

FILED

MAR 04 2004

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

**PELICAN POINT COMMUNITY
ASSOCIATION, a Washington non-
profit corporation,**

Appellant,

v.

**KRIS DEXTER and THERESA
DEXTER, husband and wife,**

Respondents.

No. 21660-8-III

**Division Three
Panel Five**

UNPUBLISHED OPINION

SCHULTHEIS, J. — Pelican Point Community Association (PPCA), a community homeowners' association, appeals the trial court's conclusion that Kris and Theresa Dexter had acquired title to a disputed strip of land by adverse possession. PPCA complains the court made its decision without setting forth findings that the Dexters provided proof of: (1) actual possession of the disputed strip for the required 10 consecutive years; (2) exclusive possession; (3) open and notorious possession; and (4) hostile possession. Because the record would support such findings, we affirm.

FACTS

PPCA is a nonprofit corporation whose members own residential lots in the Pelican Point subdivisions located on the shores of Moses Lake in Grant County, Washington. Dr. and Mrs. Kris Dexter purchased several lots in one of the subdivisions in 1982. The lots all slope toward the lake. In 1995 they constructed a residence and landscaped down to the shore of the lake. They also built and placed a dock in the lake. A 1996 survey of the Pelican Point area revealed the Dexters had encroached on and developed a strip of land that rightfully belonged to PPCA. However, nothing was done with this information until 2001, when PPCA filed a lawsuit against Dr. and Mrs. Dexter seeking to quiet title to an easement to maintain and use a road across several lots owned by the Dexters. PPCA claimed the road was needed for access to an unimproved lot it owned (lot 149) that had been dedicated as a community park many years prior. It also requested the court quiet title to a small strip (the disputed strip) of land that ran between the Dexters' property and Moses Lake. PPCA requested the court eject the Dexters from the disputed strip where they had landscaped and constructed a dock for personal use. The Dexters appeared through counsel and filed affirmative defenses and a counterclaim for possession of the disputed strip on the legal theory of accretion.

The matter was first heard at a bench trial in Grant County Superior Court. In a letter opinion, the trial court determined PPCA was entitled to an easement over the Dexters' property for access to the unimproved community park located on lot 149. The

decision was based on the theories of easement by prior use and easement by necessity. The trial court denied the Dexters' claim for possession of the disputed strip by accretion. However, it did not grant PPCA's claim for ejectment either. Instead, it invited the parties to submit additional evidence of adverse possession of the disputed strip by the Dexters.

The Dexters immediately filed an amended answer and counterclaim asserting adverse possession of the disputed strip. A trial regarding the sole issue of adverse possession of the disputed strip commenced in September 2002. At its conclusion, the court issued an oral decision finding the Dexters had proven adverse possession of the disputed strip. Findings and conclusions were later entered, but the findings do not specifically address the required elements of adverse possession. PPCA filed a timely notice of appeal.

ANALYSIS

The sole issue on appeal is whether the trial court erred in concluding the Dexters had acquired title to the disputed strip of land through adverse possession. A party claiming adverse possession has the burden of showing possession that is: (1) open and notorious; (2) actual and uninterrupted; (3) exclusive; and (4) hostile and under a claim of right made in good faith. *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989); *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984). These elements must exist concurrently for a period of at least 10 years. RCW 4.16.020. Adverse possession is a mixed question of law and fact. Whether the essential facts exist is for the

fact finder, but whether the facts, as found, constitute adverse possession is for the reviewing court to determine as a matter of law. *Chaplin*, 100 Wn.2d at 863. PPCA did not assign error to the court's findings of fact, which makes them verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

1. Open and Notorious Possession

The open and notorious element is satisfied if the title holder of the property has actual notice of another party's adverse use throughout the 10-year statutory period. *Chaplin*, 100 Wn.2d at 862. Adverse use is measured objectively based upon the observable acts of the user and the actual owner. *Dunbar v. Heinrich*, 95 Wn.2d 20, 27, 622 P.2d 812 (1980). The acts that purport to establish notice must be conspicuous enough to give unmistakable warning to the property owner and cannot be secretly carried out to avoid detection. *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 212, 936 P.2d 1163 (1997). Adverse possession will serve to deny the original owners title to their property only when they should have been aware their interest was being challenged. *Id.* This rule is consistent with the purpose of the notice requirement, which is to make certain the adverse user treats the occupied land in the same manner as would the actual owner. *Chaplin*, 100 Wn.2d at 862.

The trial court properly concluded that the Dexters' use of the disputed strip was the same as an owner of the same type of property would make and constituted actual possession. The facts in this record reveal PPCA's predecessor-in-interest knew since 1982

of Dr. Dexter's request that all fill dirt from the different subdivisions under construction be placed on his property in order to fill the low, swampy areas. Testimony disclosed that approximately 1,000 truck loads of fill were placed on the Dexter property and another 50 to 70 loads of fill were placed on the disputed strip with the knowledge of PPCA's predecessor-in-interest from 1982 through 1986. The court's undisputed finding of fact 16 states that "Dexter continued to authorize the dumping of fill material on . . . lots 34 through 38 *and* the Disputed Strip after 1986 although the dumping occurred at a significantly slower pace than it had from 1982 to 1986."¹ Additionally, the court found that "Dexter requested that the contractors dumping fill[,] level the fill material. In response to this request, the contractors leveled the fill material on both the Dexter Property *and* the Disputed Strips to the benefit of both parcels."² Because this is an important factor in our analysis, we reiterate the fact that the majority of the fill placed on the Dexters' land prior to 1994 came from contractors employed by PPCA's predecessor-in-interest, Karl Goodrich. The leveling of the Dexters' property and the disputed strip was also performed by Goodrich employed contractors. As such, we determine PPCA had actual or constructive notice of the Dexters' adverse use of the disputed strip since 1982 because the disputed strip did not exist in its present state prior to the filling and leveling directed by Dr. Dexter. Although the court did not make such a finding, the record supports such.

¹ Clerk's Papers (CP) at 94 (emphasis added).

² CP at 94 (emphasis added).

2. Actual and Uninterrupted Possession

In order to establish actual and uninterrupted use of property throughout the statutory 10-year period, a claimant must demonstrate the same type of use that a true owner would make of the property, considering its nature, character, location, and ordinary uses. *Anderson v. Hudak*, 80 Wn. App. 398, 403, 907 P.2d 305 (1995). Although the trial court did not set forth any findings establishing actual and uninterrupted use of the disputed strip, in its oral decision it made reference to the undeveloped nature of the property and the fact that approximately 70 loads of fill were placed on the disputed strip in the area of the lake. The court noted that it is reasonable for a property owner to fill the swampy areas of the lakefront property in order to get highest use from the property. Testimony elicited at trial revealed that one of the Dexters' neighbors, Pamp Meiers, filled low areas on his lakefront property at the same time and in the same manner as did the Dexters.

Our reading of the record reveals the evidence presented at trial provided proof of the actual and uninterrupted element of adverse possession being met by the Dexters. Although prior to the construction of their residence in 1995 the Dexters did not frequently visit their property, PPCA was aware the property, including the disputed strip, was being maintained by the Dexters from 1982 to 1993 when construction on their residence commenced. At that time, the landscape on the Dexters' property and the disputed strip changed from that of unimproved property to land suitable for development. As noted above, Dr. Dexter specifically requested that contractors in the employ of PPCA's predecessor-in-interest

place and level clean fill on his property from 1982 until 1993. Evidence was also presented that the Dexters kept their property and the disputed strip free of noxious weeds as required by law. Prior to the time the Dexters built their residence, they used the disputed strip for recreational purposes, including picnics, walks, and water activities. No evidence was presented that PPCA, at any time, entered onto the disputed strip after 1985 or made any use of it whatsoever after the Dexters purchased their lots. After the Dexter residence was constructed, the yard was planted and landscaped and a boat dock was placed on the lake. The yard and boat dock were located on the disputed strip. Still, PPCA did not object or take steps to halt construction or advise the Dexters the disputed strip did not belong to them. The evidence reasonably indicates a continuing recognition by both parties that the Dexters treated the disputed strip as theirs. The trial court's lack of a formal finding of these facts does not prevent our conclusion the Dexters exhibited actual and uninterrupted possession of the disputed strip for the requisite 10 years.

3. Hostile Possession

The hostility element does not require ill will, but instead requires evidence that the parties claiming adverse possession treated the disputed property as their own against all others. *Chaplin*, 100 Wn.2d 857-58. This essentially negates any type of permissive use. *Id.* Any subjective belief regarding the ownership of the land is irrelevant to a finding of hostility, as is the subjective intent to dispossess the true owner. *Id.* at 855. If permission to occupy the land is given to the claimant by the actual title owner, the element of

hostility is negated. *Id.* at 861-62. Planting trees and maintaining the area around them continuously and exclusively will suffice as hostile occupation of vacant land. *Riley v. Andres*, 107 Wn. App. 391, 397, 27 P.3d 618 (2001); *Lingvall v. Bartmess*, 97 Wn. App. 245, 254, 982 P.2d 690 (1999). Maintenance of the disputed property without asking permission is evidence of the hostility associated with ownership. *Shelton v. Strickland*, 106 Wn. App. 45, 51, 21 P.3d 1179 (2001).

Under the facts of this case, it is clear the Dexters did not seek permission from PPCA or its predecessors-in-interest to use or develop the disputed strip. There is no evidence that anyone from PPCA or its predecessors-in-interest voluntarily granted the Dexters permission to use the strip. The record does not contain any evidence that PPCA or its predecessors-in-interest used the disputed strip for any reason nor did it try to prevent the Dexters' use of the property. As noted above, the Dexters voluntarily provided weed control on their property and on the disputed strip as required by law. Pursuant to the court's holding in *Chaplin*, these factors satisfy the hostility element even though the court failed to make such a specific finding. *Chaplin*, 100 Wn.2d at 862. The trial court's reference to the fact that its decision turned on the fact that the disputed strip was originally undeveloped land that was created in part by PPCA's predecessors-in-interest placing fill in the low, swampy areas, convinces us the trial court found the Dexters treated the disputed strip as their own against others and that PPCA was aware of it for 10 consecutive years. The hostile possession element was proven under the facts of this case.

4. Exclusive Possession

Finally, proof of exclusive possession does not require absolute exclusion of all others from the disputed property as long as the claimant's use is similar to that of a true owner. *ITT Rayonier*, 112 Wn.2d at 759. Even occasional and transitory use by the title owner will not prevent a court's conclusion that adverse possession was proven, as long as the occasional use is of the type a true owner would allow as a neighborly accommodation. *Lilly v. Lynch*, 88 Wn. App. 306, 314-15, 945 P.2d 727 (1997).

The Dexters purchased their unimproved property in 1982. As noted above, they immediately began maintenance procedures, which included filling the low, swampy areas and controlling the noxious weeds by chemical application, mowing, and landscaping. The evidence revealed the Dexters did not leave either their property or the disputed strip in their original, unimproved states. PPCA argues that because the Dexters allowed trucks on their land to dump clean fill on the disputed strip, the Dexters' possession of the disputed strip was not exclusive. The rule set forth in *Lilly* makes PPCA's argument without merit. The Dexters' placement of clean fill on their land and the disputed strip was the same as other landowners in the neighborhood were doing in order to clean up the low, swampy areas on their properties. The fact that clean fill was placed on the disputed strip and then leveled, with the express agreement of the Dexters, does not support PPCA's contention the Dexters' use of the land was not exclusive. Instead, allowing the trucks to drive across the Dexters' property to the disputed strip appears to be a neighborly

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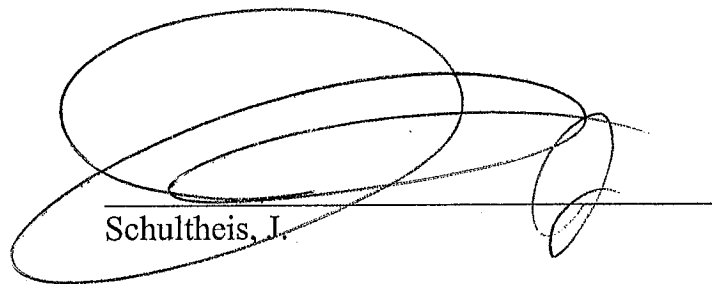
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accommodation on the part of the Dexters because they needed the clean fill to remedy the low, swampy areas and the contractors in the employ of PPCA's predecessors-in-interest needed a place to dump the extra fill from other off-site excavation projects. Although the trial court did not make specific findings related to the issue of exclusive possession, the record supports such a finding as well as the court's conclusion the Dexters acquired title to the disputed strip through adverse possession.

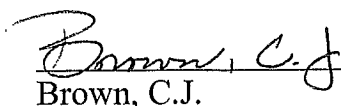
We may affirm the trial court on any basis supported by the record and the pleadings. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989). We choose to do so in this case based on the analysis set forth above.

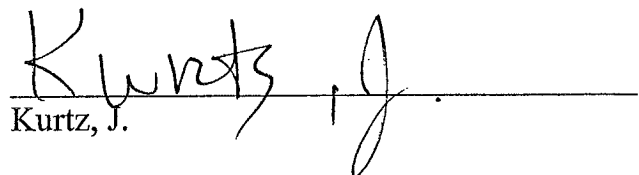
Affirmed.

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.


Schultheis, J.

WE CONCUR:


Brown, C.J.


Kurtz, J.