot boundary of the original easement. After a bench trial, the court ruled that Kerby had established a prescriptive easement to the present location of the access road. The court also quieted title along the survey line in favor of Kerby, concluding that Auttelet had failed to adversely possess the portion of land between the survey line and his horse fence, which ran north of the survey line.

Auttelet timely appealed.

DISCUSSION

A threshold problem with the trial court's decision on both claims is its application of the clear, cogent, and convincing standard, a higher burden than the standard civil burden of a preponderance of the evidence. Adverse possession is a basis to quiet title. Smale v. Noretep, 150 Wn. App. 476, 480, 208 P.3d 1180 (2009). In the specific instance of claimants seeking to establish title of forest lands through adverse possession, RCW 7.28.085(1) imposes a heightened burden of "clear and convincing evidence." This burden does not appear otherwise in the statute. Nor have courts applied it in other contexts. See ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 757, 774 P.2d 6 (1989) (explaining that, in an adverse possession case, "the party claiming to have adversely possessed the property has the burden of establishing the existence of each element," without reference to a heightened burden of proof); Drake v. Smersh, 122 Wn. App. 147, 151, 89 P.3d 726 (2004) (explaining that, in a prescriptive easement action, the claimant has the burden of establishing the existence of each element, without reference to a heightened burden of proof) (quoting Kunkel v. Fisher, 106 Wn. App. 599, 602, 23 P.3d 1128 (2001)). Lilly v. Lynch, 88 Wn. App. 306, 316--17, 945 P.2d 727 (1997), mentions the heightened burden. However, Lilly involved a theory of mutual recognition and acquiescence of a boundary. That issue is distinct and was not before the court in this matter.

I. Prescriptive Easement

We review whether a party has established the elements of a prescriptive easement as a mixed question of fact and law, upholding factual findings supported by the record and determining if those facts, as a matter of law, constitute a prescriptive easement. Lee v. Lozier, 88 Wn. App. 176, 181, 945 P.2d 214 (1997).

To establish a prescriptive easement, a claimant must prove "use of the servient land that is: (1) open and notorious, (2) over a uniform route, (3) continuous and uninterrupted for 10 years, (4) adverse to the owner of the land sought to be subjected, and (5) with the knowledge of such owner at a time when he was able in law to assert and enforce his rights." Kunkel, 106 Wn. App. at 602 (citing Mountaineers v. Wymer, 56 Wn.2d 721, 722, 355 P.2d 341 (1960)). "A party can establish a prescriptive

right even though the owner of the servient estate and others who wanted to go on the property also used it, so long as the claimant exercises and claims his right independent of others." Drake, 122 Wn. App. at 151--52.

The only element Auttelet disputes is whether Kerby's use was adverse. Auttelet insists he gave Kerby permission to put in the road around some large trees, resulting in a road beyond the original 30-foot easement.[2]

A claimant's use is adverse when he "uses the property as the true owner would, under a claim of right, disregarding the claims of others, and asking no permission for such use." Kunkel, 106 Wn. App. at 602. A court may determine adversity from the actions of the claimant and the property owner. Id. Use is not adverse if it is permissive. Id. Whether use is adverse or permissive is generally a question of fact, but if the essential facts are not in dispute, it can be resolved as a question of law. Drake, 122 Wn. App. at 152. The inference of permissive use applies when a court can reasonably infer that the use was permitted by neighborly sufferance or acquiescence. Kunkel, 106 Wn. App. at 602. A use that is permissive at its inception cannot ripen into a prescriptive right, no matter how long it may continue, "unless there has been a distinct and positive assertion by the dominant owner of a right hostile to the owner of the servient estate." Nw. Cities Gas Co. v. W. Fuel Co., 13 Wn.2d 75, 84, 123 P.2d 771 (1942).

The record contains conflicting testimony on the issue of permissive use. Kerby testified that he had never asked Auttelet for permission to put the road in around the trees. Kerby further testified that Auttelet had no involvement whatsoever in Kerby's decision to run the road a bit to the west to avoid the trees.

Auttelet testified that he gave permission to Kerby to put in a road around the trees. Kerby did not have a chain saw to cut down the trees, preventing a precise installation of the road along the easement boundary. Many years later, on July 17, 2006, Auttelet demanded in a letter to Kerby that he move the portion of the road that fell outside the original easement back onto the 30-foot strip, threatening to place boulders on Kerby's road if he did not comply.

Applying the clear, cogent, and convincing standard, the trial court concluded Kerby had a prescriptive easement for the portion of his road that ran beyond the 30-foot easement in the deed. The court neglected to make a specific factual finding to resolve the conflicting testimony over permissive use. The only findings of fact the court entered that had a relationship to the issue of permission were that, while the road traversed in places up to nine feet outside the 30-foot easement, Auttelet did not object at the time of installation and made no complaint about the road's location until 2006.

These are not specific findings on the question of permission. Rather, this finding could be interpreted to equally support either of the party's testimony, and to support a conclusion opposite to

the one the trial court reached. Auttelet's failure to object at the time of installation suggests Auttelet initially gave permission to Kerby, so Auttelet would have had no reason to object to the route of the road. We may not resolve the issue, as this would require a credibility determination, which we may not make. Trotzer v. Vig, 149 Wn. App. 594, 611, 203 P.3d 1056 (2009).

The ultimate determination of whether a prescriptive easement has been established in this case turns on whether the trial court finds that permission was, or was not, given to build the road outside the easement. On remand, the trial court must weigh the conflicting evidence, apply the preponderance standard, and enter a finding about whether Auttelet gave permission to Kerby.

Upon remand, we also direct the court to strike conclusions of law 5 and 6, which state that Auttelet waived any right to demand that Kerby move the easement back within the 30-foot easement boundary, and that Auttelet was estopped from demanding the same. The theories of waiver and estoppel were not pleaded nor argued below. They appear to be an alternate basis for affirming Kerby's prescriptive easement. However, they are inconsistent with either determination on the question of permissive or adverse use. If Auttelet did not give permission, the use was adverse and there is no basis to apply waiver or estoppel to prevent withdrawal of that permission. And, if Auttelet gave permission, then concluding he waived his right and was estopped to withdraw permission implies that a permissive use can ripen into an adverse use.[3] Absent a "distinct and positive assertion" a permissive use can never ripen into an adverse use. W. Fuel Co., 13 Wn.2d at 84. The trial court erred as a matter of law, because permission continues until revocation. See id.

II. Quiet Title Action

Whether a person has gained titled through adverse possession is a mixed question of law and fact. Miller v. Anderson, 91 Wn. App. 822, 828, 964 P.2d 365 (1998). The trier of fact decides whether the requisite facts exist, and the court decides whether the facts demonstrate adverse possession. Id. Whether the facts as found establish adverse possession is a question of law we review de novo. Bryant v. Palmer Coking Coal Co., 86 Wn. App. 204, 210, 936 P.2d 1163 (1997).

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. Bell, 112 Wn.2d at 757. 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. The party claiming to have adversely possessed the property has the burden of establishing each element to overcome the presumption of possession in favor of the holder of the legal title. Bell, 112 Wn.2d at 757.

Beginning in 1987, Auttelet built a horse containment fence and used the land in question to keep horses. The east fence line of the pasture enclosure ran along the easement road to Kerby's property, and the horses and pasture were visible from the easement. On the northern portion of the property abutting Kerby's, a horse containment fence ran some 600 feet east and west. This portion of the

fence did not sit on the true boundary, and, at the western edge of the property, encroached onto the Kerby property by some 61 feet. The area used by Auttelet south of this fence is the subject of the adverse possession claim.

In 2004, when Kerby logged the property, he noted part of Auttelet's horse fence that he had not seen before, observing it as it ran east and west near the boundary line. Concerned that the fence did not run parallel to Kerby's boundary line, he hired a surveyor. The surveyor determined Auttelet's fence ran onto Kerby's property.

Kerby sought to quiet title along the survey line. Auttelet argued as a defense that he had adversely possessed the land in question. The trial court concluded Auttelet failed to prove adverse possession by clear, cogent, and convincing evidence. The court quieted title in favor of Kerby.

Kerby does not dispute that Auttelet's use was actual and uninterrupted, exclusive, nor that his possession lasted more than 10 years, and the record contains ample support for these uncontested elements. Auttelet used the land to keep horses from 1988 on, satisfying actual and uninterrupted use lasting more than 10 years. The findings do not identify any use at all other than Auttelet's, thus satisfying the exclusivity requirement.

Kerby argues that Auttelet's use of the contested parcel was not hostile, as use of the land was for a livestock fence of convenience, not a boundary fence. He also disputes whether Auttelet's use was open and notorious.

Hostility

Considerable indicia in the record suggest the court relied on a hostility rule concerning livestock fences that has been overturned. After closing arguments, the court specifically asked Auttelet's attorney whether he conceded "that the case law says that a mere animal enclosure is not sufficient to create an adverse possession?", referring to the holding in Roy v. Goerz, 26 Wn. App. 807, 814, 614 P.2d 1308 (1980), overruled by Chaplin v. Sanders, 100 Wn.2d 853, 861, 676 P.2d 431 (1984). The focus of the trial court's findings on adverse possession (findings of fact 11--25) is on Auttelet's use of the property for horses. Finding of fact 25 specifically states that all of Auttelet's uses on the parcel in question were "in furtherance of using the containment area to raise horses." This emphasis on the use of the land for horses suggests the court rested its conclusion on the issue of hostility based on the specific purpose of the fence.

Hostility requires only that the claimant treat the land as his own as against the world throughout the statutory period. Chaplin, 100 Wn.2d at 860--61. Chaplin, 100 Wn.2d at 861, explicitly overruled the holding of Roy v. Goerz that "a fence erected to control pasturage or cattle and not as a boundary does not establish adverse possession." 26 Wn. App. at 814.

During oral argument before this court, Kerby contended that Roy v. Cunningham, 46 Wn. App. 409, 731 P.2d 526 (1986), stood for the proposition that a livestock fence could not satisfy the hostility element, even after Chaplin. His reliance on this case is misplaced. There, the court noted that, before Chaplin, if the original purpose of a fence was pasturage, there was a presumption of permissive use. Cunningham, 46 Wn. App. at 411--12. However, because Chaplin simplified the rule on hostility, the court concluded that the nature of the actual use, rather than the original purpose for constructing the fence, was controlling, so no presumption of permission arose. Cunningham, 46 Wn. App. at 412. The case does not stand for the proposition that pasturing livestock cannot constitute an adverse use.

Kerby made no use of the land in dispute. Auttelet used the land as an owner would, and Kerby offered no testimony to rebut either the nature or location of Auttelet's use. Because the undisputed facts are that Auttelet treated the land in question as a true owner would, by using it for pasturing and grazing horses, and maintaining the land all along the fence line, his use satisfies the hostility test under Chaplin as a matter of law.

Open and Notorious

Auttelet contends that the trial court erred in finding that his use was not open and notorious. The requirement of open and notorious use is satisfied if the title holder has actual notice of the adverse use throughout the statutory period. Chaplin, 100 Wn.2d at 862; Riley v. Andres, 107 Wn. App. 391, 396, 27 P.3d 618 (2001). The requirement may also be satisfied if the title holder has constructive notice-if the claimant used the land such that any reasonable person would have thought he owned it. Chaplin, 100 Wn.2d at 862; Riley, 107 Wn. App. at 396. In determining what acts are sufficiently open and notorious to manifest to others a claim to land, the character of the land must be considered. Chaplin, 100 Wn.2d at 863 (explaining that the use need only be that which a true owner would do in view of the land's nature and location).

The court's findings demonstrate that Auttelet used the land in such a way that any reasonable person would have thought he owned it. In 1987, Auttelet erected a fence used to contain horses, just north of where he had built his home and other outbuildings. Auttelet constructed the fence from metal posts and round horse wire. Auttelet sprayed the fence line for weeds, removed dead trees, cleared brush, planted grass, and cut firewood. After installation of the fence, Auttelet built and used paddock fences or gates to graze horses in different parts of the containment area.

The court noted in its findings that the property in dispute was wooded and brushy, making it difficult to see whether a fence existed from the Kerbys' house. The court was correct in considering the condition of the land. Under Chaplin, this is a proper consideration relative to the open and notorious element.[4] 100 Wn.2d at 863. However, whether Kerby could see the fence from his house farther up the hill on his lot is not the material question. Nor does the law require the owner to know the full extent of the use over every inch of the property. See Chaplin, 100 Wn.2d at 862--63. Rather,

the material inquiry is whether, given the condition of the land, Kerby had actual or constructive notice of Auttelet's use: was it visible, there to be seen by Kerby.

The portion of the fence that ran along the easement road turned west near the actual property line. From its construction in 1988, Kerby saw the containment fence along the easement road and would observe its use to contain horses. Kerby testified on cross-examination that he could see approximately 100 feet of that fence line running west from the easement road. The fence ran east to west for some 600 feet. Kerby also testified that he could make a clear distinction between the types of vegetation existing on Auttelet's side of the fence versus the vegetation on his side. Mrs. Kerby testified on direct-examination that she could see part of the fence as it ran west from along the access road. On cross-examination, Mrs. Kerby testified that she saw horses within the containment fence. Additionally, she assumed something was restraining the horses from moving on to the Kerbys' property from the south, suggesting the Kerbys knew the fence had to run east and west.

While Kerby did not have actual knowledge of the precise location of the northern boundary of the fence until he logged his property in 2004, he could observe Auttelet's use of the land: it was cleared in parts up to the fence line. Kerby could have inspected that fence line and the use of the land based on that knowledge.[5] The use was not hidden; it was there to be seen.[6]

Given the condition of the land, and the nature and visibility of the use, the record clearly establishes that Kerby had constructive notice of an open and notorious use. The trial court erred in finding that Auttelet had not satisfied the open and notorious element of adverse possession.

Having concluded that Auttelet satisfied the disputed elements, we are left with the conclusion that Auttelet has established adverse possession by a preponderance of the evidence. We reverse the trial court's conclusion of law that Auttelet did not prove adverse possession, and direct the court to quiet title in favor of Auttelet.

We remand for the trial court to determine whether Auttelet gave Kerby permission to install the road in its current location.

1. Augusta and Fay Kerby deeded it to respondents on January 7, 1982.

2. Auttelet does not dispute that most of the road lies within the original easement. The legal description of the property contains only the description of the 30-foot easement, which reads: "an easement for ingress, egress and utilities over, under and across the East 30.0 feet of the Northwest Quarter of the Northwest Quarter of the Southeast Quarter of Section 24 . . ."

3. This thought process is reflected in the court's oral ruling, where it suggested that it was troubled by the issue of permission, but that it would stick with "human logic, and say there's gotta be a way for the law to say that you've been using it there for that long, just leave it alone; okay?"

4. The property at issue here was not as remote as in other cases where the remote location and wooded condition of the land factored into the conclusion that open and and notorious use had not been proved. In Muench v. Oxley, 90 Wn.2d 637, 639, 584 P.2d 939 (1978), overruled on other grounds by Chaplin, 100 Wn.2d at 861, the true owner had purchased five and a half acres of dense, unimproved land. Prior to the sale, the true owner hired a surveyor, who noticed an old fence east of the surveyed line. Id. at 639. Once the true owner bought the property, he became aware that the claimant, the property owner to the west, thought that the old fence established the boundary line. Id. The fence was dilapidated, and the ground on either side of the fence was heavily covered by trees and underbrush. Id. at 642. Because the fence was dilapidated and densely covered at the time the claimant took possession of the property, the claimant was never in possession as would have put a person on notice of a hostile claim. Id. The facts there stand in contrast to the uncontested nature and extent of Auttelet's use, as well as the condition of the land. While there was timber around the boundary line, the presence and proximity of Kerby and Auttelet's houses and their access roads suggests that the consideration of remoteness is not material here. In Murray v. Bousquet, 154 Wash. 42, 47, 50--51, 280 P. 935 (1929), the court held that, because the claimant's use was occasional pasturing during the summer on land that was wild and mountainous, claimant's use was not sufficiently notorious. These facts are distinguishable from the current case, as the property in Murray was far more remote, and the use was occasional.

5. The trial court noted for the record that "you can see from different parts of the Kerby property portions of this fence."

6. In addition to the finding of fact describing the visibility of the containment fence from the easement road, Exhibit 5, a photo, suggests the northern part of the containment fence was plainly visible from the road. The photo shows the northeast corner of the fence, with decent visibility of it running westward. Auttelet explained the photograph: "This snapshot is taken . . . from the east to the west."