IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

Bearrach McMonagle & Jennifer Glyzinski,	)	No. 63592-1-I
Respondents,	)	UNPUBLISHED OPINION
v.	)	
David Allan,	)	
Appellant.	)	FILED: July 18, 2011

Schindler, J. — Bearrach McMonagle and Jennifer Glyzinski (McMonagle) own property in Skagit County next to the property owned by David Allan. Allan cut down trees, filled a wetland, erected fences, and constructed a pole barn and a portion of his driveway on McMonagle's property. At the conclusion of a 14-day trial, the court rejected Allan's claim of adverse possession, quieted title to the disputed property in McMonagle, and awarded McMonagle damages of $125,706 and attorney fees and costs of $73,201. Allan argues that the trial court erred in enforcing the discovery order and excluding a number of witnesses at trial, excluding testimony under the "dead man statute," and denying him the right to a jury trial. We affirm.

FACTS

The trial court's findings of fact are not challenged on appeal.[1] McMonagle and Allan own contiguous parcels of property in Skagit County. Since 1987, the McMonagle property has been taxed as forest land.

The previous owners of McMonagle's property, Larry and Lynne Hower, and Allan's property, Terry and Rebecca Read, erected fences for cattle or gardening purposes near the boundary line between the two properties.[2] The relationship between the Howers and the Reads was friendly, and "[s]uch fences were erected with the express or implied permission of the other party." Allan purchased the property from the Reads in 1995. After Allan purchased the property, there was no change in his use of the fences.

McMonagle purchased the property from Hower in August, 2004. In October 2004, Allan cut down trees near the boundary line on McMonagle's property "for a view." Allan pushed the trees and other debris into piles onto the McMonagle property. In November 2004, Glyzinski discovered Allan and his daughter on the property cutting firewood rounds. Glyzinski told Allan to finish up what he was doing and to please leave her property.

On December 23, 2005, McMonagle filed a lawsuit against Allan to quiet title to the property between the fences erected near the boundary lines, ejectment, and damages, including statutory treble damages for timber trespass. On May 17, 2006,

[1] The trial court entered detailed findings of fact and conclusions of law. Because Allan does not assign error, the findings of fact are verities on appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

[2] The Reads used a stock fence for pasturing sheep and horses, and they had the Howers' permission to keep the fence up even though it crossed over the surveyed property line to the north. There was also a remnant fence north of the surveyed boundary line to prevent cattle from falling into a drainage area.

Allan filed an answer and counterclaim for adverse possession.

After the lawsuit was filed, Allan extended his driveway onto the McMonagle property, built a swale on the McMonagle's property, and installed a culvert that redirected the natural flow of water from Allan's property onto the McMonagle property that also affected wetlands on the McMonagle property. Between 2006 and 2007, Allan cleared and filled a wetland and the wetland buffer area on the McMonagle property, and erected a pole barn near the McMonagle property that violated the setback requirement under Skagit County code. Allan also moved a trailer, a boat, and other personal property onto the McMonagle property, erected fences onto the McMonagle property, and applied for a permit to build a septic tank and drain field that encroaches onto the McMonagle property.

McMonagle filed an amended complaint alleging additional claims for trespass, encroachment, and damages. The clerk of the court mistakenly scheduled the trial date as November 13, 2007.

On June 22, the trial court entered an order that was presented and signed by the parties setting the discovery schedule. The order provides, in pertinent part:

> **1. Designation of Witnesses.** No later than 90 days prior to the date trial is scheduled to begin, the parties will identify in writing: (1) People having knowledge of discoverable matters ("fact witnesses"); and (2) Experts whom they intend to call at trial. This written notice will be filed with the court and served upon the other party. The notice will give the names and addresses of all fact witnesses and experts.

The order also requires the parties to disclose specific information regarding expert witnesses, including curriculum vitae and copies of any reports. The order sets a

discovery cut-off:

> **3. Discovery Cutoff Date.** The discovery cutoff date for this case shall be 30 days prior to the date trial is scheduled to begin. Depositions of fact witnesses and written discovery . . . may take place up until the discovery cutoff date. After that date, no discovery shall take place unless by written stipulation of the parties or by further order of court.

The order states that witnesses not disclosed according to the requirements in the order are not permitted to testify at trial. The order provides:

> **6. Binding Effect.** Except as otherwise provided in this order, no witness or expert shall be allowed to testify at trial unless properly designated in accordance with the terms of this order. Should the trial date be continued, the deadlines specified in this order remain unchanged (i.e. the deadlines relate to the original trial date, rather than the continued date).

On August 21, the parties stipulated to striking the trial date that the clerk mistakenly set to begin on November 13, 2007. A two-day trial was scheduled to begin April 15, 2008.

On November 6, Allan filed a jury demand. McMonagle filed a motion to strike the jury demand, arguing that the primary issues were equitable in nature, specifically McMonagle's claim to quiet title and Allan's counterclaim for adverse possession. On December 21, the trial court granted McMonagle's motion to strike the jury demand.

On January 16, 2008, 90 days before the scheduled trial date of April 15, McMonagle served and filed a witness disclosure designation that complied with the discovery scheduling order.

On January 17, McMonagle filed a motion to amend the answer to Allan's counterclaim to add the affirmative defense that the McMonagle property is "forest land." Allan objected, arguing that the motion to amend should be denied, but if

granted the trial date should be stricken and the discovery order amended. On February 1, the trial court granted McMonagle's motion to amend. The court modified the discovery scheduling order to allow additional time for expert depositions. The order also states that Allan's "[m]otion for continuance may be renewed upon showing of good cause."

On March 7, Allan filed a witness designation list identifying 34 witnesses. The witness designation included Tom Hanson, an arborist, as a rebuttal expert. Allan did not file a report or curriculum vitae regarding Hanson's expert testimony until after the discovery cutoff deadline. McMonagle objected to Allan's witness list as untimely and contrary to the discovery scheduling order, and argued that the witnesses should not be allowed to testify.

The trial began on April 15. On the second day of trial, and again on April 18, the trial court heard argument on McMonagle's objection to Allan's untimely witness designation. Allan argued that because the trial date originally had been set for November 13, 2007, the witness designation deadline was August 13, 2007. Allan asserted that because both parties failed to designate witnesses by August 13, 2007, it was unfair to exclude only Allan's witnesses.

The trial court ruled that the parties knew the original November 13, 2007 trial date was mistakenly set and that the dates in the discovery scheduling order relate to the April 15, 2008 trial date. Nonetheless, instead of excluding all of Allan's late-disclosed witnesses, the trial court permitted Allan to call lay witnesses to testify on the issue of tacking, to call Hanson as an expert witness, and allowed Allan to testify to any

opinions within his expertise.

The bench trial lasted 14 days. During trial the parties and a number of lay witnesses and experts testified, and the trial court made a site visit to the property.

Allan called four witnesses to testify about the prior use of his property and two expert witnesses. Allan also testified about his use of the disputed property and the alleged timber trespass. Allan also called two expert witnesses to testify at trial and was allowed to present his testimony as an expert regarding septic tank and drain field issues.

At the conclusion of the trial, the court ruled in favor of McMonagle and quieted title in the disputed property in McMonagle. The court concluded that Allan did not sustain his burden of establishing adverse possession or mutual recognition and acquiescence and dismissed the counterclaims with prejudice. The trial court ruled that McMonagle prevailed on the claims of ejectment, timber trespass, and damage to land, and that McMonagle was entitled to judgment for damages, injunctive relief, and attorney fees. The trial court awarded damages based on remedial costs, subject to statutory trebling. On February 26, 2009, the trial court issued detailed findings of fact and conclusions of law.

On April 2, Allan filed a motion for a new trial, arguing that he was denied his right to a jury trial and asking the court to reconsider the injunctive relief. The trial court denied Allan's motion for a new trial. The trial court entered judgment in favor of McMonagle, quieting title to the disputed property and awarding $125,706 in damages and $73,201 in attorney fees and costs.

ANALYSIS

On appeal, Allan argues that the trial court erred in enforcing the discovery scheduling order deadlines and excluding witnesses at trial; excluding evidence of statements under the dead man statute, RCW 5.60.030; and by denying his right to a jury trial.

Discovery Scheduling Order

Allan argues that the trial court abused its discretion by enforcing the discovery order deadline and excluding witnesses from testifying without considering the factors under Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). Allan also argues the trial court abused its discretion by ruling that the original November 13, 2007 trial date had been mistakenly set.

We review a trial court's decision to exclude a witness for an abuse of discretion. Burnet, 131 Wn.2d at 494. A trial court's decision to exclude a witness should not be disturbed on appeal unless there is a clear showing of abuse of discretion, such as "'discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" Burnet, 131 Wn.2d at 494 (quoting Assoc. Mortg. Investors v. G.P. Kent Constr. Co., Inc., 15 Wn. App. 223, 229, 548 P.2d 558 (1976)).

In a recent decision, the Washington Supreme Court set out the three Burnet factors that the trial court must consider before excluding a witness from testifying at trial.

> Although a trial court generally has broad discretion to fashion remedies for discovery violations, when imposing a severe sanction such as witness exclusion, "the record must show three things—the trial court's consideration of a lesser sanction, the willfulness of the violation, and substantial prejudice arising from it."

Blair v. Ta-Seattle East No. 176, 171 Wn.2d 342, ¶15, ___ P.3d ___ (2011) (quoting Mayer v. Sto. Indus., Inc., 156 Wn.2d 677, 688, 132 P.3d 115 (2006)). Allan argues there is no evidence that the trial court considered lesser sanctions or that Allan's late disclosure of witnesses substantially prejudiced McMonagle.

Here, there is no dispute that McMonagle filed a designation of witnesses and experts 90 days before the April 15 trial date, and Allan filed a witness designation list containing 34 names 39 days before trial. There is also no dispute that Allan did not file a motion to continue the trial date or modify the witness designation deadline before the trial date on April 15.

At trial, the court heard argument on the exclusion of witnesses for failure to comply with the discovery scheduling order deadline. Allan argued that under Burnet, his failure to comply with the deadline was not willful, that McMonagle did not claim prejudice, and that the trial court had discretion regarding the remedy. McMonagle argued Allan's late designation of witnesses was prejudicial because it required engaging in discovery of over 30 new witnesses.[3]

The trial court decided not to exclude all of the witnesses Allan designated. The trial court permitted Allan to call lay witnesses to testify on the issue of tacking, to call Hanson as an expert witness, and allow Allan to testify to any opinions within his

[3] The trial court requested that Allan identify which witnesses he intended to call at trial in order to identify if any of the witnesses were allowed under the terms of the discovery scheduling order. On April 16 the trial court told counsel for Allan:

> I really haven't made a decision because you know me well enough to know the last thing I want to do is blow out your case if I can avoid it. But I also feel to some extent constrained by the law of the case, which is what the order that Judge Needy entered in June of 2007. So I guess I need to know as much information as you can give me as to why I either shouldn't enforce the terms of this order or why it isn't applicable.

expertise.[4] During trial, the court also permitted Allan to call another expert witness to testify about damage to the wetland on the McMonagle property. The order states, in

[4] Allan's counsel understood the trial court's ruling as an "exception to the general order" that would bar all of Allan's witnesses.

pertinent part:

> [T]he parties were aware on 6/22/07 that the 11/07 trial date would be scrubbed, and that the discovery schedule would be driven by the 4/08 trial date. That was the only issue with the Discovery Order signed 6/22/07. On 2/1/08 Judge Needy made it very clear that he would hear a motion to continue, which the defense never brought. The defense's failure to timely designate has made discovery very difficult on Plaintiff, thus prejudicial. The appropriate sanction is as follows: defendant may call any lay witness whose name was disclosed in writing to Plaintiff before 1/16/08. He may also call lay witnesses who can testify on the tacking issue if Plaintiff has been given their names in writing. Tom Hanson may testify as an expert. The Plaintiff may depose him at Defendant's expense. Mr. Allan may testify as to tacks and any opinion within his expertise if appropriately disclosed to the Plaintiff by COB 4/24/08.

This case is unlike the Washington Supreme Court's recent decision in Blair. In Blair, the court held that a trial court abused its discretion when it excluded witnesses from testifying at trial without entering findings and considering the Burnet factors on the record. Blair, 171 Wn.2d 342, ¶25. In Blair, the plaintiffs failed to timely disclose witnesses under the case schedule. Blair, 171 Wn.2d 342, ¶5. The defendant filed a motion to strike the entire witness list. The trial court allowed the plaintiff to select only 7 of the 14 listed witnesses to call at trial. Blair, 171 Wn.2d 342, ¶8. The trial court later excluded two expert witnesses. Blair, 171 Wn.2d 342, ¶11. Before trial, the trial court granted the defense motion for summary judgment dismissal. Blair, 171 Wn.2d 342, ¶11. On appeal, the Washington Supreme Court reversed because the record did not reflect that the trial court considered the Burnet factors in deciding to exclude witnesses not disclosed in accordance with the case schedule. Blair, 171 Wn.2d 342, ¶16.

Here, by contrast, the record shows that the trial court considered the Burnet

factors in deciding whether to exclude witnesses that were not timely disclosed according to the agreed order the court entered. The trial court heard argument from the parties on two separate days. During argument, the parties cited and discussed the Burnet factors. The trial court's ruling and order explicitly states that Allan's "failure to timely designate has made discovery very difficult on" McMonagle, and the court imposed a lesser sanction by permitting Allan to call witnesses on the issue of tacking. The trial court also allowed Allan a great deal of latitude in presenting expert testimony. The record reflects the trial court considered the Burnet factors and imposed lesser sanctions, and did not abuse its discretion in excluding a number of the late-disclosed witnesses.

The trial court did not abuse its discretion in ruling that the November 13, 2007 trial date was mistakenly set and was not related to the discovery scheduling order. The record shows that when they drafted and presented the discovery scheduling order to the court, the parties knew the November 13, 2007 trial date had been mistakenly set by the clerk of the court.

Dead Man Statute

Allan also claims that the trial court erred in excluding testimony barred by the dead man statute, RCW 5.60.030.

RCW 5.60.030 bars testimony by a "party in interest" regarding transactions with the decedent or statements made to him by the decedent. RCW 5.60.030 provides, in pertinent part:

> That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, . . . then a party in interest or to the record, shall not be admitted

> to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased . . . person.

"The purpose of this statute is to prevent interested parties from giving self-serving testimony about conversations or transactions with a dead or incompetent person." Lasher v. Univ. of Wash., 91 Wn. App. 165, 169, 957 P.2d 229 (1998).

Glyzinski testified about her November 20 encounter with Allan on a part of the property that was not in dispute at trial.

> [Glyzinski]. . . . I approached [Allan] and knowing full well that he was on my property, I asked him whose property is this and he said it belonged to Larry Hower. I said it doesn't belong to Larry Hower anymore, that Barry and I bought it in August. He said --
> Q. I don't want to get what he said.
> [Glyzinski]. Okay.
> Q. What I want to get at is did you give him any instructions about being on your property or cutting firewood in the future?
> [Glyzinski]. I did. I said go ahead and finish up what you're doing here and then please get off my property.

During cross-examination, Allan attempted to ask Glyzinski whether he told her that he had been given permission by his predecessor-in-interest, Larry Hower, to cut firewood on McMonagle's property. McMonagle objected to the questions as barred by the dead man statute because Hower was deceased. Allan argued that asking Glyzinski about her conversation with Allan opened the door to testimony about Allan's statement to Glyzinski regarding his agreement with the decedent.

The court did not rule on the objection. The court allowed Allan to question Glyzinski and make an offer of proof. Glyzinski testified that Allan told her that he had a maintenance agreement with Hower to allow him to cut firewood on the property.

Because the trial court did not sustain McMonagle's objection under the dead man statute, the testimony was not excluded.

Request for a Jury Trial

Next, Allan claims he was denied his right to a jury trial because McMonagle's lawsuit is primarily an ejectment action. We disagree.

"[T]here is a right to a jury trial where the civil action is purely legal in nature." Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 365, 617 P.2d 704 (1980). There is no right to a trial by jury, however, where the action is purely equitable in nature. Brown, 94 Wn.2d at 365. "The overall nature of the action is determined by considering all the issues raised by all the pleadings." S.P.C.S., Inc. v. Lockheed Shipbldg. & Constr. Co., 29 Wn. App. 930, 933, 631 P.2d 999 (1981). "In determining whether a case is primarily equitable in nature or is an action at law, the trial court is accorded wide discretion, the exercise of which will not be disturbed except for clear abuse." Brown, 94 Wn.2d at 368. This discretion should be exercised with reference to the following nonexclusive factors:

> "(1) who seeks the equitable relief; (2) is the person seeking the equitable relief also demanding trial of the issues to the jury; (3) are the main issues primarily legal or equitable in their nature; (4) do the equitable issues present complexities in the trial which will affect the orderly determination of such issues by a jury; (5) are the equitable and legal issues easily separable; (6) in the exercise of such discretion, great weight should be given to the constitutional right of trial by jury and if the nature of the action is doubtful, a jury trial should be allowed; (7) the trial court should go beyond the pleadings to ascertain the real issues in dispute before making the determination as to whether or not a jury trial should be granted on all or part of such issues."

Brown, 94 Wn.2d at 368 (quoting Scavenius v. Manchester Port Dist., 2 Wn. App. 126, 129-30, 467 P.2d 372 (1970)).

The Washington Constitution guarantees the right to a jury trial in common law

actions for ejectment but not in equitable actions to quiet title. Wash. Const. art. I, § 21; Durrah v. Wright, 115 Wn. App. 634, 644, 63 P.3d 184 (2003). Where a party sues both to eject and to quiet title, the case involves both legal and equitable issues and the trial court has broad discretion "'to allow a jury on some, none, or all issues presented.'" Brown, 94 Wn.2d at 367 (quoting Scavenius, 2 Wn. App. at 129); Durrah, 115 Wn. App. at 649.

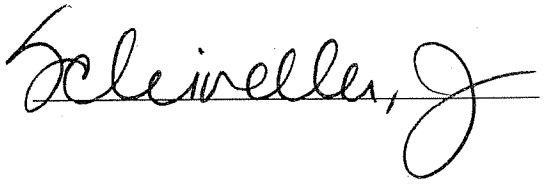
In an analogous case, Green v. Hooper, 149 Wn. App. 627, 646-47, 205 P.3d 134 (2009), we concluded that the trial court did not abuse its discretion in denying the defendant's jury demand in an adverse possession and quiet title lawsuit. In Green, the plaintiff's filed a lawsuit for ejectment and to quiet title by adverse possession. At trial, the issues were the plaintiff's claims for quiet title, ejectment, and trespass to land, and the defendant's counterclaim to quiet title. Green, 149 Wn. App. at 632. On appeal, the court affirmed the trial court's denial of the jury demand. In addition to broad discretion the trial court has in cases involving both legal and equitable issues, the court concluded that the equitable claim to quiet title was the primary relief sought. Green, 149 Wn. App. at 646-47.

As in Green, the issues in this case present legal and equitable claims. McMonagle's second amended complaint asserts claims for quiet title, ejectment, timber trespass, trespass to land, and requests damages and injunctive relief. Allan asserted a counterclaim for adverse possession and to quiet title to the disputed property up to and beyond the fence line. The primary issue at trial was the equitable quiet title action. Moreover, the relationship between the equitable and legal claims

would make it difficult

to separate the issues to submit to a jury. Brown, 94 Wn.2d at 368. We conclude that the trial court did not abuse its discretion by denying Allan's jury demand.

We affirm.



WE CONCUR: