Supreme Court Case No. 99788-8
Court of Appeals No. 80765-0-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

GERALD and SHIUE-HUEY CHANG, husband and wife,

Petitioners,

v.

SUBIR and LILLIAM M. LAHIRI, husband and wife,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Ever since Subir and Lilian Lahiri purchased their property in 1995, they maintained an immaculate, landscaped yard—they removed shrubs and trees, spread bark, and managed irrigation. But unbeknownst them, a narrow wedge-shaped area at the yard's edge was within the boundary of their neighbors' property, Gerald and Shiue-Huey Chang, who rarely—if ever—treated the property as theirs. After more than 20 years of the Lahiris' consistent gardening and landscaping efforts, the Changs sued to quiet title. The trial court correctly held that the Lahiris adversely possessed the property through their diligent use of the disputed area, finding that the Changs' evidence was "largely vague and conclusory." The Court of Appeals affirmed the trial court in an un-published opinion.

The Changs offer this Court no reason to upset the un-published Court of Appeals opinion. The Changs' primary argument—that the trial court must have made an explicit factual finding of actual possession—is based on a misunderstanding of this Court's holding in *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 774 P.2d 6 (1989). The trial court made sufficient factual findings that the Respondents engaged in the kind of use and upkeep of the property consistent with an actual owner; that is enough to sustain the *legal conclusion* of adverse possession—a specific factual finding of "possession" was not required. Petitioners also argue that the decision

below conflicts with opinions of the Court of Appeals; but those opinions—like the one here—are consistent with *ITT Rayonier*. The trial court in this case made detailed findings of fact that establish exclusive possession as a matter of law.

Finally, there is no matter of substantial public interest to be determined by this Court and no reason to reverse the award of attorney's fees. Under RAP 13.4, the Petition for Review should be denied.

II. IDENTITY OF RESPONDENTS AND DECISION BELOW

Respondents are Subir and Lilliam Lahiri, husband and wife. The decision below is *Chang v. Lahiri*, No. 80765-0-I (Div. 1 April 26, 2021) ("Op.") (un-published).

III. ISSUES PRESEENTED FOR REVIEW

A. Whether the Court of Appeals correctly held that this Court's precedent does not require an express factual finding of "possession" in order for a trial court to make the legal conclusion that adverse possession occurred.

B. Whether the Court of Appeals correctly held that no Court of Appeals opinion requires an express factual finding of "possession" in order for a trial court to make the legal conclusion that adverse possession occurred.

C. Whether there is a matter of public interest for this Court to review, in spite of the consistency of the opinion below with standing law.

D. Whether there are grounds upon which to reverse the award of attorney's fees.

IV. COUNTERSTATEMENT OF THE CASE

A. The Respondents' Longtime Use of The Disputed Area

Although the parties have been neighbors in Kent, Washington since the Petitioners purchased their property next to the Respondents' in 1995, they rarely interacted before 2018 when this boundary dispute arose. (CP, FOF 1-4).

The property at issue—the Disputed Area—lies between an old fence and rockery on the Petitioners' property's east-southeast border, and the Respondents' property's west-northwest border, on the Respondent's side of the fence. CP 17-18 (FOF 6). There is a small white drainage pipe near one end of the rockery. CP 18 (FOF 6). The features, including the fence, were all present with Petitioners purchased their property. CP 18 (FOF 7).

Even if the Petitioners had wanted to access the Disputed Area, it would have been quite difficult from their property. *Id.* (FOF 9). There is a narrow gap in the fence that a person can fit through, but the footing is

dangerous and impeded by rocks and concrete blocks. *Id.* The Respondents can access the Disputed Area easily from their property, while the Petitioners would have to go around the fence and enter from the street. *Id.*

Respondents believed they owned the Disputed Area when they moved into their home in 1995, and treated it that way ever since. *Id*. (FOF 10). At one point, Mr. Chang encountered Ms. Lahiri outside while Ms. Lahiri was shoveling in the Disputed Area, and stated that it was on the Chang side of a nail in the street demarcating the property line. CP 18-19 (FOF 10-11). However, Petitioners neither asked Ms. Lahiri to leave nor gave permission to stay. CP 19 (FOF 11).

As numerous neighbors confirmed during trial, the Respondents performed substantial maintenance on the Disputed Area. *See* CP 20-21 (FOF 20-24). Respondents hired landscapers, removed plants, and installed an irrigation system. CP 19 (FOF 14-15). Respondents' children played on the area. *Id.* (FOF 13).

In contrast, there was scant evidence that Petitioners had used the Disputed Area or even entered it to any notable amount over the past 20 years. *See* CP 20 (FOF 16, 20). At one point, Ms. Lahiri asked a tree trimmer not to trim back vines on the Lahiri side of the fence, and he complied. *Id.* (FOF 18).

Prior to 2018, Petitioners never objected to Respondents' use, maintenance, and upkeep of the Disputed Area, did not ask them to leave, and also did not give them express permission to stay. CP 21 (FOF 25-28).

B. Procedural History

In September 2018, after conducting a land survey, Petitioners filed an action to quiet title in King County Superior Court. CP 21-22 (FOF 28-29). Respondents counterclaimed for adverse possession. CP 22 (FOF 29). On October 15, after a two-day bench trial, the trial court held that the Respondents had adversely possessed the Disputed Area through their consistent use of the property, dismissing the Petitioners' "largely vague and conclusory" evidence to the contrary as unpersuasive. CP 20 (FOF 16). The trial court also held that because the Respondents had treated the land as their own for over 20 years, the litigation was unnecessary and thus Respondents were entitled to the entirety of their attorneys' fees. CP 24 (COL 11).

Petitioners appealed, arguing that there was insufficient evidence of adverse possession and that the trial court had erred by not making an express factual finding of possession. *See* Op. 1, 9-10. On April 26, 2021, the Court of Appeals, Division I, ruled in favor of Respondents on all grounds, including affirming the attorney's fees below and awarding additional attorney's fees on appeal. *Id.* at 13.

V. ARGUMENT

Under RAP 13.4(b), this Court will accept a Petition for discretionary review of a Court of Appeals decision only if (1) the Court of Appeals decision conflicts with a decision of this Court, (2) the Court of Appeals decision conflicts with a published decision of the Court of Appeals, (3) the Petition presents a significant federal or state constitutional question, or (4) the Petition presents an issue of substantial public interest that should be determined by this Court.

Petitioners do not argue that they qualify for review under RAP 13.4(b)(3). Their arguments that this case is appropriate for review under the other three categories all fail.

A. Review is not warranted under RAP 13.4(b)(1) because the Court of Appeals correctly followed this Court's precedent when it held that no express factual finding of possession was necessary.

Petitioners cannot show that the opinion conflicts with *ITT Rayonier*—or any other precedent from this Court—because the Court of Appeals correctly followed well-established law when it held that an express factual finding of "possession" is not required to sustain the trial court's legal conclusion that the Respondents adversely possessed the Disputed Area.

To establish adverse possession, a party mush show 10 years of possession that is "(1) open and notorious, (2) actual and uninterrupted, (3)

exclusive, and (4) hostile." *ITT Rayonier*, 112 Wn.2d at 757 (citing *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984)); RCW 4.16.020. A party must prove these elements by a preponderance of the evidence. *E.g.*, *Teel v. Stading*, 155 Wn. App. 390, 394, 228 P.3d 1293 (2010) (preponderance standard).

Crucially—and central to Petitioners' misunderstanding of *ITT Rayonier*—"[w]hether adverse possession has been established by the facts as found by the trial court is a question of law . . . ." *Happy Bunch, LLC v. Grandview North, LLC*, 142 Wn. App. 81, 88, 173 P.3d 959 (2007) (citing *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 210, 936 P.2d 1163 (1997)) (emphasis added). Petitioners' insistence that the trial should have made a fact finding of "possession" before entering a legal conclusion of adverse possession completely ignores this Court's unambiguous explanation in *ITT Rayonier* that the factual predicate for a legal conclusion of adverse possession can be use and "exclusive dominion." *See ITT Rayonier*, 112 Wn.2d at 759. In that case, the defendant asserted adverse possession, arguing that he made improvements to the property but ultimately could not show that the acts he claimed showed ownership had occurred over a the full 10-year statutory period. *Id.* at 759-760. As this Court explained in that case, the defendant's "shared and occasional use of

the property simply did not rise to the level of exclusive possession indicative of a true owner . . . ." *Id.* (emphasis added).

In other words, the Petitioners confuse a legal condition—possession—with the facts necessary to prove that condition. As this Court stated in *ITT Rayonier*, "[t]he ultimate test is the exercise of dominion over the land in a manner consistent with the actions a true owner would take." *Id.* at 759. Thus, nothing requires a trial court to enter a specific factual finding of "possession." A trial court need only find that a party has established "specific acts of use," that amount to possession. *Id.* For example, "acts of possession" include maintaining, using, occupying, and building improvements upon property. *See, e.g., Heriot v. Lewis*, 35 Wn. App. 496, 505, 668 P.2d 589 (1983) (describing physical occupancy, land use, and excluding others as "acts of possession"); *see also* John W. Weaver, 17 Wash. Prac. Real Estate, § 8.10 (2d ed) (listing "activities that have been held to establish actual possession" such as "maintaining trees or other vegetation" and "mowing the grass").

Thus, the trial court applied the correct standard when it found that the Respondent's engaged in specific acts like consistent landscaping and occupancy that established the legal conclusion that they adversely possessed the Disputed Area. This straightforward conclusion—and the Court of Appeals' decision affirming it—does not require this Court's

review simply because the word "possession" doesn't appear in the trial court's findings of fact.

Further, for good measure, the trial court also stated, "[t]o the extent there is any ambiguity, overlap or mixed questions of law and fact, the Court intends for any Findings of Fact described as Conclusions of Law to be a Finding of Fact, and that any Conclusion of Law described as a Finding of Fact to be a Conclusion of Law." CP 25 (COL 12). The trial court expressly wrote, "Defendants have established ownership of the Disputed Area through adverse possession." CP 24 (COL 9).

Petitioners further argue that "the trial court relied entirely on the Lahiris' *use* of the Disputed Area but made absolutely no factual or legal findings regarding whether the Lahiris' use was *exclusive* . . ." Pet. at 8. That assertion is wrong on its face, as the trial court wrote in the Conclusions of Law, "The Lahiris have met their burden of proof that they made open, exclusive, actual and uninterrupted hostile use of the disputed area from at least the late 1990s up to the time this dispute arose in 2018." CP 24 (COL 8). The Court of Appeals upheld the trial court on the question of whether sufficient evidence supported the trial court's Conclusions of Law, and Petitioners do not raise the substantial evidence argument in this Court. *See* Op. at 7.

B. Review is not warranted under RAP 13.4(b)(2) because petitioners have not shown that the opinion here conflicts with any Court of Appeals opinion.

In addition to demonstrating no grounds for review under RAP 13.4(b)(1), Petitioners have not shown that they are entitled to review under RAP 13.4(b)(2). The Petitioners claim the Court of Appeals' decision conflicts with *Lilly v. Lynch* because the Changs' use of the property was sufficient to defeat the Lahiris' adverse possession claim. 88 Wn. App. 306 (1997).

To the contrary, *Lilly* supports Respondents, and not the Petitioners. In *Lilly*, the court explained that "occasional, transitory use by the true owner usually will not prevent adverse possession if the uses the adverse possessor permits are such as a true owner would permit a third person to do as a neighborly accommodation." *Id.* at 313. That aptly describes the kind of relationship Petitioners had with the Disputed Area ever since the Respondents moved in next door in 1995. The trial court found that even Petitioners themselves described their visits to the Disputed Area as "occasional." CP 20 (FOF 16). It is therefore unconvincing that Petitioners attempt to use *Lilly* to argue that Respondents' use was insufficiently exclusive. *See* Pet. at 11-16.

Further, *Lilly* is entirely inapposite because it involved review of an adverse possession claim resolved on summary judgment, not after a bench

trial that settled disputed facts. The Petitioners' suggestion that a party's conflicting evidence of property use must defeat an adverse possession claim completely misunderstands the issue in *Lilly.* In that case, evidence of both parties' use of the property merely precluded summary judgment because a trier of fact had to determine whether the adverse possessor's use amounted to "exclusive" use. Here, the parties presented their conflicting evidence to the trier of fact who agreed with the Respondents and dismissed the Petitioners' evidence as unconvincing. In other words, the Court of Appeals' decision does not conflict with *Lilly* because, unlike that case, there are no remaining questions of fact to resolve here.

Likewise, the other Court of Appeals case cited by Petitioners, *Crites v. Koch*, explains that occasional use by neighbors and community members constituted the exclusive possession element of adverse possession, rather than negating it. 49 Wash. App. 171, 174, 741 P.2d 1005 (1987); *see also id.* ("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.").

Finally, neither *Lilly* nor *Crites* stands for the proposition that Petitioners wish it did, which that the trial court in this case was required to make a factual finding of possession in order to support the legal conclusion

of adverse possession. *See* Pet. at 11-17. Petitioners have shown no need for review under RAP 13.4(b)(2).

C. The petition does not present an issue of substantial public interest.

Petitioners' argument for review under RAP 13.4(b)(4) is premised entirely on its misconstrued arguments under RAP 13.4(b)(1) and RAP 13.4(b)(2). *See* Pet. at 17-19. Clear caselaw regarding adverse possession is important for public policy, but the Court of Appeals in this case strengthened that clarity of the law by correctly applying this Court's precedent.

Petitioners argue that "frightening public policy implications" may occur if the element of exclusive possession and dominion were removed from the adverse possession law, but that is counterfactual to this case. *See* Pet. at 18. Here, neighbors lived peacefully for over 20 years while adverse possession occurred, on either side of a piece of land that belonged to one party before now belonging to the other. In addition, Petitioners state "Chang did exactly as he was expected to do—he continued to use and cultivate his land at all times," Pet. at 19, but that is contrary to the trial court's findings of fact and even the testimony offered by Petitioners themselves. The Court must ignore the Petitioners' attempt to recast their disagreement with the trial court's factual determinations as important matters of public policy demanding this Court's attention.

D. The awards of attorney's fees should be affirmed, and, if the petition is denied, this Court should award the Respondents attorney's fees for responding to the Petitioners' meritless petition.

Both the trial court and the Court of Appeals correctly awarded reasonable attorney's fees in this case, as Respondents were the prevailing party. *See* RCW 7.28.083(3) (providing for fees for a prevailing party in an action asserting title to real property by adverse possession); RAP 18.1 ("A party may recover attorney fees and costs on appeal when granted by applicable law). The Court of Appeals' affirmance of the award below and award on appeal were proper.

Further, because the Court of Appeals correctly awarded the Respondents appellate attorney's fees, this Court should award Respondents fees for responding to the Petitioners' meritless petition if it is denied. RAP 18.1(j) ("If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review.")

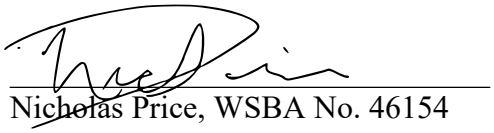
VI. CONCLUSION

Petitioners have not shown any grounds for this Court to review this case under the Rules of Appellate Procedure or other applicable law. For

the foregoing reasons, Respondents respectfully ask the Court to deny the Petition for Review.

Respectfully submitted this 26 day of July, 2021.

ARCHER PRICE LAW P.L.L.C.



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