IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL WHELAN and LYNN WHELAN, husband and wife,	)	**No. 29448-0-III**
Respondents,	)	**Division Three**
v.	)	
ALLEN LOUN and MICHELLE LOUN, husband and wife,	)	**UNPUBLISHED OPINION**
Appellants.	)	

Sweeney, J. — This suit for adverse possession was resolved by summary judgment. We conclude correctly so. The record before us shows the requisite open, notorious, actual, uninterrupted, exclusive, and hostile possession for 22 years. We therefore affirm the judgment of the trial court.

FACTS

Michael and Lynn Whelan own real property in Kittitas County. Allen and Michelle Loun own property immediately north of the Whelans' property. Ms. Loun removed a cinderblock and wood fence that ran east and west between the two lots in

July 2008. The fence had been there for at least 22 years. But it was not situated on the legally described boundary line. This dispute is over the 12.25-foot strip of land that lies south of where the fence had been situated.

The Whelans purchased their property from Mr. and Ms. James Vasquez in 2008. The Louns purchased their property from Mr. and Ms. Herbert Zurflueh in 2006. Robert and Suzie Haberman owned and lived on the Whelan property from 1986 to 1990. The fence had been in existence since at least 1986 and, according to Mr. Haberman, "was always considered the boundary between my property and that to the north." Clerk's Papers (CP) at 46 (Decl. of Haberman). Mr. Haberman maintained and repaired the fence as well as the property south of the fence and treated it as his own.

The fence was still in the same location when Mr. Vasquez and his wife purchased the property in 1998. And he "maintained and repaired the fence and took care of all of the property to the south of the fence" during the 10 years that he owned the property. CP at 37 (Decl. of Vasquez). Mr. Vasquez considered the fence jointly owned by him and the property owners to the north because it was in fact the boundary line between the properties. Mr. Vasquez and Ms. Loun apparently had a conversation at one point about the fence not being on the actual survey line but nothing was done.

The Whelans sued in June 2008 to quiet title in the 12.25-foot strip of land; they claimed adverse possession. They moved for summary judgment. The court concluded that "[o]ther than a conversation between

Loun and Vasquez as noted above, no evidence exists to rebut the Haberman and Vasquez assertions they treated all the property south of the fence as their property and that the fence was [the] boundary line" and quieted title in the Whelans. CP at 91.

DISCUSSION

The Louns contend that the matter should not have been resolved on summary judgment because disputed issues of material fact remained. They argue that they made a showing that Mr. Vasquez clearly knew the property to the south of the fence did not belong to him; that the strip of land was unkempt and unused; that Ms. Loun gave Mr. Vasquez permission to use the disputed strip of property; and finally that the Whelans should not be allowed to include the time the property was held by previous owners.

We review a trial court's summary judgment grant de novo; we engage in the same inquiry as the trial court. *Lilly v. Lynch*, 88 Wn. App. 306, 311-12, 945 P.2d 727 (1997). That is, we look to see whether there is a genuine issue of material fact and whether the established facts require the conclusion that the property was adversely possessed. *Id.*

The Whelans had to show that their possession of the disputed property was open and notorious, actual and uninterrupted, exclusive, hostile, and continued for a period of 10 years. *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 209-10, 936 P.2d 1163 (1997). And "[w]here there is privity between successive occupants holding continuously and adversely to the true title holder, the successive periods of occupation may be tacked to each other to compute the required 10-

year period of adverse holding." *Roy v. Cunningham*, 46 Wn. App. 409, 413, 731 P.2d 526 (1986). "The ultimate test is the exercise of dominion over the land in a manner consistent with actions a true owner would take." *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 759, 774 P.2d 6 (1989).

The Whelans must, of course, rely on the conduct of their predecessors in interest to tack on the necessary period of time for adverse possession. And they did so. Mr. Haberman (1986-1990) and Mr. Vasquez (1998-2008) both declared that the fence was in the same location and general condition as when they owned the property. The fence has then demarcated the boundary line for at least 22 years. Mr. Vasquez declared that he considered the fence jointly owned, but emphasized that he thought it marked the boundary line between the two properties. The Louns argue that Mr. Vasquez accepted that the property did not belong to him because he made a comment in the past about a tree branch hanging over the purported boundary. The Louns would have us infer knowledge on the part of Mr. Vasquez from this conversation. This is an inference that the trial court refused to make and one that we too must refuse to make. The Louns' showing is insufficient to raise the genuine issue of material fact necessary to avoid summary judgment here. It is not use, occupancy, or some claim of right to the disputed property. *Id.* There is also no showing that the property was unkempt or unused. The strip of land sat isolated by the fence in favor of the property owners to the south for some 22 years. Mr. Vasquez repaired and

improved the fence, continuously walking across and taking advantage of the 12.25-foot strip of land. This is an exercise of dominion over the disputed strip of land.

Nor did the Louns show that they gave express or implied permission to Mr. Vasquez to occupy the strip of land. *See Hovila v. Bartek*, 48 Wn.2d 238, 241, 292 P.2d 877 (1956) (the burden is on the true owners to show that the use was permissive). And the Louns present no evidence that they, or their predecessors, used or occupied any of the land south of the fence line. The Whelans and their predecessors have occupied the property south of the fence line for an uninterrupted period of at least 22 years. The possession was hostile, open, and notorious.

There are no genuine issues of material fact as to ownership of the property as acquired by adverse possession. And the court appropriately resolved the matter summarily in favor of the Whelans.

We affirm the summary judgment.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Kulik, C.J.

Brown, J.