

FILED: May 16, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

WILLIAM C. CASE
and GAIL K. CASE,
Plaintiffs,

and

CASE FARMS, LLC,
an Oregon limited liability company,
Plaintiff-Appellant,

v.

GARY L. BURTON
and GOLDIE H. BURTON,
husband and wife,
Defendants-Respondents.

Linn County Circuit Court
081200

A144494

Daniel R. Murphy, Judge.

Argued and submitted on August 18, 2011.

George B. Heilig argued the cause for appellant. With him on the briefs was Heilig Misfeldt & Armstrong, LLP.

Mark C. Hoyt argued the cause for respondents. With him on the brief was Sherman, Sherman, Jonnie & Hoyt, LLP.

Before Schuman, Presiding Judge, and Brewer, Judge, and Nakamoto, Judge.

BREWER, J.

Affirmed.

1 BREWER, J.

2 Plaintiffs appeal from a general judgment dismissing their common-law
3 and statutory adverse possession claims against defendants.¹ At the close of plaintiffs'
4 case-in-chief, the trial court granted defendants' motion for a directed verdict, construing
5 it as a motion to dismiss under ORCP 54 B(2), and made findings of fact under ORCP
6 62. Among other things, the trial court found that, as a fatal blow to their claims,
7 plaintiffs had failed to establish the location of a fence line that, according to plaintiffs,
8 had bounded the property that they claim. We affirm.

9 We begin by setting out the standard for the grant of a motion for judgment
10 of dismissal under ORCP 54 B(2), which provides:

11 "After the plaintiff in an action tried by the court without a jury has
12 completed the presentation of plaintiff's evidence, the defendant, without
13 waiving the right to offer evidence in the event the motion is not granted,
14 may move for a judgment of dismissal on the ground that upon the facts
15 and the law the plaintiff has shown no right to relief. The court as trier of
16 the facts may then determine them and render judgment of dismissal
17 against the plaintiff or may decline to render any judgment until the close
18 of all the evidence. If the court renders judgment of dismissal with
19 prejudice against the plaintiff, the court shall make findings as provided in
20 Rule 62."

21 ORCP 62 F, in turn, provides:

22 "In an action tried without a jury, except as provided in ORS 19.415(3), the
23 findings of the court upon the facts shall have the same force and effect,
24 and be equally conclusive, as the verdict of a jury."

25 "In deciding whether to grant a motion to dismiss with prejudice under

¹ The plaintiffs in this case are Case Farms LLC and William and Gail Case, the owners and only members of Case Farms LLC.

1 ORCP 54 B(2), the trial court is *not* required to view the evidence in the light most
2 favorable to the plaintiff and to deny the motion if the plaintiff has proffered 'some
3 evidence' establishing the requisites of a *prima facie* case." [Venture Properties, Inc. v.](#)
4 [Parker](#), 223 Or App 321, 340, 195 P3d 470 (2008) (emphasis in original). "Rather, even
5 if a plaintiff has presented a *prima facie* case, a trial court is free to assess the ultimate
6 persuasiveness of the plaintiff's evidence * * * including resolving conflicts in that
7 evidence * * * and, if it so chooses, to simply disbelieve the plaintiff's evidence." *Id.*
8 (citations omitted); *see also* [Riverside Homes, Inc. v. Murray](#), 230 Or App 292, 300-01,
9 214 P3d 835 (2009) ("[A] trial court may grant a motion to dismiss under ORCP 54 B(2)
10 if, viewing the evidence in the light most favorable to the plaintiff, the plaintiff failed to
11 present a *prima facie* case, or, even if the plaintiff has presented a *prima facie* case, the
12 court, as trier of fact, is unpersuaded by the plaintiff's evidence.").

13 Where a claim dismissed with prejudice under ORCP 54 B(2) is equitable
14 in nature, this court's review is set out in ORS 19.415(3)(b), and we have discretion to
15 review the case *de novo*, Or Laws 2009, ch 231, § 3. We decline to do so. ORAP
16 5.40(8)(c). Accordingly, we review the trial court's legal conclusions for errors of law,
17 and we are bound by the trial court's findings of fact if any evidence supports them.
18 [Jones v. Emerald Pacific Homes, Inc.](#), 188 Or App 471, 481, 71 P3d 574, *rev den*, 336 Or
19 125 (2003) ("We will not reject a trial court's finding [under ORCP 62 F] if any evidence
20 in the record supports it."); [Neff v. Sandtrax, Inc.](#), 243 Or App 485, 487, 259 P3d 985, *rev*
21 *den*, 350 Or 716 (2011) (applying "any evidence" standard of review to equitable claims

1 where notice of appeal was filed after the effective date of the 2009 amendments to ORS
2 19.415(3)).

3 We state the pertinent facts consistently with the trial court's findings under
4 ORCP 62.² The parties own adjoining parcels of farmland in Linn County. Plaintiffs
5 own tax lot 700, and defendants own tax lot 500. There is no natural boundary between
6 the two parcels. At issue is a strip of land along the eastern deed line of tax lot 500, the
7 line that separates that lot from tax lot 700. According to a survey that William Case
8 obtained in 2008, the strip is between 42.45 and 51.7 feet wide and 2008.04 feet long,
9 and it consists of 2.02 acres in area. The eastern border of the strip is the eastern deed
10 line of tax lot 500. The parties' dispute involves the location within tax lot 500 of the
11 western border of the strip.

12 Plaintiffs argued to the trial court that the western border of the strip was a
13 fence that had been built on tax lot 500 by defendants' predecessor in 1940 and that had
14 remained continuously in place until the mid-1980's, when William Case dismantled it.
15 Plaintiffs also argued that a farm road had paralleled the fence line throughout that period
16 and also established the western border of the strip. To establish the location of the fence
17 line and the farm road, plaintiffs offered into evidence a series of aerial photographs
18 taken between 1948 and 2008 that, plaintiffs argued, demonstrated that the fence and

² As explained below, because the trial court's finding that plaintiffs failed to establish the location of the fence line is dispositive, we need not reach the parties' remaining arguments and, accordingly, we do not recite the facts that are pertinent only to those arguments.

1 road had remained fixed throughout the periods of time necessary to establish their
2 common-law and statutory adverse possession claims. Along with those photographs,
3 plaintiffs adduced testimony from witnesses regarding their recollections of the location
4 of the fence and road. William Case also testified that the fence and road had always
5 been roughly 50 feet to the west of the eastern deed line of tax lot 500.

6 To establish ownership of the disputed strip by adverse possession, William
7 Case testified that he, and his father before him, had continuously farmed the strip from
8 1944 to 2007, when defendants purchased tax lot 500. According to Case, defendant's
9 predecessor, Jones, had told Case and his father that the fence line was the "property line"
10 dividing tax lot 500 from tax lot 700, and he and his father had always understood that
11 the fence line was the property line.

12 Plaintiffs' witnesses, Hoefler and Chambers, were asked to look at the series
13 of aerial photographs that plaintiff offered into evidence and identify where the farm road
14 and fence line had been located. On cross-examination, both witnesses were equivocal
15 with regard to the location of the fence line and the farm road, and their placement of the
16 fence line and the farm road in relation to other landmarks visible from the air, such as
17 trees and vegetation, changed from photograph to photograph. Plaintiffs also offered into
18 evidence a perpetuation deposition of another witness, Keller, who had visited the Jones
19 farm during the 1940s and 1950s. Keller had testified that, in 1950, the fence had been
20 tied to a large tree near Dever-Connor Road at the northern end of the properties. When
21 Keller was asked on cross-examination to identify that large tree on the 1948 aerial

1 photograph, she was unable to do so. Keller also was cross-examined regarding the
2 location of the fence line and the farm road on the aerial photographs, and she was unable
3 to consistently locate them by reference to other landmarks shown on the photographs,
4 such as a line of large fir trees across Dever-Connor road to the north of the strip and a
5 large tree at the southern end of the strip. In addition, William Case testified that the
6 farm road had continuously been in one place and that it had been located adjacent to the
7 fence line. On cross-examination, Case was confronted with his prior deposition
8 testimony that the farm road had at times been tilled under, and he admitted that there had
9 been times when portions of the road had been completely erased.

10 Case also testified that in approximately 1985 or 1986 he had installed a
11 large irrigation pivot on his property. Although the center of the pivot is on plaintiffs'
12 property, the pivot's arm extends past the eastern deed line of tax lot 500 during its
13 rotation. Case testified that he had positioned the pivot so that it would only water crops
14 on his property. Case further testified that crops planted on tax lot 500 had always been
15 planted in rows running north to south whereas crops planted on his property had always
16 been planted in rows running east to west. On cross-examination, Case was shown an
17 aerial photograph taken while the pivot was in operation showing it watering a section of
18 crops planted in rows running north to south. Case replied that the water must have been
19 blown by the wind.

20 In considering defendants' motion under ORCP 54 B(2), the trial court
21 found that the aerial photographs and the testimony of William Case and plaintiffs' other

1 witnesses regarding the location of the farm road were equivocal and that no witness was
2 able to fix the location of the road with sufficient certainty to allow the court to determine
3 that plaintiffs had adversely possessed any specific portion of tax lot 500 for the requisite
4 10-year period. The court explained:

5 "I am not convinced that the line has remained static over the years
6 based on the evidence. It may have, but the evidence doesn't prove that,
7 and in fact the evidence indicates that the line almost certainly moved,
8 especially once the fence was taken down. The property description, which
9 goes to the objective intent of the plaintiff, is at variance with where he
10 claims the line was maintained and where some of the photographs indicate
11 the line was maintained, but not all the photographs. In a nutshell, there
12 isn't enough to prove the line as being consistently maintained for ten years
13 or more during any single period of time, so that motion is allowed."

14 In response, plaintiffs urged the trial court to look at the evidence of the
15 location of the irrigation pivot that William Case had installed in "1995 or 1996" because
16 "there is no evidence that it was other than being on the land that was being possessed,
17 and you couple that with where the crop lines are, I mean, there is clear and convincing
18 evidence that that land was being possessed beyond the surveyed line."³ Plaintiffs
19 argued, in effect, that, notwithstanding the discrepancies that the court identified in the
20 evidence prior to "1995 or 1996", evidence of the pivot's location proved the boundaries
21 of the disputed strip for purposes of their statutory adverse possession claim, because that

³ Although counsel indicated that the pivot had been in place since 1995 or 1996, plaintiff William Case testified that it was installed in 1985 or 1986. That discrepancy has no bearing on our analysis because, as explained below, there is evidence in the record to support the trial court's finding that the location of the pivot was insufficient to establish the western boundary of the strip.

1 pivot had been in place for more than 10 years after 1990.⁴ The trial court disagreed:

2 "But isn't the problem there, [defense counsel], that the pivot was put
3 in after the statute was passed. Your argument has persuasion if we were
4 under common law, but since 1995 we've been under the statutory
5 definition which requires that objective belief, and since then objectively
6 the definition of that line could not be as far as the pivot may go. Now,
7 there's some discrepancy about how far the pivot goes, because, as
8 [William Case] testified, it depends on which way the wind is blowing, so
9 it's hard to tell from the photographs whether you're actually looking at how
10 far the irrigation goes or how far the actual pivot line is, but even if you
11 take that away and say that the line as it appears on the picture will be
12 given--you know, we'll give the best argument to the plaintiff, the reality is,
13 is that during that period of time since the pivot was installed we're under
14 the statutory definition of adverse possession which requires objective
15 belief, not just subjective belief."

16 Plaintiffs remonstrated that the court had "a number of choices here,"
17 including the conclusion that Case's father had perfected a claim for adverse possession
18 of the strip by farming it between 1944 and 1957. In response, the trial court further
19 explained:

20 "The problem is we don't know where the line was that [William
21 Case's father] used. That's the problem. Because this line definitely
22 moved. These photographs--the cross-examination on these photographs
23 demonstrated without any doubt that this line moved. There's no doubt this
24 line moved. It did not stay static ever since 1947. It just did not. I am
25 satisfied of that. The trees don't move, the water line didn't move. What
26 moved was the line. What I can't tell is when it moved, and since I can't tell
27 when it moved you haven't proven how long it remained in place, and
28 therefore you haven't proven by clear and convincing evidence that there
29 was a ten year continuous possession of the entire parcel of land between
30 what the deed line is and what the line is that is now being claimed by
31 [plaintiff].

32 "*****"

⁴ As explained below, in Oregon claims for adverse possession that vest after January 1, 1990, are governed by ORS 105.620.

1 "Crop lines move. And the only things in these pictures that's fixed
2 are the roads and the trees, and even the trees could be subject to some
3 movement, but everything else is subject to being plowed under, to being
4 moved, to being changed. We just--you can't say that with any certainty
5 beyond what's been testified to, and I've listened very carefully to the
6 testimony and considered that in deciding it.

7 * * * * *

8 "[The witnesses'] testimony was not unequivocal. [Plaintiff's]
9 testimony was to some extent impeached on cross-examination, and, in
10 fact, despite his assertion that the line has never moved the photographs
11 show that it has."

12 Plaintiffs renew their arguments on appeal, asserting that they are the
13 owners of the disputed strip based on either common-law adverse possession by virtue of
14 William Case's father's use of the strip from 1944 to 1957, or by Case's own use of the
15 strip from 1957 to 2007. Plaintiffs also claim title by statutory adverse possession,
16 arguing that aerial photographs of the location of one of their irrigation pivots, and the
17 extension of that pivot's rotating arm and water spray into a portion of the disputed strip
18 from roughly 1985 to 2007, proved that they had adversely possessed the entire strip.
19 Plaintiffs also argue that William Case held an "honest belief" that he was the actual
20 owner of the strip because of Jones's representation that the fence line was the property
21 line, and because both Case and his father had farmed the disputed strip consistently with
22 that belief.

23 Defendants reply that there is evidence in the record to support the trial
24 court's finding that plaintiffs failed to prove the location of the fence line and farm road
25 and, further, that an adverse claimant must present clear and convincing evidence

1 identifying the boundaries of the disputed property and that plaintiffs failed to do so. We
2 agree with defendants.

3 In Oregon, adverse possession is governed by both common-law and
4 statutory principles. To succeed on a claim of common-law adverse possession, a
5 claimant must prove by clear and convincing evidence that he or she or a predecessor in
6 interest made use of the property that was actual, open, notorious, exclusive, continuous,
7 and hostile for a 10-year period. [Lieberfreund v. Gregory](#), 206 Or App 484, 490, 136 P3d
8 1207 (2006). Proof that a predecessor in interest adversely possessed the property for the
9 statutory period is sufficient if there is evidence that the predecessor intended to transfer
10 whatever adverse possessory rights he or she may have acquired. *Id.* at 490 n 5 (citing
11 [Timber Service Co. v. Ellis](#), 163 Or App 349, 353–54, 988 P2d 396 (1999)).⁵ ORS
12 105.620, in turn, codifies the common law and adds a requirement that, at the time the
13 claimant first entered into possession of the property, the claimant had an "honest belief"
14 of actual ownership that had an objective basis and was reasonable under the
15 circumstances. *Lieberfreund*, 206 Or App at 490.⁶ That statute, however, applies only to

⁵ The parties do not dispute that William Cases's father intended to transfer whatever adverse possessory rights he may have acquired when he sold tax lot 700 to plaintiff William Case in 1976.

⁶ ORS 105.620 provides:

"(1) A person may acquire fee simple title to real property by adverse possession only if:

"(a) The person and the predecessors in interest of the person have maintained actual, open, notorious, exclusive, hostile and continuous possession of the property for a period of 10 years;

1 claims that vested after January 1, 1990. Or Laws 1991, ch 109, § 3.

2 All the elements necessary to establish adverse possession must be proved
3 by clear and convincing evidence. *Lieberfreund*, 206 Or App at 490. "This requirement
4 [also] applies to identification of the property adversely used." *Winthers v. Bertrand*, 239
5 Or 97, 99, 396 P2d 570 (1964). In *Winthers*, the defendant, who claimed ownership by
6 adverse possession of a strip of land on which she and her husband had built a tile
7 chicken house, had testified:

"(b) At the time the person claiming by adverse possession or the person's predecessors in interest, first entered into possession of the property, the person entering into possession had the honest belief that the person was the actual owner of the property and that belief:

"(A) By the person and the person's predecessor in interest, continued throughout the vesting period;

"(B) Had an objective basis; and

"(C) Was reasonable under the particular circumstances; and

"(c) The person proves each of the elements set out in this section by clear and convincing evidence.

"(2)(a) A person maintains 'hostile possession' of property if the possession is under claim of right or with color of title. 'Color of title' means the adverse possessor claims under a written conveyance of the property or by operation of law from one claiming under a written conveyance.

"(b) Absent additional supporting facts, the grazing of livestock is insufficient to satisfy the requirements of subsection (1)(a) of this section.

"(3) As used in this section and ORS 105.005 and 105.615, 'person' includes, but is not limited to, the state and its political subdivisions as created by statute."

1 "[t]o the use of the property. She identified the boundary by
2 reference to a partially obliterated fence line, an iron stake at the corner of
3 a little garage, and a slight bank of earth. None of these objects can now be
4 located definitely upon the ground.

5 "Defendant also identified the area used as extending east to within a
6 few feet of the plaintiff's driveway, which driveway is still in use. If this
7 testimony referred to that part of the driveway immediately east of the
8 chicken house it encompasses the disputed area. However, it is not
9 completely clear if it refers to this portion of the driveway or that south of
10 the chicken house. It is also not clear whether the claimed use after 1952
11 was as large as the alleged use from 1946. On the other hand, previous
12 owners of plaintiff's property from 1949 to 1961 both testified that the
13 defendant and her husband did not use the area east of the surveyed
14 boundary, as marked by a 1952 survey."

15 *Id.* at 98-99. The trial court found that the defendant had failed to identify the property
16 she claimed by adverse possession, and the Supreme Court, reviewing the case *de novo*,
17 agreed, holding that the defendant did not establish adverse possession because her
18 "evidence locating the area of adverse use is not so specific and compelling that the trial
19 court's findings to the contrary should be disregarded." *Id.* at 99.

20 Here, the trial court found that plaintiffs had failed to establish the location
21 of the fence line and the farm road, and that the evidence showed instead "that the line
22 almost certainly moved." There is evidence in the record to support that finding, and we
23 are bound by it. Thus, plaintiffs failed to sufficiently identify the area of asserted adverse
24 use. That failure is fatal to their claims for adverse possession under both the common
25 law and ORS 105.620.

26 Affirmed.