IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

LARRY W. REINERTSEN AND KAAREN A. REINERTSEN,	)	No. 64661-3-I
Respondents,	)	DIVISION ONE
v.	)	
CAROLYN RYGG, a single woman and CRAIG DILWORTH, a single man,	)	UNPUBLISHED OPINION
Appellants.	)	FILED: May 16, 2011

spearman, j. — After their attempt to build a deck created discord with their neighbors, Larry and Kaaren Reinertsen sought to quiet title to their property. The Reinertsens' neighbors, Carolyn Rygg and her son Craig Dilworth, filed counterclaims of adverse possession and assault. The trial court found in favor of the Reinertsens. In the first appeal of this matter, the court found the trial court's findings inadequate and remanded. This appeal comes after entry of supplemental findings. Holding the record supports the trial court's findings, which in turn support the conclusions of law, we affirm the trial court.

FACTS

Fred Howard owned two adjacent lots, 9 and 10. Howard's house, straddling the boundary between the lots, encroached onto lot 9. In 1966, Howard planned to divide and sell both lots. He hired L. F. McCurdy to survey them and draft new legal descriptions that would eliminate the encroachment. McCurdy referred to both distance calls and compass bearings in the descriptions to delineate a new boundary line between the lots:

> [Lot] "X" Lot 10 and that portion of Lot 9 lying westerly of the following described line: Begin at the southeast cor. of said lot 9 thence S 68º 49' W along the south line of said Lot 9 for 59.80 feet to the True Point of Beginning; thence N 8º 35' W for 164.73 ft. to an intersection with the west side of said Lot 9, All in Block 9, Plat of Shore Acres.
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> [Lot] "Y" Lot 9, Block 9, Plat of Shore Acres less that portion lying westerly of the following described line: (same point of beginning and duplicate line description above).

On his survey, McCurdy noted that the northeast corner of Howard's house was 7.5 feet west of the new boundary line.

Shortly after McCurdy's survey, Larry and Kaaren Reinertsen purchased Howard's house and the western lot X. Ownership of lot Y transferred several times until 1976, when it was purchased by Carolyn Rygg and her husband. Their marriage subsequently dissolved, and Rygg now lives on lot Y with her son, Craig Dilworth.

In late 2002 or early 2003, the Reinertsens began building a deck on the eastern side of their house. Rygg and Dilworth believed the deck extended onto their property. The Reinertsens disagreed, but made a small adjustment to the design of the deck at their neighbors' request. Rygg and Dilworth believed the revised deck still encroached

onto their property, and, as construction continued, animosity between the parties escalated. Larry Reinertsen and Dilworth had at least two confrontations, one in October 2003 and the second in February 2004. Dilworth alleged that on the second occasion, Larry Reinertsen assaulted him. Reinertsen testified that on both occasions he and Dilworth were waving their arms around, and that during the second encounter, he accidentally knocked Dilworth's glasses off.

In March 2004, the Reinertsens filed an action to quiet title to the property based on its legal description. The legal description proved problematic because measuring from the distance calls would create a different boundary line from that created by measuring from the compass bearings. Rygg counterclaimed, alleging that she adversely possessed or the parties mutually acquiesced to a boundary line created by a row of pyramidalis bushes, a board fence, and a split rail fence. This line lies slightly to the west of the boundary created by the legal description, whether measured according to the distance calls or the compass bearings. Dilworth filed a counterclaim for assault. The trial court ruled that the distance calls control the boundary, and found against Rygg and Dilworth on all of their counterclaims.

Rygg and Dilworth appealed. Among other things, they argued the trial court's findings were inadequate for purposes of review. In an unpublished decision, Reinertsen v. Rygg, et. al., Nos. 55842-1-I and 56240-1-I (July 9, 2007), we held (1) the evidence was sufficient to support the trial court's determination of the boundary line; (2) the trial court did not abuse its discretion in denying both parties requests for CR 11

sanctions; (3) the trial court did not err in refusing to disqualify the Reinertsens' counsel; and (4) the findings on adverse possession, mutual acquiescence, and assault were inadequate to review. We remanded for new findings on the counterclaims.

With regard to the inadequate findings on adverse possession and mutual acquiescence, our opinion noted that the trial court had failed to take into account (1) that the Reinertsens' defense to the claims was permission; and (2) the fact that there were disputes over three separate areas along the boundary:

> For purposes of trial, the parties divided the boundary line into three sections: the line designated by pyramidalis shrubs, a board fence, and a split rail fence. The board fence created the western edge of an enclosure abutting Rygg's garage, and Rygg had stored firewood in the enclosure for many years. Larry Reinertsen did not dispute that Rygg used the area; instead, he presented a defense of permission. In an adverse possession claim, the burden is on the true owners to show that use was permissive. Hovila v. Bartek, 48 Wn.2d 238, 241, 292 P.2d 877 (1956) (proof that use of another's land has been open, notorious, continuous, and uninterrupted for the required time creates a presumption that the use was adverse; burden is on the true owner to show use was permissive). But according to the court's finding, the party failing to meet its burden was Rygg, not the Reinertsens. Ordinarily, absence of a finding in favor of a party's position is in effect a finding against that party. Wallace Real Estate Inv. v. Groves, 72 Wn. App. 759, 773 n. 9, 868 P.2d 149 (1994). But here, substantial evidence supports a finding that Rygg adversely possessed the enclosed area up to the board fence, and the finding does not acknowledge that the burden of proof shifted to the Reinertsens to show permission.
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> In addition, evidence that the parties regarded the line represented by a collapsed portion of the split rail fence as a boundary tended to support Rygg's mutual acquiescence theory. The court did not explain why the theory failed for that section—whether because the line was not well-defined, or because the parties failed to mutually recognize and accept the line as the true boundary, or for some other reason. We are thus unable to review the record to ascertain its sufficiency on this issue.
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> Further, we cannot tell whether the court considered theories of mutual acquiescence and adverse possession for each section of the boundary line, and, if so, why it rejected them. In short, the

> court's sole finding is inadequate to suggest the factual basis for the court's conclusions.

Similarly, we held the findings on the assault counterclaim were insufficient to permit appellate review:

> The trial court found:
>
> > [T]he claim of Defendant Dilworth for assault is not well founded and should be denied. To the extent that there was any physical altercation between Defendant Dilworth and Plaintiff Reinertsen, the actions of said Defendant were at least as provocative as those of the Plaintiff and the facts presented equally support a situation of mutual combat or Defendant taking action that might have incited the Plaintiffs' response.
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> Mutual combat and provocation are irrelevant to a claim of civil assault. Washington has expressly refused to adopt the rule that parties engaged in mutual combat will be denied relief in a civil action. Hart v. Geysel, 159 Wn. 632, 635, 294 P. 570 (1930). The finding does not address the facts relevant to the elements of assault.

In addition to our holdings regarding the inadequate findings, we specifically indicated Judge Hulbert could serve *pro tem* to hear the matter on remand.

On remand, Rygg and Dilworth nevertheless sought to prevent Judge Hulbert from serving *pro tem*. They filed various motions, petitions, and writs with the trial court, this court, and the Supreme Court related to the issue of Judge Hulbert serving *pro tem*. None of these motions, petitions, or writs were successful, and the trial court eventually heard argument and entered supplemental findings. The court again found that Rygg failed to establish adverse possession or mutual acquiescence. The court found that Reinertsen did assault Dilworth, but that there was no evidence of damages. Rygg and Dilworth appeal from these supplemental findings, as well as several other orders.

DISCUSSION

Scope of Appellate Review

As a preliminary matter, based on the manner in which Appellants have made assignments of error and briefed this case, we find it necessary to address the nature and scope of review in this appeal. In general, we review challenged findings for substantial evidence, defined as the quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). This court's review is deferential. We view the evidence and all reasonable inferences in the light most favorable to the prevailing party. Korst v. McMahon, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006). When a trial court bases its findings of fact on conflicting evidence and there is substantial evidence to support the findings entered, we do not reweigh the evidence and substitute our judgment even though we might have resolved the factual dispute differently. Brown v. Superior Underwriters, 30 Wn. App. 303, 305-06, 632 P.2d 887 (1980). Regarding challenged conclusions of law, we review whether they are supported by the findings of fact. Hegwine v. Longview Fibre Co., Inc., 132 Wn. App. 546, 555, 132 P.3d 789 (2006).

In our first opinion, we affirmed the trial court's decision regarding the boundary line, sanctions, and attorney disqualification, and remanded only for findings as to Rygg and Dilworth's adverse possession, acquiescence, and assault counterclaims. On remand, the trial court made additional findings of fact and conclusions of law

regarding these counterclaims. In their briefing in this appeal, however, rather than focusing largely on the supplemental findings and conclusions about the counterclaims, Rygg and Dilworth have instead challenged numerous portions of the findings unrelated to their counterclaims, as well as portions of the findings related to issues that were already decided against them in their previous appeal. See Opening Brief at 1-3, appendix. Indeed, counsel for Rygg and Dilworth attached to the Opening Brief a lengthy appendix that includes a version of the trial court's supplemental findings wherein a substantial percentage of the supplemental findings have been underlined by counsel. Counsel then assigned numbers to the underlined portions and challenged them all as erroneous. Thus, through this appendix, appellants purport to challenge 67 findings of fact and 53 conclusions of law. See Opening Brief at 2, appendix.[1]

But again, the only questions before this court are whether the trial court's supplemental findings regarding Rygg and Dilworth's counterclaims are supported by the record, and whether those findings support the conclusions. To the extent Rygg and Dilworth have challenged findings and conclusions about the boundary line location, the trial court's decision to deny their motion for sanctions, disqualification of the Reinertsens' counselor and, Judge Hulbert's qualification to serve *pro tem*, those issues are not before this court on appeal and we decline to consider them. Additionally, we acknowledge that the evidence considered by the trial court was hotly

[1] The Reinertsens moved to strike the appendix on grounds that it violates RAP 10.3(8), which states that "[a]n appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c)." In light of our decision we decline to grant the motion.

disputed and that there is evidence in the record that could arguably support a finding in appellants' favor. But again, we are not re-weighing the evidence, assessing credibility, nor substituting our judgment for that of the trial court; rather, our purview is simply to examine whether, viewed in a light most favorable to the prevailing party, there is substantial evidence in the record to support the trial court's findings. Sunnyside Valley, 149 Wn.2d at 879; Korst, 136 Wn. App. at 206, Brown, 30 Wn. App. at 305-06.

Adverse Possession

An adverse possessor must demonstrate possession for a period of ten years that is (1) exclusive; (2) actual and uninterrupted; (3) open and notorious; and (4) hostile. ITT Rayonier v. Bell, 112 Wn.2d 754, 757, 774 P.2d 6 (1989). In boundary disputes, an adverse possessor does not have to prove possession along a straight, well-defined boundary line. See, e.g., Lloyd v. Montecucco, 83 Wn. App. 846, 853-54, 924 P.2d 927 (1996). A person claiming adverse possession, however, cannot satisfy the hostility element when the land's true owner, or a predecessor-in-interest, gives the possessor permission to occupy or possess the land. Chaplin v. Sanders, 100 Wn.2d 853, 861-62, 676 P.2d 431 (1984).

In the first appeal of this matter, this court noted that, for purposes of trial, the disputed boundary line was divided by the parties into three areas: "the line designated by pyramidalis shrubs, a board fence, and a split rail fence." We further observed that while the Reinertsens disputed Rygg's adverse possession and mutual acquiescence

claims as to the pyramidalis shrubs and the split rail fence, they conceded that Rygg had used the area created by the board fence for many years but had argued that Rygg's use was permissive. We held the trial court had failed to make adequate findings on Rygg's claims of adverse possession and mutual acquiescence and recognition and failed to recognize that the Reinertsens bore the burden of proving that Rygg's use of the board fence area was permissive. We remanded for the trial court to make findings addressing these issues. The question we must resolve is whether the court's supplemental findings on this issue are supported by the record. We conclude they are.

Pyramidalis bushes. Regarding the area bounded by the pyramidalis bushes, the trial court found:

> With respect to the area of the boundary encompassing the line of pyramidalis, the Court specifically finds the testimony of Plaintiff Reinertsen that he planted these bushes credible and supported by the letter from Dr. McCarty admitted as Exhibit 8. The court further finds that the pyramidalis are wholly within the property of the Plaintiff as shown on the Downing survey admitted as Exhibit 3. [sic, exhibit 5] The only evidence which really supports a claim of adverse possession put forward by the Defendants is that they had a "spraying service" engaged for a period of time which may have sprayed the pyramidalis over the objection at one time of the Plaintiffs. This incidental spraying is not sufficient to find that the defendants' possession was "actual and uninterrupted, open and notorious, hostile and exclusive for [more] than 10 years" . . .

We conclude the trial court's findings are supported by the record. Again, substantial evidence is simply the quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. Sunnyside Valley, 149 Wn.2d at 879.

Exhibit 5 shows the pyramidalis bushes are entirely on the Reinertsens'

property; Ms. Reinertsen testified that Rygg and Dilworth's spraying service did not spray the bushes, except for incidentally; and Mr. Reinertsen testified he topped the trees almost every year. In short, viewing the evidence in a light most favorable to the Reinertsens, Korst, 136 Wn. App. at 206, the trial court's findings on adverse possession of the area bounded by the pyramidalis bushes are supported by the record, and these findings in turn support the conclusion that any use by Rygg and Dilworth was not actual and uninterrupted, open and notorious, nor hostile and exclusive.

Board fence. Regarding the area bounded by the board fence, the trial court found:

> With respect to the area of the "board fence", sometimes referred to as a "6 foot board fence", the Court finds that the Reinertsens originally laid down a line of used railroad ties as a retaining wall, not necessarily on the surveyed boundary but close to the actual line. The court further finds that the predecessor to the defendants conferred with the Plaintiffs and wanting to erect a barrier fence, with the agreement of the Plaintiffs, did so placing its base upon the railroad ties belonging to the Plaintiffs for "mutual convenience" so that weeds would not grow in the minimal area between the railroad ties and his fence if placed on the actual boundary line. . . .

We conclude these findings are also supported by the record. Exhibit 8, a letter from Dr. Ralph McCarty, the previous landowner of Rygg and Dilworth's property, states that he built the board fence on the Reinertsens' property only after seeking the permission and approval of Larry Reinertsen. The letter further indicates the purpose of doing so was to use the railroad ties on the Reinertsens' property as a way of ensuring the fence was sturdy, and to prevent weeds from growing between the fence and the railroad ties.

See Exhibit 8. Viewed in a light most favorable to the Reinertsens, this evidence is sufficient to persuade a rational, fair-minded person that any use of the area bounded by the board fence was permissive. Sunnyside Valley, 149 Wn.2d at 879; Korst, 136 Wn. App. at 206.

Split rail fence. Regarding the area bounded by the split rail fence, the trial court found:

> With regard to the "split rail fence" and a claim of adverse possession, the Court finds that "a" split rail fence was erected by Dr. McCarty probably sometimes in 1969 or the early 70's. See Exhibit 8. There was no evidence before the Court as to exactly where Dr. McCarty located the split rail fence. However, the testimony was clear to the Court that the split rail fence deteriorated and fell down sometime in the past. The "survey" admitted as Exhibit 2, dated May 29, 1995, shows a "split rail fence" on the eastern boundary of the Rygg property (that boundary not involved in this suit) but does not show any split rail fence on the west toward the Reinertsens. The court must then presume from this evidence that the fence no longer existed as of 1995. The defendants then, at some time, resurrected the fence after 1995 (not within the 10 year period for adverse possession). But in doing so, they could not prove to the Court's satisfaction that it was erected exactly in the place or on the line set by the former split rail fence, nor can they show with any certainty where the former split rail fence was located. As a result, the court is unable to find that a specific boundary was established by a fence that existed for longer than the required 10-year period to sustain a claim for adverse possession in this portion of the boundary. The testimony of the defendants in regard to where they erected the new split rail fence was not of sufficient weight or specificity to establish their burden of proof in this regard.

Viewed in a light most favorable to the Reinertsens, Korst, 136 Wn. App. at 206, the record supports these findings. Exhibit 2 is a survey commissioned by Rygg, and the survey clearly shows there was no split rail fence in place in 1995. In addition, Larry Reinertsen testified that when Rygg reconstructed the fence in 2003, it was not in the same location as the previous fence. Rygg disputes this evidence and argues that she

presented evidence upon which the trial court could have found the location of the split rail fence with sufficient certainty. But this argument asks us to reweigh the evidence and substitute our judgment for that of the trial court. This we cannot do. Brown, 30 Wn. App. at 306. ("Our examination of the record goes no further than to determine whether there is substantial evidence to sustain the trial court's findings.") Thus, our task is to determine whether, when viewed in the light most favorable to the prevailing party, there is sufficient evidence in the record to support the trial court's finding that the evidence was insufficient to establish with certainty the location of the original split rail fence. Korst, 136 Wn. App. at 206; Brown, 30 Wn. App. at 305-06. We conclude that there is.

Mutual Acquiescence

Generally, mutual acquiescence and recognition is a doctrine of boundary adjustments that supplements adverse possession in the settlement of boundaries. Lilly v. Lynch, 88 Wn. App. 306, 316, 945 P.2d 727 (1997); Lloyd v. Montecucco, 83 Wn. App. 846, 855, 924 P.2d 927 (1996). Regarding mutual acquiescence, the elements are:

> (1) The line must be certain, well defined, and in some fashion physically designated upon the ground, *e.g.,* by monuments, roadways, fence lines, etc.; (2) in the absence of an express agreement establishing the designated line as the boundary line, the adjoining landowners, or their predecessors in interest, must have in good faith manifested, by their acts, occupancy, and improvements with respect to their respective properties, a mutual recognition and acceptance of the designated line as the true boundary line; and (3) the requisite mutual recognition and acquiescence in the line must have continued for that period of time required to secure property by adverse possession.

Lilly, 88 Wn. App. at 316.

Here, although this court affirmed the trial court's boundary line in the first appeal, we nevertheless remanded for findings on mutual acquiescence, given the trial court entered none. The trial court has now made such findings:

> Again dealing with the first portion of the contested boundary and with regard to "mutual acquiescence and recognition", the evidence at trial was that the Plaintiffs planted the line of pyramidalis inside their property line (no intending the vegetation to be the property line) and maintained, trimmed and topped the trees sometimes from either their side or the side adjoining the property owned by the Defendants. These facts do not support a claim that both property owners mutual acquiesced in the line of pyramidalis constituting the true property line. . . .
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> With regard to the second portion of the boundary in dispute, the "board fence", the issue is also clear. The letter admitted as Exhibit 8 clearly indicates that when Dr. McCarty and the Reinertsens established the fence, they did not do so to establish the boundary line. They located it upon the railroad tie retaining wall established by the Reinertsens solely as a convenience to prevent weeds from growing in the gap had they established it on the line. . . . There was no recognition by Dr. McCarty or the Plaintiffs that this fence represented the actual "boundary".
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> . . .
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> Finally with respect to the split rail fence, the line was at one time well established (when Dr. McCarty built the fence) but its actual location at the time was not proven at trial. The location at the time of trial was known through surveys but it had previously fallen down and the evidence was not sufficient to show that it existed prior to the survey of May 29, 1995 . . .

The facts relied upon by the trial court in deciding the mutual acquiescence counterclaim are the same facts it relied upon to decide the adverse possession counterclaim. As such, the same exhibits and testimony that supported the adverse possession findings also support the trial court's findings on mutual acquiescence. As is described above, when viewed in a light most favorable to the Reinertsens, the

findings on mutual acquiescence are supported by substantial evidence, which is the quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. Sunnyside Valley, 149 Wn.2d at 879. Further, we decline Rygg's invitation to reweigh the evidence considered by the trial court and substitute our judgment. Brown, 30 Wn. App. at 305-06. We reject Rygg's argument regarding mutual acquiescence.

Assault Counterclaim

In this court's previous opinion, we found the trial court's findings on Dilworth's assault counterclaim were insufficient for appellate review. On remand, the trial court found Larry Reinertsen did assault Dilworth, but it also found Dilworth suffered no damage:

> The Court finds that although the parties engaged in mutual combat in anger, they did not do so with deadly weapons or force. Under the reasoning of the decision by the Court of Appeals, that they engaged in mutual combat does not defeat a claim for civil assault brought by Defendant Dilworth. The court does find that Plaintiff Larry Reinertsen did strike a blow that made incidental contact with the eyeglasses worn by Defendant Dilworth. As a result, the Court will not find under the law as expressed by the Court of Appeals that an assault did occur. While the Court does not necessarily believe actual or demonstrated damages need [be] proven in a case of civil assault, there is no evidence of any quantifiable monetary damages incurred by Defendant Dilworth. Further, his assertion in testimony, when viewed in light of his presence, demeanor and testimony, that the result of the confrontation in question was that he and his mother were in ongoing fear of Larry Reinertsen is not accepted or given credibility by the Court. Therefore, the Court will find an assault occurred but declines to award any damages to Defendant Dilworth.

Here, the only evidence of damages suffered by Dilworth came from his testimony, which the trial court did not find credible. We leave credibility determinations to the trier of fact. State v. Boot, 89 Wn. App. 780, 791, 950 P.2d 964 (1998). For this

reason, we reject Dilworth's arguments on the assault counterclaim.

Other Pending Motions

By our current count, which may not be entirely accurate, counsel for Rygg and Dilworth has filed 18 motions with this court in this particular appeal. These 18 motions include six motions for "contempt," "perjury," and/or sanctions against the Reinertsens and their counsel. Our commissioners and other panels of judges have dealt with many of the motions, but several remain, including: (1) a 9/21/10 motion for "contempt," alleging the Reinertsens violated the commissioner's stay (designed to keep the status quo on appeal) by pruning some bushes; (2) a 10/18/10 motion for "contempt/perjury," alleging that Larry Reinertsen lied in a declaration; (3) a 10/18/10 motion to strike the Reinertsens' response to an earlier motion for contempt; (4) a 11/4/10 motion to strike the Reinertsens' motion to strike the appendix; (5) a 11/15/10 motion for extension of time to file reply brief; (6) a 11/17/10 motion to strike a summary of paid and unpaid sanctions, filed by the Reinertsens; and (7) a 4/8/11 document moving to strike the amended response brief, for sanctions, and to disqualify counsel.

The motions to strike are moot and we decline to rule on them. Regarding the remaining motions described above, they are meritless and we deny them.

Affirmed.

Spearman, J.

WE CONCUR:

Dwyer, C. J.