

No. 652184-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GARY AND SUE COHN,

Appellants,

vs.

TOLLEFSON FAMILY TRUST BY ITS CO-TRUSTEES MARC AND
NANCY TOLLEFSON,

Respondent.

**RESPONSIVE BRIEF OF TOLLEFSON FAMILY TRUST BY ITS
CO-TRUSTEES MARC AND NANCY TOLLEFSON**

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. PROCEEDINGS BELOW.....4

III. QUESTIONS PRESENTED17

IV. ARGUMENT17

A. THE TRIAL COURT CORRECTLY AWARDED THE RESPONDENTS FEE TITLE TO THE DISPUTED AREA, RATHER THAN A PRESCRIPTIVE EASEMENT.....17

1. The Cohns arguments in favor of prescriptive easement and in opposition to the trial court’s conclusions of law on the elements of adverse possession were not properly preserved for consideration by the Court of Appeals17

2. The Tollefsons’ and their predecessors’ recognized right to use the Disputed Area to the exclusion of others established their title to the Disputed Area by adverse possession, not merely the fact that they maintained and made use of the Disputed Area as a parking space and driveway.....19

3. The Cohns infrequent access of the west side of their home is insufficient to defeat the “exclusivity” element of the Tollefsons’ claim of adverse possession21

B. THE TRIAL COURT CORRECTLY AWARDED THE RESPONDENTS FEE TITLE TO THE ENTIRE DISPUTED AREA22

C. THE TRIAL COURT WAS UNDER NO OBLIGATION TO AWARD THE COHNS ANY EQUITABLE RELIEF23

D. THE TOLLEFSONS ARE ENTITLED TO AN ORDER OF FEES AND COSTS ON APPEAL.....24

V. CONCLUSION.....25

TABLE OF AUTHORITIES

STATE CASES

ITT Rayonier, Inc. v. Bell, 112 Wash.2d 754, 757, 774 P.2d 6 (1989)..... 19

Lilly v. Lynch, 88 Wash.App. 306, 945 P.2d 727 (1997)..... 19, 22

Lingvall v. Bartmess, 97 Wa.App. 245, 253, 982 P.2d 690 (1999)..... 19

Nerbun v. State, 8 Wash.App. 370, 506 P.2d 873 (1973)..... 18

Roy v. Cunningham, 46 Wash.App. 409, 413, 731 P.2d 526 (1986)..... 19

San Juan Cty. v. No New Gas Tax, 160 Wn.2d 141, 157 P.3d 831 (Wash. 2007) 25

State v. Tradewell (1973) 9 Wash.App. 821, 515 P.2d 172, cert den 416 U.S. 985, 40 L.Ed.2d 762, 94 S.Ct. 2388 18

State ex rel. LaMon v. Westport, 73 Wash.2d 255, 438 P.2d 200 (1968).. 18

SECONDARY SOURCES

17 *Stoebuck & Weaver*, Wash. Prac. Real Estate: Property Law s 2.7 (2d ed. 2004) 20

I. INTRODUCTION

In 1961, three acquainted families, the Fields, Danubios and Espidals bought a small cabin on the beach at 750 Maple Grove Lane, Camano Island, Washington (“Lot 17”). The three families, and later the Palo family whom purchased the Espidals’ interest in Lot 17, maintained the property as a shared vacation home until 2005 when Mrs. Danubio died and her estate, and Mrs. Fields and Mrs. Palo, whose husbands had previously died, sold Lot 17 to the Respondent Tollefson Family Trust By its Co-Trustees, Marc and Nancy Tollefson (the “Tollefsons”). Lot 17 is bordered to the north by Puget Sound, to the west by another beach home owned by the Marylee Brown, on its south side by Maple Grove Lane and to the east by 748 Maple Grove Lane (“Lot 16”), today owned by the Appellants, Drs. Sue and Gary Cohn (the “Cohns”). The houses on Lot 17 and Lot 16 are oriented more or less perpendicular to the beach and parallel to each other. Until 2007 the exact boundary between the two properties had not been surveyed by either of the current owners of Lot 17 or Lot 16, but the Tollefsons, the Fields and the Palos generally understood the property line to run parallel to the two homes.

In 2005, shortly after they purchased Lot 17, the Tollefsons began to make plans to renovate and modernize the small beach cabin. Part of their plans included replacement of the cesspool which serviced the

property with a modern septic system installed between the house on Lot 17 and the house on Lot 16. Up to that point, they had used this area, as their predecessors had, primarily for parking, and had maintained it as a parking area and driveway. Prior to the septic tank's installation, Marc Tollefson contacted Dr. Gary Cohn and discussed the plans for Lot 17. At Dr. Gary Cohn's request, to accommodate the modern septic system, the Tollefsons first raised the grade between the homes on Lot 17 and Lot 16 and installed a retaining wall along what they understood to be the eastern border of Lot 17. Their neighbors, the Cohns, made no objection to the location of the retaining wall or the excavation in the area planned for the septic tank. In 2007, after installing their septic system and protective paving bricks, the Tollefsons obtained a survey that, to their surprise, indicated that the shared boundary line between Lot 17 and Lot 16, rather than paralleling the two houses, dissected the parking area diagonally. In fact, the surveyed property line dissected not just their parking area, but their septic system as well.

The Tollefsons contacted the Cohns, advised them of the result of the survey and tried to negotiate a resolution of the issue. They were unsuccessful and believed that the Cohns intended to immediately take action to remove the septic system and protective paving bricks that were to the east of the true property line. The Tollefsons took action to protect

their property, filing a complaint for quiet title asserting that their predecessors in interest had obtained title to the property to the east of the surveyed property line up to their retaining wall (the “Disputed Area”), and moved the court for a temporary restraining order to prevent the Cohns from disturbing the protective paving bricks and their septic system. The parties agreed to a mutual restraining order and the Cohns counterclaimed against the Tollefsons for quiet title asserting that the Disputed Area belongs to Lot 16.

Following a contested trial, the Tollefsons were awarded title by adverse possession to the Disputed Area. The Cohns appealed. The Cohns now, for the first time since the denial of an early motion for summary judgment, raise objection to the trial court’s finding that the Tollefson met their burden of proof on the elements of adverse possession, for the first time argue that the Tollefsons are entitled to a prescriptive easement over what Gary Cohn formerly referred to as the Tollefsons’ driveway, and renew an argument vaguely made to the trial court post-trial that the trial court awarded too much property to the Tollefsons by adverse possession and/or erred in not granting the Cohns an easement to access the side of their home. None of the Cohns’ arguments, properly preserved or not, have merit and the trial court’s Judgment and Decree Quieting Title

in Favor of Plaintiff The Tollefson Family Trust should be affirmed in its entirety.

II. PROCEEDINGS BELOW

A. Procedural History. Suit was initially filed in this matter on May 6, 2008. CP 532-539. Also, on May 6, 2008, based on the Tollefsons' request, having considered the declaration of the Cohns' attorney, the Court entered a Temporary Restraining Order prohibiting the Cohns from disturbing the Disputed Area. CP 488-490. On May 21, 2008, the Temporary Restraining Order was extended by agreement of the parties. CP 480-483. On June 2, 2008 the parties appeared to litigate competing motions for Preliminary Injunctions. The Court heard argument and both parties were both enjoined from any activity that would disrupt the subject property. Both parties continue to be enjoined from normal activity on the subject property, and remain obligated to sureties who posted bonds on their behalf by order of the Court. CP 448-451.

This matter was noted for trial setting following denial of the Defendants' Motion for Summary Judgment on December 5, 2008. CP 235-236. This matter went to trial in Island County Superior Court on September 9th and concluded on September 10th. At trial, the Tollefsons relied on testimony from their predecessors in interest, Marc and Nancy

Tollefson and Dr. Gary Cohn. The Cohns relied on testimony from their neighbors and Drs. Gary and Sue Cohn.

B. Ann Field. Ann Field testified that she was a former owner of Lot 17. RP 22:3-7. She and her husband, Dean Field, purchased Lot 17 with John and Evelyn Danubio (the “Danubios”) and their friends the Espidals in 1961 and that the Espidals later sold their interest in Lot 17 to Edith and Bill Palo (the “Palos”). RP 22:8-16. The families used Lot 17 year round as a vacation home, evenly dividing the months and weeks of the summer. RP 23:4-10. For her part, when Mrs. Field visited the cabin she parked in the Disputed Area up to the drip line of the house on Lot 16, understanding that to be the eastern boundary of her property. RP 26:16-23. The Fields also used this area to dry moor their boat. *Id.* The Fields constructed maintained a set of steps in the Disputed Area to access the beach from Lot 17. RP 41:12-17.

Mrs. Field testified that Bill Palo spread gravel in the Disputed Area and that the families would keep the grass down in the Disputed Area by pulling it or poisoning it. RP 37:9-25. The Fields’ grandchildren, at the request of the Cohns, later buried planks along what Mrs. Field understood to be their shared property line in order to protect the Cohns’ rose bush. RP 28: 8-10. During the winter, the Fields may have permitted other families to park in the Disputed Area. RP 28:18, RP 38:16-18.

Normally neighbors who needed extra parking would park along Maple Grove Lane to the south of Lot 17, though the Fields occasionally found cars parked in the Disputed Area. RP 29:16-20. The owners of those cars would immediately remove them upon the Fields' arrival. RP 29:21-22, RP 38:6. Mrs. Field never had to tell anyone that the Disputed Area was her property. RP 38:25. Mrs. Field never observed any of the owners of Lot 16 that she identified "do anything" in the Disputed Area. RP 35:1-6. She had never seen Louis Zuvich, a purported predecessor in interest of the Cohns, park his boat in the Disputed Area. RP 36:1. Mrs. Field testified that the Cohns did build a fence for their dog that was partially on her property that she expected them to move "when the pup was grown up." RP 40:7.

C. Edith Palo. Mrs. Palo was unavailable to testify due to having suffered a recent stroke but the Tollefsons were allowed to admit a declaration she had made previously. RP 33:18. Mrs. Palo had declared under oath that she had no understanding of the exact boundary between Lot 17 and Lot 16, but that when she and her family were using Lot 17, that they would generally park in the area between the houses on the Lots and believed that the area in which she parked was on Lot 17. Exhibit 72, CP 420-421.

D. David Danubio. David Danubio testified that his parents, John and Evelyn Danubio owned Lot 17 with the Fields and Palos. RP 45:7. He and his family visited the property “quite often; during the summer particularly.” RP 46:5. Mr. Danubio testified that his parents “always” parked in the Disputed Area. RP 46:20. When Mr. Danubio parked his own care there, he would park to the rear of the house to the south, or in the Disputed Area. RP 47:1-4. Mr. Danubio testified that he helped his family maintain the Disputed Area by spreading gravel and weeding. RP 47:10-17. Mr. Danubio only ever saw one car which did not belong to one of the owners of Lot 17 parked in the Disputed Area and that it “was part of” Lot 17. RP 48:12-21.

Mr. Danubio assisted his mother’s estate and Mrs. Field and Mrs. Palo by helping market Lot 17 for sale after his mother’s death. RP 49:9-12. As part of his efforts, Mr. Danubio investigated Lot 17’s cesspool septic system. RP 50:9-12. Mr. Danubio contacted the Tollefsons before listing Lot 17 and they purchased it. RP 49:18-22. Mr. Danubio did not indicate to the Tollefsons that the Disputed Area was the parking area for Lot 17 because it “was never a question. You know, I knew the property line had to go between the two cabins somewheres, but it was just we had always parked there. The people, when we bought the cabin in - I think it was '61 - previous people had always parked there. And it was just never

a question. We parked there. They parked on the other side.” RP 51:18-23.

E. Marc Tollefson. Mr. Tollefson testified that the Tollefsons bought Lot 17 on February 14, 2005. RP 61:17, Exhibit 4. Mr. Tollefson testified that he parked in the Disputed Area even before the Tollefsons had agreed to purchase Lot 17. RP 63:5. The Tollefsons conditioned the purchase on the replacement of Lot 17’s cesspool with a modern septic system. RP 63:8-14. The Tollefsons dug test holes in the Disputed Area to see whether it was suitable for a septic system. Exhibit 6. The area between the houses on Lot 17 and Lot 16 is the only area in which a modern septic system would fit. RP 67:12.

Mr. Tollefson later discussed with Dr. Gary Cohn that the Tollefsons intended to remove the fence erected by the Cohns for their dogs, make a saw cut along the perceived property line, install their septic system in what was later determined to be the Disputed Area and replace the dog fence when they were through. RP 68:13-25. In order to accommodate the septic system, the grade of the Disputed Area had to be raised, and in order to accommodate the change in grade, Dr. Gary Cohn requested that a retaining wall be installed. RP 69:10-70:14. The Tollefsons complied: “So that’s what we did. We put up the retaining wall right where those boards were before that Ann Fields testified to that were

put in at the drip line. Built it up. Brought the pavers directly to that point. Left their little garden spot where it was.” RP 70:15-18, Exhibit 17, RP 96:20-23. No objection was made by the Cohns to the location of the retaining wall, but because Dr. Gary Cohn was concerned about the elevation of the retaining wall, the Tollefsons left space in the retaining wall for the Cohns to access their fireplace clean-out. RP 72:20-24. The Tollefsons further accommodated Dr. Gary Cohn’s request that his contractor be able to access Lot 16 over what he referred to in communication with Mr. Tollefson as “your driveway’.” RP 73:23-24, Exhibit 18. The Tollefsons installed their septic system in April, 2005. RP 75:11. Later, the Tollefsons installed paving bricks to protect the septic system up to the previously installed retaining wall. RP 80:15-20.

Mr. Tollefson testified that in 2008, the Tollefsons and Cohns each commissioned surveys which determined that the property boundary was six feet to the west of the retaining wall at its southerly point, and one foot to the west of a line extending northerly from the retaining wall at the parties shared bulkhead. RP 25:8, Exhibit 17. The Tollefsons attempted to purchase an easement from the Cohns to avoid a legal entanglement over the shared property line, but were unsuccessful. RP 83:4-10, RP 98:23- 99:3. The Tollefsons became concerned that the Cohns intended to immediately remove the protective paving bricks and septic system. RP

83:17-20, Exhibit 14. Since the completion of the remodel, the Tollefsons have continued to use the Disputed Area for parking without damage to the septic system. RP 85:8-11.

F. Nancy Tollefson. Mrs. Tollefson is Mr. Tollefson's wife and the co-trustee in the Tollefson Family Trust. RP 113:15. Her testimony was that she always parked her vehicle in the Disputed Area and had never seen anyone else park there, asked permission to park there, or seen the Cohns use that property for any purpose. RP 113:19- 114:10.

G. Dr. Gary Cohn. Dr. Gary Cohn testified that he and his wife Dr. Sue Cohn are the owners of Lot 16. RP 116:5-18. Dr. Gary Cohn understood the dimensions of Lot 16, but not its true boundaries. RP 118:1- 9. Other than vehicles owned by the residents and guests of Lot 17, Dr. Gary Cohn had only occasionally observed any vehicle parked in the Disputed Area. RP 145:10. Dr. Gary Cohn testified as to his use of the Disputed Area that: "we use it for access to the west side of our home. We use it to - to tend it. We tend to garden there what we could. We used it for moving a boat up and down in between the two homes in order to get it to the front area. I maintained it. I think I weed whacked it sometimes. I know I picked up a lot of dog poop there. And we walk around it to - to access the house. From time to time, you know, guests would park there. From time to time other folks in the community would park there." RP

145:14-23. Dr. Cohn also accessed the garden area and side of the house from the Disputed Area. RP 235:3-23. Dr. Cohn could not directly explain why he only objected to the Tollefson's use of the Disputed Area until after the area was surveyed. RP 146-147. Dr. Gary Cohn testified that he erected a fence to contain his dogs along the eastern border of the Disputed Area. RP 192:20-25, RP 210:21. Dr. Gary Cohn could not directly explain why the Cohns had not used the Disputed Area for anything other than access until after the survey was published. RP 207-208. Dr. Cohn testified that he could not recall entering the Disputed Area at all in the three years prior to the lawsuit. RP 252:16.

H. Barry Margolese. Barry Margolese has been a "mostly full-time" resident of Maple Grove Lane since 1993. RP 160:17-21. Mr. Margolese testified that on a busy weekend, residents would, with their neighbor's permission, park on their neighbor's property, but move their vehicles at the property owner's request. RP 161:16-19. As to the Disputed Area, Mr. Margolese had observed vehicles parked there, but could not identify whose vehicles, had never parked their himself, and had never had guests park there. RP 167:1-9.

I. Marylee Brown. Ms. Brown owns three lots on Maple Grove Lane, including Lot 18, to the west of the Tollefsons' property. RP 168:25. Ms. Brown's mother bought Lot 18 forty years ago. RP 169:20-

23. Ms. Brown is at Lot 18 three to four nights a week except during the summer when she is there most of the summer. RP 173:13-18. Ms. Brown also testified that, with permission, she or her guests would use her neighbors' property for parking. RP 172:1-17. Ms. Brown observed Ms. Field's car in the Disputed Area, quite frequently, and Evelyn Danubio's parked to the south of the house. RP 174:1-16. Ms. Brown did not observe the Cohns, nor their predecessors in interest nor any other neighbors park their vehicles in the Disputed Area. RP 175:10-12, RP 176:7-9, RP 176:15-20. Ms. Brown's husband gave Mr. Tollefson a chain to put between the roadway and Disputed Area to protect the septic system. RP 176:21-25.

J. Melinda Kelly. Ms. Kelly has been coming to the beach at Maple Grove Lane since 1949. RP 179:14. Ms. Kelly testified that parking is scarce in the neighborhood so, with permission, neighbors use each other's lots to accommodate guests and extra vehicles. RP 181:1-10. None of Ms. Kelly's guests ever parked their vehicles in the Disputed Area. RP 182:1-4. One time, Ms. Kelly parked her own car in the Disputed Area but was "willing to move it at the moment's notice if [the owners of Lot 17] came... as fast as we could unless they said it's okay." RP 182:6-9, 185:1-4. A "couple times", she saw Mr. Zuvich's boat parked in the Disputed Area during the wintertime, but did not know if it

was parked with the permission of Lot 17's owners. RP 183:16, RP 185:12.

K. Carolyn Cowan. Carolyn Cowan has had property on Maple Grove Lane since 1988. RP 276:1-6. Ms. Cowan has frequently given her neighbors permission to park on her property, and has also found vehicles parked on her property without her permission. RP 277:22-278. Ms. Cowan has observed vehicles parked in the Disputed Area, but did not know whose vehicles. RP 279:11-15. Ms. Cowan has never parked in the Disputed Area. RP 280:5-7. Ms. Cowan also gave testimony that conflicted with a prior declaration wherein she stated that she "hates" the Tollefsons' remodel and that the boundary line between Lot 17 and Lot 16 was "obvious." RP 282:28-283:9.

L. Dr. Sue Cohn. Dr. Sue Cohn testified that she accessed the Disputed Area to paint the side of the Cohns' house in 1997 or 1998 and "did the gardening a little bit." RP 287:11- 288:5. Dr. Sue Cohn testified that the Tollefsons use the Disputed Area for parking more than what she observed of their predecessors. RP 291:7- 292:18.

M. Post Trial. The trial court issued its verdict in favor of the Tollefsons in its Memorandum Opinion on November 3, 2009. CP 53-59. On November 13th, 2009, the Cohns filed and served a Motion for

Clarification, requesting clarification of two limited issues not directly addressed by the trial court's opinion:

“Defendants request that the Court address the extent of the adverse possession of by the Plaintiffs in the disputed area. The Court's opinion does not address the extent to which the Cohns may access the side of their residence for purposes of maintaining the structure and the flower areas located there. The Court's opinion also does not address the extent to which the adverse possession would extend in front of the area used for parking.” CP 50-52. The Cohns never noted their Motion for Clarification for hearing, and it was never before the trial court.

On February 11, 2010, the trial court heard argument on the Tollefsons' proposed Findings of Fact and Conclusions of Law and Judgment and Decree Quietening Title. The Cohns had filed no separate written objection in opposition to the documents noted for presentation by the Tollefsons. During the hearing, the Cohns' counsel relied almost entirely on the Cohns' Motion for Clarification though it still had never been noted:

I have but four brief comments to make. I believe that Findings of Facts Nos. 12, 13, 14 and 15 deal with the subjective intent of the parties and are basically irrelevant matters. I believe -- And this comes out of the Motion for Clarification, which I made, Your Honor -- that the last sentence of Finding of Fact No. 16 is incorrect in that it does not acknowledge that the fence that was built was built along

the house line in order to create a continuous barrier for - for the Cohns' dog and that the supports for that fence extended into what is called the disputed property area.

The other two points I wish to make, Your Honor, are just briefly that I believe that, as mentioned in the Motion for Clarification, there is no evidence which would extend the adverse possession beyond - beyond the northerly line of the residences. And that given that the possession is based - the adverse possession is based upon the use of parking, that there is no evidence which would extend that adverse possession all the way to the line chosen by the Court, which is immediately adjacent to the Cohns' property.

And that's all I have, Your Honor.

RP (Presentation) – 3:7-4:3.

The trial court entered the Findings of Fact and Conclusions of Law and Judgment and Decree Quieting Title as proposed by the Tollefsons. RP (Presentation) – 5:1-17, CP 17-33.

On February 19, 2010, the Cohns filed and served their “Motion to Reconsider”, requesting “that the Court reconsider the issues set forth in the previously filed Motion for Clarification, a copy of which is attached.” The Cohns provided no specific facts or authority in support of their “Motion to Reconsider,” raised no new issues for reconsideration by the trial court, and failed to articulate any ground on which the motion was based. CP 12-15. The Cohns’ “Motion to Reconsider” was noted for hearing on March 1, 2010, ten (10) days after the date that the motion was filed and served. CP 11. The Cohns’ Motion was heard on March 1, 2010.

At the hearing, the Cohns argued that, though the form of their motion failed to reference the Findings of Fact and Conclusions of Law and Judgment and Decree Quieting Title:

Your Honor, the motion says to reconsider the issues set forth in the attached previously filed Motion for Clarification. I'm not asking for the Court to reconsider the Motion for Clarification. That's never been decided. I'm asking for the Court to consider the issues raised in that as they relate to the judgment that was entered a couple of weeks ago, Your Honor.

Verbatim Report of Proceedings (Motion for Reconsideration) – 3:25-4:7.

The trial court denied the Cohn's motion. An Order Denying the Cohns' Motion for Reconsideration was entered on March 5, 2010. CP 1-2.

On April 2, 2010, fifty (50) days after the entry of the Findings of Fact and Conclusions of Law and Judgment and Decree Quieting Title in Favor of Plaintiff The Tollefson Family Trust, the Cohns filed a Notice of Appeal in the trial court seeking review by the Court of Appeals of the:

“(1) Findings of Fact and Conclusions of Law and Judgment and Decree Quieting Title in Favor of Plaintiff The Tollefson Family Trust, entered February 11, 2010; and

(2) Order Denying Defendants' Motion for Reconsideration, entered March 5, 2010.” CP 611-630.

The Cohns filed their appellant brief on August 16, 2010. The Tollefsons subsequently filed a Motion to Dismiss, based on the timeliness of the Cohns' Notice of Appeal which was denied on October 28, 2010.

III. QUESTIONS PRESENTED

A. WHETHER THE TRIAL COURT ERRED IN AWARDING THE RESPONDENTS TITLE TO THE PROPERTY RATHER THAN A PRESCRIPTIVE EASEMENT.

B. WHETHER OR NOT THE TRIAL COURT ERRED AWARDING TITLE TO THE ENTIRE DISPUTED AREA.

C. WHETHER THE TRIAL COURT ERRED IN DECLINING TO AWARD THE COHNS AN EASEMENT FOR ACCESS TO THEIR PROPERTY.

D. WHETHER THE TOLLEFSONS ARE ENTITLED TO THEIR ATTORNEYS FEES AND COSTS INCURRED IN RESPONDING TO THE COHNS' APPEAL.

IV. ARGUMENT

A. THE TRIAL COURT CORRECTLY AWARDED THE RESPONDENTS FEE TITLE TO THE DISPUTED AREA, RATHER THAN A PRESCRIPTIVE EASEMENT.

1. The Cohns arguments in favor of prescriptive easement and in opposition to the trial court's conclusions of law on the elements of adverse possession were not properly preserved for consideration by the Court of Appeals.

Initially, the Tollefsons point that the Cohns never argued that the Tollefsons had failed to meet their burden of proof at the time that the Judgment and Decree Quietening Title was entered or that the Tollefsons had proven that they were entitled to a prescriptive easement, and these

arguments should be ignored. An issue not raised in the trial court may not be considered for the first time on appeal. *State v. Tradewell* (1973) 9 Wash.App. 821, 515 P.2d 172, cert den 416 U.S. 985, 40 L.Ed.2d 762, 94 S.Ct. 2388. A theory which is not advanced at trial will not be considered by the court on appeal. *Nerbun v. State*, 8 Wash.App. 370, 506 P.2d 873 (1973). Where appellant offered no objection or exception at trial to alleged error, he could not urge it as basis for reversal. *State ex rel. LaMon v. Westport*, 73 Wash.2d 255, 438 P.2d 200 (1968). In this matter, it is undisputed that counsel for the Cohns raised “four brief comments” in objection to the Tollefson’s proposed Judgment and Decree Quietening Title. None of these objections asserted that the Cohns disagreed that the trial court had substantial evidence on which to find that the Tollefsons had acquired title to at least some of the Disputed Area. In fact, the Cohns were solely concerned about the amount of property to which title had been acquired and that the Cohns would need an easement to access the side of their residence. RP (Presentation) – 3:7-4:3. All of their assignments of error related to the Judgment which were not addressed at the hearing on the Tollefson’s proposed Judgment and Decree Quietening Title should be ignored.

2. The Tollefsons' and their predecessors' recognized right to use the Disputed Area to the exclusion of others established their title to the Disputed Area by adverse possession, not merely the fact that they maintained and made use of the Disputed Area as a parking space and driveway.

The standards for the establishment of adverse possession are not disputed. Determining adverse possession requires the court to resolve questions of fact and law. *Lingvall v. Bartmess*, 97 Wa.App. 245, 253, 982 P.2d 690 (1999). To establish adverse possession there must be evidence that, for a period of at least ten years, the claimant's possession was: (1) hostile; (2) exclusive; (3) open and notorious; and (4) actual and uninterrupted. *ITT Rayonier, Inc. v. Bell*, 112 Wash.2d 754, 757, 774 P.2d 6 (1989). "Where 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 Wash.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." *Lilly v. Lynch*, 88 Wash.App. 306, 945 P.2d 727 (1997). In this matter, the evidence in the record is overwhelming that the owners of Lot 17 for as long as any witness could remember had exercised dominion over the Disputed Area. Aside from Gary Cohn, who never parked in the Disputed Area, and

Carolyn Cowan, who admittedly gave conflicting testimony about her observations of the property, each neighbor testified that the owners of Lot 17 had the right to use the Disputed Area to the exclusions of all others. Melinda Kelley, for instance testified that she would only park in the Disputed Area with the permission of the owners of Lot 17. Marylee Brown testified that her husband provided Mr. Tollefson a chain to block vehicles from entering the area during the construction of the Tollefsons' septic system. All of the neighbors testified that to the extent that they parked on each other's lots, the owners of the lots would permit the accommodation. The owners of Lot 17 had more than just the right to exclude others with the interference with their use, they had the right to exclude others for any reason or no reason. See *17 Stoebeck & Weaver*, Wash. Prac. Real Estate: Property Law s 2.7 (2d ed. 2004), cited by the Cohns.

The Cohns argue that, prior to 2005, there was never a dispute regarding the use or ownership of the Disputed Area. In fact, prior to 2008, there was never a dispute regarding the use or ownership of the Disputed Area. The reason for this was not the Tollefson's expansion of use of the Disputed Area, or because the Cohns were unconcerned with encroachment on Lot 16 by the owners of Lot 17. In actuality, the reason that there was no dispute was because as far back as any of the witnesses

could remember, it was accepted that the Disputed Area was part of Lot 17. In fact, none of the witnesses except for the Cohns could ever remember any individual parking in the Disputed Area aside from the owners of Lot 17 or their guests, with the exception of Melinda Kelly who testified that if any of the owners of Lot 17 had come home, she would have moved her car immediately. That the owners, present and past, of Lot 17 used the Disputed Area on a regular basis for parking their vehicles in undisputed, but it is also only one expression of their ownership of the Disputed Area. What is more important is that they had a recognized right to exclude their neighbors from the Disputed Area, that right being the true test of dominion and ownership. Moreover, the Cohns own construction of their dog fence along the perceived property line recognized the right of the owners of Lot 17 to possession up to their homes' drip line.

3. The Cohns infrequent access of the west side of their home is insufficient to defeat the "exclusivity" element of the Tollefsons' claim of adverse possession.

The Cohns claim that they and their predecessors regularly used the Disputed Area in such a way as would defeat the Tollefson's claim of adverse possession. In fact, the Cohns own testimony was that they infrequently used the Disputed Area. Dr. Gary Cohn recounted cutting the grass once or twice, picking up after his dogs, cleaning out the fireplace,

and knocking down a beehive in the many years since he owned Lot 16. Dr. Sue Cohn did “a little” gardening, and painted house once in 1997 or 1998. Neither of the Cohns testified that they had entered the Disputed Area at all in the three years preceding the trial. In order to reverse the trial court’s finding that the owners of Lot 17’s use of the Disputed Area was exclusive, they would have to show evidence that their use of the Disputed Area was without the permission of the owners of Lot 17 and more than “occasional.” See *Lilly v. Lynch*, 88 Wn.App. 306, 945 P.2d 727 (1997). There is substantial evidence in the record to support the trial court’s finding that the only uses of the Disputed Area aside from the owners of Lot 17 was an occasional neighborly accommodation.

B. THE TRIAL COURT CORRECTLY AWARDED THE RESPONDENTS FEE TITLE TO THE ENTIRE DISPUTED AREA.

The Cohns argue that, if parking was the only consistent use of the Disputed Area, then a space big enough to park a car is the only space to which the Tollefsons’ predecessors acquired title. In fact, other than their garden, which it is not argued is within the Disputed Area, there is no evidence as to the amount of property which the owners of Lot 17 exercised possession except for the testimony from Mrs. Field and Mr. Danubio as to the extent of the area between their house and the house now owned by the Cohns which they maintained, graveled and weeded the

area. Though the Cohns suggest otherwise, the only legitimate conclusions that can be drawn from their own actions are consistent with this testimony. The Cohns used only the area under their drip line for their garden, and had no plans to do otherwise until they found out that the surveyed property line ran diagonal between the houses. The fence the Cohns built extends from the drip line straight down the perceived property line to the beach. At most, prior to 2005, the Cohns infrequently accessed the Disputed Area to perform limited maintenance to the side of their home that they were likely standing under the drip line to perform.

The trial court's award of the entire Disputed Area was based on substantial evidence in the record before the trial court and should be sustained. None of the Cohns uses were more than transitory or infrequent, and no evidence exists that they were actually in the Disputed Area, rather than within the cartilage of their home when they were performing those activities.

C. THE TRIAL COURT WAS UNDER NO OBLIGATION TO AWARD THE COHNS ANY EQUITABLE RELIEF.

It is undisputed that the trial court may fashion equitable remedies under certain circumstances. In this case, the trial court declined, post-trial to find that the equities justified any particular relief. There is no authority that a trial court is obligated to fashion equitable remedies when

not required by evidence in the record. The standard of review for a trial court's failure to fashion an equitable remedy is unclear. It is equally unclear that the Court of Appeals has the authority to abrogate the trial court's power to do so and fashion its own.

In this case, the Cohns failed to provide sufficient evidence to convince the trial court that they were entitled to equitable relief. The Cohns argue that it is obvious that they would be unable to carry on the maintenance of the west side of their house when there is no actual testimony which would support such a claim and when there needs may well be accomplished within their drip line. The Court of Appeals should not reverse the trial court's finding in the absence of evidence that such relief is necessary to preserve an existing right of the Cohns'.

D. THE TOLLEFSONS ARE ENTITLED TO AN ORDER OF FEES AND COSTS ON APPEAL.

The Tollefsons request that the Court enter an order of its fees on appeal pursuant to RAP 18.1(b). CR 65(c) allows a party who prevails on an injunction its attorney's fees. In this case, the Cohns requested that the trial court continue an injunction during the pendency of an arguably meritless appeal. If the Court does find for the Tollefsons on its Motion on the Merits, the Court should award the Tollefsons their fees on appeal pursuant to RCW. As the Cohns previously argued in their motion for

summary judgment, a party defeating a wrongful injunction is entitled to its attorney's fees. This should be just as true when a party defeats an appeal that was necessary to dissolve a supersedeas continuation of the lower court's injunction. CP 426-439, citing *San Juan Cty. v. No New Gas Tax*, 160 Wn.2d 141, 157 P.3d 831 (Wash. 2007).

V. CONCLUSION

The Tollefsons successfully presented substantial evidence to the trial court that their predecessors in interest had, for a period of at least ten years maintained the entire Disputed Area, used it for parking, and had the recognized right to exclude others from the entire area for any reason or no reason at all. The record shows no inconsistency with the trial court's conclusion that there was substantial evidence to support the findings necessary to meet the elements of adverse possession. Further there is no right to equitable relief, and though the trial courts have been given the power to award such relief when necessary, the court declined to find evidence of such necessity here, and that decision should not be disturbed on appeal.

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DATED this 2nd day of December, 2010.

BAROKAS MARTIN & TOMLINSON

By: 

Hans P. Juhl, WSBA #33116
Attorneys for Respondent
Tollefson Family Trust by Its Co-Trustees.
Marc and Nancy Tollefson

No. 652184-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GARY AND SUE COHN

Appellants,

vs.

TOLLEFSON FAMILY TRUST BY ITS CO-TRUSTEES MARC
AND NACY TOLLEFSON

Respondent.

**RESPONDENT'S CERTIFICATE OF SERVICE OF
RESPONSIVE BRIEF OF TOLLEFSON FAMILY TRUST
BY ITS CO-TRUSTEES MARC AND NANCY TOLLEFSON**

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Trustees Marc and Nancy Tollefson

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COURT OF APPEALS
DIVISION I
CLERK
[Signature]

ORIGINAL

On December 6, 2010, I caused the foregoing
RESPONSIVE BRIEF OF TOLLEFSON FAMILY TRUST BY
ITS CO-TRUSTEES MARC AND NANCY TOLLEFSON to be
served on the parties to this action, by facsimile to:

Edward Lin
Gerard Lutz
Perkins Coie
10885 NE 4th St, Ste 700
Bellevue, WA 98004-5579
(425) 635-2400

I declare that the statements above are true to the best of
my information, knowledge and belief.

DATED this 7th day of October 2010.



Lisa A. Earnest