

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

**ATHENA L. TAYLOR and
RALPH K. TAYLOR,**

Appellants,

v.

**STEVE and KAY HOODENPYL,
Trustees of the Hoodenpyl Living
Trust Dated August 28, 1997,**

Respondents.

No. 27663-5-III

Division Three

UNPUBLISHED OPINION

Kulik, A.C.J. — Ralph and Athena Taylor appeal the trial court’s decision that Steve and Kay Hoodenpyl adversely possessed a six-foot strip of land along the parties’ mutual property line in Klickitat County. Sufficient evidence supports the trial court’s findings and the findings support the conclusion of adverse possession. Therefore, we affirm.

FACTS

In 1971, Steve and Kay Hoodenpyl bought approximately eight acres of property in Klickitat County. Athena and Ralph Taylor now own the property directly to the west of the Hoodenpyls' property.

In 1980, Mr. Hoodenpyl had his property surveyed. In 1982, Mr. Hoodenpyl and his son built a fence that started at the southwest corner of the Hoodenpyls' property and extended north about one-half the length of the property, and then turned east. Mr. Hoodenpyl built the fence to establish his western boundary and to contain livestock. The fence was substantial, consisting of metal and wooden posts and four strands of barbed wire. He believed that he built the north-south fence on the true boundary line; however, it was actually placed approximately six feet west of the true boundary line. In 1982, Mr. Hoodenpyl moved a mobile home onto his property and lived there with his family part-time until 1984.

In 1983, Donald and Jeanne Holliston purchased property immediately to the west of the Hoodenpyls. The Hoodenpyls' 1982 fence ran along the southern portion of the Hoodenpyl-Holliston boundary.

In 1985, the Hoodenpyls leased their land to Dean Naffziger, who kept horses in

the area that had been fenced in by Mr. Hoodenpyl in 1982. The horses were on the land until 1988.

In 1990, most of the fence was destroyed when a building from the Hollistons' property blew into the fence. Early in the year, Mr. Holliston replaced the fence on the same line as the old fence and extended it along the entire Hoodenpyl-Holliston boundary. Mr. Holliston did not believe the fence was on the true boundary line.

In 2000, the Hollistons sold their property to Michael and Donna Zitur, who were aware that the fence on the eastern boundary was completely on their property. In 2003, Mr. Zitur removed the fence before leaving his property for about one month. When he returned, a portion of the fence had been rebuilt along the southern part of the Hoodenpyl-Zitur boundary by Dale White, who was leasing the Hoodenpyls' property.

In April 2004, the Ziturs sold their property to the Taylors. At the time of the sale, Mr. White's fence was still standing.

In 2005, the Taylors' survey confirmed the actual boundary was not the same as the fence line. The Taylors filed suit to quiet title to the disputed strip between the 1990 fence and the true property line. The Hoodenpyls countersued to quiet title, alleging adverse possession and mutual acquiescence.

The trial court found that Mr. Holliston never used the disputed strip but that Mr.

Hoodenpyl did.¹ The Taylors challenge this finding, arguing that Mr. Holliston and Mr. Zitur did use the disputed strip as evidenced by one of the trial court's conclusions of law stating, "Mr. Holliston or Mr. Zitur occasionally [went] over the fence for brush control." Clerk's Papers (CP) at 69.

The trial court determined that the Hoodenpyls had adversely possessed the strip between the 1990 Holliston fence and the true property line and quieted title in the Hoodenpyls.

The Taylors appeal, arguing the trial court erred: (1) by finding that the Hoodenpyls acquired title to the disputed strip through adverse possession, and (2) by finding that the Hoodenpyls had adversely possessed the entire disputed strip when there was insufficient evidence to support the Hoodenpyls' use of the strip north of the east-west cross fence.

ANALYSIS

¹ Finding of fact 13 states in its entirety: "Holliston never used any of the land to the east of the fence that was constructed in 1990. After the new fence was constructed, Holliston grazed sheep on his side of the fence. Hoodenpyl continued to use the property to the east side, on his side of the fence. Hoodenpyl mowed up to the fence, he exercised brush control to the fence, he performed Scotch Broom control, he grazed animals up to the fence, he allowed others to graze animals up to the fence, and at one time he built a fire trail along his side of the fence." Clerk's Papers (CP) at 67.

To establish a claim of adverse possession, the claimant must show by a preponderance of the evidence,² possession that is (1) exclusive, (2) actual and uninterrupted, (3) open and notorious, and (4) hostile. *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989). All elements must be met for 10 years. *Id.* The holder of legal title is presumed to have possession. *Id.* The party asserting adverse possession has the burden to prove each element. *Id.* A claimant's motive in possessing land is irrelevant, the nature of the claimant's possession should be determined solely on how he or she treats the property. *Chaplin v. Sanders*, 100 Wn.2d 853, 860-61, 676 P.2d 431 (1984).

Our review is limited to determining whether substantial evidence supports any challenged findings and whether the findings support the conclusions of law. *Saviano v. Westport Amusements, Inc.*, 144 Wn. App. 72, 78, 180 P.3d 874 (2008). Unchallenged findings of fact are verities on appeal. Substantial evidence is sufficient evidence to persuade a fair-minded, rational person that the finding is true. *State v. Hill*, 123 Wn.2d

² Adverse possession must be shown by a preponderance of the evidence. *Draszt v. Naccarato*, 146 Wn. App. 536, 545, 192 P.3d 921 (2008). The trial court erroneously concluded that adverse possession must be shown by clear, cogent and convincing evidence as stated in conclusion of law 1. Ownership under the doctrine of mutual acquiescence and recognition must be proven by clear, cogent and convincing evidence. *Green v. Hooper*, 149 Wn. App. 627, 641, 205 P.3d 134 (2009). However, that doctrine does not apply here because there was no mutual acquiescence.

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641, 644, 870 P.2d 313 (1994). A challenge to a trial court's conclusion of law is reviewed de novo. *State v. Horrace*, 144 Wn.2d 386, 392, 28 P.3d 753 (2001).

The Taylors challenge finding of fact 13. The trial court's finding contains three parts. The first part states that Mr. Holliston never used any land east of the fence constructed in 1990. In his deposition, Mr. Holliston states he did not use any land east of the 1990 fence. The trial court's finding virtually mirrors Mr. Holliston's statement, and with no evidence to contradict the statement, substantial evidence supports this finding.

The second part of finding of fact 13 states that Mr. Holliston grazed sheep on his side of the fence. This part of the finding does not seem to be in contention, but Mr. Holliston did have sheep and Mr. Hoodenpyl testified that Mr. Holliston had to improve the fence to contain the sheep on his side of the fence. Sufficient evidence supports this portion of finding of fact 13.

The third part of finding of fact 13 states that Mr. Hoodenpyl "mowed up to the fence, exercised brush control to the fence, he performed Scotch Broom control, he grazed animals up to the fence, he allowed others to graze animals up to the fence, and at one time he built a fire trail along his side of the fence." CP at 67. David Hoodenpyl, son of Steve Hoodenpyl, testified that he cut and burned scotch broom every couple years

and that his father hired someone to till up the scotch broom. The Hoodenpyls also hired someone to mow up to the fence when Mr. Holliston expressed concern about fire danger. David Hoodenpyl further testified that animals kept on the property were allowed to graze up to the fence. Steve Hoodenpyl testified that he made a fire trail along the fence line and that he consistently performed scotch broom maintenance on the land. Sufficient evidence supports finding of fact 13.

All other findings of fact were unchallenged and are verities on appeal.

A claimant must adversely possess property for 10 years. Here, we have a 21-year time span. The first fence stood from 1982 to 1990 and the second fence stood from 1990 to 2003. In the 1980s, animals grazed up to the fence. The Hoodenpyls and their tenants lived on the property and the Hoodenpyls maintained their property up to the fence. Consequently, the trial court had sufficient evidence from the 1980s that the Hoodenpyls acquired the disputed strip south of the east-west cross fence in 1992, 10 years after erecting their fence in 1982.

The evidence from 1990 to 2003 also supports the trial court's findings of fact. The Hollistons and the Ziturs did not use the disputed strip between 1990 and 2003. The Hoodenpyls maintained up to the fence line (scotch broom maintenance, mowing, fire trail) and treated the disputed strip as a true owner would and, therefore, would have

acquired the disputed strip in 2000.

The Taylors ask the court to adopt a rule giving effect to a true owner's deliberate decision to place a fence inside the property line when the intent was not to use it for a boundary. The Taylors argue that *Chaplin* considers only the subjective intent of the possessor, not the true owner, and that there is no rule pertaining to the true owner's subjective intent. In *Harris v. Urell*, 133 Wn. App. 130, 140, 135 P.3d 530 (2006), the court concluded that a true owner's subjective thoughts are not a grant of permission. Here, even if Mr. Holliston did not think that the fence line was the true boundary, the Hoodenpyls used the disputed strip without permission, as a true owner would. This satisfies the hostility component of adverse possession.

The Taylors also argue that the Hoodenpyls did not acquire the disputed strip north of the east-west cross fence by adverse possession because they had not used it prior to 1990. However, the trial court focused on the time period between 1990 (when the fence was built) and 2003 (when the fence was taken down). Adverse possession requires 10 years, and the fence erected by Mr. Holliston was in place for 13 years.

While animals were mostly kept south of the east-west cross-fence on the Hoodenpyls' property, the Hoodenpyls maintained the entire disputed strip. Mr. Holliston and Mr. Zitur never used the disputed strip of land from 1990 until 2003. We

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note that the trial court found by clear, cogent and convincing evidence that the Hoodenpyls adversely possessed the entire strip, when only a preponderance of the evidence was required.

We affirm the trial court's judgment quieting title in the Hoodenpyls.

A majority of the panel has determined 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.

Kulik, A.C.J.

WE CONCUR:

Sweeney, J.

Brown, J.