IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JEAN I. SIMMONDS, a married woman as her separate estate, Respondent, v. GUY SODERLIND, individually, and as Personal Representative of the Estate of Guy Egan Soderlind, deceased; and as Personal Representative of the Estate of Charlotte J. Soderlind, deceased, Appellants, and all other persons or parties unknown claiming any right, title, estate, lien, or interest in the real estate described in the complaint herein, Defendants.	)	No. 63842-4-I DIVISION ONE UNPUBLISHED OPINION FILED: November 2, 2009

AGID, J.—Jean I. Simmonds and Guy Soderlind own neighboring recreational beach front lots. In 2006, Soderlind had his property surveyed and discovered that a .0309 acre triangular portion of Simmonds's yard was part of his lot. Simmonds filed a complaint to quiet title and for adverse possession of the disputed area. After a bench

trial, the court quieted title in Simmonds. On appeal, Soderlind asserts that substantial evidence does not support the trial court's conclusion that Simmonds adversely possessed the disputed area. We disagree. The evidence in the record overwhelmingly supports the trial court's findings of fact, and those findings support the trial court's legal conclusions and ruling. We also reject the argument that the trial court abused its discretion in admitting the survey and legal description in exhibits 10 and 11. But because Simmonds does not provide any legal or factual basis for her request for attorney fees, we conclude she is not entitled to fees on appeal.

FACTS

Lot 16 and lot 17, Ludlow Beach Tracts No. 2, are recreational beach front properties in Jefferson County. Each lot has approximately one acre of frontage on Port Ludlow Bay. Jean Simmonds's family has owned lot 16 since 1950, when her father, Alvin Solberg, bought the property. Guy Soderlind, Jr., owns lot 17. His family has owned lot 17 since 1949, when his great-uncle bought the property. The disputed area is a flat .0309 acre of beach front abutting lot 17.

Simmonds's father, Solberg, built a cabin on lot 16 in 1951. Simmonds's former spouse, Dr. Benjamin Bryant, assisted Solberg in building the cabin. The cabin is sighted at an angle compared to the houses on either side of it. Simmonds spent weekends on the property beginning in the 1950s. Simmonds's family cleared a triangular shaped area of beach front in the 1950s, which included the disputed area. Bryant cut salmon berry bushes that encroached on what they thought was the property line. Simmonds built a woodshed on lot 16 in 1980. The woodshed is a separate

structure from the cabin but has a common roof with the cabin.

Simmonds and her husband separated in 1978, and Simmonds began spending more time on lot 16 beginning that year. After her retirement in 1987, Simmonds split her time between the house on lot 16 and her residence in Seattle. In 1990, Simmonds hired her neighbor, Bob Fish, to build a boat dock in the disputed area.

Soderlind has a 15 foot trailer on lot 17 but has not made other improvements to lot 17. In June 2006, Soderlind hired Wood Surveying to determine the boundary lines of lot 17. The survey showed the disputed area as part of lot 17. The survey also showed that Simmonds's woodshed encroached on lot 17. According to the survey, Simmonds's house is right on the edge of the boundary line between lot 16 and lot 17, but the house does not encroach on Soderlind's property.

On February 4, 2007, Simmonds filed a complaint to quiet title and for adverse possession of the disputed area. Simmonds claimed that she and her family had occupied the disputed area for more than 20 years and asked for judgment against Soderlind and reasonable attorney fees and costs.

After the bench trial, the court entered findings of fact and conclusions of law and a judgment and decree in favor of Simmonds. The court quieted title to the disputed area in Simmonds and awarded Simmonds $200 in attorney fees and $225 in costs.

Soderlind appeals.

ANALYSIS

Adverse Possession

Soderlind assigns error to many of the trial court's findings of fact and conclusions of law. Essentially, he argues that there was insufficient evidence to support the trial court's conclusion that Simmonds proved the elements of adverse possession of the disputed area.

Adverse possession is a mixed question of law and fact.[1] "We review whether substantial evidence supports the trial court's challenged findings and, if so, whether the findings in turn support the trial court's conclusions of law and judgment."[2] Evidence is substantial when it is sufficient to persuade a fair-minded, rational person of the truth of the finding.[3] When the trial court is the finder of fact, we defer to the court's credibility determinations.[4] Unchallenged findings of fact are verities on appeal.[5]

To prove the elements of adverse possession, the claimant must prove the possession was "(1) exclusive, (2) actual and uninterrupted, (3) open and notorious and (4) hostile and under a claim of right made in good faith" for a period of 10 years.[6] The burden of establishing the existence of each element is on the party claiming to have adversely possessed the property.[7] The claimant "need only demonstrate use of the same character that a true owner might make of the property considering its nature and location."[8] The ultimate test is whether the claimant "exercise[d] . . . dominion over

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[1] Miller v. Anderson, 91 Wn. App. 822, 828, 964 P.2d 365 (1998), review denied, 137 W.2d 1028 (1999).

[2] Harris v. Urell, 133 Wn. App. 130, 137, 135 P.3d 530 (2006), review denied, 160 Wn.2d 1012 (2007).

[3] Id.

[4] Bartel v. Zucktriegel, 112 Wn. App. 55, 62, 47 P.3d 581 (2002).

[5] State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

[6] Chaplin v. Sanders, 100 Wn.2d 853, 857, 676 P.2d 431 (1984); RCW 4.16.020.

[7] ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 757, 774 P.2d 6 (1989).

the land in a manner consistent with actions a true owner would take."[9]

Soderlind first asserts that Simmonds failed to prove the elements of adverse possession because she did not establish that her use of the disputed area was exclusive. "In order to be exclusive for purposes of adverse possession, the claimant's possession need not be absolutely exclusive. Rather, the possession must be of a type that would be expected of an owner under the circumstances."[10] If the adverse possessor and the title owner share occupancy, the possession is not exclusive.[11]

Soderlind argues that because he used the disputed area for camping and his family and guests used it for recreation and sunbathing, Simmonds's use was not exclusive. Soderlind specifically challenges finding of fact 17: "Guy Soderlind, Sr., and his guests occasionally did use the platform when socializing with the Simmonds family, but any other use of the platform and the disputed area was transitory since none of the neighbors who testified witnessed use by the Soderlind family or its guests."

We conclude that there is substantial evidence to support the court's finding that Simmonds's use was exclusive. Jane Pingrey, who owned lot 18 until 2006, testified that she could see the Soderlind property from her lot. Pingrey stated that she never saw anyone camping on the disputed area. Karen Jensen, another neighbor, testified that she never saw Soderlind on the beach and she had not noticed a significant difference in the property line from 1998 to the present. A third neighbor, Phyllis Blum, testified that she did not see anyone other than Simmonds or her guests using the dock

[8] Heriot v. Lewis, 35 Wn. App. 496, 504, 668 P.2d 589 (1983).
[9] ITT Rayonier, 112 Wn.2d at 759.
[10] Crites v. Koch, 49 Wn. App. 171, 174, 741 P.2d 1005 (1987).
[11] Id.

or the land behind it. In addition, it is an undisputed finding of fact that "Mr. Soderlind testified that he and his friends camped in the disputed area but none of the neighbors who testified as witnesses saw them camping or saw any evidence of their camping in the disputed area."

Soderlind also asserts that his family jointly used the dock. But Simmonds's testimony at trial was that she was the only one who stored boats on her property. Simmonds testified that in a picture of Soderlind's boat, "The Soderlind boat is pulled up here on Soderlind property between the line of possession and their trail." Simmonds said that she saw Guy Soderlind, Sr., leaning against the dock, but that was the only way he used it.

Even if Soderlind did occasionally use the disputed area for camping and recreation, that does not mean Simmonds failed to prove that her use was exclusive. "[A]n occasional, transitory use by the true owner usually will not prevent ownership transfer by adverse possession if the adverse possessor permits the use as a 'neighborly accommodation.'"[12] We conclude that despite Soderlind's occasional use, substantial evidence supports the finding that Simmonds's use of the disputed area was exclusive.

Soderlind next asserts that Simmonds failed to establish that her use of the disputed area was hostile. Hostility does not mean enmity or ill-will, but rather that the claimant possesses the property like an owner and is not subordinate to the true owner.[13] "When a claimant does everything a person could do with a particular

[12] Harris, 133 Wn. App. at 138 (quoting Lilly v. Lynch, 88 Wn. App. 306, 313, 945 P.2d 727 (1997)).

[13] Chaplin, 100 Wn.2d at 858.

property, it is evidence of the open hostility of the claim."[14]

Soderlind asserts that because Simmonds's use was permissive, she did not prove the element of hostility.[15] But Soderlind fails to point to any evidence in the record to support the contention that his family gave Simmonds permission to use the disputed area. There is only a 1979 letter from Simmonds asking Soderlind's predecessor for permission to cut some trees that were on lot 17 and general evidence that Simmonds had a friendly relationship with the Soderlind family. But Simmonds's neighbors testified that Simmonds had cleared and maintained the yard for 20 years and paid Bob Fish to build a dock in the disputed area because it was part of Simmonds's property. The trial court found that testimony credible. We conclude that there is no evidence that Simmonds's use of this portion of lot 17 was permissive. Because she possessed the property like a true owner, she established the element of hostility.

Soderlind also asserts that because there is no fence or well-defined boundary, Simmonds failed to prove that her use was open and notorious. "The open and notorious requirement is met if (1) the true owner has actual notice of the adverse use throughout the statutory period, or (2) the claimant uses the land so that any reasonable person would assume that the claimant is the owner."[16] "In other words, the claimant must show that the true owner knew, or should have known, that the occupancy constituted an ownership claim."[17]

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[14] Anderson v. Hudak, 80 Wn. App. 398, 403, 907 P.2d 305 (1995).

[15] Chaplin, 100 Wn.2d at 861-62 (if the true owner gives the claimant permission to occupy the land, that negates the element of hostility).

[16] Anderson, 80 Wn. App. at 404-05.

[17] Id. at 405.

The undisputed findings of fact establish that "[i]t [is] clear that when the Soderlinds visited their property, they knew that the Simmonds were using the 'disputed area.'" Soderlind also does not challenge the finding that "Phyllis Blum testified that from 1984 until 2006, she walked by Lot 16 almost daily, observed the dock or platform being built, the encroaching woodshed, the grassy flat area in-between, saw Ms. Simmonds maintaining the property and always believed that the 'disputed area' was part of the Simmonds' property." At trial, Simmonds's son Benjamin Bryant testified that his parents put in the lawn in 1984, the lawn clearly established the boundary line, and the Soderlind side of the boundary just had brush on a hillside.

We conclude that substantial evidence supports the findings that Simmonds's use of the property was open and notorious and that the edge of the lawn established a clear boundary line for the disputed area.

For the first time on appeal, Soderlind asserts that Simmonds's use of the disputed area was not continuous. Continuous use does not mean constant use, but rather use of the same character that a true owner would make of the property.[18] As stated above, Simmonds, her neighbors, and her son testified that the boundary of the disputed area did not change over 20 years. Simmonds's former spouse, Bryant, also identified the lawn in a picture and testified that the lay of the land had not changed since the 1980s. Even if there was insufficient evidence, because Soderlind did not raise this issue below, we need not consider it on appeal.[19]

Soderlind also specifically challenged finding of fact 21: "Mr. Soderlind alleged

[18] Lee v. Lozier, 88 Wn. App. 176, 185, 945 P.2d 214 (1997).
[19] RAP 2.5(a).

that a trail ran from Lot 17 down through the wooded area of that lot to the beach. The testimony of Steven Glucoft, Linda Bryan and Sheila Miller indicated that the trail ended at the beach to the east of the 'spring' and was located to the east of the 'disputed area.'"

Glucoft, a friend of Guy Soderlind, Sr., testified that "the trail ended down by the log, and there was like tall grass, and there was trees all the way up and then there was tall grass, and then there was the beach." Glucoft stated that when he got down to the beach, he did not see any areas close by that had been cleared. Sheila Miller testified that the trail started at the top of the property and ended about two feet to the right of the dock on the beach. Linda Bryan, Guy Soderlind, Sr.'s wife, stated, "[T]here was also a fresh spring down below the bottom where we would come out to the trail to the water . . . there was a spring down there where fresh water was and we got buckets of water from there." Simmonds's children, Elizabeth and Benjamin, both testified that the only trail to the dock was on lot 16. Elizabeth said that she never saw a second path going toward the Soderlind property. Benjamin said there was no other trail to the dock, but there was a trail on the Soderlind property that went to a spring located on the Soderlind property. Based on this testimony, we conclude that there was substantial evidence in the record to support the finding that the trail on Soderlind's property was located to the east of the disputed area.

In sum, we conclude that the trial court did not err in concluding that Simmonds established the elements of adverse possession of the disputed area.

Exhibits 10 and 11

Soderlind asserts that the trial court abused its discretion in admitting exhibits 10 and exhibit 11. Exhibit 10 is a diagram defining the boundaries of the disputed area, and exhibit 11 is a legal description of the area. Wood Surveying prepared both of the exhibits, and Arnold C. Wood testified about the exhibits at trial.

We will uphold a trial court's evidentiary rulings absent an abuse of discretion.[20] "A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law."[21]

Soderlind asserts that the trial court abused its discretion in admitting exhibits 10 and 11 because Wood testified at trial that he had not personally viewed the area. Wood said that although he had not personally visited the property, people from his office had been there 8 to 10 times to establish the boundary. Wood stated that he worked from an existing survey of lot 17 in preparing exhibit 10, he followed standard land surveying techniques in making his calculations, and he did not find anything unusual in preparing the exhibit.

In addition, Wood stated that his son conducted the ground survey and he identified the disputed area based on his son's observations. At trial, Soderlind called Wood's son, Max Wood, to testify. Max Wood testified that he went out to the property and prepared the survey for exhibits 10 and 11 based on his observations. We conclude that because Wood followed standard land surveying techniques in preparing

[20] Proctor v. Huntington, 146 Wn. App. 836, 852, 192 P.3d 958 (2008), review granted, 165 Wn.2d 1041 (2009).

[21] Id.

the survey, the court did not abuse its discretion in admitting the exhibits based on those techniques. In addition, Max Wood also testified about his observations and the

foundation for the exhibits. This testimony provided sufficient foundation to admit the exhibits.

Soderlind contends that the trial court abused its discretion in admitting the exhibits because Wood included four feet around the platform in the disputed area and the extra four feet were not supported by the evidence. But case law is clear that "courts will project boundary lines between objects when reasonable and logical to do so."[22] In Lloyd, we stated, "Courts may create a penumbra of ground around areas actually possessed when reasonably necessary to carry out the objective of settling boundary disputes."[23] Wood testified that the boundary included a few feet beyond the edge of the dock for maintenance. We conclude that adding four feet to the disputed area for maintenance was within the court's authority. The exhibits were accurate, and the court did not abuse its discretion in admitting them.

Attorney Fees

Citing RAP 14.2, both parties ask the court to award them attorney fees if they are the prevailing party on appeal. Below, the trial court awarded Simmonds $200 in attorney fees and $225 in costs, but there is no explanation of the basis for the award. Because neither party provides a basis for the award of attorney fees in law or in the

[22] Lloyd v. Montecucco, 83 Wn. App. 846, 854, 924 P.2d 927 (1996), review denied, 131 Wn.2d 1025 (1997).

[23] Lloyd v. Montecucco, 83 Wn. App. 846, 853-54, 924 P.2d 927 (1996), review denied, 131 Wn.2d 1025 (1997).

record, we conclude that neither party is entitled to attorney fees on appeal.

We affirm.

WE CONCUR: