IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

LEE WRIGHT and NINA WRIGHT, husband and wife,	)	No. 67747-1-I
	)	DIVISION ONE
Appellants,	)	
v.	)	
	)	UNPUBLISHED OPINION
THOMAS EGGLESTON and SHERRY, EGGLESTON, husband and wife,	)	
Respondents.	)	FILED: December 10, 2012

Spearman, A.C.J. — At issue in this case is a dispute over the boundary line dividing the properties owned by the Wrights and the Egglestons. The Egglestons sued to quiet title under theories of adverse possession and mutual recognition and acquiescence. The trial court granted the Egglestons' motion for summary judgment, and denied the Wrights' cross-motion.

The record here shows the parties did not intend the fence to be a true boundary line. Additionally, the record fails to show any possession by the Egglestons was either exclusive or hostile. As such, we reverse summary judgment in favor of the Egglestons on the mutual acquiescence claim, reverse the trial court order denying the Wrights' cross-motion for summary judgment as to adverse possession and mutual acquiescence, and remand for further proceedings.

FACTS

Lee and Nina Wright have owned four acres of property on Cultus Bay Road near Clinton, Washington since 1975. Thomas and Sherry Eggleston purchased the adjacent property from Rodger Clevish in January of 2002. Clevish owned the adjacent property, which includes a single family residence and several commercial buildings, from 1995 to 2002.

The issues in this case arise from a fence that exists on the Wrights' side of the true property line dividing the two properties. At the time Clevish purchased his property in 1995, the fence was a broken down, wire fence attached to trees and posts in a haphazard and erratic fashion. Sometime after he purchased his property, Clevish asked Lee Wright if he could repair the fence. Clevish wanted to fix the fence because he had dogs that he wanted to contain. Wright gave permission to Clevish to repair the fence. While discussing the fence, Wright and Clevish both indicated they did not know the location of the property boundary line.

Sometime after the Egglestons purchased Clevish's property in 2002, a dispute arose with the Wrights about the proper location of the boundary line between the properties. The Egglestons filed a complaint to quiet title on November 25, 2009. The complaint alleged four causes of action: (1) adverse possession; (2) mutual acquiescence and recognition; (3) estoppel in pais; and (4) bad faith pre-litigation misconduct warranting an attorney fee award.

The Egglestons moved for summary judgment. Although the "issues" identified in

the motion were both adverse possession and mutual acquiescence and recognition, the motion did not address the adverse possession claim, and instead sought judgment only on a theory of mutual acquiescence and recognition. The Wrights opposed the motion, and cross-moved for partial summary judgment dismissal of two of the Egglestons' claims: adverse possession and mutual acquiescence and recognition.

The trial court granted the Egglestons' motion for summary judgment, and entered a judgment and order quieting title in the Egglestons and denying the Wrights' cross-motion. The parties agreed that entry of the judgment constituted a final determination of all of the Egglestons' claims.

The Wrights appeal, arguing the trial court erred by granting the Egglestons' summary judgment motion, and by denying their cross-motion.

DISCUSSION

Mutual recognition and acquiescence. The Wrights argue the trial court erred by granting the Egglestons' motion for summary judgment on their claim for mutual recognition and acquiescence. They further argue the trial court erred by denying their cross-motion for summary judgment dismissal of that claim. We agree with both arguments for the reasons described herein.

A moving party is entitled to summary judgment only "'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . 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.'" Hash v. Children's

Orthopedic Hosp. & Med. Ctr., 110 Wn.2d 912, 915, 757 P.2d 507 (1988) (quoting CR 56(c)). "The burden of showing that there is no issue of material fact falls upon the party moving for summary judgment" and further, "all reasonable inferences must be resolved against the moving party, and the motion should be granted only if reasonable people could reach but one conclusion." Hash, 110 Wn.2d at 915 (quoting Detweller v. J.C. Penney Cas. Ins. Co., 110 Wn.2d 99, 108, 751 P.2d 282 (1988)). This court reviews summary judgments de novo. Michael v. Mosquera-Lacy, 165 Wn.2d 595, 601, 200 P.3d 695 (2009).

A plaintiff seeking to prove a disputed property line via the doctrine of mutual recognition and acquiescence must demonstrate three elements:

> (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.

Draszt v. Naccarato, 146 Wn. App. 536, 543, 192 P.3d 921 (2008) (quoting Lamm v. McTighe, 72 Wn.2d 587, 593, 434 P.2d 565 (1967)).

The dispute here centers on the second element. Regarding that element, "the parties must agree or acquiesce in the boundary, either expressly or by implication." Draszt, 146 Wn. App. at 543 (citing Houplin v. Stoen, 72 Wn.2d 131, 137, 431 P.2d 998 (1967)). Significantly, "[t]he purported boundary must be recognized by the parties as a true boundary and not just a barrier." Id. at 543-44. Our Supreme Court's decision

in Thomas v. Harlan, 27 Wn.2d 512, 178 P.2d 965, (1947) is instructive on this issue. In that case, the defendant's predecessor owner built a fence twenty feet off of the true line, giving the plaintiff twenty feet more land. The fence existed for fourteen years, but the plaintiff did not occupy the additional land until four or five years before a survey was made. The Supreme Court reversed judgment in favor of the plaintiff, indicating that acquiescence must be to the true boundary line, not the fence location:

> In the absence of an agreement to the effect that a fence between the properties shall be taken as a true boundary line, mere acquiescence in its existence is not sufficient to establish a claim of title to a disputed strip of ground.
>
> . . .
>
> In all cases, it is necessary that acquiescence must consist in recognition of the fence as a boundary line, and not mere acquiescence in the existence of a fence as a barrier.

Harlan, 27 Wn.2d at 519.

The Egglestons acknowledge that a person may erect a fence for some purpose other than to mark a boundary line, and that "where the parties have not expressly agreed that the fence is the boundary line, there must be some evidence that they have acquiesced in it as the boundary line." Response Brief at 10 (citing Merriman v. Cokeley, 152 Wn. App. 115, 215 P.3d 241 (2009), reversed on other grounds, 168 Wn.2d 627, 230 P.3d 162 (2010)). They argue that here, "there was no other purpose for the fence, other than a boundary to the property." Id. In support of this argument the Egglestons assert, without any citations to the record, that "the fence was in actual use by both neighbors specifically as a boundary between their respective properties." Response Brief at 13.

The Egglestons are simply incorrect. Although Clevish's declaration in support of the Egglestons' summary judgment motion stated he and Wright intended "the fence as the boundary line[,]" CP at 246, Clevish repudiated this testimony when he was deposed:

> Q: At the time that you made the decision to replace that portion of the fence on the easterly part of your – or westerly part of your property, rather, did you confer with your neighbor Mr. Wright?
>
> A: Yes. We talked about it.
>
> Q: Okay. What did you discuss?
>
> A: That I was going to replace it, and if he had a problem, please let me know. And he said he didn't have a problem, and he even offered to help pay for it.
>
> . . .
>
> Q: Did you talk about anything else with regard to the significance of the fence?
>
> . . .
>
> A: Well, somebody else had built the fence –
>
> Q: Okay. Well, what did you –
>
> A: - and I'm just going to replace the fence because I had a couple dogs and I wanted to keep them in my property.
>
> Q: That was the purpose of the fence.
>
> A: Yes.
>
> . . .
>
> Q: And what did you and Mr. Wright talk about as far as the significance of the location of that fence?
>
> A: I was just following the old fence line.
>
> Q: You didn't have any discussions about whether it represented an actual boundary or not?
>
> A: I don't recall that. We may have, but, you know, like I say, there

was – I did talk to Mr. Wright, asked him if he knew where the property lines were. He didn't know either.

Q: So the two of you, just in a neighborly kind of a deal, agreed that it would be okay to put that old fence back up in the same basic location.

A: Pretty close, yes.

Q: It wasn't intended to be a boundary line between your two properties; correct?

A: Not really. But like I say, that was the property that I was showed when I bought the place, that that's where the property was.

. . .

Q: According to what [Eggleston's counsel] prepared for you to sign, you made this statement about the Eggleston property. You said Tom Eggleston and I walked the fence line after he acquired title to the subject property and I told him that Lee Wright and I agreed on the fence as the correct boundary line. Is that true or not?

A: Well, a – we – we tried to figure out as close as we could. That – that fence line was as close to the boundary as we could tell.

Q: Okay. But it's not true or correct to say that you've agreed, for all intents and purposes, that was the boundary between your properties.

A: Probably not at the time, no. Because I was just going on, like I say, what I had been told and shown –

. . .

Q: The disputed area has been outlined in yellow. The survey shows the boundary lines on the map. What I'm interested in knowing from you is whether you and Mr. Wright attempted to legally establish your boundary line, or if you were just trying to find a fair location for the fence that didn't bother either one of you?

A: We didn't really try to establish a legal boundary line. We were just – like I say, I was replacing the old fence line that was there.

CP at 155-56, 159-60, 162-64 (Clevish deposition). Thus, the only evidence before the trial court on this issue was that both Wright and Clevish indicated the purpose of replacing the fence was <u>not</u> to establish a legal boundary line.

The Egglestons also argue the trial court made "factual findings" that support their argument. They contend that because the Wrights failed to challenge these "factual findings," the findings are verities on appeal. The Egglestons are mistaken; the trial court made no findings of fact, and instead actually crossed out the findings and conclusions on their proposed order. The trial court was hearing cross-motions for summary judgment; it was not conducting a hearing in which it took evidence, weighed the evidence, and assessed credibility. Indeed, "findings of fact on summary judgment are not proper, are superfluous, and are not considered by the appellate court." Hemenway v. Miller, 116 Wn.2d 725, 731, 807 P.2d 863 (1991) (quoting, Chelan Cy. Deputy Sheriffs' Ass'n v. Chelan Cy., 109 Wn.2d 282, 294 n.6, 745 P.2d 1 (1987)).

In sum, the only evidence before the trial court on the doctrine of mutual recognition and acquiescence was that both property owners indicated the purpose of replacing the fence was not to establish a legal boundary line. As such, the trial court erred in granting the Egglestons' motion for summary judgment, and also in denying the Wrights' cross motion for summary judgment on mutual acquiescence and recognition.

Adverse possession. The Wrights argue the trial court erred by denying their cross-motion for summary judgment dismissal of the Egglestons' adverse possession claim. We agree.

A party claiming adverse possession must establish that possession is: (1) exclusive, (2) actual and uninterrupted, (3) open and notorious and (4) hostile and under a claim of right made in good faith. Chaplin v. Sanders, 100 Wn.2d 853, 857, 676

P.2d 431 (1984). The period throughout which these elements must concurrently exist is ten years. RCW 4.16.020.[1] Because the holder of legal title is presumed to possess the property, the party claiming adverse possession bears the burden of proof on each element. ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 757, 774 P.2d 6 (1989).

The Egglestons response brief focuses chiefly upon the first element, i.e., whether their use of the disputed area, when combined with the use of the previous owner, 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." Crites v. Koch, 49 Wn. App. 171, 174, 741 P.2d 1005 (1987). According to the Egglestons, Mr. Clevish's use of the disputed area was exclusive because the fence fully enclosed the property and was used by Mr. Clevish for his dogs. See Response Brief at 7-9.

The Wrights respond that these uses are irrelevant, because before exclusivity is analyzed, the Egglestons must demonstrate actual possession of the property. But "[e]vidence of use is admissible because it is ordinarily an indication of possession." ITT Rayonier, 112 Wn.2d at 759 (quoting Wilson v. Nelson, 57 Wn.2d 539, 540, 358 P.2d 312 (1961)). Thus, the proper question to be addressed is whether the uses alleged by the Egglestons, when viewed in a light most favorable to the Egglestons, are sufficient to demonstrate exclusive possession. We conclude they are not. Although

[1] The Egglestons owned their property for only seven years before filing this action. The Egglestons' possession and use of the disputed area during this time, including clearing the area and installing drain fields, is largely undisputed. The key question is the nature of the possession and use of the property the three prior years by the previous owner, Mr. Clevish.

Clevish testified the purpose of the fence was to keep his dogs from getting away, he also testified he did not make any use of the disputed area:

> Q: Did you make any use of this area here in any particular way, the area –
>
> A: The yellow area?
>
> Q: The yellow area.
>
> A: No. That was all in trees, and I left it that way.
>
> . . .
>
> Q: At the time that you sold the property to Mr. Eggleston it's my understanding that the disputed area that's shown here on Exhibit 1 which is outlined in the green highlighter was completely covered in Douglas fir and undergrowth and salal and that you were putting no use to it on any type; correct?
>
> A: Not that particular area, no.
>
> Q: No, you were not putting a use to it?
>
> A: No.

CP at 160-61, 167 (Clevish deposition).

Additionally, the fourth element of adverse possession, hostility, is not met here. To satisfy the element of hostility, a claimant must prove that she treated the land as her own against the world. Chaplin, 100 Wn.2d at 860-61. Permission, express or implied, from the true owner negates the hostility element. Id. at 861-62. Here, the Wrights correctly point out that it is undisputed that Clevish asked for, and they gave their express permission for him to rebuild the fence. Moreover, the Egglestons failed to respond to this argument in their response brief.

In sum, no questions of fact exist as to the exclusive possession and hostility elements of the adverse possession claim, and the trial court therefore erred in denying

the Wrights' motion for summary judgment on the claim.

Reversed and remanded for further proceedings.MSS

WE CONCUR: