

65218-4

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No. 65218-4-1

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

Gary and Sue Cohn,

Appellants,

v.

**Tollefson Family Trust by Its Co-Trustees,
Marc and Nancy Tollefson**

Respondent.

Appellants' Reply Brief

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COURT OF APPEALS
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I. Introduction

In their opening brief, Dr. Gary Cohn and Dr. Sue Cohn (the "Cohns") cite Washington cases, out-of-state cases, and property law treatises, all of which agree that maintaining and parking in a driveway are typically considered only uses, and thus do not satisfy the actual possession element of adverse possession. The Tollefson Family Trust, represented by Marc and Nancy Tollefson as co-trustees (the "Tollefsons") appear to concede that parking is only a use but contend the issue was not preserved for appeal. In fact, the issue was argued extensively below and ruled on by the trial court and is properly before this Court.

On the merits, the Tollefsons argue that their predecessors did more than just park and that they had a "recognized right to use the Disputed Area to the exclusion of others" that establishes title by adverse possession. Respondent's Br. p. 19. However, a neighborhood perception of a "recognized right" is not relevant under Washington law in establishing actual or exclusive possession of property. The subjective intent or beliefs of the parties (or of their neighbors) is irrelevant to an adverse possession analysis.

The Tollefsons also argue that their predecessors exercised "dominion" over the disputed area. Respondent's Br. p. 19. However, the Cohns and their predecessors used the disputed area (their half of the area

between the homes) throughout the prescriptive period for gardening, home maintenance, and home and beach access, and they sometimes used the entire driveway area for their winter boat parking, guest parking and other purposes. Joint use by the Cohns and the Tollefsons' predecessors precludes a holding of actual or exclusive possession by the Tollefsons' predecessors.

The trial court erred again in the amount of property awarded to the Tollefsons. The evidence does not support the new boundary line drawn by the trial court and, in fact, awards the Tollefsons more property than the Tollefsons requested in their complaint.

Finally, assuming, *arguendo*, the adverse possession award and new boundary line are upheld, the trial court erred in failing to award the Cohns any equitable relief, more particularly the right to make reasonably necessary uses of the area adjacent to the Cohns' home for gardening, home maintenance and access to the beach. The question of whether equitable relief is appropriate is a question of law and the standard of review is de novo, so this Court may award equitable relief directly or instruct the trial court to do so.

The Tollefsons' request for attorneys' fees should be denied. There is simply no basis for such an award.

II. Argument

A. The Issues on Appeal Were Raised and Argued Extensively Below and Should Be Addressed on Their Merits

The issues raised in this appeal were all argued at trial: (i) whether the Tollefsons met their burden of proof and acquired title to property between the parties' vacation cabins via adverse possession, (ii) if so, how much of the property was adversely possessed, and (iii) whether equitable relief was appropriate. These issues were argued extensively below by both the Tollefsons and Cohns, the trial court ruled on the issues, and the Cohns designated the relevant decisions in their notice of appeal. The issues were preserved for appellate review.

The Tollefsons argue on appeal that the Cohns waived their right to address the "burden of proof" issue by not using the words "burden of proof" at the hearing on presentation of the judgment. The Tollefsons do not cite any relevant authority for this proposition. Their argument is not supported by Washington law. Moreover, the Cohns did raise the burden of proof issue at the presentation hearing, pointing out that there was no evidence to support an award of property north of the line of the parties' houses or any closer than 3.25 feet from the Cohns' house.

1. Legal Standard for Preserving an "Issue"

RAP 2.5(a) provides: "The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a)

does not specify that a party must object during the hearing on presentation of the judgment to issues already argued extensively at trial and ruled on by the court. Moreover, the Cohns' motions for clarification and reconsideration did address the issues now before this Court. The record below reflects that the issues raised in this appeal were raised in the trial court and addressed by the trial judge.

The underlying purpose of RAP 2.5(a) is to "encourag[e] the efficient use of judicial resources," State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988), and "to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials," Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). Thus, an issue not brought to the trial court's attention at all is generally not preserved for appeal. Id., In re Detention of Ambers, 160 Wn.2d 543, 558 n.6, 158 P.3d 1144 (2007).

However, appellate courts may properly consider an issue that was raised by either party below. See In re Dependency of D.F.-M., 157 Wn. App. 179, 186, 236 P.3d 961 (2010). Moreover, even if an issue is not raised during a bench trial, it still may be preserved for appeal if raised in a motion for reconsideration so long as "the issue is closely related to an issue previously raised and no new evidence is required." August v. U.S. Bancorp, 146 Wn. App. 328, 347, 190 P.3d 86 (2008), rev. denied, 165

Wn.2d 1034, 203 P.3d 380 (2009). In other words, to preserve an issue for appeal, it must be raised during the bench trial or in a motion for reconsideration; either is sufficient.

The Tollefsons' argument that issues properly raised during trial must be raised again during the presentation of judgment hearing to preserve an issue for appeal (or that a party waives its appeal if it does not object to the "burden of proof" at the presentation hearing) misinterprets RAP 2.5(a) and would be contrary to the purpose of RAP 2.5(a). The Tollefsons' construction would require parties to raise and trial courts to hear and rule on the same issues repeatedly, wasting judicial resources (and the parties' resources).

2. The "Burden of Proof" and "Prescriptive Easement" Issues Were Argued to the Trial Court

Throughout the trial court proceedings the Cohns argued that the Tollefsons could not meet their burden of proof for adverse possession, particularly with regard to the elements of hostility, actual possession and exclusivity. E.g., CP 426-39 (Cohns' memorandum in support of motion for summary judgment). Regarding actual possession (the "prescriptive easement" issue), the Cohns argued in their trial brief:

In the present case, the evidence will not demonstrate an actual possession of the property. At the most, the Plaintiffs and their predecessors, for the relevant period, used the property at issue for the parking of cars. . . . [T]his is use—

not possession. Plaintiffs' predecessors never possessed the property—they only used it. At the most, they can claim an easement of the scope for which they used the property, they may not claim a fee ownership interest.

CP 185. In closing arguments, both parties addressed the disputed elements, including the issue of whether parking is only a use or is actual possession. RP 315:12-316:20 (Tollefsons' closing); RP 328:25-329:30 (Cohns' closing).

After the two-day bench trial, the trial court issued a letter opinion stating that "[s]ince the court has found that all elements of adverse possession have been proven, the Tollefsons are entitled to quiet title and to ejectment of the Cohns from the disputed area. . . . The court will enter orders to this effect upon proper presentation." CP 59. The letter opinion did not define the precise boundaries of the disputed area, nor did it discuss equitable relief in any detail. Accordingly, the Cohns filed a motion for clarification (and later a motion for reconsideration) to address those particular issues and to again highlight the fact that the Tollefsons had not met their burden of proof as to actual possession of the entire area to which title was to be quieted.

Specifically, the Cohns argued that (i) the disputed area was not "actually possessed," (ii) the Tollefsons had not introduced evidence of possession of the property beyond the northern line of the houses or any

closer than 3.25 feet from the Cohns' residence, and (iii) the Cohns should have a continued right to use the disputed area for access and home maintenance purposes. CP 12-15. These issues were properly raised and preserved for appeal. In sum, the "burden of proof" and "prescriptive easement (actual possession)" issues were raised to the trial court and should be addressed on their merits.

B. There Is No "Recognized Right" Test for Adverse Possession, and the Tollefsons' Predecessors Did Not Exercise Dominion Over the Disputed Area

1. The Subjective Intent or Beliefs of the Parties and Their Neighbors Is Irrelevant to Adverse Possession

There is no "recognized right" test for adverse possession. It is well established in Washington that the subjective intent or belief of the parties (or of their neighbors) is irrelevant because thoughts do not place a person into possession of property. Instead, courts look to the parties' actions and the manner in which they treat the property. Chaplin v. Sanders, 100 Wn.2d 853, 861, 676 P.2d 431 (1984) ("The nature of [a claimant's] possession will be determined solely on the basis of the manner in which he treats the property."); see also McInerney v. Beck, 10 Wash. 515, 518, 39 P. 130 (1895) (holding that the community's belief that property belonged to claimant did not establish possession). Even if there was a belief by the neighbors that the Tollefsons' predecessors

owned the entire driveway (which is not supported by the testimony),¹ such a belief does not convert a periodic use into possession.

The Tollefsons' reference to the placement of the Cohns' dog fence is misleading and again irrelevant under Chaplin. The Cohns built the fence sometime in or after 2000, in a location of convenience, to keep their new golden retriever contained. RP 192:20-193:5; RP 193:24-194:9. The dog fence does not run the length of the disputed area, and it was never intended by the Cohns to establish a mutually agreed boundary,² as the Tollefsons suggest.³ The placement of a dog fence *by the Cohns* does not show dominion *by the Tollefsons' predecessors*. The subjective beliefs of the parties about the fence is simply irrelevant to their adverse possession dispute, and the Tollefsons' arguments related to an agreed or recognized boundary are not relevant to their adverse possession claim.

¹ Ms. Kelly "assumed it was both parties owned half of it [the area between the homes]." RP 186:3-5.

² Under the doctrine of mutual recognition and acquiescence, courts will recognize an agreed-upon boundary line only if the plaintiff shows, by "clear, cogent and convincing evidence, that both parties acquiesced in the line for the period required to establish adverse possession—10 years." Lilly v. Lynch, 88 Wn. App. 306, 316-17, 945 P.2d 727 (1997). The Tollefsons did not argue mutual recognition and acquiescence, nor would the evidence at trial support judgment in the Tollefsons' favor on those grounds.

³ The testimony at trial was that the owners of Lots 16 and 17 never discussed a boundary line or their joint use of the disputed area, never gave permission to one another to use the disputed area, and never objected to joint use. See, e.g., RP 29:23-25; 39:23-39:2 (Ms. Field's testimony that she never asked for permission to park and never told her neighbors her understanding of the property line); RP 289:8-13 (Dr. Sue Cohn's testimony that she never asked permission from anyone to use the disputed area).

2. Parking Does Not Show "Dominion," and the Cohns Used the Disputed Area as an Owner Would

The evidence simply does not support a legal conclusion that the Tollefsons' predecessors exercised dominion over the area. The Tollefsons' predecessors admitted that they never placed any permanent structures in the area, never fenced the area, and never posted signs. RP 36:17-37:1; RP 53:2-12. Neighbors testified that they never witnessed anything in the area delineating a boundary line. RP 163:24-164:25; RP 175:13-23. Also, there is no evidence that the Tollefsons' predecessors ever excluded or prevented the Cohns or their predecessors from entering or using the disputed area.

The evidence that neighbors would occasionally park in the driveway and would move or might move their vehicle if Ms. Field arrived⁴ does not establish dominion, nor does it turn a potentially adverse parking use into adverse possession. At most, the evidence could be construed to show that Ms. Field and her neighbors believed Ms. Field had a superior right to park in the area. But a superior right to park can be based on easement rights, on part ownership of the driveway (as Ms. Kelly

⁴ Ms. Field testified that neighbors would occasionally park in the area between the houses and that they would move their car when she arrived. Ms. Kelly, a neighbor, also testified that she parked in the driveway one time and that she would have moved if the owners of Lot 17 had arrived. RP 184:25-185:5. However, Ms. Kelly also testified that she would have moved if the owners of Lot 16 wanted to use the area. RP 185:24-186:2.

believed and as was shown in the surveys), or on some sort of shared use agreement with the owners of Lot 16.

As detailed in pages 38-42 of the Cohns' opening brief, the evidence showed that the Cohns and their predecessors regularly used the disputed area for gardening, maintenance, and access (the uses that an owner typically makes of a side yard). The Tollefsons assert that there was no evidence that the Cohns' myriad uses were beyond the drip line and that the Cohns "were likely standing under the drip line" when performing any home maintenance. Respondents' Br. p. 23. That assertion defies common sense and the evidence introduced at trial.

Photographs of the area as it existed in 2005, Exs. 6, 9, 10, show that to maintain a garden under the drip line, to clean the fireplace and to replace the fireplace flue wind cap, to paint the house, to clean the gutters, and to access or move a boat, a person would be physically located in or using the disputed area and would not be "under the drip line." Prior to the Cohns' recent remodel, the chimney of the Cohns' cabin extended to the drip line, so of necessity, the Cohns went further into the "disputed area" simply to get around the chimney.

The Cohns also testified that to clean the gutters or paint the house they placed ladders in the disputed area, RP 235:8-14; RP 287:9-13, and as a matter of common sense, it would be practically impossible (and

certainly not a natural practice) for them to have cleaned the gutters by standing under the eaves (under the drip line) and reaching up and around to pull debris from the gutters. Also, the Cohns' survey and testimony show that there is only a very narrow walkway on the other (east) side of the Cohns' house, and the Cohns cannot use that path to move their dinghy back and forth to the beach, or for similar access. RP 228:23-230:21; Ex. 17. Given regular use of the disputed area by the Cohns outside the drip line, it would be error to hold that the Tollefsons' predecessors exercised dominion over the disputed area.

C. The Trial Court Erred in Holding That the Entire Area Was Adversely Possessed by the Tollefsons

The trial court erred when it drew a straight line parallel to the Cohn's drip line for the entire length of the lot and awarded the Tollefsons all the property west of that line. Even assuming that parking by the Tollefsons' predecessors amounts to possession of land, the evidence did not support an award of property beyond the northerly line of the residences or all the way to the Cohns' drip line.

The Tollefsons argue that there was substantial evidence to support the trial court's award, but do not cite any evidence introduced at trial that the property north of the bulkhead was used by the Tollefsons' predecessors. In fact, paragraph 2.4 of the Complaint describes the

bulkhead as the northern "point of origin" and does not claim any property north of the bulkhead:

Prior to 1998 to, and including, May 2008, Plaintiffs and their predecessors in interest have used a portion of Defendant's land described above. The Plaintiffs have used a portion of the Defendant land, which is a piece of land extending from where the Defendant's fence meets the bulkhead ("Point of Origin") out at an angle that bisects the Maple Grove Road at a point approximately eight feet south and west of the Point of Origin. The land described in this Paragraph 2.4 is also represented by "Exhibit 1" and "Exhibit 2" attached to this Complaint.⁵

CP 533-34 (included in the Appendix to the Cohns' Opening Brief). Also, the evidence did not support an award of the concrete patio area located between the bulkhead and the northerly line of the parties' residences. The Tollefsons' predecessors did not park cars in this area (they did put temporary stairs next to the bulkhead, but the stairs were west of the disputed area and not located next to the Cohns' drip line), and there is no evidence that the Tollefsons' predecessors ever excluded anyone from the concrete patio area.

Further, as the Cohns argued to the trial court, a parked vehicle would not take up the entire width of the driveway area between the homes. At a minimum, the trial court should not have drawn the new boundary line any closer than 3.25 feet from the Cohns' residence. This

⁵ The complaint appears to allege that the Cohns' dog fence existed in 1998. However, it was undisputed at trial that the dog fence was installed after the Cohns got their dog in the year 2000, less than 10 years before the complaint was filed in 2008.

area closest to the Cohns' residence also corresponds to the part of the disputed area used most frequently by the Cohns for their home maintenance and access needs. The trial court erred in awarding Tollefsons title to the property all the way to the Cohns' drip line.

D. Equitable Relief Is Appropriate if the Adverse Possession Award is Upheld

The Tollefsons state that the standard of review for the trial court's failure to fashion equitable relief is unclear. The Tollefsons question whether this court has the authority to award equitable relief and contend that there was no testimony to support the Cohns' claim of hardship.

In fact, "the question of whether equitable relief is appropriate is a question of law" and is reviewed de novo. Bank of America, N.A. v. Prestance Corp., 160 Wn.2d 560, 564, 160 P.3d 17 (2007) (quoting Niemann v. Vaughn Cmty. Church, 154 Wn.2d 365, 374, 113 P.3d 463 (2005)). Appellate courts can award equitable relief. See id. at 582.

At trial, the Cohns testified about the hardships they would incur if they lost title to the disputed area:

Q Dr. Cohn, what would be the effect on your property if a judgment were entered that the Plaintiffs owned to the retaining wall?

A . . . Well, that would - that would take away 9 percent of the land that we purchased, which the documents indicated we owned and so did the title search and the insurance. That would take away 14 percent of the space that isn't in-house. It would prevent us, given that the

Tollefsons would have the ability to erect a wall inches from our western wall, from accessing the west side of our house at all. It would prevent us from being able to access the front of our house in an emergency.

...

We would no longer be able to move our dinghy up - up and back to the water that way.

Q Is this an area that you have used for getting around to the front of your house?

A Oh, absolutely.

RP 228:23-229:25.

The issue was raised again in the Cohns' motion for clarification and motion for reconsideration when the Cohns argued:

Should the Court not wish to restrict the adverse possession area as just discussed, it is requested that the Court consider an alternative to provide the Cohns with a continued right to access the side of their house for maintenance purposes. Such a right could be an easement, perhaps akin to an easement of necessity. The easement could be drafted to assure both the [Tollefsons]' right to park between the properties, and the Cohns' right to access the side of their house.

CP 51-52 (motion for clarification); CP 14-15 (motion for reconsideration attaching copy of motion for clarification).

In contrast to the severe hardship imposed on the Cohns by the trial court's decision to deny the Cohns any equitable relief, there would be no hardship on the Tollefsons if the Cohns were provided rights to use the disputed area for access and maintenance purposes because such uses

would not interfere with the Tollefsons' parking use or septic system. Given these circumstances, it was error for the trial court to deny the Cohns' requested equitable relief.

E. The Tollefsons Are Not Entitled to Attorneys' Fees

The Tollefsons' request for attorneys' fees should be denied. "RAP 18.1(b) requires more than [a] bald request for attorney fees on appeal. The rule requires argument and citation to authority to advise [courts] of the appropriate grounds for an award of attorney fees and costs." Bay v. Jensen, 147 Wn. App. 641, 661, 196 P.3d 753 (2008). A prevailing party on appeal may recover attorneys' fees *if* fees were allowable at trial. Landberg v. Carlson, 108 Wn. App. 749, 758, 33 P.3d 406 (2001). The Tollefsons cite to CR 65(c) as the appropriate grounds for fees. That rule is not applicable.

Under CR 65(c), attorneys' fees *may* be awarded at trial based on equitable grounds to a party who dissolves a wrongfully issued injunction or restraining order, but the award is *discretionary* and is reviewed under the abuse of discretion standard. Confederated Tribes of Chehalis Reservation v. Johnson, 135 Wn.2d 734, 758-759, 958 P.2d 260 (1998). "The purpose of the rule permitting recovery for dissolving [an injunction or] a restraining order is to deter plaintiffs from seeking relief prior to a trial on the merits." Id. at 758.

The Cohns are not seeking relief prior to a trial on the merits. In fact, it was the Tollefsons who originally sought a restraining order. CP 520-21. Later, both parties obtained preliminary injunctions, essentially to keep the status quo during litigation. CP 448-51. At trial, counsel for the Tollefsons argued, "I believe that there's absolutely no basis for an award of fees, frankly, to either party." RP 345:16-18. The Tollefsons did not request attorneys' fees at trial, and the trial court did not award fees. The Tollefsons do not contend that the trial court abused its discretion at trial, and the Tollefsons do not cite any relevant authority showing that an award would be appropriate now.

Nor are the Tollefsons entitled to fees based on equitable grounds. The stay pending appeal simply continues the status quo. The injunction was originally requested by the Tollefsons, and the Tollefsons have not suggested that they have been harmed in any way by its continuation pending appeal. The Tollefsons' request is insufficient to support an award of attorneys' fees and it would be inequitable to award attorneys' fees under the circumstances.

III. Conclusion

The Tollefsons' procedural argument regarding preservation of error is without merit. The issues on appeal are the same issues that were argued extensively below and were preserved for appeal. On the merits,

the Tollefsons did not meet their burden of proof for actual and exclusive possession of the property the trial court awarded to them. The trial court erred in holding that the Tollefsons acquired fee title to any part of the disputed area, much less the entire disputed area up to the Cohns' drip line. The Cohns respectfully request that this Court reverse the trial court's holding that the Tollefsons exclusively and adversely possessed the disputed area and vacate the trial court's judgment.

Alternatively, if this Court upholds the trial court's adverse possession ruling, the Cohns respectfully request that this Court use its equitable authority to modify the trial court's judgment and to quiet title in the Cohns to an easement or other rights in favor of the Cohns to use the disputed area for home maintenance and access around the home and to the beach, in a manner that does not unreasonably interfere with the Tollefsons' use of the disputed area.

Finally, the Cohns request that the Tollefsons' request for attorneys' fees be denied.

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Certificate of Service of Reply Brief

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I, EDWARD C. LIN, hereby state that on this 5th day of January, 2011, I arranged to be served true and correct copies of **Appellants' Reply Brief** and this Certificate of Service on the individual named below, in the manner specifically indicated:

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I certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.



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