IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROGER FLOE and BETTY FLOE, husband and wife,	)	No. 64104-2-I
Appellants,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
DAN N. FIORITO, Jr., as his separate property if married; and TIMOTHY T. FIORITO, as his separate property if married,	))))	
Respondents.	)	FILED: July 19, 2010
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Spearman, J. —Roger and Betty Floe sought to quiet title to an undeveloped parcel of land adjacent to their rural residence in their favor under the doctrine of adverse possession, based on their acts of clearing and mowing the property. The trial court rejected their claim as a matter of law on cross-motions for summary judgment, and quieted in favor of the title holders, Dan and

Timothy Fiorito. The Floes argue on appeal that the court erred because material questions of fact precluded resolution in favor of the Fioritos. Because the Floes failed to produce evidence that could establish an open and notorious possession of the disputed parcel, we affirm.

FACTS

This property dispute involves an undeveloped triangular parcel of land located south of Mount Vernon and east of Conway, in rural Skagit County. The Floes own and live on a rectangular parcel of land of approximately one and one-third acres that is adjacent to Interstate Five on the east side of the freeway. Bordering the Floes' property further to the east is the disputed parcel, which is situated between the Floes' property and Cedardale Road. The disputed parcel, which apparently amounts to something less than half an acre, is part of a larger parcel of approximately five and two-thirds acres of undeveloped land owned by the Fioritos, which extends farther north than the Floe property and further to the east across Cedardale Road. Because Cedardale Road runs at an angle from the southwest to the northeast, the narrow point of the triangle is adjacent to the south end of the Floe property. The north edge of the disputed parcel is a drainage ditch that runs roughly east to west from Cedardale Road across the Fiorito property and further west to the freeway, forming the northern border of the Floe property.

For purposes of our review, the following facts relating to the ownership and use of the property are undisputed. The Floes purchased their parcel in

1988. At the time the property contained a house, a workshop, and two other small outbuildings. Both the Floe property and the disputed parcel were partially overrun with blackberries, and had pieces of concrete and other construction debris on them. In 1991, the Floes cleared the debris and cut the blackberries on their property and the disputed parcel back to a line approximately 15 to 20 feet from the drainage ditch. After that time, the Floes mowed the property during the spring and summer months, which prevented the blackberries from returning, and kept the parcel in the same condition as the portion of their property they used as a lawn.

The Fioritos took possession of their property in 1992, and made no improvements on any portion of it, including the disputed parcel. In 2007, the Floes filed a lawsuit to quiet title to the disputed property in their name based on the theory of adverse possession. The Fioritos answered the complaint and cross-claimed for a judgment quieting title in their name.

Each party moved for summary judgment in its favor. After considering affidavits from the Fioritos and the Floes, the trial court granted the Fioritos' motion and denied the Floes' motion.

The Floes thereafter moved for reconsideration, filing additional affidavits from other witnesses describing their intermittent use of the disputed property over the years for such events as family picnics, barbecues and games. In a letter ruling the trial court denied the motion to reconsider.

The Floes appeal.

ANALYSIS

We review summary judgment orders de novo and perform the same inquiry as the trial court.[1] Summary judgment is proper 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 a judgment as a matter of law."[2] "After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact."[3] Summary judgment is appropriate if, in view of all the evidence, reasonable persons could reach only one conclusion.[4]

To establish a claim of adverse possession, the possession must be: (1) exclusive, (2) actual and uninterrupted, (3) open and notorious, and (4) hostile.[5] Possession of the property with each of the necessary elements must exist for ten years.[6] The party claiming adverse possession has the burden of establishing each element.[7]

Whether a person has gained title by adverse possession is a mixed question of law and fact. The trier of fact decides whether the requisite facts

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[1] Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

[2] CR 56(c).

[3] White v. State, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

[4] Hansen v. Friend, 118 Wn.2d 476, 485, 824 P.2d 483 (1992).

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

[6] RCW 4.16.020.

[7] Id.

exist, but the court decides whether those facts constitute adverse possession.[8] Whether adverse possession has been established by a particular set of facts is a question of law.[9]

Preliminarily, we must determine which set of pleadings and affidavits is properly considered in our review. The Floes contend that we should consider not only the declarations and materials submitted for the cross-motions for summary judgment, but should also include the declarations they submitted at the time of their motion to reconsider. They contend this is appropriate because the trial court "invited the evidence that was included in the motion for reconsideration." We disagree.

The Floes rely on comments the trial court made during oral argument and in giving its oral ruling on the cross-motions for summary judgment. They assert that the court raised issues sua sponte about the type of activities needed beyond merely mowing the property to establish the elements of adverse possession, and thereby implicitly agreed to consider any materials showing such activities. This, however, is not an accurate characterization of the record. It is apparent that the trial court's comments were not sua sponte, but were directly responsive to the issues raised by the Fioritos about the type of activities that would be required to establish adverse possession for the disputed parcel, and that the court was merely emphasizing that the Floes' claimed facts fell short of establishing the requisites for their legal claim. The court did not expressly or

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[8] Miller v. Anderson, 91 Wn. App. 822, 828, 964 P.2d 365 (1998).

[9] Id. at 828.

implicitly agree to allow the Floes to submit any new evidence.

Nor does the trial court's ruling denying reconsideration indicate, as the Floes claim, that the court was "essentially accepting [the additional declarations] as evidence." While the Floes rely on the court's closing comments that the additional declarations would not have changed the outcome, they disregard the court's clear rejection of those declarations as a basis to reconsider because the "evidence was readily available and known to the Floes at the time of the motion" and for that reason "[t]here is no basis to consider that information at this time."[1] Accordingly, we confine our review to the materials submitted at the time of the cross-motions for summary judgment.

The Floes contend that the trial court erred in granting summary judgment to the Fioritos because there were material issues of fact that required resolution at trial. They identify a dispute regarding the number of times they claimed to have mowed the property because the Fioritos' declarations recited that they travelled past the parcel approximately four times a year and never saw any mowing activities. But our review assumes the truth of the Floes' declarations and draws all inferences in their favor. The issue of whether those alleged facts and inferences were sufficient to establish adverse possession is a legal

[1] While the Floes have separately assigned error to the denial of their motion to reconsider, the only argument they advance is that the trial court erred because it had invited the additional submittals. As discussed above, our review of the record shows the contrary. Moreover, the trial court was correct that the additional materials could and should have been provided at the time of the initial motion because they did not constitute "[n]ewly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced" when the cross-motions for summary judgment were heard. CR 59(a)(4). It is therefore clear that the trial court did not abuse its discretion in denying the motion to reconsider.

question,[11] and therefore is appropriate for determination on summary judgment as the resolution of a matter of law.[12]

The open and notorious element of adverse possession requires that (1) the true owner had actual notice of the adverse use throughout the statutory period, or (2) the claimant used the land such that any reasonable person would have thought he owned it.[13] In other words, the claimant must show that the title owner either knew or should have known that the occupancy constituted a claim of ownership.[14] The use and occupancy only needs to be like that of a true owner, considering the land's nature and location.[15]

Washington courts have found adverse possession even where the parties did not erect fencing.[16] But, as our Supreme Court stated in Wood v. Nelson,[17] "[a] fence is the usual means relied upon to exclude strangers and establish the dominion and control characteristic of ownership." Because there was no fence or boundary marker, the question before us is whether the Floes' repeated acts of mowing after cutting back the blackberries and clearing the construction debris in 1991 could be enough to establish the open and notorious elements of a claim for adverse possession.

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[11] Miller, 91 Wn. App. at 828.

[12] CR 56(c).

[13] Riley v. Andres, 107 Wn. App. 391, 396, 27 P.3d 618 (2001); Shelton v. Strickland, 106 Wn. App. 45, 51-52, 21 P.3d 1179 (2001).

[14] Anderson v. Hudak, 80 Wn. App. 398, 405, 907 P.2d 305 (1995).

[15] Krona v. Brett, 72 Wn.2d 535, 539, 433 P.2d 858 (1967), overruled on other grounds by Chaplin v. Sanders, 100 Wn.2d 853, 861, 676 P.2d 431 (1984).

[16] See Lilly v. Lynch, 88 Wn. App. 306, 945 P.2d 727 (1997); Lingvall v. Bartmess, 97 Wn. App. 245, 982 P.2d 690 (1999); Riley, 107 Wn. App. 391.

[17] 57 Wn.2d 539, 540, 358 P.2d 312 (1961).

Citing Chaplin v. Sanders,[18] and Mesher v. Connolly,[19] the Floes contend that, as a matter of law, the singular act of mowing the disputed property may be sufficient to create open and notorious use. But neither of these cases stands for this proposition.

In Chaplin, claimants cleared, mowed, landscaped, and maintained a previously overgrown strip of land, used it for parking cars, garbage disposal, storage, gardening and picnicking, and installed underground wiring and surface power poles.[2] The actual holding of Chaplin was that these acts together were sufficient to establish open and notorious conduct.[21] Also unlike the present case, Chaplin involved discussions between the parties about the encroachment of the claimant's acts on the property.[22]

In Mesher, the claimant asserted a right to 30 inches of lawn next to a sidewalk and maintained the area up to that boundary.[23] In addition to consistently mowing along the claimed line, the claimant built a rockery and tended ornamental plants at one end of the line, and placed a partial fence corresponding with his claim at the other end. The Supreme Court affirmed the award to the plaintiff of the disputed strip by reason of adverse possession. In Mesher, the court stated that although mowing a neighbor's lawn may merely be an act of neighborly accommodation, considering the location of the rockery and

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[18] 100 Wn.2d 853, 676 P.2d 431 (1984).

[19] 63 Wn.2d 552, 388 P.2d 144 (1964).

[2] 100 Wn.2d at 856.

[21] Id. at 863.

[22] Id.

[23] 63 Wn.2d at 554-56.

the fence together with the consistent mowing to the asserted boundary and no further, there was a sufficient "unfurling of the flag" of ownership to support the trial court's findings of fact and conclusions of law.[24]

The circumstances here do not remotely resemble those in either Chaplin or Mesher. Despite the Floes' claims, no Washington case has held that mowing, by itself, is sufficient to establish the open and notorious element of a claim for adverse possession.[25] And considering the particular circumstances here, it is clear that the Floes' use by mowing was not enough.

The undisputed record showed that a substantial strip of land along the side of Cedardale Road belongs to Skagit County as part of the right of way, and therefore could not be subject to adverse possession as a matter of law.[26] But the Floes mowed that strip along with the disputed parcel. Given those circumstances, there would be no reason for the title holder to know or even draw an inference that the Floes' supposed occupancy by means of mowing constituted an ownership claim. Rather, the situation in this case fits the example of an act of mowing that the Mesher court indicated would not be sufficient to establish a claim because it included land that clearly would not be subject to adverse possession.[27]

The Floes assert that the land is only useful as a lawn, and therefore the

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[24] Id. at 556-57.

[25] See Wood, 57 Wn.2d at 540.

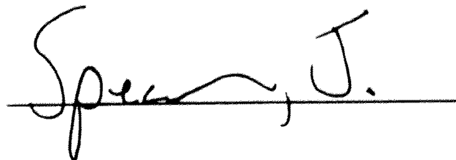
[26] See Finley v. Jordan, 8 Wn. App. 607, 609, 508 P.2d 636 (1973).

[27] Mesher, 63 Wn. 2d at 556 ("The cutting of the entire lawn between the two houses could well have been an act of neighborly accommodation and does not evidence any intent to claim any right of ownership in the 30-inch strip with which we are concerned.").

only act they could perform to establish their claim was mowing. But their use of their own property demonstrates the contrary. In their depositions they acknowledged installing additional permanent and portable outbuildings, storing cars and boats, installing drainage ditches, placing no trespassing signs and engaging in other activities that unambiguously signaled their ownership of their property to anyone that observed it. Accordingly, given the character of their own adjacent property, that the Floes repeatedly mowed the disputed parcel fell far short of signaling to a reasonable person that they claimed to own it.

As a matter of law, the Floes did not provide evidence sufficient to meet their burden of establishing the elements of adverse possession. The trial court did not err in granting summary judgment and quieting title to the disputed parcel in the Fioritos.

We affirm.



WE CONCUR: